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LAUGHING AT TREATIES

Carlos Manuel Vázquez*

Professor Vázquez argues in this Response that constitutional text, doctrine, and structure—to say nothing of the Founders’ intent—rule out Professor Yoo’s claim that all or most treaties categorically or presumptively lack the force of domestic law and thus, unless implemented by statute, can be disregarded by citizens, the courts, and other officials responsible for enforcing domestic law. The text of the Supremacy Clause plainly gives all United States treaties, if valid and in force, the status of domestic law. The cases recognizing some treaties as non-self-executing fully support a presumption that treaties are self-executing and hence judicially enforceable in the absence of statutory implementation. Finally, Professor Yoo’s structural arguments are either implausible or too general to yield any particular conclusions on the question of the status of treaties as domestic law.

INTRODUCTION

Though ambitious in length and scope, “Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding”¹ is modest in aim. Professor Yoo examines British and colonial approaches to treaty-making and enforcement, the experience under the Articles of Confederation, and the debates at the Constitutional Convention and some state ratifying conventions, and argues that this material does not provide “conclusive” or “definitive”² support for the position that, under our Constitution, treaties “automatically” take effect as “the internal law of the United States” once made.³ Some of this material, he argues, in-

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1. 99 Colum. L. Rev. 1955 (1999) [hereinafter Yoo, Globalism].

2. Id. at 1962, 2099.

3. Id. at 1976. Professor Yoo dubs this the “internationalist” position—a label that, in my view, conveys the unwarranted impression that the defenders of this position are making normative or policy arguments to advance a position they favor on ideological grounds. Professor Yoo reinforces that impression in his descriptions of the “internationalist model” and the project of its adherents. See, e.g., id. (internationalists claim that “international agreements and law *ought to be* directly merged into the domestic legal system”) (emphasis added); id. (“[T]he internationalist model argues that international agreements and international law *should* take effect directly as domestic law without any intervening legislative action.”) (emphasis added); id. at 1977 (suggesting that internationalists are engaged in “[a]dvocacy of self-execution”). To the contrary, the defenders of this view have relied on fairly conventional modalities of constitutional argument, primarily argument based on text, history, and doctrine. I shall refer to what Professor Yoo calls the “internationalist” view as the “prevailing” understanding regarding the status of treaties as domestic law in the United States.

I do not criticize Professor Yoo for himself relying on purely normative or policy arguments. See, e.g., id. at 2093 (“Non-self-execution responds to globalization by enhancing democratic safeguards . . .”); see also the title of his article. To the extent that

stead supports the position that all or most treaties lack the force of domestic law, and can thus be disregarded by citizens, the courts, and other officials (state and federal) responsible for enforcing domestic law.⁴ He hopes that, by clearing away this inconclusive underbrush, his work will “shift the debate on treaty execution toward textual, structural, or doctrinal arguments.”⁵

Professor Flaherty has convincingly shown that Professor Yoo falls far short of even this modest goal.⁶ Indeed, as Professor Flaherty’s Response demonstrates, a comprehensive examination of the founding material confirms the constitutional interpretation Professor Yoo attempts to discredit. Because the prevailing view emerges from Professor Yoo’s historical mill unscathed, I take this opportunity to engage in the sorts of analyses Professor Yoo thinks potentially more decisive. Although the conclusion of “Globalism” indicates that the article’s purpose was not to advance a textual, doctrinal, or structural defense of any particular position concerning the status of treaties as domestic law under our Constitu-

text, history, and doctrine are inconclusive, it may well be appropriate to defend a constitutional interpretation on the basis of the types of arguments one would make in drafting a constitution from scratch. Cf. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 *Am. J. Int’l L.* 310, 311–13 (1992) (analyzing policies that would be advanced and hindered by alternative constitutional rules on domestic status of treaties). Defenders of the prevailing view, however, do not regard text, history, or structure as inconclusive.

The “internationalist” label also misleadingly suggests that the defenders of the prevailing view seek to encourage international commitments on the part of the United States. To the contrary, the prevailing view is designed to deter the treaty-makers from entering into treaties lightly. It is Professor Yoo’s view which, by diminishing the significance of a treaty’s ratification, would encourage the promiscuous conclusion of international treaties. Gouverneur Morris recognized this at the Constitutional Convention, see *infra* text accompanying note 20, and Professor Yoo himself appears to acknowledge the point. See John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 *Colum. L. Rev.* 2218, 2231 (1999) [*hereinafter* Yoo, *Treaties and Public Lawmaking*].

I also note that the scholars Professor Yoo critiques do not agree in all respects. In describing my own position on the issues Professor Yoo discusses, I emphatically do not purport to speak for the other scholars Professor Yoo identifies as “internationalists.” Perhaps the biggest point of disagreement among us concerns my acceptance of the treaty-makers’ power to deny a treaty domestic legal force through a clear statement in the body of the treaty or in a reservation. See *infra* text accompanying notes 123–135. What we have in common, I think, is that we all agree that the Supremacy Clause establishes *at least* a presumption that valid treaties in force have the status of domestic law in the United States. This is what I refer to as the “prevailing view.”

4. That this is the position Professor Yoo espouses is made clear in his Rejoinder, most starkly in his use of a quotation from Frederick Maitland, to which the title of this article alludes. See Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2227. My responses to the arguments raised in the Rejoinder are found primarily in the Coda. See *infra* text accompanying note 210–266.

5. Yoo, *Globalism*, *supra* note 1, at 2094.

6. See Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 *Colum. L. Rev.* 2095 (1999).

tion, Professor Yoo says enough about text, doctrine, and structure to justify a preliminary response. I explain in this Response why the readings of the Supremacy Clause that Professor Yoo finds plausible in light of the founding material are implausible from the textual and doctrinal standpoints. I also explain why the structural critique Professor Yoo offers of the prevailing view misses its mark. This examination shows that, even if Professor Yoo had succeeded in demonstrating the inconclusiveness of the founding material, the other modalities of constitutional argument would provide more than ample support for the constitutional interpretation Professor Yoo disputes.

Before turning to text, doctrine, and structure, however, I shall comment briefly on the type of argument that consumes by far the greatest portion of Professor Yoo's article—his historical argument. Because this is the focus of Professor Flaherty's Response, I resist the temptation to explain how Professor Yoo misinterprets or overreads specific statements upon which he relies.⁷ Instead, I identify some fundamental problems with the interpretive theory that appears to underlie the structure of Professor Yoo's historical exposition, as well as his critique of the use of the historical material by defenders of the prevailing view. I call Yoo's theory the "contractual theory" of original intent because it appears to regard as binding certain agreements reached at certain ratifying conventions regarding the interpretation of certain provisions of the Constitution. Part I describes the theory and explains why it would hold little promise in interpreting a constitutional provision like the Supremacy Clause, even if the statements upon which Professor Yoo relies as support for his interpretation were more conclusive than he finds them in the end.

That constitutional text and doctrine offer no firmer ground than history for rejecting the interpretation of the Supremacy Clause that prevails among scholars should come as no surprise. Contrary to Professor Yoo's suggestions, not all of the scholars who take this view⁸ rely primarily on the founding materials. In my view, the position Professor Yoo disputes is supported most strongly by the text of the Constitution. Concluding that the Constitution gives treaties, once made, "automatic" effect

7. To the extent I have succumbed to the temptation, I have confined my discussions to footnotes. My discussion of specific statements should not be interpreted as agreement with Professor Yoo's interpretations of other statements.

8. See generally Louis Henkin, *Foreign Affairs and the United States Constitution* 198–204 (2d ed. 1996); Jordan J. Paust, *Self-Executing Treaties*, 82 *Am. J. Int'l L.* 760 (1988). My contributions to this literature are Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 *Am. J. Int'l L.* 695, 697–700 (1995) [hereinafter Vázquez, *Four Doctrines*]; Carlos Manuel Vázquez, *The "Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation*, 7 *Geo. Immigr. L.J.* 39, 44–49 (1993) [hereinafter Vázquez, *Self-Executing Character*]; Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 *Colum. L. Rev.* 1082, 1101–10 (1992) [hereinafter Vázquez, *Treaty-Based Rights*]. Hereinafter, I shall discuss primarily my own positions on the issues Yoo discusses. I shall refer to the writings of other scholars where appropriate, but mostly to explain how our positions appear to diverge.

as domestic law requires only a reading of the Supremacy Clause, which declares “all” treaties to be the “supreme Law of the Land.”⁹ I consider in Part II whether there are plausible ways to reconcile Professor Yoo’s various alternative positions with the Constitution’s text. I conclude that there are not.

I turn in Part III to judicial doctrine. Professor Yoo places much weight on judicial decisions recognizing a category of treaty that is not judicially enforceable because “non-self-executing.” I regard this as the strongest support for Professor Yoo’s position. Many courts and commentators (including Yoo) take the position that a non-self-executing treaty lacks the force of domestic law.¹⁰ If so, then the cases recognizing a category of non-self-executing treaties are incompatible with a literal interpretation of the Supremacy Clause, as they recognize that not “all” treaties of the United States are the law of the land. I have attempted to show that the conflict between the cases and the text is less severe than it at first appears, but I acknowledge that some tension remains.

This tension, however, merely raises the question whether the text or the cases must give way. Answering the question requires a theory about the relative weight to be given to text and precedent in interpreting the Constitution. Some strict textualists take the position that the whole doctrine of non-self-execution is invalid because it conflicts with the Supremacy Clause.¹¹ The approach to constitutional interpretation I have followed accepts a greater, though limited, role for judicial precedent that deviates from the text. But my approach strives to preserve as much of both text and doctrine as possible, reading both in such a way as to minimize the conflict.¹² The Supreme Court cases Professor Yoo cites

9. U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

10. See, e.g., Yoo, *Globalism*, supra note 1, at 1978–79; *United States v. Postal*, 589 F.2d 862, 878 (5th Cir. 1979); *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 590 (S.D. Tex. 1980); Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. h, reporter’s note 5 (1987) [hereinafter Restatement (Third)]; Henkin, supra note 8 at 203–04; J.W. Peltason, Corwin and Peltason’s *Understanding the Constitution* 114–115 (6th ed. 1973); Alona E. Evans, *Some Aspects of the Problem of Self-Executing Treaties*, 45 *Am. Soc’y Int’l L. Proc.* 66, 68 (1951); John H. Jackson, *United States*, in 7 *The Effect of Treaties in Domestic Law* 141, 145–46 (Francis G. Jacobs & Shelley Roberts eds., 1987); Geoffrey R. Watson, *The Death of Treaty*, 55 *Ohio St. L.J.* 781, 831 (1994). Compare *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (stating that “[t]he Convention is a self-executing treaty . . . [Thus] no domestic legislation is required to give [it] the force of law in the United States”), with *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (suggesting that a treaty’s self-executing character and its status as “Law of the Land” are separate questions).

11. See Paust, supra note 8, at 782–83.

12. The approach I have followed resembles that elaborated by Richard Fallon in *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189 (1987). See Vázquez, *Treaty-Based Rights*, supra note 8, at 1114 n.126. For related

thus lead me to read the Supremacy Clause as adopting a default rule that treaties have the force of domestic law, a rule that may be reversed by the treaty-makers through a clear statement in the treaty itself (or reservation thereto). This view is tolerably consistent with the Constitution's text. By contrast, Professor Yoo's view that treaties are not the law of the land unless implemented by statute is in intolerable conflict with the text.

I address in Part IV a type of constitutional argument to which Professor Yoo often resorts—an argument based on what he sees as the “deeper structural imperatives” of the Constitution.¹³ By this he apparently means the separation-of-powers principles that give the “political branches”—the President and Congress—and not the courts, the responsibility for conducting the nation's foreign policy. At the general and abstract level at which Professor Yoo most often deploys them, these arguments are wholly inconclusive. They offer no basis for rejecting the prevailing interpretation of specific separation-of-powers provisions of the Constitution, such as the Supremacy Clause, which expressly gives judges a role to play in the enforcement of treaties.

I conclude with some comments on the larger project of unsettling legal doctrine.

I. YOO AND THE FOUNDING

The great bulk of Professor Yoo's historical analysis is remarkably consistent with the conventional account. Although the defenders of the prevailing view might dispute some nuances of Professor Yoo's narrative, I, for one, have not doubted that the British distinguished sharply between treaties and laws, or that treaties in Great Britain lacked the force of domestic law unless implemented by Parliament.¹⁴ Nor have I

approaches, see Phillip Bobbit, *Constitutional Fate: Theory of the Constitution* (1982); Phillip Bobbit, *Constitutional Interpretation* (1991); Dennis Patterson, *Law and Truth* (1996).

13. Yoo, *Globalism*, *supra* note 1, at 1982.

14. See Vázquez, *Four Doctrines*, *supra* note 8, at 698. Professor Flaherty does question the claim that, under the British system that prevailed at the time of the Founding, treaties lacked the force of domestic law until implemented by Parliament. See Flaherty, *supra* note 6, at 2108–10. I will not attempt here to defend my position on this issue (and Yoo's) as a description of actual British practice at the time. It is enough for me that some (perhaps most) Founders so understood the British approach and attributed the failure of state courts to enforce the peace treaty to those courts' understanding that state statutes prevailed over inconsistent treaty obligations. The Convention debates show that at least some Founders understood the British rule to be as I have described it. For the propositions that this was the prevailing understanding, that the states' violations of treaties resulted from their adherence to some version of the British rule, and that the Supremacy Clause was adopted to “obviate this difficulty,” I have relied primarily on the writings of roughly contemporaneous commentators, Justice Iredell in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) and Justice Story in his *Commentaries on the Constitution of the United States* (1833). See Vázquez, *Four Doctrines*, *supra* note 8, at 698–99. I recognize that some Founders questioned whether the British rule was in fact as I have described it. See Debate at the Pennsylvania Ratifying Convention (Dec. 3, 1787), *in* 2 *The*

doubted that violations of treaties by the states were a major problem during the period of the Articles of Confederation, or that the Articles were widely perceived to be flawed because they did not provide for the enforcement of treaties against the states. Indeed, I have noted that this was a key reason for the Framers' decision to draft a new Constitution. As I have explained elsewhere, the state courts failed to enforce treaties during this period because, adhering to the British rule, they understood that treaties were not enforceable in court without legislative implementation.¹⁵

Professor Yoo's disagreement with the conventional account concerns the mechanism adopted by our Constitution to address this fundamental problem. The prevailing view has been that the Founders addressed the problem in the Supremacy Clause by rejecting the British rule and adopting a different principle for the United States. Professor Yoo argues that the Constitution instead perpetuated the British rule that treaties lack domestic legal force without legislative implementation. Although the Constitution denies the House of Representatives a role in the making of treaties, Professor Yoo argues that it gives the House the power to determine whether treaties made shall have the force of domestic law, and thus whether they will be complied with or violated. The Founders gave the House this power, Professor Yoo argues, to ensure "that the legislature maintained sufficient checks on executive power"¹⁶ and that the most representative part of the legislature would "retain the power to choose how or whether to implement the nation's international obligations."¹⁷

Professor Yoo claims some support in the Framing Debates in Philadelphia, but in fact these debates show that "the framers were virtually of one mind when it came to giving treaties the status of law."¹⁸ What is most striking about these debates is that, after the convention voted to adopt the provision declaring treaties to be law, *no one*—least of all the defenders of the House's prerogatives—proposed to deny treaties the force of law unless implemented by statute.¹⁹ The Framers who objected to giving treaties the status of law without giving the House a role in their

Documentary History of the Ratification of the Constitution 457, 460 (Merrill Jensen ed., 1976) [hereinafter Documentary History]. But I cannot see how the fact that some Founders thought that the British did regard treaties as having the effect of domestic law even without legislative implementation supports Professor Yoo's argument that our Constitution denies treaties such effect.

15. See Vázquez, *Four Doctrines*, supra note 8, at 698.

16. Yoo, *Globalism*, supra note 1, at 2086.

17. *Id.* at 2089.

18. Flaherty, supra note 6, at 2120 (quoting Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty Making Clause as a Case Study*, 1 *Persp. Am. Hist.* 233, 264 (1984)).

19. This is all the more striking because the Supremacy Clause was adopted as a substitute for a proposal to give the legislature the principal role in ensuring state compliance with treaties. See Vázquez, *Treaty-Based Rights*, supra note 8, at 1105–06 (discussing proposal to give legislature the power to negative state laws that conflicted with treaties).

making proposed to address this seeming anomaly by including the House in the treaty-making process, not by denying treaties the force of law. Indeed, the proponents of a House role in treaty-making defended their position on the ground that it would *enhance* treaty compliance. When Madison objected to Gouverneur Morris's proposal to give the House a role in the making of treaties, arguing that it would make it too difficult to enter into treaties, Morris replied that he was not disposed to make treaty-making too easy: The greater the difficulty in making them, the more seriously they will be taken.²⁰ That treaties should be taken

20. See 2 The Records of the Federal Convention of 1787, at 393 (Max Farrand ed., 1911) [hereinafter Farrand, Records]. In light of Morris's explanation of his proposal, Professor Yoo's reading of the comments by Wilson and Johnson that immediately follow are implausible. Wilson, speaking in favor of Morris's proposal, noted that the British Crown "is under the same fetters as the amendment of Mr. Morris will impose on the Senate," as the king is "obliged to resort to Parliament for the execution of [treaties]." Id. Johnson, speaking against the amendment, noted that "The Example of the King of G. B. was not parallel. Full & compleat power was vested in him—If the Parliament should fail to provide the necessary means of execution, the Treaty would be violated." Id. Yoo's reading of these statements as showing that Wilson and Johnson "thought that Congress's legislative powers gave it sole control over a treaty's domestic implementation" is mysterious. Yoo, *Globalism*, supra note 1, at 2033. Wilson merely cites the British rule requiring Parliamentary implementation as a reason not to be concerned about giving the House a role in the *making* of treaties. (Morris had just gotten through clarifying that under his proposal treaties could not be *made* without the House's involvement.) If anything, the fact that Wilson was speaking in support of Morris's amendment indicates that he did not regard this regime as inherent. Johnson was criticizing Morris's proposal, but he appears to have been making primarily a semantic point. He said "there was something of solecism in saying that the acts of a Minister with plenipotentiary powers from one Body, should depend for ratification on another Body." 2 Farrand, Records, supra, at 393. In other words, it is inconsistent to say that someone has "full and compleat power" to make a treaty but at the same time that the treaty is subject to ratification by another body. He cited the British rule to show that the treaties in Great Britain were binding once made, but required action by Parliament to ensure compliance. To the extent he was making a substantive point, he presumably was pressing for a regime in which the negotiators had full authority to make the treaty without the need for ratification by another body. His statement that if the Parliament failed to act the treaty would be violated reads more like a criticism than an endorsement of such a regime.

That Wilson did not view a House role in the implementation of treaties to be inherent is shown clearly by his subsequent renewal of Morris's amendment. He said: "As treaties . . . are to have the operation of laws, they ought to have the sanction of laws also." Id. at 538. In discussing this episode, Yoo switches gears. He reads the defeat of Wilson's proposal as not necessarily endorsing his premise that treaties "are to have the operation of laws," but merely as a determination that the House's "structural inadequacies" made it unsuitable for a role in the making of treaties. Yoo, *Globalism*, supra note 1, at 2039. A number of points should be made. First, whatever the reason for the defeat of the proposal, the fact that Wilson made it shows that Yoo's earlier interpretation of his remark is untenable. Second, Wilson's premise that treaties are "to have the operation of laws" shows that Wilson was not as incompetent at reading legal texts as Yoo's discussion of his comments at the ratifying convention would lead one to believe. See id. at 2036. It provides strong additional support for Professor Flaherty's interpretation of those comments. Finally, Yoo fails to appreciate that the "structural inadequacies" that render the House unsuitable for a role in the making of treaties make it just as unsuitable for a role in their implementation. See *infra* notes 22–23 and accompanying text.

seriously once made was common ground. There is not a shred of evidence that anyone wanted to give the House the power to block compliance with treaties already in force. The cavalier attitude towards treaty compliance that Professor Yoo implicitly attributes to the Founders²¹ is nowhere to be found in the records of the debates in Philadelphia.

Professor Yoo also misses the implication for his theory of the Framers' conclusion that the House was "structurally unsuited" for the treaty-making process.²² The feature of the House that unsuited it for treaty-making equally unsuited it for a veto over treaty compliance. The argument that the House must be excluded from the treaty-making process because of the need for secrecy *would have had no purchase whatsoever* for someone who assumed that the House would eventually be involved anyway because the Constitution required House action to implement treaties. If complying with the treaty would have required House action, then the prudent course for the treaty-makers to follow would have been to get the House's approval before concluding the treaty. If so, then a requirement of House action to implement treaties would have been regarded as the substantial equivalent of a requirement of House action at the stage of making the treaty.²³ If the treaty-makers failed to get the House's approval before making the treaty, they would have had to get it later. If the House was deemed structurally unsuited for a veto at the earlier stage, then there would appear to be no reason for regarding it as better suited at the later stage. The only difference is that a requirement of House involvement at the later stage would be *more* dangerous, as it would make it more likely that a treaty in force would be violated.

In the end, even Professor Yoo appears to concede that the debates at Philadelphia support the prevailing interpretation of the Supremacy Clause. He argues, however, that these debates do not deserve much weight because, after all, the Convention merely resulted in a proposal. It was the ratifying conventions that gave life to the Constitution, and thus it is the interpretations of the Constitution reflected in those debates that are important.²⁴ He criticizes the defenders of the prevailing view for relying primarily on the debates at Philadelphia and failing to give adequate consideration to what he regards as the counter-narrative that emerges from certain ratifying conventions.²⁵ In his view, these debates show that the Federalists significantly watered down their position to meet Anti-Federalist objections regarding the Constitution's freezing of the House out of the treaty-making process.²⁶

21. The attitude is made more explicit in the Rejoinder. See Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2227 & n.34.

22. Yoo, *Globalism*, *supra* note 1, at 2036.

23. This appears to have been the gist of the comment by Wilson at the Pennsylvania ratifying convention relied on by Yoo. See *infra* notes 46–49 and accompanying text.

24. See Yoo, *Globalism*, *supra* note 1, at 2039–40.

25. See *id.*

26. See *id.* at 2025.

As Professor Flaherty shows, a fair reading of these debates tells a very different story, one that is fully consistent with—indeed, buttresses—the interpretation Professor Yoo disputes.²⁷ Rather than address Professor Yoo's readings of specific aspects of the debate, I will comment on the interpretive theory that appears to underlie his belief that the natural reading of a constitutional text should yield to an agreement between Federalists and Anti-Federalists at one or more ratifying conventions regarding the meaning of the text. I call it the "contractual theory" of original intent.

More moderate originalists often say that originalism does not seek to uncover how the Founders would have resolved specific questions, but instead seeks to ascertain how an ordinary reader at the time of the Founding would have understood the words of the Constitution.²⁸ If this is the point of the originalist enterprise, a broad array of sources would supply relevant evidence. It would be appropriate to consult the debates at the Constitutional Convention in Philadelphia; the debates at the state ratifying conventions, even ones that voted not to ratify;²⁹ the roughly contemporaneous writings of participants in the framing and/or ratifying conventions, such as Justice Iredell's opinion in *Ware*³⁰ and Chief Justice Jay's charge to the jury in *Henfield's Case*;³¹ and even the roughly contemporaneous writings of nonparticipants in those conventions, such as Justice Story's *Commentaries on the Constitution of the United States*.³²

Some originalists have insisted that it is the understanding of the Constitution at the ratifying conventions that should be binding, as it is only as a result of the votes at those conventions that the Constitution by its terms came into force.³³ Yet drawing conclusions about an original understanding based on the debates at the ratifying conventions is impeded by a number of factors. First, our evidence is far from complete, as we have records of only some of these conventions, and the records that do exist are abysmal.³⁴ Moreover,

[w]e possess neither the equations needed to convert expressions of individual opinion on particular provisions into collective understandings nor formulas to extract from the unstable compounds of hopes and fears and expectations those elements

27. See Flaherty, *supra* note 6, at 2126–51.

28. See, e.g., Robert Bork, *The Tempting of America* 143–44 (1990).

29. But see Yoo, *Globalism*, *supra* note 1, at 1984 n.129 (criticizing defenders of the prevailing view for relying on the North Carolina convention because this convention resulted in a vote not to ratify).

30. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 256–80 (1796) (Iredell, J., concurring); Vázquez, *Four Doctrines*, *supra* note 8, at 697 & n.12; Vázquez, *Treaty-Based Rights*, *supra* note 8, at 1110–13.

31. See *Henfield's Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360); Vázquez, *Treaty-Based Rights*, *supra* note 8, at 1103 n.82.

32. See Story, *supra* note 14; Vázquez, *Four Doctrines*, *supra* note 8, at 698–99.

33. See, e.g., Jack N. Rakove, *Original Meanings* 16, 341 (1996).

34. See Flaherty, *supra* note 6, at 2103 (citing James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex. L. Rev.* 1 (1986)).

that best predicted how the Constitution would operate in practice. Nor can one tidily graph how these perceptions shifted over time, as participants on both sides grappled with objections and counterarguments or thought through the implications of their own positions.³⁵

Additionally, the heated political context casts doubt on the reliability of statements made during this process as reports of the speakers' understanding of the document. Particularly suspect are statements made orally in the heat of a highly adversarial debate (as distinguished from documents like the Federalist Papers, written in relative tranquility).³⁶ For these reasons, the best evidence of the ratifiers' understanding of the document may in the end be the same as the best evidence of the ordinary readers' understanding.³⁷

Although he never develops it in the article, Professor Yoo appears to be operating under an interpretive theory that employs more specific criteria for assessing the positions taken during the ratification debates. I call it the "contractual theory," as it appears to regard as binding certain agreements reached between the Federalists and the Anti-Federalists at some ratifying conventions. The point of Professor Yoo's historical narrative appears to be that the Federalists watered down their interpretation of the Supremacy Clause in consideration of the agreement of certain Anti-Federalists to drop their objections and vote in favor of ratification. Because this watering down was how the Constitution's peddlers succeeded in selling it to wavering buyers, Professor Yoo appears to be arguing, their agreements on those interpretations should be binding.³⁸

35. Rakove, *supra* note 33, at 134.

36. See *id.* at 16–17, 132–34. The emphasis in the parenthetical is on "relative." See, e.g., Larry D. Kramer, *Madison's Audience*, 112 *Harv. L. Rev.* 611, 667 (1999); Edmund S. Morgan, *The Federalist*, *The New Republic*, Feb. 26, 1996, at 37.

37. Privileging the ratification may have one valid implication for originalism. If what is relevant is how the ratifiers understood the document, then any evidence that the Framers in Philadelphia interpreted a particular provision in a counterintuitive way should be irrelevant, except to the extent this information was conveyed to the ratifiers. But this works against Professor Yoo, as it is he who relies on nonpublic evidence to defend a counterintuitive reading. For example, he relies on statements by Wilson and Johnson at the Philadelphia Convention that he reads as support for the idea that non-self-execution was regarded as inherent in the concept of legislation. See *supra* note 20. He also relies on an unpublished memorandum written by Madison. See Yoo, *Globalism*, *supra* note 1, at 2021 (citing James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 *Papers of James Madison* 345–57 (Robert A. Rutland & William M.E. Rachal eds., 1975)).

38. Thus, in explaining why Wilson's statements at the Pennsylvania ratifying convention deserve special weight, Professor Yoo writes that "[i]t was the public explanation of the Constitution's meaning, before the first critical state ratification convention, that 'sold' the Constitution to its ratifiers." Yoo, *Globalism*, *supra* note 1, at 2048. Professor Flaherty likewise reads Professor Yoo to be operating under what I call the contractual theory. See Flaherty, *supra* note 6, at 2134 (noting that Yoo argues that "the Federalists contorted the Supremacy Clause . . . as a price for ratification").

This theory holds some promise for someone trying to defend as counterintuitive a reading of the Constitution's text as Professor Yoo's. Even an agreement among the parties to a contract that a particular provision shall be regarded as meaningless or shall mean the opposite of what its words denote would be binding on the parties under the common law.³⁹ This theory would also obviate the question whether the Federalists involved truly understood the words of the document to mean what they claimed in the debates, or instead embraced the interpretation for political reasons. Indeed, this theory would make a virtue out of what appeared to be a liability, as its whole point is that certain political decisions should be binding.⁴⁰

Despite its potential benefits for someone in the precarious textual position in which Professor Yoo finds himself, the theory is ultimately unavailing. First, under black-letter contract law, anyone trying to introduce evidence that a contractual provision was intended to be meaningless, or to mean the opposite of what it says, is required to present unusually probative evidence of a meeting of the minds.⁴¹ Yet, as Professor Yoo himself ultimately admits, the evidence in support of Yoo's position is no more than inconclusive.⁴² Second, to show that an agreement is binding under the contractual theory requires a showing of causation—i.e., a showing that the Federalists' watering down of their interpretation actually induced a decisive number of Anti-Federalists to vote to ratify. This sort of evidence is difficult to come by in any context, but certain features of the ratification debates make it especially unlikely that the Federalist

39. See *infra* note 41.

40. An apparent use of something like this theory can be found in Supreme Court decisions regarding state sovereign immunity. During the ratification debates, some Anti-Federalists argued that Article III permitted individuals to sue states in the federal courts on their revolutionary war debts. In response, some Federalists argued that nothing in the Constitution did away with state sovereign immunity, and that Article III thus conferred federal jurisdiction in cases between states and individuals only where the state was the plaintiff. John Marshall made this point at the Virginia ratifying convention. Of course, the Supreme Court in *Chisholm v. Georgia* decided the issue as the Anti-Federalists had feared, but in response the Eleventh Amendment was adopted. In interpreting this Amendment as Chief Justice, Marshall appeared to take a narrower view of state immunity than he had taken at the ratifying convention, and for this he has been accused of employing a sort of bait-and-switch tactic. See *Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 482 n.11 (1987), in which Justice Powell accuses Marshall of this. (The characterization is mine. See Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 *Geo. L.J.* 1, 88 n.504 (1998).) This accusation suggests a version of the contractual theory described above. (There are, however, reasons that might justify this theory's use in the context of state sovereign immunity that would not apply to the self-execution issue, the main one being that the view of state sovereign immunity espoused by the Federalists in selling the Constitution to the Anti-Federalists was arguably later ratified in a constitutional amendment. See U.S. Const. amend. XI.)

41. See Restatement (Second) of Contracts § 202 cmt. e (1981); Arthur L. Corbin, *Corbin on Contracts* § 542 (1952).

42. See Yoo, *Globalism*, *supra* note 1, at 2094.

statements Professor Yoo points to, even if read as Professor Yoo reads them, actually switched any votes. As Professor Rakove has emphasized, the decision facing the ratifiers was momentous and binary: whether to retain the Articles of Confederation or instead adopt a radically different governmental system.⁴³ In making that choice, the delegates had to weigh a multitude of disparate factors. It is highly unlikely that an affirmative vote could be attributed in any meaningful way to any particular feature. It is particularly unlikely that many Anti-Federalists were swayed by Federalist assurances that treaties that had already received the approval of two-thirds of the Senate and bound the United States internationally would lack the force of internal law without the consent of a majority of the House.⁴⁴

Moreover, the Anti-Federalists could have “relied” on these assurances only if they regarded their own interpretations of the Constitution, however idiosyncratic, as binding on future authoritative interpreters. Yet substantial doubts have been raised about whether the Founders embraced a theory of interpretation under which their own views would be binding on future interpreters.⁴⁵ If the delegates regarded their own statements as merely predictions about how future interpreters would read the words of the Constitution without reference to their intent, then it is difficult to see how this debate could have generated a binding “agreement” on any interpretation. Furthermore, some of the statements that Professor Yoo relies on most strongly were offered as nothing more

43. See Rakove, *supra* note 33, at 96; Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 *Fordham L. Rev.* 1587, 1604 (1997).

44. To the extent the Anti-Federalists had a common concern, it was that the Constitution gave too much power to the federal government at the expense of the states. See J.R. Pole, *The American Constitution: For and Against* 17 (1987). But treaty-making already required the consent of two-thirds of the Senate, “which was taken to be the collective embodiment of the concerns of the states.” G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 *U. Colo. L. Rev.* 1109, 1119 (1999); see also Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 *Mich. L. Rev.* 390, 412 (1998); Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2231 (stating that Framers feared the Senate would be “state-dominated”). Although Anti-Federalists may well have preferred a narrower treaty-making power, it is far less clear that they would have been happy with a regime that made it more likely that treaties already made would be violated. See *infra* note 50.

45. Compare H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885, 948 (1985) (arguing that the Framers did not understand their intent to be an appropriate basis for constitutional analysis), and Hans W. Baade, “Original Intent” in *Historical Perspective: Some Critical Glosses*, 69 *Tex. L. Rev.* 1001, 1104 (1991) (agreeing with Powell), with Raoul Berger, *The Founders’ Views—According to Jefferson Powell*, 67 *Tex. L. Rev.* 1033, 1093 (1989) (disputing Powell’s conclusion regarding Framers’ disapproval of original intent in constitutional interpretation), Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw. U. L. Rev.* 226, 274 (1988) (finding Powell’s arguments against original intent unpersuasive), and Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *Const. Commentary* 77, 77 (1988) (disputing Powell’s conclusion regarding the Framers’ disapproval of original intent in constitutional interpretation).

than *predictions* of how things might develop. For example, Professor Yoo relies on the following statement by Wilson at the Pennsylvania Convention:

[T]hough the House of Representatives possess no active part in making treaties, yet their legislative authority will be found to have strong restraining influence upon both President and Senate. In England, if the king and his ministers find themselves, during their negotiation, to be embarrassed, because an existing law is not repealed, or a new law is not enacted, they give notice to the legislature of their situation and inform them that it will be necessary, before the treaty can operate, that some law be repealed or some be made. *And will not the same thing take place here?*⁴⁶

Even if we assumed that Wilson meant to convey the idea that treaties would lack domestic legal force without legislative implementation, he formulates this idea, as Professor Yoo himself notes,⁴⁷ as a prediction.⁴⁸ A prediction is an invitation to agree (or not) on a factual issue—i.e., the course of future events over which the speaker has no direct control; it is not an invitation to agree on a binding interpretation.⁴⁹

Finally, even if the evidence did establish that the Federalists and Anti-Federalists “agreed” on a given interpretation at one or two ratifying conventions, it is unclear why that agreement should be binding on the nation as a whole. Even if it could be shown definitively that Virginia or New York or Pennsylvania, or all three, would have rejected the Constitu-

46. James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 11, 1787), in 2 *Documentary History*, supra note 14, at 562–63 (emphasis added, following Yoo, *Globalism*, supra note 1, at 2047). Professor Yoo omits the remainder of the passage: “*Shall less prudence, less caution, less moderation take place among those who negotiate treaties for the United States, than among those who negotiate them for the other nations of the earth?*” Id. at 563 (emphasis added).

47. See Yoo, *Globalism*, supra note 1, at 2047.

48. Technically, it is not even a prediction; it is a question. I shall overlook the technicality, however, as the question appears to invite the audience to agree that certain things will happen. Nonetheless, as Professor Flaherty suggests, Wilson here displays an almost Clintonian talent for studied ambiguity. See Flaherty, supra note 6, at 2130–31. The passage is thus exceedingly weak evidence of the sort of agreement Professor Yoo seeks to prove.

49. Wilson’s prediction, moreover, was about what the *negotiators* of the treaty would do in the future. See supra note 46. It therefore does not support the claim that all treaties would require legislative implementation. At best (and even this is a stretch), it would support the claim that the treaty-makers have the power to render a treaty non-self-executing (something I do not dispute). More likely, Wilson was just observing that, in those limited situations in which the Constitution specifically requires House involvement (such as appropriations), the treaty-makers would be well advised to get the House’s approval beforehand. This supports the idea that a requirement of House involvement in implementation is the practical equivalent (for prudent treaty-makers) of a requirement of House involvement in the making of the treaty. The statement thus supports my claim that the Founders would have regarded the reasons for denying the House a role in the making of treaties as reasons for denying it a role in treaty implementation as well. See supra text following note 22.

tion unless the reference to treaties were read out of the Supremacy Clause, it would remain a possibility that Massachusetts and New Jersey and Georgia would have ratified only if the reference to treaties remained in the clause.⁵⁰ Indeed, it is precisely because no state had the power to control the other states as a group that the choice facing each of them was an up-or-down vote on the Constitution as a whole. This fact alone makes it unlikely that the delegates regarded their role as the reaching of binding agreements on matters of interpretation. It shows, at any rate,

50. The only argument I can think of to explain why an agreement of this sort at a few conventions should bind the rest of the nation would apply at best only to agreements to construe federal power narrowly. The argument would begin with two assumptions: (a) the Anti-Federalists at every state convention objected primarily to the breadth of power the Constitution gave the federal government at the expense of the states, and (b) the Federalists at every state convention would have preferred the new Constitution, even if narrowly construed, over the Articles of Confederation. Based on these assumptions (which I shall grant for purposes of argument), a plausible argument can be made that the narrowest construction to which the Federalists were forced to retreat at any of the state conventions should be binding because, without the retreat, the Constitution would not have been ratified. (I shall disregard for the moment the problems stemming from the fact that more states ratified the Constitution than the nine necessary to bring it into force pursuant to its terms. I will credit Professor Yoo's argument that the enterprise would not have succeeded without Virginia, Pennsylvania, or New York. See Yoo, *Globalism*, supra note 1, at 2059; cf. Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863–1869*, at 104–06 (1990) (arguing that the conservative Republicans' narrow construction of the Equal Protection and Due Process Clauses of the Fourteenth Amendment should be binding because their support was necessary for the Amendment's passage in Congress).)

Perhaps an agreement reached at a single convention about the scope of the treaty-making power could be said to be binding on the rest of the nation on this theory. See *infra* Part III.B.2 (suggesting that one reading of the material Professor Yoo relies on is that treaties may not be made on matters falling within Art. I, § 8, but rejecting this position on doctrinal as well as textual grounds). But if the issue is whether treaties already validly made by the President and Senate would require implementation by statute, the argument does not fly. One cannot assume that Anti-Federalists would have preferred a regime in which treaties that bound us internationally would lack the force of internal law without House action over a regime in which treaties automatically had domestic legal force once made. Once a treaty is made, every state has an interest in compliance with it, as noncompliance would be likely to produce retaliation against the nation as a whole. For some states, the interest in compliance might be outweighed by their opposition to the particular terms of the treaty, and, if so, such states might welcome Professor Yoo's rule *with respect to that particular treaty*. But for other treaties, the same state might prefer compliance. Of course, a state that prefers compliance would be free to comply even under Professor Yoo's rule, but the problem is that Professor Yoo's rule makes it more likely that *other* states would fail to comply, thus potentially vitiating the benefits of the treaty for all the states. A state adopting a cost/benefit approach in choosing a constitutional rule to govern all future treaties, and trying to decide between Professor Yoo's regime and a regime giving treaties automatic effect as law, would have to make difficult predictions about such things as how many future treaties will be to its liking and the likelihood that the House would fail to implement such treaties. Because it is far from clear that a delegate concerned with preserving states' rights would prefer Professor Yoo's rule, it cannot be assumed that, without an agreement at a single convention that treaties would not have the force of law once made, the Constitution would not have entered into force.

why *we* should not regard any decision made at the ratifying conventions as binding except the decision to ratify the Constitution's text.⁵¹

For the foregoing reasons, the contractual theory seems both flawed and unavailing to Professor Yoo.⁵² It is only from the perspective of someone who embraces this theory, however, that the less selective use of the founding material by the defenders of the prevailing view appears to be a "confused jumble."⁵³ If one rejects the contractual theory, the point of looking at material from the founding would appear to be simply to try to understand how the ratifiers understood the words of the Constitution. For the reasons given above, this project is substantially the same as attempting to understand how an ordinary, well-informed reader would have understood those words.⁵⁴

51. Professor Yoo erroneously attributes to me the position that "the ratification debates are relevant only insofar as they show that the states adopted the Constitution." Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2222 n.17. In my view, the ratification debates are as relevant to interpreting the Constitution as other founding-era materials. All of it is relevant insofar as it sheds light on how the Founders understood the text of the document they were adopting. My point is that the only *decision* reached at such conventions that should be regarded as *binding* is the decision to adopt the Constitution's text. I also call into question Professor Yoo's enterprise of relying on these debates to contradict rather than illuminate the constitutional text. I emphatically do not object to "using the original understanding at all in constitutional interpretation." *Id.* Indeed, I stand by my own prior use of founding-era material. See supra notes 30–32 and accompanying text and infra note 54.

52. In light of Professor Yoo's apparent embrace of this thesis, it is interesting to consider his interpretation of statements by Wilson and Johnson, suggesting that they believed the need to implement treaties by statute to be "inherent" in the concept of legislation. See supra note 20 (discussing Yoo's interpretation of Wilson and Johnson). It is odd to argue that people engaged in the process of writing a constitution would regard any separation-of-powers issue as "inherently" beyond their control. Cf. Naftali Bendavid, *When Congress Tries to Sideline Court*, *Legal Times*, Mar. 6, 1995, at 2, 18 (quoting Professor Charles Fried as saying that "[t]he idea of an unconstitutional amendment to the Constitution is stupid"). It is even odder to defend the position these speakers regarded as "inherent" by reference to their statements. By hypothesis, these persons believed that the need for legislation would persist no matter what they included in the Constitution. As Yoo interprets these statements, therefore, they support the position that the Framers tried to accomplish something (i.e., giving treaties direct effect as law) that in the view of these speakers a constitution could not accomplish. The only pertinent issue for us is what they tried to accomplish. If Wilson and Johnson did believe that this could not be accomplished through a constitution, history has proven them wrong. See infra Part III.B.

53. Yoo, *Globalism*, supra note 1, at 1982.

54. Because my intent in consulting this material was to shed light on how the founding generation understood certain terms, I have cited the Founders' discussion of those terms even when the discussion did not relate to the particular clause in question. See Vázquez, *Treaty-Based Rights*, supra note 8, at 1098 (discussing the Founders' understanding of the concepts of "law" and "treaties" in the *Federalist* 15); see also infra text accompanying notes 62–66 ("intratextual" analysis of the phrase "shall be"). It is only because Professor Yoo is operating under a more rigid contractual model of interpretation that he can dismiss my reliance on these sources as irrelevant because they do not relate to the treaty power. See e.g., Yoo, *Globalism*, supra note 1, at 1984.

II. YOO'S TEXTUAL PROBLEM

Should someone ask me why I think the Constitution gives treaties the force of domestic law, I would be tempted to respond by paraphrasing George Leigh Mallory's explanation for attempting to scale Mount Everest: "Because it's there" in the Constitution.⁵⁵ The Supremacy Clause provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."⁵⁶ No interpretation is necessary to conclude that this clause purports to give "all" treaties the status of domestic law.

But Professor Yoo is nothing if not bold in the face of constitutional texts.⁵⁷ He concludes that our Constitution does not give treaties the effect of domestic law once "made" by the President with the consent of the Senate pursuant to Article II. Instead, he maintains, our Constitution can properly be read to establish that validly made treaties do not "take effect as internal U.S. law" until implemented by federal statute.⁵⁸ Yoo does not square his position with the Supremacy Clause's text by arguing that the clause's reference to the "Law of the Land" is a reference to something other than "internal U.S. law."⁵⁹ Rather, he maintains that Professor Henkin (and many others) erroneously assume that the Supremacy Clause was meant to give treaties *automatic* effect as law.⁶⁰ He sees nothing in the Constitution that conflicts with the idea that treaties have domestic legal force only if and when the House joins the President and the Senate in passing an implementing statute.⁶¹ In other words, he thinks the Supremacy Clause can be read as non-self-executing.

This argument, however, overlooks the wording of the clause. The clause provides that "all" treaties which "shall be made" under the author-

55. See John Bartlett, *Familiar Quotations* 593 n.2 (16th ed. 1992) ("Because it is there."). George Steinbrenner also offers some relevant wisdom: "We can't start to talk about philosophy and intent and spirit of the rule if it's [written] there in black and white." Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 399 (1985) (quoting George Steinbrenner) (internal quotation marks omitted).

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

57. This was already apparent in his work on war powers, where he has attempted to show that the clause giving the Congress the power to declare war does not inhibit the President from employing troops in war without a prior declaration. Yoo reads the clause instead as merely giving the Congress the power to recognize (or not) that a state of war exists and to bring about the legal effects that follow from a declaration to that effect. See generally, John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. Colo. L. Rev. 1169, 1178-79 (1999); John C. Yoo, *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 295 (1996).

58. Yoo, *Globalism*, supra note 1, at 1962.

59. For example, Professor Yoo criticizes Professor Louis Henkin's statement that our Constitution "mean[s] that treaties are law of the land of their own accord and do not require an act of Congress to translate them into law." *Id.* at 1977 (quoting Henkin, supra note 8, at 119 (internal quotation marks omitted)); see also Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2249 n.119 (equating "law of the land" with "domestic law").

60. See Yoo, *Globalism*, supra note 1, at 1977.

61. See *id.*

ity of the United States “shall be” the law of the land. The natural reading of that language is that they “shall be” the law of the land once “made.” The only even remotely plausible textual basis for Professor Yoo’s construction would take the clause’s use of the future tense to signify that treaties “shall be” the supreme law of the land not once made but at some later time. So read, the clause would function as an instruction to the lawmakers to pass the relevant statutes.⁶² But the clause cannot be read that way. The clause does indeed employ the future tense, but the future event that triggers the treaty’s status as law of the land is plainly the coming into force of the treaty. The words “shall be” in the Supremacy Clause apply equally to the Constitution and federal statutes, yet the clause has always been read to make the Constitution and federal statutes the supreme law of the land immediately upon their coming into force.⁶³

That the term “shall be” in the Supremacy Clause does not denote non-self-execution is confirmed by its use in other Articles. Article I says that the legislative power “shall be” vested in Congress,⁶⁴ and Article II provides that the executive power “shall be” vested in the President.⁶⁵ In both contexts, the vesting has been understood to be effective by virtue of the adoption of the Constitution itself, without the need for additional legislative action. Article III provides that the judicial power “shall be” vested in the Supreme Court and in such inferior courts as Congress may establish.⁶⁶ Here, too, the language has been read as self-executing. The Supreme Court is understood to possess the whole judicial power, as described in Article III, Section 2, by virtue of the Constitution itself.⁶⁷ With respect to the lower federal courts, the vesting is understood to be non-self-executing, but that is not because of the use of the term “shall be,” but rather because of the language making it clear that Congress has the discretion whether or not to establish lower federal courts.⁶⁸

Interpreting the Supremacy Clause to give treaties the force of domestic law only to the extent they are implemented by statute would also

62. As discussed below, even this reading of the clause would conflict with Professor Yoo’s thesis, as he clearly contemplates that the Congress would have discretion whether or not to pass such legislation. See *infra* note 126 and accompanying text.

63. This is by no means an inherent feature of constitutions or statutes. One can envision a regime in which a statute is passed but does not have certain effects we normally associate with supreme law until some other legal act is performed. Indeed, the Framers considered and rejected a system in which the Constitution and federal statutes would not necessarily have had the effect of nullifying inconsistent state laws. See generally Vázquez, *Treaty-Based Rights*, *supra* note 8, at 1106 & nn.91& 94 (discussing proposal for a federal power to “negative” state laws).

64. U.S. Const. art. I, § 1.

65. *Id.* art. II, § 1.

66. *Id.* art. III, § 1.

67. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512–13 (1868).

68. See U.S. Const. art. I, § 8, cl. 9. For a discussion of the pedigree of intratextual arguments of the sort I make in this paragraph, see Akhil Reed Amar, *Intratextualism*, 112 *Harv. L. Rev.* 747, 788–95 (1999).

have the unfortunate effect of reading the reference to treaties entirely out of the Supremacy Clause. A treaty that has the force of domestic law only to the extent a federal statute gives it such force would not have the effect of domestic law before *or after* the statute's enactment; when and if it is implemented, only the implementing statute would have domestic legal force.⁶⁹ Had the Founders intended to establish such a regime, they could (and should) have omitted the reference to treaties from the Supremacy Clause. The Necessary and Proper Clause⁷⁰ would still have given Congress the power to pass statutes implementing treaties, and the Supremacy Clause's reference to federal statutes would have sufficed to give supremacy to any such statutes. Professor Yoo notes that his reading would treat the Supremacy Clause's reference to treaties "much in the way that the Necessary and Proper Clause provides the federal government with the authority to pass enabling legislation for other constitutional grants of power."⁷¹ He fails to see that this undermines his argument. The Constitution already has a "necessary and proper" clause that gives Congress the power to implement treaties.⁷² A longstanding and unimpeachable axiom of legal interpretation advises us to strive to avoid interpretations that render provisions redundant.⁷³

Perhaps in tacit recognition of the textual difficulty with this broad position, Professor Yoo advances in the alternative a narrower claim: Treaties lack the force of domestic laws not categorically, but presumptively.⁷⁴ Although he is not clear about exactly what is needed to over-

69. The Restatement makes clear that "it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States," for non-self-executing treaties. Restatement (Third), supra note 10, § 111 cmt. h (1987).

70. U.S. Const. art. I, § 8, cl. 18.

71. Yoo, *Globalism*, supra note 1, at 1979.

72. See U.S. Const. art. I, § 8, cl. 18 ("[Congress shall have the power to] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). This is the clause that has been understood to give the Congress the power to pass statutes implementing non-self-executing treaties. See *Missouri v. Holland*, 252 U.S. 416, 432 (1920) ("If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.").

73. See, e.g., *United States v. Alaska*, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'" (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995))); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882))); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause of the constitution is intended to be without effect."); see also Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons & Marathon*, 1982 Sup. Ct. Rev. 25, 30; Maurice J. Holland, *The Modest Usefulness of DOMA Section 2*, 32 *Creighton L. Rev.* 395, 397 (1998) ("To [attribute identical meaning to two Clauses of the Constitution] is to violate a fundamental maxim of constitutional and statutory interpretation to the effect that redundancy is to be avoided.").

74. See Yoo, *Globalism*, supra note 1, at 2092.

come the presumption, it does appear that, on this view, the treaty-makers have the power to give the treaties they make the force of domestic law.⁷⁵ The reference to treaties in the Supremacy Clause would thus have some role to play under this interpretation: It would serve as the basis for the treaty-makers' power to determine whether or not the treaties they make shall have the force of domestic law. Without the clause, their role might have been thought to extend only to the making of the international agreement.

But this reading of the Supremacy Clause—which I have called the “power-conferring” interpretation⁷⁶—is almost as difficult to square with the clause’s text as a flat rule of non-self-execution. The Supremacy Clause is not written as a power-conferring provision; it is written as a status-conferring provision. Article I gives the President the power to make treaties, with the consent of a supermajority of the Senate; and the Supremacy Clause purports to give the treaties they make the status of domestic law. The claim that the clause is not self-executing runs into the textual problems noted above, whether the power to execute is alleged to reside in the lawmakers or the treaty-makers. The Supremacy Clause itself purports to give treaties the force of domestic law.⁷⁷

In short, if the question is whether treaties of the United States, validly concluded by the constitutionally appointed treaty-makers and in force, are the “Law of the Land” once made, it is answered by the Constitution’s text. The claim that such treaties only acquire the force of “internal U.S. law”⁷⁸ once implemented by an internal U.S. law is simply not an eligible interpretation of that text. The claim that the Constitution establishes a presumption that treaties lack domestic legal force is more plausible, but not nearly plausible enough.

To be sure, the text does not answer all questions concerning the domestic enforcement of treaties. There remain substantial questions about what it *means* to say that the Constitution, federal statutes, and treaties have the force of law. Specifically, there remain important questions about the relationship between the idea that all treaties are the law of the land and the doctrine that some treaties are non-self-executing. If Professor Yoo’s argument that treaties either categorically or presumptively lack domestic legal force cannot withstand a textual analysis, perhaps his larger project can be salvaged by casting it as a claim that our Constitu-

75. See *id.*

76. See Vázquez, *Self-Executing Character*, *supra* note 8, at 46–47 (concluding that this argument must be rejected, if only on textual grounds).

77. For doctrinal reasons, I ultimately accept that the treaty-makers have the power to determine in certain circumstances that a treaty shall not have the force of domestic law. See *infra* Part III.A.2. But the tension between this power and the Supremacy Clause’s text, in my view, requires that the Supremacy Clause remain the default rule and that the treaty-makers’ power to countermand it be strictly limited.

78. Yoo, *Globalism*, *supra* note 1, at 1962.

tion establishes either a flat rule or a presumption that treaties are not self-executing.

The textual problem is not so easily escaped, however. I have argued elsewhere that our Constitution should be read to establish a presumption that treaties are self-executing, relying in part on the claim that the concept of a non-self-executing treaty is in tension with the Supremacy Clause's designation of treaties as "law."⁷⁹ One might have expected a defense of the concept of non-self-execution to attempt to show that I have misinterpreted the term "law" in that clause—that there is no tension between a treaty's non-self-executing character and its status as "law."⁸⁰ But Professor Yoo does not do that.⁸¹ Indeed, he apparently agrees with the Restatement of Foreign Relations Law, which maintains that a non-self-executing treaty lacks the force of domestic law.⁸² As discussed further below, Professor Yoo is unquestionably right in conceding that a non-self-executing treaty, as he understands the concept, lacks the force of domestic law. This, however, is exactly why the concept of a non-self-executing treaty is rightly regarded as constitutionally problematic.

III. JUDICIAL DOCTRINE

Professor Yoo's position that, notwithstanding the Supremacy Clause, not all treaties of the United States have the force of domestic law finds stronger support in judicial precedent than in text or the founding material. The support consists of the cases recognizing that certain treaties, though in force internationally, are not "self-executing." These cases offer some support for his position because there is some tension between the concept of a non-self-executing treaty and the Supremacy Clause's declaration that treaties are "law."

In other work, I discuss the nature of the apparent conflict between the concept of a non-self-executing treaty and the status of those treaties as law, and consider whether the two can be reconciled.⁸³ The often-expressed sense that non-self-executing treaties lack the force of domestic law appears to be based on the fact that such treaties, unlike most law,

79. See, e.g., Vázquez, *Four Doctrines*, *supra* note 8, at 700–10.

80. Cf. Khaldoun A. Baghdadi, Note, *Apples and Oranges—The Supremacy Clause and the Determination of Self-Executing Treaties: A Response to Professor Vázquez*, 20 *Hastings Int'l & Comp. L. Rev.* 701, 701 (1997) (arguing that Supremacy Clause has no bearing on whether a treaty is self-executing).

81. Professor Yoo does suggest in passing that the fact that a norm is not judicially enforceable does not mean that it is not law in some sense. See Yoo, *Globalism*, *supra* note 1, at 1967. That he consistently equates a non-self-executing treaty with one that does not have domestic legal force indicates that he has not quite convinced himself of that proposition. See *id.* at 1965–66, 1974, 2036. Moreover, as discussed below, he never elaborates an understanding of the concept of law under which unexecuted, non-self-executing treaties would be law.

82. See *id.* at 1972 (citing Restatement (Third), *supra* note 10, § 111(4)(a) & cmt. h (1987)).

83. See Vázquez, *Four Doctrines*, *supra* note 8, at 697–723.

cannot be enforced in court against those on whom the treaty purports to impose a duty, by those for whose benefit the treaty imposes the duty. In my view, the understanding of the concept of law reflected in this position is well-founded. I conclude that the Supreme Court cases recognizing that certain treaties are non-self-executing involve relatively unproblematic exceptions from, or refinements of, that understanding of the concept of law.⁸⁴ Nevertheless, the treatymakers, with the help of some lower courts, have been pushing the doctrinal envelope in a direction that exacerbates the tension between the judicial doctrine and the Supremacy Clause. Although exactly what they have been doing is disputed, on one view, they have been entering into treaties and purporting to deny them the force of domestic law by attaching to them a declaration that the treaty is non-self-executing. With respect to certain treaties, in other words, the treatymakers have arguably purported to countermand the ordinary operation of the Supremacy Clause.

The doctrine as reflected in these declarations is clearly in tension with the Supremacy Clause's text. If the treatymakers have the power to deny a treaty the force of domestic law in this way, then not "all" treaties of the United States are the law of the land. The Supremacy Clause becomes a default rule, subject to reversal through the acts of the treatymakers.

If the doctrine is in this respect in tension with the clause, the question arises: Which should give way, the text or the doctrine? In other words, should we adjust our understanding of the text, or should we reject this aspect of the doctrine? Answering this question requires a theory of constitutional interpretation. Some scholars have insisted that the practice of declaring treaties to be non-self-executing is unconstitutional, and the declarations invalid, because it conflicts with the text of the Supremacy Clause.⁸⁵ Unlike these scholars, I accept the authoritative nature in certain circumstances of judicial precedent that deviates from the text. Despite the apparent tension with the text, I acknowledge that the treatymakers have the power to countermand the ordinary operation of the Supremacy Clause because, on my analysis, this power falls within the broad contours of Supreme Court decisions on the self-execution doctrine.

This recognition gives some surface plausibility to Professor Yoo's reading (out) of the Supremacy Clause, as it problematizes a literal interpretation of that clause. The concession does not help Professor Yoo nearly enough, however. Acceptance of a doctrine that deviates somewhat from the text does not justify reading that text entirely out of the Constitution. The philosophy reflected in the aphorism "in for a dime, in

84. See *id.*

85. See Thomas Burgenthal, *Modern Constitutions and Human Rights Treaties*, 36 *Colum. J. Transnat'l L.* 211, 222 & n.36 (1997); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law in the United States*, 20 *Mich. J. Int'l L.* 301, 324-35 (1999).

for a dollar” has no place in constitutional interpretation. (If it did, we would have little of the constitutional text left to work with.) The interpretive methodology I have followed strives to salvage as much as possible of both text and judicial precedent. The non-self-execution doctrine, as recognized in Supreme Court decisions, goes only so far as to permit the treaty-makers to countermand the Supremacy Clause’s effects. The clause’s declaration that treaties have the force of domestic law remains the default rule. The cases support a presumption that treaties are the law of the land and self-executing. Even if they did not, the fact that they do not conflict with such a presumption should be enough to require its adoption on textual grounds. But judicial precedent requires, at most, the acceptance of a power to countermand the ordinary operation of the Supremacy Clause. To the extent Professor Yoo would go beyond that, his position is doctrinally unsupported and, because textually implausible, must be rejected.

In this Part, I first discuss why the concept of a non-self-executing treaty is regarded by Professor Yoo and others as lacking the force of domestic law. I then consider whether the Supreme Court cases recognizing the category of non-self-executing treaties can be reconciled with the Supremacy Clause’s text. In this regard, I summarize my claim that the doctrine in fact encompasses four distinct types of reasons why a valid law might not be judicially enforceable. I include here a discussion of the treaty-makers’ recent practice of declaring certain treaties to be non-self-executing, and a brief explanation of my acceptance of their power to do so through a reservation. In the following Section, I consider the plausibility of the various alternative positions Professor Yoo appears to espouse.

A. *The Concept of a Non-Self-Executing Treaty*

At a general level, a treaty—like any law—may be said to be non-self-executing when it does not accomplish its aims of its own force. Although it can arise in other contexts, the question of a treaty’s status usually arises when someone tries to invoke a treaty in a court. A treaty that is non-self-executing, as the Restatement defines that concept, is simply not enforceable in the courts.⁸⁶ It is easy to see why the Restatement

86. See Restatement (Third), *supra* note 10, § 111 (3), (4) (1987). The term has sometimes been used by the lower courts in a broader sense to include treaties that do not create a private right of action. See Vázquez, *Four Doctrines*, *supra* note 8, at 719. As I have written elsewhere, the term “non-self-executing” is ambiguous enough to encompass such treaties, but a treaty that is non-self-executing in this sense may still be enforceable in the courts in certain circumstances. See *id.* at 720. The Restatement’s conclusion that non-self-executing treaties are not the law of the land is plausible only because it takes the position that “the question of a treaty’s self-executing nature is distinct from the question whether it creates a cause of action.” Restatement (Third), *supra* note 10, § 111 cmt. h (1987). Professor Yoo approves of the cases equating the self-execution issue with the right of action issue. See Yoo, *Globalism*, *supra* note 1, at 1972–73. His position that non-self-executing treaties lack domestic legal force may suggest that he thinks that a treaty that

would go on to describe such a treaty as lacking the force of domestic law. The role of the courts in our system of government is to resolve disputes in accordance with law. Indeed, the Supremacy Clause expressly instructs state judges to give effect to treaties notwithstanding anything in state constitutions or laws. Yet a non-self-executing treaty is not cognizable in the courts, state or federal. It does not, for example, preempt state laws or provide a defense in a criminal or civil proceeding. The position that a non-self-executing treaty lacks domestic legal force thus reflects an understanding of the concept of law which ties a norm's legal status to its enforceability in court against those upon whom the law purports to impose an obligation, by those for whose benefit the law imposes the obligation. The position also reflects the related notion that a law requires a sanction⁸⁷—that is, that the legal system must make some provision for enforcing legal norms against the duty-holder. Elsewhere, I elaborate and offer a qualified defense of these conceptions of what it means for a norm to have the force of law.⁸⁸

1. *The Four Doctrines of Self-Executing Treaties.*⁸⁹ — Notwithstanding the Supremacy Clause, our courts have long recognized that some treaties are not enforceable in the courts because they are non-self-executing. In a prior article, I considered the compatibility of this doctrine with the Supremacy Clause and concluded that this “doctrine” actually encompasses four distinct types of reasons why a treaty might legitimately be considered judicially unenforceable.⁹⁰ As long as the four doctrines are confined to their proper scope, they are tolerably compatible with the Supremacy Clause's designation of treaties as law. But, like the analogous doctrine under which certain constitutional provisions are said to raise political questions, this doctrine should be regarded as problematic precisely because, if broadly construed, it is in tension with the conviction

does not create a private right of action is not judicially enforceable in any circumstances. If offered as a description of current doctrine, his claim is inaccurate. See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (relying on treaty as defense to state action to take property); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928) (relying on treaty to obtain writ of mandamus requiring action by state official); *Asakura v. City of Seattle*, 265 U.S. 332, 343 (1924) (relying on treaty to obtain restraining order preventing application of state law that violated treaty). If offered as a proposal for doctrinal evolution, the suggestion makes no sense. See *infra* text accompanying notes 172–173. In discussing the claim that a treaty that is non-self-executing lacks the force of domestic law, I will use the term “non-self-executing” to refer only to non-self-executing treaties that are not judicially enforceable under any circumstances.

87. See, e.g., *The Federalist* No. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

88. See Carlos Manuel Vázquez, *The Constitution as Law of the Land: The Supremacy Clause and Judicial Review* (unpublished manuscript on file with the *Columbia Law Review*) [hereinafter Vázquez, *Constitution as Law of the Land*].

89. I discuss the four categories of non-self-executing treaties here in a different order than in “*The Four Doctrines of Self-Executing Treaties*.” To avoid confusion, I shall refrain from referring to the doctrines by reference to the order in which I have discussed them (e.g., the first category, second category, etc.).

90. See generally Vázquez, *Four Doctrines*, *supra* note 8.

that law is judicially enforceable by the individuals whose rights it purports to govern. The Supreme Court's self-execution decisions, like its political question decisions, can and should be read to construe our Constitution to establish a presumption of judicial enforceability.

a. Unconstitutional Treaties. — One of the four categories of non-self-executing treaties consists of treaties that purport to accomplish what is beyond the powers of the treaty-makers under our Constitution. Such treaties may be said to lack the force of domestic law for the same reason unconstitutional statutes are thought to lack such force. To the extent they purport to accomplish what is beyond the treaty-making power, they are invalid.

A treaty might in theory be invalid because it purports to do something that neither the federal nor state governments may do under our Constitution. A treaty that restricts the freedom of speech within the meaning of the First Amendment would be an example. Such a treaty is void as a matter of domestic law. Other treaties may attempt to accomplish something that is within the power of the federal government but beyond the power of the treaty-makers. Such treaties are unconstitutional because they intrude upon the exclusive powers of the legislature. They purport to do what, under our Constitution, can only be accomplished through a statute. These treaties might be, and have been, described as "non-self-executing."⁹¹ They are in force internationally, but because of the way our Constitution divides powers between the treaty-makers and the lawmakers, they cannot accomplish their goals of their own force. They require implementation.

One example of something that, under our Constitution, can only be done by statute is the appropriation of money. During the Jay Treaty debates, everyone assumed that an appropriation would require action by the House. The debate was about whether the House was duty-bound to appropriate the money simply because the treaty was the law of the land, or instead had discretion to decline to appropriate the money if it objected to the treaty. The latter position has prevailed, a position that indeed seems to follow from the premise that an appropriation requires a law. The idea that the legislature can be legally bound to enact legislation is foreign to us.⁹² In any event, any such "duty" would be wholly unenforceable. To say that the House is under a duty to appropriate the money and that, if it does not, it can be ordered to do so, is to trivialize the requirement of House action. And to recognize that the "duty" is unenforceable is to trivialize the duty.

If we reconcile treaties that purport to appropriate money with the Supremacy Clause by regarding them as unconstitutional, it would appear to follow that the treaty-makers are legally bound not to conclude

91. For a more thorough discussion of these types of treaties, see Vázquez, *Four Doctrines*, *supra* note 8, at 718–19.

92. See *Printz v. United States*, 521 U.S. 898, 972 n.1 (1997) (Souter, J., dissenting).

such treaties, at least not before obtaining the necessary appropriation from the House. That we instead say only that the treaty is non-self-executing reflects the same view about the nature of a legal obligation that underlies the statement that a non-self-executing treaty is not the law of the land—that is, it reflects the conviction that a supposed duty not enforceable against the duty-holder, either judicially or otherwise, is not truly a legal duty. Perhaps if the impeachment power had come to be used against Presidents who entered into such treaties, the idea that the President lacks the constitutional power to conclude such treaties might have taken root.⁹³ In any event, a President who knows that appropriations require action by the House would presumably not enter into a treaty purporting to appropriate money (and the Jay Treaty did not purport to do so⁹⁴). A prudent President would refrain from entering into an unconditional obligation to do something that requires an appropriation without getting the House's approval beforehand. He would be more likely to agree to "propose" action to the Congress, to "use his best efforts" to achieve the desired ends, or to attach a reservation or declaration alerting the other parties to the constitutional role of the House. Treaties phrased in any of those ways would not be unconstitutional, but they would fall into one or more of the other categories of non-self-executing treaties.

b. *Nonjusticiable Treaties.* — Like the previous category, the next category of non-self-executing treaties reflects separation-of-powers notions. This category, however, reflects the Constitution's allocation of powers among the branches of our federal government with respect to *the enforcement*, rather than the making, of treaties. This category consists of treaties that are not judicially enforceable because they establish a type of obligation whose enforcement our Constitution allocates to a branch other than the judiciary. As noted, our legal tradition recognizes a link between law and courts. Thus, by declaring treaties to be law, the Supremacy Clause appears to allocate their enforcement to the courts. But our legal tradition also recognizes certain limits on the judicial enforceability of laws. The courts are regarded as the proper enforcers of certain types of norms but not others.

The most pertinent limitation can be traced to *Marbury v. Madison*: "The province of the court is, solely, to decide on the rights of individuals."⁹⁵ A treaty, therefore, is not judicially enforceable if it does not con-

93. Given the requirement of Senate consent to treaties, however, it is easy to see why this power was never used in this way.

94. See Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-U.K., 8 Stat. 116, 120.

95. 5 U.S. (1 Cranch) 137, 170 (1803). The courts, of course, decide on the rights of individuals whether such individuals are plaintiffs or defendants. That is why the *Marbury* dictum is not in conflict with the fact that courts often enforce public rights at the behest of government, for example in criminal cases. Even in such cases, it may be said that the role of the court is to protect the rights of individuals. The rights of the public (as distinguished from the individual) could in theory be enforced without the involvement of

fer rights.⁹⁶ A treaty does not confer a right if it does not impose an obligation. This is why a precatory or hortatory treaty is not judicially enforceable. Such treaties are sometimes said to be non-self-executing,⁹⁷ but the label in this context signifies something very different from what it means in the case of an unconstitutional treaty. There is nothing in the Constitution that prevents the treaty-makers from entering into treaties with precatory or aspirational provisions.

That the courts may not enforce such provisions is not problematic. Such treaties might be said to impose obligations of a sort, just as the Constitution's preamble might be said to obligate the Congress to seek to "promote the general welfare." But, in both cases, the "obligations" are not thought to create correlative legal rights. They might be described as moral obligations. Determining how to implement an aspirational provision requires the balancing of a number of competing demands on our resources, and this sort of balancing is something our Constitution assigns to the legislative branch. The formal conclusion that such provisions do not create legal "rights" might be thought to reflect this division of powers among the branches of the federal government.

Precatory provisions might be regarded as part of a broader category of nonjusticiable provisions. Another type of nonjusticiable provision consists of those that are too vague for judicial enforcement. Like constitutional and statutory provisions, a treaty may be judicially unenforceable because it does not offer "judicially manageable standards."⁹⁸ The formal and functional reasons for concluding that such provisions are not enforceable in the courts are similar to the rationales for finding precatory provisions to be non-self-executing. A vague treaty provision does not

courts, but such enforcement is too likely to trample the rights of individuals. It is to protect the latter that the executive is required to resort to courts if it seeks to deprive people of liberty or property.

96. This principle has produced a great deal of confusion among the lower courts with respect to the standing of individuals to enforce treaties in the courts. Some courts have denied relief to individuals based on the notion that treaties, as a matter of international law, confer rights only on states. Of course, if this were relevant, treaties would never—or virtually never—be enforceable by individuals in our courts. I have argued elsewhere that as a matter of international law individuals generally lack "rights" under treaties only in the sense that they generally lack standing to enforce the correlative obligations of states at the international plane. The Supremacy Clause's declaration that treaties are domestic law was designed to make treaties enforceable at the domestic plane. Since the role of the courts at the domestic plane is to enforce the rights of individuals, the Supremacy Clause is best read to give individuals standing to enforce treaties that obligate the state to treat them in a given way. See generally Vázquez, *Treaty-Based Rights*, *supra* note 8, at 1133–41. Thankfully, there is no need to address the standing issue here. A treaty that is not self-executing, as Professor Yoo uses the term, is not enforceable in the courts at the behest of anyone, presumably including other nations. I invoke Chief Justice Marshall's dictum about the role of the courts only insofar as it tells us, indirectly, that a treaty is not judicially enforceable if it does not establish obligations.

97. See, e.g., *INS v. Stevic*, 467 U.S. 407, 429 n.22 (1984) (stating that Article 34 of Refugee Convention is "precatory and not self-executing").

98. *Baker v. Carr*, 369 U.S. 186, 223 (1962).

“prescribe a rule by which the rights of the private citizen or subject may be determined.”⁹⁹ It leaves the parties with much discretion about how to comply, and in our system of government it is for the legislature to exercise that discretion.

It may be that even certain mandatory and determinate treaty provisions are nonjusticiable as a constitutional matter. Analogously, the political-question doctrine is said to reflect the idea that the enforcement of certain constitutional norms has been allocated by the Constitution to a branch other than the judiciary.¹⁰⁰ Sometimes the conclusion that the Constitution allocates the enforcement of a constitutional provision to the nonjudicial branches is based on the precatory or vague nature of the norm, but sometimes it is based on constitutional text¹⁰¹ or structure.¹⁰² It cannot be said that the Constitution allocates the enforcement of treaties generally to a branch other than the judiciary, but perhaps a court could legitimately construe the Constitution to place treaties concerning certain subjects—arms control, for example—beyond the enforcement power of the courts. Alternatively, the unenforceability of such treaties might be explained by the more general principle I traced above to *Marbury v. Madison*: An arms-control treaty might be said to be judicially unenforceable because it does not confer rights on individuals, as individuals are not its objects.¹⁰³

This is not the place to explore the outer boundaries of this category of non-self-executing treaties. What is important for present purposes is to recognize that this category includes treaties that are not judicially enforceable because of the way our constitution allocates the power to enforce treaties that are validly concluded by the treatymakers. Like the political question doctrine, this category of non-self-executing treaties should be regarded as an exception to the general rule that laws are judicially enforceable.¹⁰⁴

99. *Head Money Cases*, 112 U.S. 580, 598–99 (1884).

100. See *Baker*, 369 U.S. at 218–29; *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 140–51 (1912).

101. See *Nixon v. United States*, 506 U.S. 224, 228 (1993).

102. The nonjusticiability of disputes about whether the constitutional norms regulating the amendment process have been complied with has been defended on structural grounds. See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *Yale L.J.* 517, 596 (1966); see also *Coleman v. Miller*, 307 U.S. 433, 457–60 (1939) (Black, J., concurring).

103. Explaining the nonjusticiability of such treaties on this ground would mean extracting from the *Marbury* dictum the principle that domestic courts do not enforce the rights of sovereign states. Cf. Brief for Amicus Curiae United States at 11–12, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770) (arguing that foreign states lack standing to maintain actions under treaties in domestic courts). But see Brief Amicus Curiae of a Group of Law Professors at 5–6, *id.* (disputing U.S. brief).

104. Professor Yoo argues that separation-of-powers notions require the conclusion that treaties always, or presumptively, are judicially unenforceable in the absence of implementing legislation. I address these separation-of-powers arguments in Part IV.

c. *Treaties Addressed to the Legislature*. — The foregoing categories of non-self-executing treaties are simply versions of doctrines that apply equally to constitutional and statutory provisions. To the extent the term “non-self-executing” describes a doctrine unique to treaties, it refers to what I have called the “intent-based” category.¹⁰⁵ It consists of treaties that are addressed to the legislature in the sense that the obligation they impose is an obligation to pass domestic legislation.

Foster v. Neilson is the prototype of this category.¹⁰⁶ At issue in that case was whether a treaty between the United States and Spain ratified and confirmed certain Spanish grants of land of its own force or instead required the United States to “pass acts” (i.e., legislation) to ratify and confirm the grants.¹⁰⁷ The Court acknowledged that, if the treaty had provided that the grants were “hereby” confirmed, it would have been self-executing and would accordingly have governed the question of title.¹⁰⁸ But the Court read the treaty as “stipulating for some future legislative act.”¹⁰⁹ The Court relied on the English text, which provided that the grants “shall be ratified and confirmed.”¹¹⁰ It read this language as contemplating a future act of ratification. In a later case involving the same treaty, *United States v. Percheman*,¹¹¹ the Court confessed error. This time, the Court had before it the Spanish text, which said that the treaties “shall remain ratified and confirmed.”¹¹² This, the Court held, was the language of self-execution.

Foster recognizes that a treaty is not self-executing if the obligation it imposes is an obligation to enact domestic legislation. It is important to distinguish this category from the two categories discussed earlier. The determination that a treaty is non-self-executing because unconstitutional or nonjusticiable turns on an interpretation of the Constitution. The first reflects the conclusion that the treaty was invalidly made; the second the conclusion that the treaty, though validly made, imposes an obligation whose enforcement our Constitution allocates to nonjudicial branches. In *Foster*, by contrast, the self-execution question turned on an interpretation of the treaty. Treaties that fall in the first two categories may be said to be “addressed to the legislature,” but only constructively. The necessity for legislative action is a consequence of a constitutional disability (in the first case, a disability of the treaty-makers; in the second case, a disability of the courts). The *Foster* category consists of treaties that are *actually* addressed to the legislature. The content of the obligation imposed by the treaty is the enactment of legislation. According to *Foster*, such trea-

105. See Vázquez, *Four Doctrines*, supra note 8, at 700–10.

106. 27 U.S. (2 Pet.) 253 (1829).

107. *Id.* at 314.

108. *Id.* at 314–15.

109. This characterization of the holding comes from the later case of *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

110. *Foster*, 27 U.S. (2 Pet.) at 315.

111. 32 U.S. (7 Pet.) 51 (1833).

112. *Id.* at 88.

ties are not enforceable in the courts. With respect to such treaties, the role of the courts is merely to enforce the statute passed by the legislature to implement the treaty.¹¹³

d. *Treaties That Do Not Create Private Rights of Action.* —Increasingly, lower courts have been using the term “non-self-executing” to refer to treaties that do not themselves create a private right of action.¹¹⁴ The Restatement, on the other hand, insists that the self-execution issue is distinct from the question whether a treaty creates a private right of action.¹¹⁵ It is true that the doctrine recognized in *Foster* does not have to do with the existence of a private right of action. The plaintiff in *Foster* had invoked a right of action at common law; he relied on the treaty merely to establish his title to the property. But I have attempted to show that, outside the treaty context, courts often use the term “self-executing” (and hence “non-self-executing”) to refer to laws that do not create remedies or rights of action.¹¹⁶ Once it is recognized that the term “non-self-executing” is not a term of art restricted to treaty law, but instead refers to a number of possible reasons why a law might not be judicially enforceable without prior legislative implementation, there is little reason to deny the label to treaties that contemplate but do not create a private right of action. Constitutional provisions, for example, have frequently been described as self-executing (or not) with respect to remedies.¹¹⁷

There is, however, an important difference between treaties that are non-self-executing in the first three senses of the term and treaties that are non-self-executing in this fourth sense. In the first three cases, a non-self-executing treaty is not judicially enforceable under any circumstances. A treaty that is non-self-executing in the fourth sense is judicially unenforceable only when it is invoked by someone who seeks to maintain an action and has no other legal source for his right of action. Someone who invokes a treaty as a defense does not need a right of action.¹¹⁸ Ad-

113. Professor Yoo erroneously attributes to Professor Henkin an excessively narrow understanding of the concept of a non-self-executing treaty. He says that Professor Henkin would recognize a treaty as non-self-executing only if it imposes on the parties the obligation to accomplish through future legislative action something that the Constitution exclusively assigns to Congress. See Yoo, *Globalism*, supra note 1, at 1977. Professor Yoo thus suggests that Professor Henkin would regard as self-executing a promise of future legislative action on a matter not exclusively assigned by the Constitution to Congress, or a treaty on a matter exclusively assigned to Congress that is not framed as a promise of future legislative action. Professor Henkin has never taken such a position. See Henkin, supra note 8, at 203.

114. See, e.g., *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir. 1991); *United States v. Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring).

115. See Restatement (Third), supra note 10, § 111 cmt. h (1987).

116. See Vázquez, *Four Doctrines*, supra note 8, at 721.

117. See Alfred Hill, *Constitutional Remedies*, 69 Colum L. Rev. 1109, 1112 (1969).

118. For example, if Texas makes conduct X a crime, and a treaty provides that the parties shall not regard conduct X as a crime, someone being prosecuted in Texas for

ditionally, it is unnecessary to rely on a treaty as the source of a private right of action if another law provides a private right of action. For example, someone seeking damages or an injunction against a state official who has allegedly violated a treaty may rely on Section 1983 for his right of action.¹¹⁹ Someone who seeks an injunction ordering a federal official to stop violating a treaty may rely on the Administrative Procedure Act for his right of action.¹²⁰ As *Foster* illustrates, historically treaties were not relied upon as the source of the plaintiff's right of action. The treaty governed the rights and duties of the parties, but the common law provided the right of action.

The lower court opinions most frequently cited for the proposition that a non-self-executing treaty is one that does not create a "private right of action" were written in cases in which the treaty was being invoked by a plaintiff suing a private individual or a foreign state in circumstances in which for jurisdictional reasons, there was a need to find a federal right of action. In such circumstances, there may in fact have been a need to determine whether the treaty itself conferred a right of action. Unfortunately, the dictum in these cases—to the effect that a treaty that does not create a right of action is non-self-executing—has been wrenched from its context and applied in cases in which there should have been no need to ask whether the treaty itself created a right of action.¹²¹

2. *Are Non-Self-Executing Treaties "Law"?* — As the foregoing analysis suggests, there is no single answer to the question whether a non-self-executing treaty is "law." A treaty that is non-self-executing because it does not create a private right of action is plainly "law" under even the narrowest definition of that term. Not all laws create private rights of action; a treaty that does not create a private right of action may still be enforced in court in certain circumstances. On the other hand, a treaty that is non-self-executing because it is unconstitutional may unproblematically be described as not law. To the extent it exceeds the treaty-making power, it is invalid. Treaty provisions that are nonjusticiable because they are precatory or aspirational might be said to be law, but the characterization is not meaningful because of the provision's content: It does not purport to obligate the parties to do anything in particular. The same might be said of treaty provisions that are nonjusticiable because they are vague.¹²²

conduct X should be able to rely on the treaty as a defense, even if the treaty does not create a private right of action.

119. 42 U.S.C. § 1983 (1994) (permitting suits against state officials for violations of federal Constitution or laws).

120. 5 U.S.C. § 702 (1994) (establishing judicial review of legal wrongs caused by federal agency action).

121. See Vázquez, *Four Doctrines*, supra note 8, at 719.

122. To the extent a mandatory and determinate treaty provision is deemed nonjusticiable for other separation-of-powers reasons, the question of its status as law is more complicated.

Whether a treaty "addressed to the legislature" is law is a more complex question. An example will aid our analysis. Consider a treaty that provides: "Do not deport refugees."¹²³ (I shall hereinafter refer to this as a Type A treaty.) If the relevant concepts (e.g., "deport" and "refugee") are sufficiently determinate, such a provision would be self-executing on my analysis. Upon the entry into force of the treaty, by virtue of the treaty itself (and the Supremacy Clause), the corpus of federal law in the United States would include a norm prohibiting the deportation of refugees. Now assume a treaty that provides instead: "Pass legislation prohibiting the deportation of refugees" (hereinafter a Type B treaty).¹²⁴ Such a treaty is plainly non-self-executing under *Foster*. Although the treaty contemplates the creation of a domestic-law norm identical to the one created by the first treaty, such a norm does not become part of the corpus of federal law by virtue of the entry into force of the treaty. Indeed, one might say that a Type B treaty is non-self-executing *because* it does not, of its own force, create a Type A law.

But what about the norm addressed to the legislature? Is the norm "Pass a law barring the deportation of refugees" part of the corpus of federal law in the United States by virtue of the entry into force of the treaty? The text of the Supremacy Clause would appear to require an affirmative answer. Yet, it is also clear that this norm is not enforceable in court. The norm can be violated by the legislature with impunity. Whether we regard such a norm as law depends on how we define law. The norm would not be law if we linked the legal status of a duty to its judicial enforceability or the existence of some other mechanism for enforcing it against the duty-holder. Professor Henkin, on the other hand, argues that such norms are indeed law:

Whether [a treaty] is self-executing or not, it is supreme law of the land. If it is not self-executing, Marshall said, it is not "a rule for the Court"; he did not suggest that it is not law for the President or for Congress. It is their obligation to see to it that it is faithfully implemented; it is their obligation to do what is necessary to make it a rule for the courts if the treaty requires that it be a rule for the courts¹²⁵

Professor Henkin thus reconciles the concept of a non-self-executing treaty with the Supremacy Clause by embracing a broader conception of "law."

Professor Henkin's rationale for reconciling a non-self-executing treaty with the Supremacy Clause is unavailable to Professor Yoo, however. First, a non-self-executing treaty, as Professor Yoo understands the

123. More likely the treaty would provide that all parties agree not to deport refugees. The provision quoted in the text is the equivalent for purposes of analyzing the self-execution question.

124. Again, the treaty is more likely to provide that all parties agree to pass legislation prohibiting the deportation of refugees.

125. Henkin, *supra* note 8, at 203-04.

term, would not be law even under Professor Henkin's less demanding test. Even if one were to grant for purposes of argument that a norm can be law even though it can be violated by the duty holder without legal consequences, surely one would have to insist that such a norm is law only if it is *binding* on the duty holder. Professor Henkin can describe such a norm as law because he insists that the Congress is legally bound to comply with it. Professor Yoo, on the other hand, forthrightly defends his thesis by arguing that the political branches *should have the flexibility to violate the norm*.¹²⁶ This position is not entirely implausible. If the Constitution requires action by Congress to implement a non-self-executing treaty of the type hypothesized above, then presumably it does so for a reason. In the case of a treaty that is non-self-executing solely because it is framed as a requirement of legislation,¹²⁷ it is plausible to conclude that the reason is to leave Congress the legal option of violating it. But, if Professor Yoo's position is that treaties are not even theoretically binding on the nonjudicial branches, treaties would not be law in even the least demanding sense of that term.

Second, a looser understanding of the term "law" does not help Professor Yoo because he does not restrict the concept of a non-self-executing treaty to Type B treaties. He would regard Type A treaties as non-self-executing, either categorically or presumptively. This position is in conflict with the Supremacy Clause, no matter how we interpret the term "law." According to the terms of that clause, the entry into force of a treaty norm having the content "Do not deport refugees" results in the existence of a domestic law norm having the same content. Professor Yoo denies this. He insists instead that the entry into force of a treaty norm having the content "Do not deport refugees" results in the existence, at best, of a domestic law norm having the content "Pass legislation prohibiting the deportation of refugees." A less demanding definition of "law" helps Professor Henkin explain why a treaty having the content "Pass legislation prohibiting the deportation of refugees" is law even though it is unenforceable; such a definition cannot explain why a treaty having the content "Do not deport refugees" should be treated as a law having the content "Pass laws prohibiting the deportation of refugees." Professor Yoo would find the authority for treating the former as the latter in the Constitution, yet the most relevant thing the Constitution says on the matter is that a treaty having the content "Do not deport refugees" is itself law.

Unlike Professor Henkin, I am inclined to question the status as "law" of a norm that can be disregarded with no legal consequences. It is

126. See, e.g., Yoo, *Globalism*, supra note 1, at 1979.

127. As noted above, the categories of non-self-execution might overlap, and thus a treaty that expressly contemplates future acts of legislation might do so *because* the parties regarded the provision as precatory or vague. A treaty would be non-self-executing solely because it is framed as a requirement of future legislation if it is not also precatory or vague.

for this reason that I argue the Supremacy Clause provides textual support for a presumption that treaties are self-executing (a presumption that finds independent support in the cases). But the question whether a Type B treaty is law is less interesting, and less pertinent, than the question whether a Type A treaty should be treated as a Type B law. That Professor Henkin is willing to regard a Type B treaty as law even though it is not judicially enforceable does not mean that he would find it unproblematic to say that a Type A treaty is law even though it is judicially unenforceable. He might take the position that treaties are law only if they bind the norm subject. In the case of a Type B treaty, the norm-subjects are the legislature and the executive (in its lawmaking capacity). In the case of our hypothesized Type A treaty, the norm subjects would be any government officials involved in deporting people—the executive (in its law executing capacity) and the courts. Professor Henkin might take the position that a Type A treaty would be law only if the executive were bound as a matter of domestic law to refrain from deporting refugees, and the courts were bound in a deportation proceeding against a refugee to rule that the deportation is prohibited. He might accordingly take the position that the Supremacy Clause requires that “all” Type A treaties be binding on judges to the extent they purport to address the rights of individuals before the court.

There is much force in this analysis, but an examination of the treaty-makers’ recent practice of attaching non-self-executing declarations to human-rights treaties leads me to conclude that the treaty-makers do have the power to enter into a Type A treaty obligation that is not binding on judges and other law-applying officials. Although the purpose of these declarations is a matter of some dispute, on one view these declarations seek to render non-self-executing a treaty provision that otherwise would be self-executing.¹²⁸ What the declarations mean by “self-executing” is also unclear. The Senate Reports attached to some of the treaties indicate that the declarations mean merely that the treaty does not create private rights of action,¹²⁹ thus leaving open the possibility that the treaty may be enforced defensively or pursuant to generic rights of action, like the APA or section 1983. With respect to other treaties, however, the Senate Reports indicate that the declarations mean that the treaty lacks the force of domestic law.¹³⁰ It is possible, then, that by attaching the declaration to the treaty, the treaty-makers intended to deny domestic legal force to a treaty that would otherwise be self-executing in every

128. Scholars have argued, however, that the declarations were not intended to be binding on the courts. See, e.g., David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *Yale J. Int'l L.* 129, 135–36 (1999).

129. See, e.g., S. Exec. Rep. No. 102-23, at 19 (1992) (International Covenant on Civil and Political Rights); see also S. Exec. Rep. No. 103-29, at 8 (1994) (International Convention on the Elimination of All Forms of Racial Discrimination).

130. See, e.g., S. Exec. Rep. No. 101-30, at 10 (1990) (Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).

sense of the term. If this were the treaty-makers' intent, the declarations may be characterized as an attempt to countermand for a given treaty the rule that the Supremacy Clause would otherwise establish.

Some scholars maintain that, if the declarations do purport to countermand the Supremacy Clause, they are unconstitutional.¹³¹ Professor Henkin's position is less clear. He has called the practice of attaching such declarations to treaties "anti-Constitutional"¹³²—an unconventional term that he may be using advisedly to denote something other than unconstitutional.¹³³ I agree that the practice is contrary to the spirit that animated the Supremacy Clause. It certainly conflicts with the evident desire of the Founders to "show the world" that we take our treaty commitments seriously by making them enforceable in the ordinary courts.¹³⁴ Contrary to Professor Yoo's suggestion,¹³⁵ however, I have never taken the position that such declarations are invalid.¹³⁶

It is unnecessary for present purposes to resolve the interpretive or constitutional issues surrounding these declarations. It suffices to consider instead the constitutionality of a hypothetical "non-self-executing" reservation attached to a treaty that would otherwise clearly be self-executing. By hypothesizing a reservation rather than a declaration, we avoid the issues stemming from the uncertain effect of declarations on the international obligations established by the treaty. To avoid the ambiguities surrounding the intended meaning of the declarations, I shall assume that the reservation clearly states that the treaty "does not have the force of domestic law." Would such a reservation be valid and effective? If one accepts *Foster*, then in my view one must accept the validity and effectiveness of such a reservation. *Foster* held that the treaty-makers could render an otherwise self-executing norm non-self-executing by framing it as a requirement of future legislation. Thus, the contemplated domestic law norm "Do not deport refugees" is denied effect as domestic law if it is embedded in a provision framed as "Pass legislation barring the deportation of refugees." The same result must follow if the "non-self-execution" provision appears in a separate part of the treaty. Thus, Article 1 of a treaty, which considered alone would be self-executing, can be denied domestic legal force by Article 27 of the treaty, which provides that "the requirements of Articles 1–26 shall be achieved through future acts of domestic lawmaking." Assuming the other parties to the treaty do not

131. See Burchard, *supra* note 85, at 222 & n.36; Paust, *supra* note 85, at 324–25.

132. Henkin, *supra* note 8, at 202.

133. See Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* 63 (1990) (arguing that such declarations are misguided). But cf. Henkin, *supra* note 8, at 477 n.100 ("[I]f what I wrote [in a previous article] can be read to support a general policy of declaring all treaties, or a category of treaties, to be non-self-executing, I do not hold that view.").

134. James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 7, 1787), in 2 *Documentary History*, *supra* note 14, at 514, 518.

135. See Yoo, *Globalism*, *supra* note 1, at 1959.

136. See, in particular, Vázquez, *Four Doctrines*, *supra* note 8, at 708 n.61.

object to it, the identical statement in a reservation to the treaty would have exactly the same effect as hypothetical Article 27, assuming the reservation is not contrary to the object and purpose of the treaty.¹³⁷ In my view, such a reservation would rarely, if ever, be contrary to the object and purpose of a treaty.¹³⁸ If another party does object to the reservation, then the treaty is not in force between the reserving and the objecting parties,¹³⁹ and the treaty would lack domestic legal force because it lacks international force. If at least one other party fails to object, the treaty would come into force subject to the reservation. The result would be the existence of a Type A treaty obligation—binding and in force under international law—that would lack the force of domestic law and would accordingly not be binding on domestic law-applying officials, such as judges.

If my analysis is correct, then treaty-makers have the power to deprive Type A treaties of domestic legal force, absent implementing legislation. They can do this by making non-self-execution an unseverable part of the United States' ratification of the treaty. If so, then the Supremacy Clause in the end functions as a default rule.¹⁴⁰ It makes treaty provisions judicially enforceable, if valid and otherwise justiciable, unless the treaty-makers themselves affirmatively determine otherwise (and manifest that intent in the constitutionally appropriate way). A strict textualist might object that this construction is unfaithful to the Supremacy Clause's text, which makes "all" treaties the law of the land. But the opposite conclusion, in my view, would require the rejection of too much entrenched doctrine to be plausible. This critique, in any event, is unavailable to Professor Yoo, whose various alternative constructions of the Constitution would represent far greater inroads onto the rule established by the Supremacy Clause's text.

137. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, 1155 U.N.T.S. 331, 336–37.

138. Such a reservation does nothing more than establish for the United States the rule that applies in other countries (such as the United Kingdom) by virtue of their constitutions—i.e., that the treaty will not have the force of domestic law until legislatively implemented. If such a provision were contrary to the object and purpose of a treaty, the U.K. could never become a party to the treaty.

139. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 20, 1155 U.N.T.S. at 337.

140. Professor Yoo writes that, on his reading, "[t]he provision [of the Supremacy Clause] requiring state judges to enforce federal law creates a default rule that would be triggered only if the political branches chose to enforce a treaty judicially, but had failed to establish any lower courts." Yoo, *Globalism*, supra note 1, at 1980. But a default rule is one that does not need to be "triggered." Thus, insofar as he is arguing that a treaty always or presumptively requires implementation by statute, he is reading the Supremacy Clause not as the default rule, but as the opposite of a default rule. To the extent he is just saying that he reads the "state judges" portion of the Supremacy Clause as a default rule because it applies only if Congress fails to establish federal courts, his characterization is more plausible, but still not accurate. State judges continue to have jurisdiction over treaty cases even though Congress has created federal courts, and when they have jurisdiction, they are required by the Supremacy Clause to enforce treaties as law.

B. *Yoo's Doctrinal Problem*

Professor Yoo does not clearly espouse any particular rule concerning the domestic effect of treaties as an alternative to the prevailing view. Instead, he argues that the founding material is consistent with any of a number of possible alternative rules. In this section, I describe six alternative theories that Professor Yoo's article might be read to espouse, and I explain why each is implausible in the light of text and doctrine.

1. *First Theory: Treaties Never Have the Force of Domestic Law.* — The most radical position advanced by Professor Yoo is that all treaties require implementing legislation. None is effective as domestic law unless and until Congress enacts a statute giving it such force. (As discussed above, this means that none have domestic force by virtue of the Constitution; if and when an implementing statute is passed, the statute will have the force of law.¹⁴¹) The support for this position consists of statements that Professor Yoo reads as indicating that the Founders regarded the treaty-making power as distinct from the legislative power and gave the treaty-makers the former but not the latter.¹⁴²

This position, however, is flatly inconsistent with the Supremacy Clause's declaration that treaties do have the force of domestic law. It is also contradicted decisively by the many, many cases in which the Supreme Court has given effect to treaties even though they had not been implemented by Congress.¹⁴³ This position also conflicts with such entrenched doctrines as the last-in-time rule, under which treaties and statutes are regarded as having equivalent stature and thus the last in time prevails. Under Professor Yoo's theory, a treaty could never prevail over a statute, as treaties would never have the force of law. Nor would it make any sense even to say that a statute prevails over an earlier treaty. A

141. See *supra* note 69 and accompanying text.

142. See Yoo, *Globalism*, *supra* note 1, at 1966–67, 1997, 2055. Professor Yoo also argues that certain Framers regarded the making of domestic law as inherently legislative and nondelegable, see *supra* note 20, but since he relies on the statements of the Founders to this effect, I do not take him to be defending the rule described in the text on the ground that the Founders could not have given treaties automatic domestic legal force even if they had intended to do so. Cf. *supra* note 52. Instead, I take him to be relying on evidence that some Framers regarded domestic lawmaking to be inherently legislative and nondelegable as support for the argument that our Constitution should be construed that way even though the Founders may have been wrong in thinking that this power could not be delegated to the treaty-makers in certain circumstances. See *supra* notes 20, 52 (considering Yoo's discussion of statements by Wilson and Johnson at the Philadelphia convention).

143. See, e.g., *El Al Airlines, Ltd. v. Tseng*, 119 S. Ct. 662, 668 (1999); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 551 (1991); *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 123–24 (1989); *United States v. Stuart*, 489 U.S. 353, 366 (1989); *Air France v. Saks*, 470 U.S. 392, 396 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Bacardi Corp. v. Domenech*, 311 U.S. 150, 161 (1940); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931); *Ford v. United States*, 273 U.S. 593, 609 (1927); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 247 (1872); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 91 (1833).

statute would prevail even over a later treaty. It would in fact never be necessary to compare a statute and a treaty; statutes need be compared only to each other (and to the Constitution). Professor Yoo's theory is in even greater conflict with the numerous decisions involving unimplemented treaties in which the Court has applied the principle that treaties should be construed liberally.¹⁴⁴ In short, this position is plainly untenable.

2. *Second Theory: Treaties on Matters Within Article I Powers Never Have the Force of Domestic Law.* — In the alternative, Professor Yoo advances the argument that treaties lack the force of domestic law if they regulate a matter falling within the scope of an Article I power. There are two possible versions of this position: The first would read the treaty-making power as being constructively limited to matters not assigned to the legislature. The second would concede that the treaty-makers have the power to enter into such treaties, but would interpret the Constitution as denying such treaties domestic legal force until implemented.

In form, the basis for reconciling the first version of this position with the Supremacy Clause's text is the same as the reason we regard treaties that purport to appropriate money not to be effective as law. Because the treaty-making power would not extend to matters falling within Article I, any treaty that does regulate such a matter lacks domestic legal force because it is unconstitutional. But the two examples of claimed legislative exclusivity are so different in scope that they ultimately must be regarded as different in kind. The conclusion that a treaty may not appropriate money is narrow and supported plausibly by Article I's specific requirement that appropriations be "made by law" (meaning presumably an Article I law). If everything falling within an Article I power were excluded from the treaty-making power, on the other hand, the latter power would be reduced virtually to nothing. Recall that Article I gives the Congress the power to regulate foreign commerce, to define offenses against the law of nations, and to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in the federal government or any officer thereof, presumably including the powers of the President in the area of foreign affairs. If treaties could not be made on those subjects, it is difficult to imagine what treaties could be made. Indeed, a far more plausible case has been made that the federal government may not do by treaty anything that falls outside the powers of the federal government as outlined in Article I.¹⁴⁵ Of course, if this argu-

144. See, e.g., *Stuart*, 489 U.S. at 368; *Domenech*, 311 U.S. at 163; *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933); *Nielson v. Johnson*, 279 U.S. 47, 51 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Asakura*, 265 U.S. at 342 (1924); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 241, 249 (1830).

145. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390 (1998).

ment and Yoo's were accepted, the treaty-making power would be a null set. Although I do not agree that the treaty-making power encompasses only matters that fall within Article I,¹⁴⁶ the argument is plausible at all only because most treaties throughout our history have involved matters that plausibly fall within Article I. This, in turn, shows that the position Professor Yoo attributes to the Federal Farmer is not only unsupported by constitutional text, which places no such limits on the treaty-making power, but also has been decisively rejected by history and tradition. Numerous Supreme Court and lower court decisions give effect to treaties on matters within Article I powers.¹⁴⁷

Professor Yoo might well respond that he is not claiming that the treaty-makers were thought to lack the power to conclude treaties on such matters, but only that any such treaties were thought to lack domestic legal force unless and until implemented by Congress. But this argument would present a direct conflict with the Supremacy Clause's text. If the treaty were regarded as being within the treaty-making power, then under the Supremacy Clause it would be "the law of the land." If Professor Yoo's claim that it nevertheless requires legislative implementation were correct, then the treaties would not appear to be "law" in any recognizable sense. By his own accounting, such treaties would not even bind Congress to pass the called-for legislation.¹⁴⁸ Congress would retain the discretion to enact implementing legislation or not, just as it would if the Supremacy Clause had made no mention of treaties.¹⁴⁹ There is no support in doctrine for this reading out of the Supremacy Clause. Numerous cases enforce treaties on matters within Article I in the absence of implementing legislation.¹⁵⁰

146. See Carlos Manuel Vázquez, *Breard, Printz, and the Treaty Power*, 70 U. Colo. L. Rev. 1317, 1336–43 (1999) (discussing the scope of the Treaty Power) [hereinafter Vázquez, Treaty Power].

147. See, e.g., *Tseng*, 119 S. Ct. at 668 (Warsaw Convention); *Floyd*, 499 U.S. at 533–34 (same); *Chan*, 490 U.S. at 123–25 (same); *Stuart*, 489 U.S. at 366 (Convention Respecting Double Taxation); *Saks*, 470 U.S. at 396 (Warsaw Convention); *Franklin Mint*, 466 U.S. at 252 (same); *Domenech*, 311 U.S. at 161 (Pan American Trademark Treaty); *Cook v. United States*, 288 U.S. 102, 119 (1933) (1924 Treaty with Great Britain); *Santovincenzo*, 284 U.S. at 40 (Consular Convention with Italy); *Ford*, 273 U.S. at 618 (1924 Treaty with Great Britain); *Holden*, 84 U.S. at 247 (Treaty of Dec. 29, 1835); *Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) (Warsaw Convention); *Xerox Corp. v. United States*, 41 F.3d 647, 652 (Fed. Cir. 1994) (Convention Respecting Double Taxation); *Blanco v. United States*, 775 F.2d 53, 60 (2d Cir. 1985) (Treaty of Honduras); *Edwards v. Carter*, 580 F.2d 1055, 1058–59 (D.C. Cir. 1978) (Panama Canal Treaty); *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 801–02 (2d Cir. 1971) (Warsaw Convention); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 640 & n.9 (2d Cir. 1956) (Convention for Fair Protection of Industrial Property); *Master of County v. Cribben & Sexton Co.*, 202 F.2d 779, 783 (C.C.P.A. 1953) (same); *American Express Co. v. United States*, 4 Ct. Cust. App. 146, 161 (Ct. Cust. App. 1913) (Treaty with Canada).

148. See Yoo, *Globalism*, supra note 1, at 1979.

149. See supra notes 70, 72 and accompanying text (discussing Necessary and Proper Clause).

150. See cases cited supra note 147.

3. *Third Theory: The Constitution Establishes a Presumption That Treaties Are Not the Law of the Land.* — Perhaps in recognition of the array of cases that contradict the categorical rules he proffers, Professor Yoo advances in the alternative the claim that our Constitution should be read to embrace a presumption that treaties lack the force of domestic law unless and until implemented by Congress.¹⁵¹

As noted above, this reading has the virtue of not reading the Supremacy Clause entirely out of the Constitution, as the clause would function as the source of the treaty-makers' power to give the treaties they make the force of domestic law. Nevertheless, it is in conflict with the clause's text, as the provision is not written as a power-conferring provision. It would presume that a Type A treaty establishes a Type B law, whereas the Supremacy Clause declares Type A treaties to be themselves law.

This interpretation is also unsupported by Professor Yoo's historical narrative. The burden of his discussion of the British practice is that the requirement that treaties be implemented by Parliament reflected the desire to safeguard the prerogatives of the representative branch against executive overreaching.¹⁵² The burden of his discussion of the debates at the framing and the ratifying conventions was similarly the need to protect the role of the House from overreaching by the President and Senate.¹⁵³ It is understandable why delegates who had this concern would propose to give the House a necessary role in the making or even the implementation of treaties.¹⁵⁴ But it seems certain that such delegates would be entirely unsatisfied by a rule that would give the House such a role only if the President and Senate wanted them to have it (or forgot to address the matter). A rule that leaves it to the other branches to determine whether the House will have a role fits poorly with Professor Yoo's story about the perceived need to protect the people and their representatives from overreaching by the less representative branches.

Professor Yoo argues that a presumption against self-execution is supported by *Foster*. His treatment of this case, however, is a textbook example of how, with just a little strategic cutting and pasting, a text may be made to appear to stand for the opposite of what it says. Marshall wrote in *Foster* as follows:

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a

151. See Yoo, *Globalism*, supra note 1, at 2092.

152. See *id.* at 1997–2004.

153. See *id.* at 2024–26.

154. As Professor Flaherty has shown, however, these proposals largely took the form of suggested amendments, thus implying that the unamended Constitution did not give the House such a role. See Flaherty, supra note 3, at 2123.

different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.¹⁵⁵

The first part of that passage is obviously referring to the effect of treaties under international law or in countries such as Great Britain that do not regard treaties as having the force of law. The second part plainly states that the Supremacy Clause *rejects* that rule and “establishe[s]” a “different principle” in the United States.

In an attempt to portray *Foster* as embracing a presumption that treaties do not generally have effect as domestic law, Professor Yoo inverts the order of Marshall’s sentences. Professor Yoo writes as follows:

In *Foster*, Marshall acknowledged that the Supremacy Clause suggested that all treaties were to be considered self-executing because it “declares a treaty to be the law of the land.” A treaty’s status as supreme federal law required that the courts regard the international agreement “as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.” According to Marshall, however, “a treaty is, in its nature, a contract between two nations, not a legislative act.” As a result, a treaty does not achieve, by its own operation, “the object to be accomplished,” but instead “is carried into execution by the sovereign power of the respective parties to the instrument.”¹⁵⁶

Inverting the order allows him to portray Marshall as suggesting that the British rule is an exception to the Supremacy Clause, whereas what Marshall plainly says is that the Supremacy Clause was an alteration of the British rule. Of course, if the British rule were an exception to the Supremacy Clause, the Supremacy Clause would mean nothing, as under the British rule treaties are not regarded as law.¹⁵⁷

To be sure, Marshall does say that only a treaty that “operates of itself without the aid of any legislative provision” is equivalent to an act of the legislature. But this language cannot have been meant as a reference to his earlier statement that a treaty “in its nature” is a contract that “does not generally effect, of itself, the object to be accomplished.” The latter language came immediately before the statement that “[i]n the United States, a different principle is established” by the Supremacy Clause. This has to mean that the rule established by the Supremacy Clause is *not* a rule under which treaties “generally” do not effect of themselves the ob-

155. *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829).

156. Yoo, *Globalism*, supra note 1, at 2087 (footnotes omitted).

157. Justice Iredell’s opinion in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), is similarly unrecognizable from Yoo’s description of it. I discuss the opinion, which Yoo regards as the strongest evidence for the “internationalist” position, see Yoo, *Globalism*, supra note 1, at 1981, in Vázquez, *Treaty-Based Rights*, supra note 8, at 1110–13.

ject to be accomplished. *Foster* thus strongly supports a presumption that treaties are self-executing in the United States.

When Marshall turned to the treaty before him, he seemed to lose sight of this presumption. As I have noted, Marshall's application of the "different principle" to the treaty before him might be read to suggest a purer interpretive enterprise, uninfluenced by a presumption either for or against self-execution.¹⁵⁸ But, I argued, the Court's need to reverse itself on this issue in *Percheman*, and the Court's language in the latter case, more than compensate for Marshall's apparent failure to heed his own counsel in *Foster*. In particular, the Court framed the issue in *Percheman* as whether the treaty "stipulat[es] for some future legislative act."¹⁵⁹ To "stipulate" for something is "to include [it] *specifically* in the terms of an agreement, contract, etc.; to arrange *definitively*."¹⁶⁰ Thus, if a non-self-executing treaty is one that stipulates for a future legislative act, it is one that provides *specifically* that such acts are contemplated. In addition to the "different principle" language in *Foster* and the "stipulate" language in *Percheman*, a presumption of self-execution is supported by the fact that *Foster* itself remains the sole case in which the Supreme Court has unambiguously denied relief on the ground that the treaty was not self-executing.¹⁶¹ In the overwhelming majority of treaty cases, the Supreme Court has reached the merits without even discussing whether the treaty was or was not self-executing.¹⁶²

Even if *Foster* did contain language that supported a presumption against self-execution, dictum¹⁶³ in a single Supreme Court decision that

158. See Vázquez, *Four Doctrines*, supra note 8, at 702 n.36. This is far from saying, however, that treaties can be enforced in the courts only if they "are specifically directed" to the judiciary or if the text "clearly indicates judicial enforcement." Yoo, *Globalism*, supra note 1, at 2089, 2091. The opinion says nothing even remotely resembling that.

159. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

160. Webster's *New Twentieth Century Unabridged Dictionary* 1790 (2d ed. 1983) (emphasis added) (first definition) (The second definition is "to specify as an essential condition of or requisite in an agreement."). On the term's denotation of specificity, see also, e.g., Jane Austen, *Sense and Sensibility* 6 (E.P. Dutton & Co. 1955) (1811) ("He did not stipulate for any particular sum, my dear Fanny; he only requested me, in general terms, to assist them.").

161. See Vázquez, *Four Doctrines*, supra note 8, at 716 & n.96.

162. See *id.* at 716 n.99.

163. This is Yoo's characterization. See Yoo, *Globalism*, supra note 1, at 2088. I have characterized it as an alternative holding. See Vázquez, *Four Doctrines*, supra note 8, at 700 n.27, 702 n.35. Professor Yoo criticizes me for "missing" the assertedly "significant" connection between the Court's first alternative holding in *Foster* and its self-execution holding. Yoo, *Globalism*, supra note 1, at 2088. I did not see a connection earlier, see Vázquez, *Four Doctrines*, supra note 8, at 702 n.35, and I still do not see one. It is in the nature of alternative holdings that each assumes the incorrectness of the other. The "connection" Professor Yoo apparently sees is in fact merely a parallel: Both holdings, in Professor Yoo's view, reflect deference to the political branches in foreign affairs. But, contrary to Professor Yoo's suggestion, the Court in *Foster* does not suggest that the courts are to defer to the Executive's interpretation of treaties that are the law of the land. See *infra* p. 2202. Even if the court had articulated a rule of deference to the Executive in

was subsequently overruled would be a thin reed on which to rest a rule as incompatible with the Supremacy Clause's text as the one Professor Yoo advances.¹⁶⁴ The dictum would be more than offset by the text of the Constitution, which, as discussed above, independently supports a presumption of self-execution. But, in fact, *Foster* (in light of *Percheman*) strongly supports a presumption of self-execution.

4. *Remaining Theories: No Treaty Is Self-Executing; No Treaty That Falls Within an Article I Power Is Self-Executing; The Constitution Establishes a Presumption That Treaties Are Non-Self-Executing.* — The remaining theories parallel the first three, except they substitute the term “self-executing” for “law of the land.”¹⁶⁵ To the extent that Professor Yoo understands “non-self-executing” to mean “not domestic law,” the last three theories are the same as the first three and must be rejected for the reasons discussed above. But Professor Yoo's apparent approval of the cases that equate the self-execution question with the private right of action question in-

treaty interpretation, it is hard to see the relevance of this to the self-execution issue. The Court does hold that, when a treaty promises legislation, it is addressed to the legislature. Beyond this, the decision tells us nothing about the allocation of powers among the branches. It certainly does not hold that any “types” of treaty provisions necessarily require implementation other than those that by their terms stipulate for legislation. See Yoo, *Globalism*, supra note 1, at 2089.

164. Professor Yoo relies in addition on language from the *Head Money Cases* and *Whitney v. Robinson* that indicates, in his view, that treaties “were generally not self-executing.” Yoo, *Globalism*, supra note 1, at 1970. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 598–99 (1884). But the language from these cases that he reads as suggesting that treaties generally are not self-executing only makes the obvious point that domestic courts will not get involved in international claims between states regarding treaty violations—i.e., claims at the international plane, rather than domestic cases that raise international issues. These cases do not say, as Professor Yoo suggests, that the courts must defer to the political branches in cases involving treaties. They only go so far as to recognize that the courts must respect a decision to violate a treaty made by particular combinations of the political branches—i.e., a majority of both Houses of Congress plus the President or a supermajority of both Houses without the President. See, e.g., *Head Money Cases*, 112 U.S. at 599. As noted, had these courts embraced Professor Yoo's position that all treaties are non-self-executing, there would have been no need to articulate or rely on a last-in-time rule. Professor Yoo claims that these cases “linked self-execution to the specific creation of individual rights.” Yoo, *Globalism*, supra note 1, at 1971. But the concept of specificity makes no appearance in any of these cases, but appears to have been interpolated by Professor Yoo. The cases do suggest that the courts' role is to enforce individual rights created by treaty. This raises but does not help answer the question of when a treaty creates individual rights. In the *Head Money Cases*, the Court indicated that treaties may be enforced by individuals when they prescribe a rule from which the rights of individuals may be determined. See 112 U.S. at 598. As I have noted, this appears to reflect the requirement that treaty provisions be mandatory and sufficiently determinate that courts can give them effect without difficulty. I discuss the issue more generally in *Vázquez, Treaty-Based Rights*, supra note 8, at 1123–25, 1128–33. Suffice it to say that Professor Yoo reads far more into the dicta in these cases about self-execution than their text will bear.

165. Professor Yoo does not advance these last three as separate from the first three theories, but I discuss them separately because there are a few statements in his article that contradict his position that non-self-executing treaties lack the force of domestic law.

troduces an ambiguity.¹⁶⁶ If a treaty that is not self-executing is merely one that fails to confer a private right of action, then a categorical rule that all treaties (or treaties falling within Article I) are non-self-executing would mean that such treaties could still be invoked in court as a defense or pursuant to rights of action having their source in other laws, such as section 1983, the APA, or the common law.¹⁶⁷ A presumption that treaties are non-self-executing, on this view, would apparently allow such treaties to serve as a defense or to be enforced pursuant to other laws conferring rights of action, even if the presumption were not overcome. Overcoming the presumption would be necessary only if there were a need to rely on the treaty for the right of action. Moreover, overcoming the presumption would require unambiguous evidence that the treaty-makers intended to create a private right of action, but not evidence that they intended the treaty to be effective as domestic law.¹⁶⁸

That this is what Professor Yoo has in mind is suggested by his discussion of *Ware v. Hylton*, in which he finds, "contrary to internationalist claims," that Article IV of the treaty "did not actually give British plaintiffs a cause of action to sue in federal court," but, rather, "only preempted a defense created by state law," the "cause of action [arising] under state common law."¹⁶⁹ If Professor Yoo means that, for this reason, the Court found the treaty to be non-self-executing, he seems to be saying that a non-self-executing treaty can still be relied on in court as a defense or pursuant to rights of action having their source outside the treaty. That this is his position is also suggested by his reference to the case law concerning implication of private rights of action under statutes as an analogous doctrine that addresses whether statutes are "self-executing."¹⁷⁰ Of course, the doctrine reflected in that line of cases is not relevant when a

166. See Yoo, *Globalism*, supra note 1, at 1972 & n.75.

167. In addition, the lack of a private right of action would not prevent the treaty from being enforced in court at the behest of the executive branch, the states or state officials, or even foreign states or their officials. But cf. Brief for Amicus Curiae United States at 11-12, *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770) (arguing that federal district courts should not try claims of treaty violations brought by foreign governments seeking to overturn otherwise valid criminal proceedings in U.S. courts). Of course, such treaties could not be enforced in court even at the behest of these entities if they lacked the force of domestic law.

168. Thus a treaty like the Warsaw Convention or the Torture Convention would be self-executing. See Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3019-20, 137 L.N.T.S. 11 (creating right of action for certain injuries during international transportation); International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (creating right of action for damages caused by torture).

169. Yoo, *Globalism*, supra note 1, at 2080.

170. *Id.* at 1972.

party relies on a statute as a defense or when he can base his right of action on another statute, such as section 1983.¹⁷¹

On the other hand, this position is inconsistent with the position he takes elsewhere that non-self-executing treaties lack the effect of domestic law.¹⁷² Perhaps he means to adopt the “private right of action” theory for purposes of determining what has to be unambiguously stated to overcome the presumption against self-execution, but the “not effective as domestic law” theory for purposes of determining the effect of a non-self-executing treaty.¹⁷³ The result would be that a treaty that does not unambiguously create a private right of action would be non-self-executing, and as a result it could not be enforced in court even as a defense. Such a rule verges on the incoherent, however. Why should the failure to make a clear statement about the existence of a private right of action have a bearing on the treaty’s enforceability as a defense?

If Professor Yoo’s position is simply that a treaty presumptively does not create a private right of action, but may still be enforced as a defense or pursuant to other statutes or the common law, then his theory is far less significant than the sweeping statements in his article suggest. In addition to being enforceable as defenses, the obligations of state and federal officials could be enforced through generic rights of action such as those codified in Section 1983 (for state officials), the APA (for federal

171. See *Wright v. City of Roanoke Redevel. & Hous. Auth.*, 479 U.S. 418, 423–24 (1987); Vázquez, *Treaty-Based Rights*, supra note 8, at 1146–47.

172. See Yoo, *Globalism*, supra note 1, at 1961. The attempt to understand Professor Yoo’s understanding of the concept of non-self-execution is further complicated by his discussion of Justice Iredell’s opinion in *Ware v. Hylton* and the subsequent negotiation of the Jay Treaty. Professor Yoo suggests that Iredell’s opinion stood for the proposition that the 1783 treaty was non-self-executing. See *id.* at 2078. But Iredell merely interpreted the treaty not to apply to debts that had already been discharged by the time of the treaty’s application. The disagreement between Iredell and the majority in *Ware* was thus about what the treaty required on the merits, not whether it was operative as law without prior implementation, or whether it conferred a cause of action, or about anything that might plausibly be regarded as a self-execution issue. Professor Yoo also suggests that John Jay’s agreement with the British to establish an international tribunal for the resolution of certain disputes is somehow inconsistent with the prevailing view or with the concept of self-execution. It is not. Indeed, a self-executing treaty could facilitate such a regime by requiring courts to dismiss suits that under the treaty are subject to compulsory arbitration or to enforce the decisions of such a tribunal. Cf. *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. On the other hand, regarding such a treaty as non-self-executing would hamper such a regime, as the treaty could not be the basis for a domestic court’s decision to compel arbitration.

173. That he would find a treaty to be self-executing only if it clearly states that it creates a private right of action is suggested by his discussion of *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989). See Yoo, *Globalism*, supra note 1, at 1972–73. Elsewhere he says that a treaty that is non-self-executing does not have the force of domestic law. See *id.* at 1958–59. That he would combine the two theories in the manner suggested in the text is less clear, but implied by his statement that the “private right of action” analysis is a refinement of the intent-based analysis. *Id.* at 1972–73. (This combination of the two would conflict with his treatment of *Ware*, however.)

officials), and the habeas corpus statute (for both).¹⁷⁴ If the legislature were to repeal those statutes, substantial constitutional questions would arise under the due process clause (and, I would argue, the Supremacy Clause), but that contingency is a topic for another day.¹⁷⁵ Because of these statutory provisions providing rights of action against government, the need to find a right of action in the treaty should arise primarily where an individual seeks to enforce a treaty against another individual (or a foreign state). Here, Professor Yoo urges a rule analogous to the stringent one the Court has adopted for the purpose of determining whether a statute creates an implied right of action.¹⁷⁶ In another article, I explain why the standard for implying private rights of action under treaties should be more lenient.¹⁷⁷ Further discussion of this question, however, would take me too far afield. The very fact that the effect of adopting the "private right of action" interpretation would be modest is a strong indication that this is not what Professor Yoo has in mind. Modest change seems inconsistent with the article's tone and with its sweeping statements about the separation of powers, to which I shall now turn.¹⁷⁸

174. 42 U.S.C. § 1983 (1994); 5 U.S.C. § 702 (1994); 28 U.S.C. § 2241 (1994).

175. I discuss the issue in Vázquez, *Treaty-Based Rights*, supra note 8, at 1150–51 & n.288.

176. See Yoo, *Globalism*, supra note 1, at 1977.

177. See Vázquez, *Treaty-Based Rights*, supra note 8, at 1157–62.

178. Professor Yoo's critique of my position in his Rejoinder is based on a complete misapprehension of my position. Yoo claims that I take the "unsparing" position that all treaties are self-executing and hence immediately judicially enforceable. Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2254. To the contrary, the thesis of one of my prior articles was that there are not one but "four grounds on which a court might legitimately conclude that legislative action is necessary to authorize it to enforce a treaty, notwithstanding the Supremacy Clause." Vázquez, *Four Doctrines*, supra note 8, at 696. See also supra Part III.A.1 (summarizing those four distinct types of reasons that can support the conclusion that a treaty is non-self-executing). Yoo says that my position that treaties are always judicially enforceable is implausible because even the other categories of laws mentioned in the Supremacy Clause are not always judicially enforceable. See Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2220. In fact, I have argued that the categories of non-self-executing treaties correspond generally to the reasons constitutional and statutory norms are sometimes found to be judicially unenforceable. My claim is that the Supremacy Clause declares the three types of norms to have the status of "Law of the Land," and hence the three should be judicially enforceable in at least roughly the same circumstances. See generally Vázquez, *Four Doctrines*, supra note 8. It is Yoo who seeks to treat treaties radically differently from the other two sorts of federal law mentioned in the Supremacy Clause.

Yoo would have been closer to the mark had he contended that I take the position that all treaties have the force of domestic law. This position differs from the one Yoo attributes to me in that it recognizes that a norm may be said to have the force of domestic law even though it is not judicially enforceable. The position that all treaties have the force of domestic law derives strong support from the text of the Constitution, which provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Nevertheless, my position is not in the end that simple. (Unlike Professor Yoo, however, I regard the complexities I am about to describe as a point against my thesis. I regard simplicity in legal doctrine as desirable, and in particular I regard complexities that deviate from a text as problematic. Nevertheless, I

IV. YOO'S STRUCTURAL ARGUMENTS

Professor Yoo relies as well on “deeper structural imperatives, arising from federalism and the separation of powers, that the Constitution imposes upon treaties”—imperatives that he accuses defenders of the prevailing view of ignoring.¹⁷⁹ Presumably, he is referring here to the sweeping arguments he has made throughout the article calling to mind the political question doctrine. Treaties should not be enforced in courts, he argues, because they implicate foreign policy, and the conduct of foreign policy is allocated by our Constitution to the political branches.¹⁸⁰ Finding a treaty to be self-executing “robs the President and Congress of the flexibility they might need in conducting the nation’s foreign affairs,”¹⁸¹ meaning the flexibility to violate treaty commitments. At the abstract level in which they most often appear in the article, these “structural imperatives” are too indeterminate to be of any help in answering the questions at issue. Professor Yoo’s periodic attempts to derive from the cases more specific structural principles that support his position on the non-self-execution of treaties, on the other hand, are wholly unpersuasive.

I readily endorse the statement that our Constitution allocates the conduct of foreign policy to the political branches, but the statement is no more helpful at answering the tough questions than any other tautology. Equally unassailable is the statement that enforcement of the law

accept the complexities described below because of the need to accommodate judicial doctrine.) First, I recognize that treaties that go beyond the treaty-making power lack the force of domestic law. Second, and more controversially, I accept that the treaty-makers have the power to enter into an international treaty obligation towards individuals but deny it the force of domestic law by attaching to it a “no-domestic-effect” reservation. Unlike Yoo, I do not regard the question of the validity of such reservations to be easy, but I ultimately accept the practice’s constitutionality because I cannot find a stable and principled distinction between such reservations and what the Court upheld in *Foster*. Yoo criticizes me for abandoning the purity of my literal interpretation of the Supremacy Clause by reducing the clause to a mere presumption, but this criticism is ironic because: (a) Yoo had earlier criticized my literal interpretation as simplistic, and (b) Yoo makes exactly the same move when he discovers that what he regards as the correct interpretation of the Constitution is untenable in light of entrenched judicial doctrine.

Even though much of my prior writing on this subject has sought to reconcile the categories of non-self-executing treaties with the status of such treaties as domestic law by pointing to circumstances in which the other forms of domestic law have been found to be judicially unenforceable, I do not “take [Yoo] to task for equating whether a treaty is a law of the land, and therefore domestic law, with whether a treaty is enforceable in court.” Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2249 n.119. In fact, I am quite sympathetic to the claim that the status of a norm as domestic law entails the norm’s enforceability in court against those on whom it imposes a duty, by those for whose benefit it imposes the duty is not a legal norm. My effort has been to show that treaties have generally been held non-self-executing for reasons that are either consistent with this principle or fall within narrow exceptions to it. I thus largely agree with his statements in “Globalism” that, under his theory, non-self-executing treaties lack the force of domestic law. This is indeed the basis of my textual critique of his position.

179. Yoo, *Globalism*, *supra* note 1, at 1982.

180. See *id.* at 1979.

181. *Id.*

has been allocated to the legal branches (including the courts). The Constitution may be said to require that foreign policy be conducted within the bounds established by the law. In other words, when a matter is governed by law, it is outside the realm of mere "policy," whether foreign or domestic. Thus, the political branches may not infringe constitutional rights even when doing so would advance foreign policy goals.¹⁸² Similarly, foreign policy must be conducted in accordance with statutes that regulate foreign commerce.¹⁸³ Like the Constitution and federal statutes, treaties are declared by the Supremacy Clause to be law. Thus, the Constitution may well require that those responsible for conducting foreign policy do so in accordance with applicable treaties. The truism that our Constitution allocates the conduct of foreign policy to the political branches does not help us answer that question.

Moreover, the doctrine of self-executing treaties "robs" the political branches of their flexibility only if we independently establish that the Constitution entitles those branches to more flexibility than the doctrine gives them. Even without a presumption against self-execution, the political branches retain a great deal of flexibility to violate treaties. A majority of both Houses plus the President may do so by passing a statute that conflicts with the treaty.¹⁸⁴ The President and the Senate may do so by concluding a later inconsistent treaty with another nation.¹⁸⁵ They may do so without the agreement of another nation by abrogating the treaty.¹⁸⁶ More controversially, they may even attach a reservation making it clear that the treaty is not judicially enforceable.¹⁸⁷ In certain circumstances, at least, the President acting alone may abrogate a treaty.¹⁸⁸ Even when the President lacks the power to abrogate a treaty alone, the courts apparently will not interfere with his "flexibility" to do so.¹⁸⁹ The conclusion that a treaty is self-executing admittedly precludes lower-level

182. See, e.g., *Boos v. Barry*, 485 U.S. 312, 323-24 (1988) (holding D.C. code in violation of the First Amendment despite its enactment for reasons of foreign policy).

183. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) (stating that presidential power is at its weakest in areas where Congress has affirmatively acted).

184. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that when a statute conflicts with a provision of a treaty, the latter in time will prevail); *Head Money Cases*, 112 U.S. 580, 599 (1884) (same).

185. See *DeCoteau v. District County Court*, 420 U.S. 425, 443-45 (1975) (holding that treaty concluded in 1889 terminated 1867 treaty between Indian tribe and the United States).

186. See *Van Der Weyde v. Ocean Transp. Co.*, 297 U.S. 114, 116-18 (1936) (holding that United States' termination of a treaty provision prevents the provision from being relied on in U.S. courts).

187. See *supra* text accompanying notes 136-140.

188. See *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) (stating that when engaged in the recognition or derecognition of a country, the President may, as an incident of executive power, abrogate a treaty).

189. See *id.* at 1002 (Rehnquist, J., concurring in judgment) (stating that whether a treaty has been properly terminated is a political question). But cf. *id.* at 998 (Powell, J., concurring) (stating that question may be justiciable in certain circumstances).

executive officials, and perhaps the President as well, from violating a treaty that has not been validly (or perhaps even invalidly) terminated. Such officials may wish to have the flexibility to violate treaties that have not been terminated or declared non-self-executing, but Professor Yoo has not shown why our Constitution is best interpreted to provide such flexibility. Flexibility has its benefits, but so does precommitment. The decision to have a constitution that limits as well as grants powers and which, among other things, gives treaties the status of law, reflects a rejection of unlimited flexibility in favor of precommitment.

Furthermore, the proposed presumption against self-execution may actually hobble the political branches in their conduct of foreign policy. Recall that a non-self-executing treaty is not judicially enforceable even against the states. If Professor Yoo's presumption were adopted, a treaty would be enforceable in court against the states, even at the behest of the federal government, only if the treaty-makers made it clear that they intended it to be. The political branches may not welcome the burden Professor Yoo would place on them or the consequences of failing to overcome the presumption. The presumption Professor Yoo advocates would give the states a greater opportunity to block an attempt to give the treaty domestic legal force, quite possibly to the ultimate detriment of our foreign policy. This result may be defensible on federalism grounds, but Professor Yoo has not rested his argument on federalism principles.¹⁹⁰

Professor Yoo is no more successful at deriving more specific and determinate separation-of-powers principles from the cases. For example, he cites *Foster* for the principle that the judiciary's role is limited to "decid[ing] upon individual rights, according to those principles which the political departments of the nation have established."¹⁹¹ But this does not tell us, as Professor Yoo suggests, that the courts have "no special role" in the enforcement of treaties.¹⁹² On the contrary, the "principles which the political departments of the nation have established" would

190. See Yoo, *Globalism*, *supra* note 1, at 2091–94. Professor Yoo's exclusive focus on horizontal separation of powers suggests that he might permit even non-self-executing treaties to be enforced in court against states, at least at the behest of the federal government. But this would be inconsistent with his recognition that non-self-executing treaties lack domestic legal force. State law cannot be preempted by federal norms lacking the force of law. Perhaps he would construe a non-self-executing treaty as a delegation of lawmaking power to the Executive Branch. This would solve some of the problems just noted, as it would allow the Executive Branch to issue a regulation implementing the treaty. Inconsistent state laws would be preempted by the regulation, and their enforcement could be enjoined by a court at the behest of the federal government. There is little doubt that a treaty could delegate lawmaking power to the Executive in this way, but Professor Yoo has not explained the basis for construing treaties to delegate lawmaking power to the Executive even when they are silent on the issue. Indeed, it is not clear that Professor Yoo would approve of such a presumption, as it would not offer what he sees as the principal benefit of the presumption he advocates—the preservation of a role for the most representative of the branches, the House.

191. *Id.* at 2088 (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829)).

192. *Id.* at 1965.

appear to include treaties made by the President and the Senate.¹⁹³ Professor Yoo has given us no reason to conclude otherwise. Professor Yoo also appears to interpret the statement that the courts are to get involved only where the treaty involves "individual rights" as somehow "ensur[ing] that the political branches . . . retain the power to choose how or whether to implement the nation's international obligations."¹⁹⁴ He draws a false dichotomy. If a treaty creates individual rights, the courts have a role in enforcing them. This does not negate the power of the political branches to break the treaty by passing a statute or abrogating the treaty, but the existence of this power does not imply that the enforcement of a treaty that has not been terminated or superseded is entirely in the hands of the political branches.

The principle for which Professor Yoo cites *Foster* does help explain why the courts were required to defer to the President's interpretation of the treaty at issue in that part of the opinion, an 1803 treaty between Spain and France (thus not one made by the political departments of the United States). But, for the same reason, the fact that the Court found it appropriate to defer to the Executive's interpretation of such a treaty tells us little about the need for judicial deference to the Executive with respect to treaties that are the law of the land.¹⁹⁵

Similarly, Professor Yoo cites the *Head Money Cases* and *Whitney v. Robinson* for the general proposition that "the political branches are to enforce treaties, break treaties, or to seek remedies for their violation," but "the courts generally are to restrain themselves from entering the area" of treaty violations.¹⁹⁶ But the broad language from those opinions that Professor Yoo relies on establishes only that the courts have no role to play in resolving disputes between nations at the international plane. When it comes to resolving disputes about alleged treaty violations at the domestic plane, the Court merely holds that the courts must defer to a decision to break a treaty made by specific combinations of the political branches: a majority of both Houses plus the President, or a supermajority of both Houses without the President. The Court, in other words, merely applied the last-in-time rule. That the political branches may bind the courts by passing a statute does not mean that they can do so without passing a statute. Professor Yoo has read far greater limita-

193. *Id.* at 2088 (quoting *Foster*, 27 U.S. at 307).

194. *Id.* at 2089.

195. If the courts were required to defer to the Executive's interpretation of U.S. treaties, those who were litigating against the Executive in *Sale v. Haitian Centers Council Inc.*, 509 U.S. 155 (1993) (refugee challenge to Executive's interpretation of treaty), *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (challenge by criminal defendant of Executive's interpretation of extradition treaty), and in many other cases, could have been quickly dispatched. Instead, their arguments were considered on their merits without any mention of deference.

196. Yoo, *Globalism*, *supra* note 1, at 1970. See *Whitney v. Robertson*, 124 U.S. 190, 195 (1888); *Head Money Cases*, 112 U.S. 580, 591-600 (1884).

tions on the courts into these and other cases than their language will bear.¹⁹⁷

CONCLUSION: ON UNSETTLING THE SETTLED

As Professor Flaherty notes at the start of his Response, Professor Yoo is now among the ranks of a small group of scholars who have embarked on the project of unsettling what had previously been thought to be settled in the area of foreign affairs law. This entire project is in my view vulnerable to a powerful threshold objection: It undermines one of the central reasons for having law—its settlement function. The dictum that it is often more important that something be settled than that it be settled right¹⁹⁸ is as applicable to constitutional law as to other forms of law.¹⁹⁹ The settlement function is reflected most prominently in the doctrine of *stare decisis*, and even the greatest judicial defenders of the importance of text and original intent in constitutional adjudication admit that they do not always prevail over judicial precedent.²⁰⁰

The fact that a point of law is settled is thus by itself a reason not to unsettle it. This does not mean, of course, that there can be no sound reasons for unsettling the settled. Clearly there were sound reasons for

197. Another example of overreading is Professor Yoo's interpretation of *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). He cites that case as establishing the proposition that the Supreme Court has now adopted the "private right of action" view of the non-self-execution doctrine. Yoo, *Globalism*, supra note 1, at 1972-73. *Amerada Hess* involved the question whether, by becoming a party to certain treaties, Argentina had waived its sovereign immunity. The treaties said nothing about sovereign immunity. The Court held that the treaties did not withdraw Argentina's immunity because they "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Amerada Hess*, 488 U.S. at 442 (footnote omitted). This statement has no implications for the self-execution issue. It merely recognizes that a treaty that does not address the amenability to suit of a foreign state in U.S. courts does not remove such a state's immunity. For the proposition that the Court now equates the self-execution issue with the private right of action issue, Professor Yoo relies on the Court's "telling" citation of *Foster v. Neilson* and the *Head Money Cases* after the statement quoted above. Why the Court cited these cases for the proposition is admittedly mysterious. But to draw the conclusions from it that Professor Yoo draws is a stretch, to say the least. Perhaps Chief Justice Rehnquist or his clerk meant what Professor Yoo says when they inserted the "cf." cite to *Foster* and the *Head Money Cases*, but it seems unreasonable to attribute such a position to the Court as a whole.

198. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

199. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1371 & n.48 (1997); Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 8 (1997).

200. See *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring); Antonin Scalia, *Originalism: The Lesser Evil*, William Howard Taft Constitutional Law Lecture at the U. of Cin. (Sept. 16, 1988), in 57 U. Cin. L. Rev. 849, 861 (1989) ("[A]lmost every originalist would adulterate [originalism] with the doctrine of *stare decisis* . . .").

unsettling what was settled by *Scott v. Sandford*²⁰¹ or *Plessy v. Ferguson*.²⁰² But those who propose to unsettle the settled bear a high threshold burden of persuasion—and the strongest reasons for jettisoning a settled rule would appear to be those based on morality and justice.²⁰³ Professor Yoo invokes democracy, but the very decision to have a constitution that places limits on majorities is inconsistent with a pure form of democracy, and the most desirable impure form of democracy is the subject of too much disagreement to justify the rejection of a consensus on a point such as the one under discussion here. At any rate, Professor Yoo has not offered any robust theory of democracy, let alone one that warrants the rejection of the prevailing view.

Professors Curtis A. Bradley and Jack Goldsmith have devoted considerable effort to attempt to unsettle the principle that, under our Constitution, customary international law is federal law.²⁰⁴ They note with some force that the consensus on this issue appears to have been produced by anachronistically reading pre-*Erie* claims that customary international law is part of our law to mean that customary international law is federal law in a post-*Erie* sense. But the fact that a settled point began in error is not a reason to reject it. The same sort of criticism could be leveled at the decisions that originally adopted the last-in-time rule,²⁰⁵ yet we do not see many calls for its rejection,²⁰⁶ least of all from these scholars. Indeed, the very point of the doctrine of *stare decisis* is to require courts to follow precedents without inquiring into their correctness. The

201. 60 U.S. (19 How.) 393 (1856).

202. 163 U.S. 537 (1896).

203. If, as discussed earlier, entrenched precedent prevails over arguments based on text and history, it can be overcome only by bringing strong arguments based on justice and morality into the mix.

204. See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997).

205. See *Whitney v. Robertson*, 124 U.S. 190, 195 (1888); *Taylor v. Morton*, 23 F. Cas. 784, 786 (C.C.D. Mass. 1855) (No. 13,799). These decisions reasoned that treaties and statutes have equivalent status because the Supremacy Clause makes no distinction between them. However, the Supremacy Clause similarly makes no distinction between the Constitution and those two other forms of federal law, yet we have no difficulty saying that the Constitution controls the other two. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, 867 & n.67, 869 & n.72 (1987).

206. But see Henkin, *supra* note 205, at 886 (arguing that “the power to derogate” from international law should be “strictly limited”); Louis Henkin, *Treaties in a Constitutional Democracy*, 10 Mich. J. Int’l L. 406, 425–26 (1989) (arguing that the last-in-time rule reflects a misunderstanding of Article VI); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1110 (1985) (arguing that the historical basis for the last-in-time rule suggests its limitation). I have made it clear that I accept the last-in-time rule because it is entrenched. See Vázquez, *Four Doctrines*, *supra* note 8, at 696 n.9; Vázquez, *Treaty-Based Rights*, *supra* note 8, at 1114 n.126.

doctrine has bite only when it causes a court to follow a precedent that it regards as wrong.²⁰⁷

Perhaps Professors Bradley, Goldsmith, and Yoo would defend their project on the ground that their whole point is that these areas are not properly governed by law at all. The fact that unsettling it undermines the point of law is not an objection if their point is that law properly has no role to play here. That this is Professor Yoo's position is suggested by his description of a scenario of which he apparently approves:

Rather than imposing a fixed rule of self-execution, the Constitution may allow the House and Senate to use their constitutional and political powers over legislation and funding to prevent direct treaty implementation. Congress may use its powers in specific cases to establish the broad principle that any treaty that infringes upon the scope of the domestic legislative power must be implemented by legislation, or it can use its powers on a case-by-case basis to ensure that it plays a central role in treaty implementation. After this process of cooperation or struggle, the branches may even arrive at a rule of complete non-self-execution, depending on historical and international circumstances, the relative power of the branches, and the people's wishes.²⁰⁸

The picture Professor Yoo paints here of a process of struggle among the branches and a possible resolution based on "relative power" is, of course, the very opposite of the rule of law. Although Professor Yoo clearly welcomes such a process of struggle, he tells us little about why it would be a good thing. The Founders experienced considerable struggle during the critical period attempting to get the states to comply with treaty obligations, but they did not look back on that experience with equanimity. They regarded it as a problem, and they addressed it by declaring treaties *to be supreme law*. And—unlike the Continental Congress, which passed a resolution declaring treaties to be the law of the land (something that Professor Yoo appears to envision as one of the possible outcomes of this struggle)—the Founders enshrined this declaration *in a constitution*, which they in turn also declared to be supreme law. This was quite obviously an attempt to settle the issue by (partially) removing treaty compliance from the realm of politics.

Of course, enshrining a decision in the Constitution cannot by itself settle the point. For any attempted settlement to succeed, it has to be accepted by those exercising power, which means ultimately by the people. The success of the settlement attempted by our Framers required

207. Moreover, even if the principle that customary international law is federal law did originate in error, it has since been ratified for more persuasive reasons. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (relying on Phillip C. Jessup, *The Doctrine of Erie Railroad v. Thompkins Applied to International Law*, 33 *Am. J. Int'l L.* 740, 743 (1939) (urging Supreme Court not to apply *Erie* doctrine to international law in federal courts)).

208. Yoo, *Globalism*, *supra* note 1, at 2093.

the ratification of the instrument by state conventions, but also, and perhaps as importantly, the acceptance by the people of such vital aspects of the settlement as the institution of judicial review (vital because it in turn facilitated further settlements). This just goes to show that, if anything, the general acceptance of a principle is more important to its status as law than the enshrinement of that principle in a text. The principle that treaties in the United States have the force of domestic law is both enshrined in text and, until now at least, has been generally accepted.

Precisely because the principle is enshrined in the Constitution, the proposition that treaties have the status of federal law stands on considerably firmer ground than the claim that customary international law is federal law. Indeed, for this reason, I had regarded the proposition as immune from attack. On this point, I am happy to have been proved wrong. Professor Yoo has performed a valuable service by initiating this exchange. It is healthy for a theory, no matter how widely adhered to, to be challenged from time to time.²⁰⁹ In law, unlike other disciplines, the fact that an interpretation is widely accepted itself counts as a reason to retain it. But, since it is not a conclusive reason, it is useful to be reminded that an interpretation has more going for it than that. Professor Yoo's article and the responses it has generated have helped to show that sometimes a point of law is not just settled, but settled right.

CODA

In his Rejoinder, Professor Yoo attempts to supply persuasive textual, structural, and doctrinal arguments in defense of his position that our Constitution did not reject but "continue[d] the British system" concerning the status of treaties as domestic law.²¹⁰ He aptly captures the rule he claims our Constitution establishes in an epigram from Frederick Maitland: "Suppose the queen contracts with France that English iron or coal shall not be exported to France—until a statute has been passed forbidding exportation, one may export and laugh at the treaty."²¹¹ Professor Yoo's claim that this is the rule established by our Constitution, which declares treaties to be the "supreme Law of the Land," is untenable from a textual, structural, and doctrinal perspective.

Preliminarily, I note that Yoo is not altogether successful in clarifying exactly what his position is. He describes a hard position, which he appears to regard as the correct interpretation of the Constitution from a textual and structural perspective. But, recognizing that the hard posi-

209. See John Stuart Mill, *On Liberty* 97, 108 (Gertrude Himmelfarb ed., Penguin Books 1985) (1859) ("[H]owever true [an opinion] may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth. . . . [Even if] the received opinion [is] true, a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth.").

210. Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2230.

211. *Id.* at 2227 (quoting Frederick W. Maitland, *The Constitutional History of England* 425 (1908)).

tion is untenable from a doctrinal perspective, he offers in the alternative a softer position. The hard position is that treaties that address matters falling within the scope of Article I are non-self-executing and thus require legislative implementation, even if they purport to be self-executing, while treaties that address matters falling outside Article I are self-executing.²¹² The softer position is that treaties regulating matters within the scope of Article I are non-self-executing unless the treaty-makers clearly stated that the treaty is self-executing (i.e., a presumption of non-self-execution).²¹³ There is an ambiguity, however, concerning what Yoo thinks legislation is needed for. In describing the hard and soft rules, Yoo states that the treaties would not be enforceable in courts without such legislation.²¹⁴ But in the portion of the Rejoinder responding to Professor Flaherty, Yoo dismisses some of the statements Flaherty relies on as irrelevant because they merely “show that treaties were understood to be supreme over contrary *state law*.”²¹⁵ “‘Globalism’ does not dispute this conclusion, but addresses the different question of the relationship between treaties and the federal legislative power.”²¹⁶

The two questions, however, are not in fact different. The self-execution question is a mixed question of federalism and separation of powers: A self-executing treaty is a treaty that preempts inconsistent state law without the need for action by the federal legislature, and a non-self-executing treaty is one that does not preempt state law without such action. In stating that “Globalism” does not dispute that treaties preempt inconsistent state laws, Yoo suggests that, under his hard rule, a treaty falling within the scope of Article I does preempt inconsistent state law but does not prevail over prior federal law. This, however, would be less a thesis about self-execution than about the hierarchy of the forms of federal law, an issue addressed by the last-in-time rule, under which treaties and statutes are understood to have equivalent stature and hence the last in time prevails. Yoo’s Rejoinder takes on the last-in-time rule in a footnote,²¹⁷ but if this was his principal target, I’m afraid I completely misapprehended the point of “Globalism.” On the assumption that he means to advance a thesis about self-execution, I shall address the hard and soft rules as he sometimes describes them: A treaty within the scope of Article I is, either categorically or presumptively, unenforceable in courts unless

212. See *id.* at 2220.

213. See *id.*

214. See *id.* at 2248.

215. *Id.* at 2224.

216. *Id.*

217. See *id.* at 2243 n.93.

implemented by statute.²¹⁸ I note, however, that this deprives his critique of Professor Flaherty's Response of what little force it had.²¹⁹

In addressing Yoo's defense of these positions, I shall begin with his hard position, as that is what he appears to regard as the correct interpretation of the Constitution from a textual and structural perspective. He retreats to his soft position only because he recognizes that his hard position is untenable in light of judicial doctrine. I shall address his soft position, therefore, only in connection with his doctrinal arguments. I also note that Yoo appears to buttress some of his textual and structural arguments by reference to the ratification debates he discussed in "Globalism." His extensive discussion of those debates, however, led him to conclude only that the original understanding did not conclusively or definitively establish the correctness of the prevailing view, and thus required a shifting of the debate to textual, structural, and doctrinal arguments. If the originalist evidence, taken as a whole, is inconclusive, then Yoo cannot in good faith smuggle originalist arguments into the textual, structural, and doctrinal debate.

In response to my textual critique of his thesis, Professor Yoo disputes my claim that "law," as that term is used in the Supremacy Clause, entails presumptive judicial enforceability. This is not the place to defend further the conceptual link between law and courts.²²⁰ Suffice it to say that Yoo does not develop an alternative understanding of "law" under which the treaties that he would regard as non-self-executing would be law. He tentatively advances a view of "law" that resembles the one I attributed to Professor Henkin above: Even if a norm is not judicially enforceable, it is law as long as it is "binding" on those addressed by the norm.²²¹ Yoo states that "[a] constitutional, statutory, or treaty provi-

218. This interpretation is supported by *id.* at 2239 (criticizing me for claiming that all treaties "automatically preempt inconsistent state law"); *id.* at 2254 (recognizing that a treaty that falls within the "exclusive powers of the states" (and apparently only such a treaty) can be enforced by the judiciary "against inconsistent state law.>").

219. Under the approach to self-execution elaborated in "Four Doctrines," treaties falling into the "private right of action" category of non-self-executing treaties *would* preempt inconsistent state laws, see Vázquez, *Four Doctrines*, *supra* note 8, at 719–22, while treaties in the other three categories would not. As noted above, *supra* Part III.B.4, although portions of "Globalism" appeared to embrace the "private right of action" version of non-self-execution, most of "Globalism" seemed to take the position that non-self-executing treaties lack domestic legal force (and thus would not preempt inconsistent state laws). The Rejoinder appears to resolve the conflict by embracing the latter view; it does not appear to take the position that a non-self-executing treaty is one that does not create a private right of action but is otherwise enforceable in court. Cf. Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2244 (analogizing his proposed rule to "[t]he Court's strict test on private rights of action" to the extent the latter test "means that numerous federal statutory provisions cannot be enforced in court"). My discussion in the text thus refers to treaties that are non-self-executing in the other three senses. See also *supra* note 86.

220. I offer an extended defense in Vázquez, *Constitution as Law of the Land*, *supra* note 88.

221. Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2249 n.119. See *supra* text accompanying note 125.

sion can achieve 'law of the land' status through presidential or congressional, rather than judicial, action,"²²² and hence "[o]ne might read the 'Law of the Land' phrase as an affirmative duty of the federal government, as a whole, to give effect to constitutional, statutory, or treaty obligations."²²³

But this position is inconsistent with the position he took in "Globalism,"²²⁴ and repeats in the Rejoinder, that, under his view, "the executive and legislative branches *would remain free to break the treaty.*"²²⁵ How can the executive and legislative branches be legally free to break a treaty if the treaty is legally "binding" and the federal government has the "affirmative duty" to give it effect? That Professor Yoo does not in fact believe that a non-self-executing treaty has the force of domestic law is shown by his descriptions of the British rule, which he claims our Constitution "continue[s],"²²⁶ most notably his quotation from Maitland that one may "laugh at" treaties until they are implemented by statute.²²⁷ Although he is more careful in the Rejoinder to avoid saying that non-self-executing treaties lack the force of internal law, even here this view occasionally surfaces.²²⁸ Finally, the logic of his textual argument seems to require the conclusion that non-self-executing treaties lack the force of domestic law. As discussed below, his textual argument rests on the idea that to recognize a treaty as self-executing would be to give it the force of legislation and thus to intrude on Article I's grant of exclusive legislative power to Congress. If the problem is solved by regarding treaties falling within the Article I legislative power as non-self-executing, it is only because to do so is to deny such treaties the status of law.²²⁹

Yoo also disputes my argument that "Law of the Land" status entails presumptive judicial enforceability by pointing to the "judges" portion of the Supremacy Clause.²³⁰ He argues that, if "Law of the Land" status

222. Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2249. In fact, no such action is necessary, as the Constitution itself grants those three types of norms "law of the land" status." I shall read Professor Yoo's statement as expressing the view that a norm can have the status of law of the land even if its enforcement has been allocated to branches other than the judiciary.

223. *Id.*

224. Yoo, *Globalism*, supra note 1, at 1979 (non-self-execution gives political branches the discretion to determine how *or whether* to comply with treaty obligations).

225. Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2249 (emphasis added).

226. *Id.* at 2229-30.

227. See supra text accompanying note 211.

228. See, e.g., Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2223 (arguing that the Constitution was designed to give the House the power to "block a treaty's domestic effect" "by withholding implementation").

229. That he does not regard a non-self-executing treaty as having the force of domestic law is suggested as well by his apparent recognition that his position would be wholly implausible if he were contending that all treaties are non-self-executing. See *infra* text accompanying note 244.

230. This is sometimes referred to as the "Judges Clause," see Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 *Sup. Ct. Rev.* 199, 207.

implied judicial enforceability, it would have been redundant to go on to direct state judges to give effect to the Constitution, federal statutes and treaties notwithstanding inconsistent state laws. This argument cannot get Yoo anywhere. If the latter portion is superfluous, then both portions support my position; if it is not superfluous, then the latter portion supports it instead of the former. I assume that Yoo is not making the untenable argument that state judges are required to enforce treaties but federal judges are not. If so, he would have to contend with the unanimity of opinion since the Founding that federal and not just state judges are bound by federal statutes and the Constitution, to say nothing of treaties. Most likely, the clause mentions state judges and not federal judges because the former and not the latter were thought to need a specific instruction to disregard inconsistent state law. If anything, the reference to state *judges* reinforces the link between law and courts that is the basis of the presumption I defend.

In disputing my claim that the Supremacy Clause is self-executing with respect to treaties, Yoo relies as well on the fact that Article III is not self-executing with respect to the lower federal courts.²³¹ I fail to see how this fact supports his argument. It is true that the Founders opted to leave the decision whether to create lower federal courts to the legislature. The default regime for judicially enforcing the supreme Law of the Land was through litigation in the state courts, with an appeal to the Supreme Court. This is how treaty cases reached the Supreme Court for much of our history. The only relevance of this regime, known as the Madisonian Compromise, to the issue under discussion here is that it shows that the Founders knew how to write a non-self-executing constitutional provision when they wanted to. Article III makes it clear that the lower federal courts shall exist only if Congress creates them; Article VI, by contrast, simply declares treaties to be the “supreme Law of the Land.”

Yoo fares no better in presenting affirmative defenses of his own position. The textual support Yoo musters for his hard position is exceedingly weak. His claim, as noted, is that giving a treaty self-executing effect is to treat the treaty as legislation, yet the Constitution’s placement of the treaty-making power within Article II shows that treaty-making was regarded as an executive power. Giving self-executing effect to such executive action would violate Article I’s vesting of the legislative power exclusively in Congress. Even if we credited each of those textual points, Yoo would have established at best a conflict among constitutional texts. It is indisputable, after all, that Article II allocates the treaty-making power to the President, with the consent of two-thirds of the Senate, and that Article VI gives treaties the status of “law of the land, and therefore domestic law.”²³² Thus, if we equate “legislation” and “law,” as Yoo does, then the combination of Articles II and VI would produce a clear allocation of

231. See Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2246.

232. *Id.* at 2249 n.119.

legislative power to the President (and Senate). If this conflicts with Article I, the solution would appear to be to give effect to the more specific provisions, which in this case would be the ones specifically addressing treaties. In fact, though, there is no necessary conflict, as the text of Article I allocates to the Congress only the legislative powers "herein granted." The constitutional text can thus easily be read to provide that only the legislative powers granted in Article I are vested in Congress, leaving open the possibility that legislative powers granted in other articles might rest elsewhere.²³³

Moreover, Yoo's textual argument fails to explain why a treaty that regulates matters falling outside the legislative power as enumerated in Article I can be self-executing. If the problem is that giving treaties domestic effect violates the textual grant of the legislative power to Congress, then the problem would seem to extend to any Article II treaty.

Yoo defends this aspect of his rule by noting that a treaty that regulates matters outside Article I does not impinge Congress's prerogatives, as by hypothesis Congress lacks any power in the matter. This is not a textual argument but a structural one.²³⁴ From a structural perspective, however, Yoo's position seems, if possible, even more problematic. It is true that Congress cannot complain if the treaty-makers are granted the power to legislate on matters beyond the scope of its legislative powers, but, as Yoo recognizes, the legislative power was limited not to protect Congress but to protect the states and the people.²³⁵ Although Yoo criticizes my position because it would permit an easy circumvention of federalism limits,²³⁶ he overlooks the fact that his proposal would permit the very same thing. National power would remain precisely as broad under his theory, as the Congress would retain the power to implement treaties that fall within Article I and the treaty-makers would retain the power to "legislate" on matters falling beyond the scope of Article I.

The national power would be structured differently under his theory, as it would take the consent of the House to implement a treaty falling

233. Although I am here engaging in a purely textual argument, I am unaware of any evidence that the Framers intended something different by the phrase "herein granted." To the contrary, the fact that the proposal to add the phrase to Article I was made by Gouverneur Morris, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1789-91 (1996), the same man who had earlier stressed that "treaties were to be 'laws,'" 2 *Farrand, Records*, supra note 20, at 390, indicates that he regarded treaty-making as a quasi-legislative power allocated to the President and Senate.

234. Yoo also seeks to derive support from the ratification debates he discusses. See, e.g., Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2222 n.17. But, for the reasons noted above, reliance on such evidence is inconsistent with Yoo's own conclusion that, taken as a whole, the debates are inconclusive. See supra text accompanying notes 219-220.

235. See Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2234.

236. See *id.* at 2237 ("In making treaties self-executing, Vázquez and other internationalists would create a potentially limitless legislative power."); *id.* at 2238 ("Self-execution also would free the treaty-makers from federalism limitations, which internationalists claim do not apply to treaties.").

within the scope of Article I. Yoo defends this result as more consistent with the constitutional structure because it subjects international agreements to the difficult procedures the Founders deliberately required before state law could be preempted by federal law, and he argues that it protects the principle of popular sovereignty because it requires the participation of the most representative part of the legislature.²³⁷ He hypothesizes horrible changes that the treaty-makers might effectuate if freed of these structural safeguards, such as changes in the separation of powers system as we know it.²³⁸ My own view is that the treaty-making power is subject to a structural safeguard that is at least as effective as those to which the legislative power is subject: the requirement of the consent of two-thirds of the Senate.²³⁹ It is inconceivable to me that two-thirds of the Senate would agree to the sorts of horrors Yoo parades. Even Yoo recognizes that it is "perhaps unlikely" that a treaty would gain the support of two-thirds of the Senate without having the support of a majority of the House.²⁴⁰ Indeed, the practice of giving domestic legal force to international agreements through ordinary legislation has arisen precisely because of the difficulty of getting two-thirds of the Senate to agree on anything.²⁴¹

If I did think that the treaty-making process lacked adequate safeguards against unwise or unpopular laws, I would not find Yoo's solution very appealing. Yoo would allow the hypothetically unwise or unpopular treaties to take direct effect precisely in those categories of cases that, according to Article I, are least deserving of federal attention. I would take some comfort from the fact that the federal legislative power today is quite broad; the smaller the sphere reserved to the states by Article I, the smaller the sphere in which treaties could be self-executing. But, as the Supreme Court frequently notes, as originally understood, "[t]he powers delegated by the proposed Constitution to the federal government" were thought to be "few and defined," while those reserved to the states were

237. See *id.* at 2240.

238. See *id.* at 2237.

239. See Vázquez, *Treaty Power*, *supra* note 146, at 1339.

240. Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2240 n.79.

241. Cf. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 799, 801, 837-42 (1995) (linking rise of congressional-executive agreements to difficulty of obtaining Senate consent for Versailles treaty). If anything, the more significant popular sovereignty objection to the treaty-making power is that it makes it too hard to make treaties, not too easy. One-third of the Senate, representing a minuscule portion of the national electorate, can block a treaty having broad popular support. A version of this objection infects the ordinary legislative process. Indeed, it is more likely, given the make-up of the Senate, that a piece of ordinary legislation will fail to pass even though it is supported by a majority of the national electorate than that a treaty will be approved even though it is not supported by a majority of the electorate. Indeed, the composition of the Senate shows clearly that the Founders did not ultimately embrace the pure form of popular sovereignty on which Yoo's arguments are grounded. Those arguments would perhaps support a constitutional amendment rejecting the Great Compromise, but they are not a basis for interpreting the Constitution we now have.

thought to be “numerous and indefinite.”²⁴² If we agreed with Yoo that the treaty-making process lacks adequate safeguards, it is implausible to read the Constitution as approving this “constitutionally dangerous”²⁴³ process for what was considered the broad and indefinite area otherwise reserved to the states, and as correcting the problem only for the narrow area delegated to Congress under Article I.

If we assumed the area reserved to the states by Article I to be narrow, on the other hand, Yoo would face a different problem. Yoo recognizes in the end that his position would be untenable from a textual standpoint if he would deny self-executing effect to all treaties,²⁴⁴ but he maintains that he is not vulnerable to this objection because he accepts that treaties can be self-executing if they regulate matters outside Article I.²⁴⁵ Given the Supremacy Clause’s reference to “all Treaties,” however, this textual defense is unconvincing if only a small subset of treaties in fact are self-executing and hence the law of the land.

Professor Yoo’s proposal appears to be an attempt to find a clever way out of a tight box.” But there is no discernable textual or structural reason for a rule in which a treaty that falls within the Article I legislative power lacks domestic legal effect while a treaty falling outside that power has such effect. The sole purpose of such a rule appears to be to preserve some category of treaty for the Supremacy Clause to operate on. But Yoo at best escapes from a tight textual box only to find himself in an even tighter structural box. A broad view of the federal legislative power would mean that the text’s reference to “all Treaties” implausibly refers only to a small subset of treaties. A narrow view of federal power under Article I, on the other hand, would mean that Congress implausibly decided to make a constitutionally dangerous structure applicable to a broad range of situations, correcting the problem only for a narrow subset. The way out of this Catch-22 is of course to reject Yoo’s claim that the treaty-making power is dangerously lacking safeguards against unwise or unpopular laws. But this leaves his structural argument without its linchpin.²⁴⁶

Yoo fares no better with doctrinal arguments. He argues that *Ware v. Hylton*²⁴⁷ is consistent with his hard rule because the treaty involved in the case addressed matters outside the scope of Article I.²⁴⁸ It is difficult

242. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *The Federalist* No. 45 (James Madison)).

243. Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2256.

244. See *id.* at 2254.

245. See *id.*

246. I note that Yoo finds Professor Bradley’s argument that the treaty-making power is limited by Article I to be “powerful.” *Id.* at 2239 n.76. Since Yoo himself ultimately concedes that his rule is tenable only to the extent it would recognize at least a small sliver of treaties as self-executing, Yoo’s argument depends in the end on a rejection of this “powerful” argument. While I have not been convinced by Professor Bradley’s argument, I do find it far more plausible than Yoo’s position on self-execution.

247. 3 U.S. (3 Dall.) 199 (1796).

248. See Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2251.

to evaluate this argument because the Court at the time had not yet construed the scope of the Commerce Power. What is most telling about *Ware* is that the Court saw no need to consider the scope of the Commerce Power before giving self-executing effect to the treaty. Yoo in the end recognizes that his hard rule is inconsistent with judicial doctrine,²⁴⁹ and for this reason he proffers in the alternative a softer rule, under which treaties that fall within the Article I power are self-executing only if the treaty-makers attach a clear statement that they are self-executing.²⁵⁰ Yoo recognizes that there are numerous Supreme Court cases in which treaties were given effect even though there was neither implementing legislation nor a clear statement of self-execution, but he argues that some of them are consistent with his theory because they addressed matters beyond the scope of Article I.²⁵¹ He includes in this category the many cases giving effect to the Warsaw Convention.²⁵² The claim that a treaty addressing the liability of foreign and domestic air carriers falls outside the scope of the foreign commerce clause is mystifying. Even though there admittedly were no air carriers at the time of the framing, I doubt that *any* Justice would say that a regulation of such carriers falls within the exclusive legislative power of the states. In any event, Yoo makes no attempt to square his theory with the many other Supreme Court decisions that conflict with it.²⁵³

Yoo also relies heavily on the Executive's recent practice of attaching non-self-execution declarations to treaties.²⁵⁴ The meaning and effect of such declarations has yet to be addressed by the Court, but, more importantly for present purposes, the practice of attaching such declarations to treaties is fully consistent with the rule I defend—that treaties are presumptively self-executing. Yoo claims that these declarations “may have signaled the political branches' agreement that non-self-execution should become the general rule applied to all treaties.”²⁵⁵ Even assuming such a view were relevant to a constitutional interpretation,²⁵⁶ it is hard to see

249. See *id.* at 2254–55.

250. See *id.* at 2220.

251. See *id.* at 2254 n.138.

252. See *id.*

253. None of the cases cited *supra* note 147 involved treaties that included anything resembling the sort of clear statement Professor Yoo would require.

254. See Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2256–57.

255. *Id.* at 2257.

256. Cf. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 408 (1990), in which the Court, in a unanimous opinion, held that an executive branch statement on a legal question implicating foreign affairs was not binding on the courts. In *Kirkpatrick*, the Court narrowed the Act-of-State Doctrine on the basis of the principle that “Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.” *Id.* at 409. Yoo notes that “a non-self-execution rule . . . is consistent with other developments in foreign relations law that have sought to limit judicial discretion in areas such as the act of state doctrine, the political question doctrine, and dormant preemption.” Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2256. That may be so, but, as *Kirkpatrick* shows, judicial discretion can be limited

how the declarations reflect such a view. If the political branches had embraced Yoo's position, they would have regarded such declarations as superfluous.

Professor Yoo also makes a number of broad separation of powers arguments, many of them relying on the political question doctrine. I completely agree that the non-self-execution concept has strong affinities with the political question doctrine. Indeed, I regard the former doctrine as the treaty-law counterpart to the latter. One point of my earlier writings has been that the political question doctrine, as applied to constitutional and statutory norms, is extremely narrow, and that the corresponding doctrine for treaties should be equally narrow.²⁵⁷ Yoo proposes a radically different abstention rule with respect to treaties, but he paints with too broad a brush. He relies on cases that he reads to require judicial deference to the other branches in matters that implicate foreign affairs, but these cases either did not involve treaties and have no implications for the self-execution question,²⁵⁸ or merely affirmed that treaties can be trumped by later legislation,²⁵⁹ or are otherwise inapposite.²⁶⁰ By contrast, when the Court has been urged by the Executive to reject treaty-based claims on non-self-execution (or related lack-of-standing) grounds, it has declined to do so.²⁶¹ If the decisions Yoo cites did suggest that courts must avoid adjudicating cases based on treaties, they would be vulnerable to a powerful objection based on the text of the Constitution, which explicitly instructs judges to give effect to treaties. But they do not. What is most noteworthy about the Supreme Court's decisions is that the Court has only once unambiguously denied relief on the ground that the treaty at issue was non-self-executing, and it later found even that treaty to be self-executing.²⁶²

by expanding the judicial role as well as by contracting it. Thus, the trend of diminishing judicial discretion in the foreign affairs area is as consistent with the traditional rule as with the one Yoo advocates—indeed, more so, in light of *Kirkpatrick*.

257. See Vázquez, *Four Doctrines*, supra note 8, at 716. For elaboration, see Vázquez, *Constitution as Law of the Land*, supra note 88; see also David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. Colo. L. Rev. 1439, 1441 (1999) (arguing that “the ‘pure’ form of the political question doctrine is largely out of favor today in the Supreme Court, even with respect to foreign affairs controversies”).

258. See Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2247–48 (relying on *Baker v. Carr* and *Curtiss-Wright*).

259. See Yoo, *Globalism*, supra note 1, at 1969–71 (relying on the *Head Money Cases* and *Whitney v. Robertson*).

260. Some of the cases Yoo relies on are lower court decisions, and others plurality opinions. See Yoo, *Treaties and Public Lawmaking*, supra note 3, at 2247 (citing *Goldwater v. Carter* and lower court cases dismissing challenges to the Vietnam War).

261. See, e.g., cases cited supra note 143.

262. See supra text accompanying notes 106–112; see also Vázquez, *Four Doctrines*, supra note 8, at 716 & n.96.

Professor Yoo cites a number of lower court decisions in support of various aspects of his thesis, including most notably Judge Bork's sole concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J. concurring). See Yoo, *Globalism*, supra note 1, at 1973 n.82. But as he himself admits, the lower courts are

Finally, Professor Yoo makes policy arguments in favor of his constitutional interpretation that belong instead in an article urging a constitutional amendment. For example, he says that I “argue that the House is ill-suited for the secrecy needed for diplomacy.”²⁶³ I actually did not express a view on that point; I merely noted that the Founders held that view.²⁶⁴ Yoo’s argument that this view is no longer tenable²⁶⁵ makes it manifest that his beef is with the arrangement the Constitution establishes, not anyone’s interpretation of it. If he is right that the House is no longer ill-suited for the secrecy needed for diplomacy, that would be a reason to reject the Framers’ decision to deny the House a role in the making of treaties.²⁶⁶ But it would not be a reason to deny treaties that are already in force the status of domestic law. Even less would it be a

avowedly confused by the self-execution doctrine. See *id.* at 1958. I attempt to show in “Four Doctrines” that most of the lower court decisions are consistent with my view. See Vázquez, *Four Doctrines*, *supra* note 8. In any event, while constitutional text perhaps may yield to Supreme Court decisions, it cannot in my view yield to lower court decisions, particularly confusing or ambiguous lower court decisions that conflict with other lower court decisions.

Yoo argues that the APA and section 1983 do not confer a right of action for violations of treaties, as they only apply to violations of federal “law.” See Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2256 n.140. Here, as elsewhere, he overlooks that treaties are law. On the applicability of the APA and section 1983 to treaties, see generally Vázquez, *Treaty-Based Rights*, *supra* note 8, at 1143–57. Congress knows how to exclude treaty claims from its remedial statutes when it wants to. See 28 U.S.C. § 1491(a)(1) (1994). Yoo is on firmer ground when he notes, somewhat inconsistently, that, because treaties are law, the conclusion that appropriations require House action is unsupported by the constitutional provision that “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const., art. I, § 9, cl. 7; see Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2236 n.61. But the need for House action derives indirect textual support from the related Origination Clause. U.S. Const., art. I, § 7, cl. 1. In any event, the requirement of House action for appropriations and for other limited purposes does not support the claim that House action is necessary to accomplish anything falling within the scope of Article I.

Yoo also cites the APA in support of the proposition that treaties should generally be unenforceable in courts, noting that “[a]dministrative law schemes recognize that certain federal mandates are to be enforced by the executive branch, rather than by Congress or the courts.” Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2244–45. But the APA actually supports a presumption of judicial enforceability. As the Court noted in the case Yoo cites, there is a strong presumption in favor of judicial review, a presumption that can be overcome only by “clear and convincing evidence of a legislative intent to restrict access to judicial review.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (citations and internal quotation marks omitted); see Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2245 n.97. The exception for action “committed to agency discretion,” moreover, is “very narrow” and covers cases in which there is “no law to apply.” *Overton Park*, 401 U.S. at 410 (citations and internal quotation marks omitted). Because treaties are “law,” the analogy Yoo draws would appear to be inapt.

263. Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2241.

264. Indeed, I merely quoted *his* statement that the Founders held that view. See *supra* note 22 (citing Yoo, *Globalism*, *supra* note 1, at 2036).

265. See Yoo, *Treaties and Public Lawmaking*, *supra* note 3, at 2241.

266. Arguably we have already done this through an informal constitutional amendment. See Ackerman & Golove, *supra* note 241.

reason to interpret the existing Constitution as denying treaties the status of domestic law. To read the Supremacy Clause that way would be to display the same cavalier attitude towards the Constitution that Professor Yoo claims the Framers took towards treaties. He is mistaken when he claims that the Framers thought it acceptable to laugh at treaties, and he is mistaken when he claims that constitutional text, doctrine, and structure tolerate it.