

Article

Treaty Textualism

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[A]ll doubts . . . respecting the meaning of a treaty . . . are to be heard and decided in the Courts of Justice having cognizance of the causes in which they arise, and whose duty it is to determine them according to the rules and maxims established by the laws of nations for the interpretation of treaties.

John Jay, Draft Letter to the States to Accompany the Resolutions Passed by the Continental Congress on March 21, 1787. Agreed to Unanimously, April 13, 1787.¹

Gov. Randolph observed the difficulty in establishing the powers of the judiciary—the object however at present is to establish this principle, to wit, the security of foreigners where treaties are in their favor Agreed to unanimously.

Edmund Randolph, Records of the Federal Convention, June 13, 1787.²

I. INTRODUCTION

In *Medellin v. Texas*, a high profile case of the U.S. Supreme Court's 2008 Term, Chief Justice Roberts and Justice Breyer engaged in a sharp exchange over the proper approach to treaty interpretation.³ *Medellin* raised the question of whether decisions by the International Court of Justice (ICJ) are “non-self-executing”—that is, whether they only become federal law if Congress passes a statute “executing” them.⁴

The Court was divided. Six Justices held that judgments by the ICJ do in fact require further action by Congress before they become law. Chief Justice Roberts, writing for the Court, argued that when it comes to treaties, the text governs,⁵ and the text and structure of the ICJ treaty anticipated future legislative action because it required only that parties to the ICJ proceeding “undertake[] to comply” with the ICJ's decision.⁶ Justice Stevens, concurring in the judgment, agreed: “in my view, the words ‘undertakes to comply’—while not the model of either a self-executing or a non-self-executing commitment—are most naturally read as a promise to take additional steps to enforce ICJ judgments.”⁷ In his dissent, Justice Breyer argued that the majority

1. 4 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS: FROM THE FIRST MEETING THEREOF TO THE DISSOLUTION OF THE CONFEDERATION, BY THE ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 329, 331-32 (Thomas B. Wait ed., Boston 1821) [hereinafter 4 SECRET JOURNALS OF CONGRESS].

2. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 238 (Max Farrand ed., 1911) (1787) [hereinafter 1 FARRAND'S RECORDS].

3. 552 U.S. 491 (2008).

4. *Id.* at 496-99.

5. *Id.* at 506, 514, 518-19.

6. *Id.* at 508.

7. *Id.* at 533 (Stevens, J., concurring); see also *id.* at 534 (“Absent a presumption one way or the other, the best reading of the words ‘undertakes to comply’ is, in my judgment, one that contemplates future action by the political branches.”).

had reached the wrong conclusion because it placed too much emphasis on treaty language and broke from the Court's settled approach to treaty interpretation, which called for the Court to look to a wide array of other interpretive materials.⁸ The majority, in his view, "look[ed] for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)."⁹

That's when they broke out the history books. Defending the majority's reliance on the text of the treaty, Chief Justice Roberts cited two opinions by Chief Justice Marshall, though only for the proposition that "[t]he interpretive approach employed by the Court today—resorting to the text—is hardly novel."¹⁰ Justice Breyer responded with his own account of the history. It is "difficult to reconcile the majority's holdings with the workable Constitution that the Founders envisaged,"¹¹ he wrote. Had Chief Justice Marshall considered the question in *Medellin*, he would have asked "[d]oes . . . [the] treaty provision address the 'Judicial' Branch rather than the 'Political Branches' of Government,"¹² not searched for an express statement about self-execution "the text cannot [possibly] contain."¹³

Medellin drew a wave of criticism, much of it also grounded in history. Two distinct strands of criticism arose. First, many scholars argued that the majority's holding could not be "reconciled with any identifiable version of originalism" because it broke with the original understanding of self-execution in the Supremacy Clause, which these scholars contend mandates a strong interpretive presumption that all treaties are self-executing.¹⁴ A second strand criticized the Court's textualism as too wooden and inflexible to account for the unique needs of modern treaty-making.¹⁵ Some scholars called *Medellin*'s textualist approach a "new paradigm"¹⁶ and a "normalization" of treaty

8. See *id.* at 541, 549-50 (Breyer, J., dissenting).

9. *Id.* at 562 (Breyer, J., dissenting).

10. *Id.* at 514. The Chief Justice's statement was itself hardly a ringing endorsement of the historical foundations of treaty textualism.

11. *Id.* at 567 (Breyer, J., dissenting).

12. *Id.*

13. *Id.* at 562 (Breyer, J., dissenting).

14. D. A. Jeremy Telman, *Medellin and Originalism*, 68 MD. L. REV. 377, 377 (2009); see Carlos Manuel Vazquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1617-18 (2008); Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 689-90 (2008) [hereinafter Vazquez, *Treaties as Law of the Land*]; see also David H. Moore, *Do U.S. Courts Discriminate Against Treaties? Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2230-33 & nn.10-18 (2010) (explaining that "scholars often cast their opposition to non-self execution in sweeping terms"). But see Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131 (2008); John O. McGinnis, *Medellin and the Future of International Delegation*, 118 YALE L.J. 1712, 1748 (2009); John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT'L L.J. 1209, 1328-29 (2009); Ben Geslison, Comment, *Treaties, Execution, and Originalism in Medellin*, 32 HARV. J.L. & PUB. POL'Y 767, 783 (2009); Sarah Elizabeth Nokes, Note, *Redefining the Supremacy Clause in the Global Age: Reconciling Medellin with Original Intent*, 19 WM. & MARY BILL RTS. J. 829, 830 (2011).

15. See, e.g., Vazquez, *Treaties as Law of the Land*, *supra* note 14, at 634-36 (arguing "that close scrutiny of treaty text" is "particularly likely to lead judges astray").

16. David J. Bederman, *Medellin's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529, 530 (2008).

interpretation that now conceives of treaties and statutes as interchangeable.¹⁷

Medellin raised but left unanswered an insistent question. To what extent does Chief Justice Roberts's turn to treaty textualism diverge from, or comport with, the original understanding of treaty interpretation? In an effort to answer that question, this Article surveys the understanding of treaty interpretation in the years leading up to the ratification of the Constitution and through the end of the Marshall Court. The materials from this era suggest a remarkable conclusion. The best reading of the historical record is that the Framers, ratifiers, and the early Supreme Court thought that courts would employ highly textual treaty interpretation not just as a matter of consensus, but as a matter of law. At the time of the Constitution's adoption, international law dictated that treaties were to be interpreted textually. Then-contemporary treatises on the law of nations—authoritative accounts of the substance of international law in the founding era and cited liberally throughout early Supreme Court treaty interpretation decisions both under the Articles of Confederation and in the early republic¹⁸—contained substantive guidance as to how courts and other departments were to interpret treaties. These treatises—by Blackstone,¹⁹ Grotius,²⁰ Pufendorf,²¹ Burlamaqui,²² and Vattel²³—held that treaties were to be construed according to then-prevailing principles of international treaty interpretation, which called on interpreters to rely exclusively on the text of the treaty itself in determining its meaning.²⁴

This highly textual method of interpretation carried within it the seeds of many of the most commonly expressed core commitments of modern textualism.²⁵ In interpreting treaties, the early Supreme Court privileged semantic meaning over legal meaning—tendering interpretations far more literal than modern purposivism would.²⁶ The Court also did not look to legislative or enactment history, and gave neither deference nor great weight to interpretations proffered by the political branches, regularly ruling against the

17. Ernest A. Young, *Treaties As "Part of Our Law,"* 88 TEX. L. REV. 91, 136-37 (2009).

18. See *Miller v. The Resolution*, 17 F. Cas. 347 (Adm. Pa. 1781) *aff'd in part, rev'd in part*, 2 U.S. 1 (1781).

19. 1 WILLIAM BLACKSTONE, COMMENTARIES *59-62.

20. 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 848-83 (Richard Tuck ed., Liberty Fund 2005) (1625) (discussing the "Interpretation of a Promise or Convention").

21. SAMUEL PUFENDORF, THE LAW OF NATURE AND NATIONS 534-52 (Basil Kennet trans., London, J. and J. Bonwicke et al. 5th ed. 1749) (discussing the interpretation of "Compacts and Laws").

22. 2 J. J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 220-371 (Thomas Nugent trans., 2d ed. 1763) (1752) (discussing relations with foreign states and interpretive principles relating to agreements between nations).

23. EMMERICH DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 244-74 (London, G.G. & J. Robinson 1797) (1758); see also *infra* Subsection III.B.1 (detailing Vattel's treatise).

24. Cf. Curtis J. Mahoney, Note, *Treaties As Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 834-36 (2007) (arguing that the Framers "intended courts to interpret treaties using methods derived from the law of contracts," methods which emphasized the importance of the text).

25. See Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309 (2014) (describing the most common dimensions of interpretive disagreement between textualists in an effort to better understand textualism's core commitments).

26. *Id.* at 314-22 (describing disputes over "privileging").

President's preferred positions.²⁷ The Court also self-consciously cast its decisions as textualist—that is, bound by, and rooted fundamentally in, the plain, unambiguous meaning of the words of the treaty itself.²⁸ And when the Court did look to adapt its interpretations to the circumstances of a treaty, it looked to sources conventionally associated with textualism—history, precedent, and tradition—rather than fundamental values or the needs of the present moment.²⁹ While no particular kernel or “core” unites modern or historical textualism, these dispositions are often closely associated with textualism, and certainly sit far removed from the tenets of modern-day purposivism, which, as Justice Breyer explained in *Medellin*, would not depend upon “explicit textual expression” or “clarity” in the “treaty language” to confer a definitive construction upon the meaning of a treaty.³⁰

In its effort to illuminate the original understanding of treaty interpretation, this Article uncovers a provocative link between the Constitution's structure and this original understanding. The U.S. Constitution makes several unusual institutional choices in its foreign-affairs policymaking. Unlike England, which required in 1787 that treaties also be executed by an act of Parliament, the U.S. Constitution makes treaties supreme law immediately upon their ratification by the Senate.³¹ Additionally, the Constitution expressly invests the federal courts with jurisdiction over cases and controversies involving treaties, and there was little doubt in the framing era that courts—not the political branches—were meant to be the final arbiters of the meaning of the nation's treaty commitments.³² Given treaty interpretation's enormous political stakes, the United States' decision to vest treaty interpretation in its courts rather than its political branches was bold and unusual.³³

The law of nations' requirement of textual treaty interpretation proves the essential bridge that makes sense of these structural decisions.³⁴ The United States sought through these two design features—automatic legal effect and judicial interpretation—to assure other nations that the United States would scrupulously honor its treaty obligations.

But for the Framers to have thought that the decision to vest treaty interpretation in the judiciary would *work* as a precommitment strategy, they must have believed that judges could be relied upon to construe them properly

27. *Id.* at 322-30 (describing disputes over “ordering”).

28. *Id.* at 330-40 (describing the importance of narration).

29. *Id.* at 340-44 (describing statutory adaptation); *id.* at 344-48 (describing statutory integration).

30. *Medellin*, 552 U.S. at 562 (Breyer, J., dissenting).

31. David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U.L. REV. 932, 995 & n.266 (2010).

32. *Id.* at 994. *But see id.* at 1007-08 (noting that even though the courts were to be the final arbiters with respect to interpretation, they were not necessarily expected “to have primary responsibility for ensuring that the new government would comply with the law of nations or even treaties”—a task the Constitution largely leaves to the political branches).

33. *See id.* at 989-1000.

34. *Id.* at 1000-01.

even if the decision would obviously harm the interests of the United States.³⁵ The law of nations' textual interpretive requirements supplied this objective guarantee. The United States federal courts—bound by the law of nations' interpretive rules—would be forced to interpret treaties narrowly, allowing treaty partners to trust the United States' representations that it would adhere to its present promises in the future.

Set against this backdrop, and supported by arguments from the framing convention and the ratification, it appears evident that the Constitution's use of the word "treaties"—in the Supremacy Clause and elsewhere—is best read as incorporating then-contemporaneous international law understandings of treaty interpretation, much as Articles I, II, and III incorporate the law of nations when they talk about "Piracies," "War," "Ambassadors, other public Ministers and Consuls," "admiralty and maritime Jurisdiction," and "Agreement[s] or Compact[s]" (that are not themselves treaties) between States and a "foreign Power." As such, the balance of powers between Congress and the President, between the federal government and the states, and between the legislative and executive branch and the courts was struck against particular expectations about how treaties would be interpreted. Because the Constitution's design depends in some measure upon this textual interpretive approach, textual construction of treaty commitments could be thought of as an interpretive rule derived directly from the original understanding of the Constitution itself.³⁶

This potentially draws into question the ability of present-day instruments—including federal laws and international treaties—to alter the United States' approach to treaty interpretation. If treaty textualism was the expectation of the Framers in drafting the Supremacy Clause, then it would seem that neither the Vienna Convention on the Law of Treaties, nor any present-day international convention, nor federal statute can require that American courts adopt methods of treaty interpretation that vary from this original understanding.

Part II of this Article explains the emerging literature on "original methods" originalism and canvasses what is presently known about the original understanding of treaty interpretation in the legal academy. Part III then explains the original understanding of treaty interpretation as expressed by the Framers and ratifiers of the Constitution and practiced in the Supreme Court through the end of the Marshall Court. Finally, Part IV draws out some of the implications for present-day treaty interpretation that might be derived from these historical materials. This Article concludes that textual treaty interpretation is an interpretive rule older than the Constitution—and one presupposed by its Framers.

35. Cf. *id.* at 977 (explaining the benefits of "[p]laying by the rules" of the European powers); see *id.* at 1001-10.

36. Cf. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (arguing that the Constitution's structure shows an expectation that judges would be textualists).

II. THE MOVE TO “ORIGINAL METHODS” ORIGINALISM

In recent years, a splinter strand of originalism has shifted from looking at the Constitution’s original substantive commitments to a focus on institutional designs, structures, and expectations. Rather than ask how the Framers thought the Constitution would govern a *specific* issue, like, say, direct taxes or the impairment of contracts, these scholars ask how the Framers thought the Constitution would apply to enduring questions of interpretation and institutional orientation.

Perhaps unsurprisingly, these scholars have for the most part been self-consciously concerned with how the Constitution’s Framers and ratifiers thought the constitutional document *itself* would be interpreted in the future.³⁷ The neologism “original methods” originalism originates in just such an article, concerned with “the interpretive methods that the constitutional enactors would have deemed applicable to it.”³⁸

But one easily sees that expectations about how statutes, treaties, and other legal instruments would be interpreted would have been an equally essential, if unexpressed, element of the Constitution’s overarching design. Methods of statutory interpretation that failed to respect legislative language would have proven disastrous in a system that makes enacting laws as difficult as ours does. The very difficulty of enacting legislation under the Constitution would thus seem to imply something about the Framers’ and ratifiers’ expectations about how statutes would be interpreted.³⁹ Recognizing this, Professor Manning has researched original methods of statutory interpretation at length, concluding that the Constitution’s structure, along with the practice of judges at and around the time of the Constitution’s adoption, strongly support the proposition that the document’s Framers and ratifiers thought judges would engage in faithful-agent, rather than equitable, statutory interpretation.⁴⁰

Professor Manning’s investigation naturally raises further questions. Might there have been an original understanding of treaty interpretation? How might it have aligned with and diverged from the original understanding of statutory interpretation? Should it have any bearing on how treaties are interpreted today?

Scholarly efforts to explore this issue have so far been limited. Professor Yoo has offered an opinion on the original understanding of treaty

37. See, e.g., Hans W. Baade, “Original Intent” in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1984).

38. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

39. See John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1651 (2001).

40. *Id.*; see Manning, *supra* note 36, at 9-10. For an opposing effort, see William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001).

interpretation: that the President was probably intended to have nearly exclusive authority to interpret treaties.⁴¹ According to Professor Yoo, the original understanding of the role of courts in treaty interpretation was that they look to the interpretation tendered by the executive branch and endorse it.⁴² This renders debates over the proper method of treaty interpretation—whether textual or otherwise—moot. Professor Yoo’s textual and structural argument for almost complete presidential control over treaty interpretation is largely consistent with—if not a strand of—his larger theory that the President was intended to play a predominant role in foreign affairs.⁴³

But unlike Professor Yoo’s scrupulous work describing presidential power over other areas of foreign affairs, his investigation into the historical understanding of treaty interpretation is hasty: a few citations to *The Federalist Papers*, excerpts from the constitutional convention, and ratification debates,⁴⁴ a case study involving President Washington’s 1793 Neutrality Proclamation,⁴⁵ and references to his own other works.⁴⁶ From this, Professor Yoo tentatively concludes that “it seems that the Framers’ early practice assumed that the President enjoyed the plenary power to interpret treaties.”⁴⁷

In the years following Professor Yoo’s effort some scholars have engaged with his work, but none have presented a convincing alternative account. Professor Sloss challenged Professor Yoo’s claim that the President was understood to have plenary treaty interpretation powers by surveying treaty-interpretation cases in which the United States was a party from 1789 through 1838 to see if the Supreme Court deferred to the President’s interpretation of

41. John Yoo, *Politics As Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 883 (2001) (reviewing FRANCES FITZGERALD, *WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR* (2000)).

42. See *id.*; see also John C. Yoo, Rejoinder, *Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1310 (2002) (“*Politics as Law* concluded that treaty interpretation has to rest with the President due to his management of foreign policy and his constitutional control over the interpretation of international law on behalf of the United States.”)

43. See, e.g., John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1963, 1966 (1999) (“The President exercises a broad foreign affairs power that derives from these provisions [Article II, Section 2], from Article II’s vesting of the executive Power . . .”) [hereinafter, Yoo, *Globalism*]; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 174 (1996) [hereinafter Yoo, *Politics by Other Means*] (arguing that the Framers intended Congress to have a very circumscribed role in war-making, exercised through control over appropriations and impeachment rather than legislative limitations on Executive action); John C. Yoo, Rejoinder, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2226 (1999) [hereinafter Yoo, *Treaties*] (“In foreign relations, then, the story of constitutional development played out by unifying executive powers in a national Presidency (or, in the case of the treaty power, in the President and Senate) and by creating a national legislature that balanced executive authority through its traditional powers over legislation and funding.”)

44. In these ratification debates, support for Professor Yoo’s specific conclusion that treaties were to be entirely the President’s to interpret could be charitably described as oblique. See Yoo, *supra* note 41, at 888-94.

45. *Id.* at 895-901.

46. Professor Yoo has since codified all of his views into a single theory of presidential power over foreign affairs. See JOHN C. YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005). The arguments, however, seem not to have improved, at least with respect to treaty interpretation.

47. See Yoo, *supra* note 41, at 901.

the treaty's terms. He found it did not.⁴⁸ But Professor Sloss's effort was limited to a survey, and directed exclusively to the question of deference, rather than the more nuanced question of how the Court engaged in the substance of judicial interpretation in the period. As such, while a theory of total presidential deference includes an account of the proper approach to treaty interpretation in the judiciary, Professor Sloss's conclusion that there was no deference does not go the extra step of explaining what manner of interpretation, precisely, was being used by the Supreme Court of the era to resolve difficult treaty interpretation questions.

Thus, Professor Yoo's work remains unique in its focus on historical arguments about how, precisely, treaties were meant to be interpreted by judges. At the time he wrote his article, he was unable to find another scholar who had engaged in any significant search for the original understanding of treaty interpretation.⁴⁹ Since Yoo's inquiry a little over a decade ago, little progress has been made. No scholar has performed a thorough examination of the original understanding of treaty interpretation in the years since, though many have written about other historical aspects of treaty-making and treaty practice.⁵⁰ While other scholars have engaged in examinations of treaty

48. See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations*, 62 N.Y.U. ANN. SURV. AM. L. 497, 505-23 (2007).

49. See Yoo, *supra* note 41, at 882-83 (explaining that “[w]hile much work on the original understanding of the treaty power has recently appeared . . . [s]cholars of the Framing have not devoted as much investigation to the question of the allocation of power among the branches after the ratification of a treaty.”). Professor Michael Van Alstine, in a contemporaneous article responding to Professor Yoo's, sought to refute Professor Yoo's understanding, but through functionalist and contemporary doctrinal arguments, rather than through a historical investigation. See Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263 (2002) [hereinafter Van Alstine, *The Judicial Power*]; Yoo, *supra* note 42, at 1307 (“[T]he separation of powers and federalism require a clear distinction between treaties and statutes, and Professor Van Alstine provides no compelling reason, rooted in the text, structure, or history of the Constitution, for erasing that textual barrier.”). Notably, Professor Van Alstine, like Professor Yoo, explains that “[s]urprisingly . . . the matter of treaty interpretation has thus far received only limited scholarly attention,” Van Alstine, *supra* at 1266 & n.16, citing a small number of published Articles, all of which were about contemporary treaty interpretation practice and theory. See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 954 (1994) (explaining that the article's goal will be to provide a constructive account of the practice of treaty interpretation in U.S. federal courts); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 692 (1998) [hereinafter Van Alstine, *Dynamic Treaty Interpretation*] (explaining that the article will attempt to demonstrate that “new” textualism is ill-equipped to grapple with the needs of contemporary treaty-making); James C. Wolf, Comment, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023, 1024-25 (1988) (commenting on the norms of treaty interpretation set forth in the *Restatement (Revised) of the Law of Foreign Relations* and noting their conflict with customary international law and United States law).

50. See Robert Anderson IV, “Ascertained in A Different Way”: *The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189, 203-09 (2001); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1580-94 (2007); Alex Glashauser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1251-54 (2005); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1100-1257 (2000); Duncan B. Hollis & Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VA. J. INT'L L. 507, 558-72 (2009); J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 872-96 (2007); Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1514-1612 (2006); Mahoney, *supra* note 24, at 834-38; Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 851-62 (2007); Ryan D. Newman, *Treaty Rights and Remedies: The Virtues of A Clear Statement Rule*, 11 TEX. REV. L. & POL. 419, 427-33 (2007); Michael P. Van Alstine, *The Death of Good Faith in*

interpretation, such as Professors Van Alstine, Bederman, Chesney, and Glasshauser, their efforts have not been rooted in efforts to excavate the original understanding of treaty interpretation.⁵¹

We lack a definitive account—even a definitive investigation—of the original understanding of treaty interpretation. A more refined appreciation might have significant implications for our understanding of how treaties should be interpreted today. In particular, it might shed important light on how powers were meant to be distributed and exercised between three coequal branches, and between the federal government and the states.

III. THE ORIGINAL UNDERSTANDING OF TREATY INTERPRETATION

The following Part presents an overview of the legal, philosophical, and jurisprudential backdrop against which the U.S. Constitution was drafted and against which the early Supreme Court first construed the young nation's early international treaties. This context is critical to understanding precisely how and why these documents were written and implemented as they were, and they are highly illuminating regarding the original understanding of the proper interpretation of treaty commitments. If one were asked to guess, it would not be entirely implausible to believe, as Justice Breyer posited in *Medellin*, that treaties were meant to be interpreted broadly and flexibly, with more of an eye to their purposes, drafting history, and the circumstances in which they were ratified than to their text. Nor would it be particularly implausible before reviewing the history to believe, as Professor Yoo has argued, that treaties were meant to be more political than legal—subject to liberal post-enactment “interpretation” by the political branches to better serve the needs of the nation at any particular moment.

Yet the legal ideology of the Founding era, as expounded by the jurists, philosophers, and statesmen that the Founding generation held in high esteem, reveal that these two postulates are far off the mark. As the remainder of this Part endeavors to show, strict fidelity to the plain meaning of enacted text was *the* most central interpretive commitment of lawyers of the era, a commitment expounded by nearly every authoritative international legal scholar of the age, and one that permeated the authoritative legal texts used in the teaching and practice of law in the Founding era.

A. *The “Most Highly Qualified Publicists” and the Late Eighteenth-Century Law of Nations*

One of the primary ways eighteenth-century lawyers were socialized into

Treaty Jurisprudence and A Call for Resurrection, 93 GEO. L.J. 1885, 1895-907 (2005).

51. See, e.g., Van Alstine, *Dynamic Treaty Interpretation*, *supra* note 49; David J. Bederman, *Deference or Deception: Treaty Rights As Political Questions*, 70 U. COLO. L. REV. 1439 (1999); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723 (2007); Alex Glasshauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25 (2005).

law was through a series of authoritative legal texts.⁵² These texts, in some ways precursors to the modern casebook, treatise and case reporter all rolled into one, set forth general legal principles rooted in old cases, biblical passages, ancient legal codes, and moral principles.⁵³ But unlike either modern treatises or casebooks, these works were considered authoritative statements of the law and their rules and principles were suitable for use in courts and legislatures. They were freely cited in judicial proceedings⁵⁴ and political debates.⁵⁵ In settings where matters of law or legality might call for an appeal to a higher authority, their names were likely to be mentioned. As John Adams wrote admiringly of James Otis, for example, he was “a great master of the law of nature and nations. He had read Puffendorf, Grotius, Barbeyrac, Burlamaqui, Vattel, Heineccius . . . It was a maxim which he inculcated in his pupils, ‘that a lawyer ought never to be without a volume of natural or public law, or moral philosophy, on his table or in his pocket.’”⁵⁶ Such an expertise was expected of an educated lawyer of the time. It would thus not have been unusual for a lawyer in the Supreme Court to salt his arguments with phrases like “Sir William Blackstone, therefore, considers it . . . ,”⁵⁷ “Blackstone tells us . . . ,”⁵⁸ or “the language of Vattel [is]”⁵⁹

American lawyers of the late eighteenth and early nineteenth centuries were well acquainted with William Blackstone’s *Commentaries on the Laws of England*,⁶⁰ Sir Matthew Bacon’s *A New Abridgment of the Law*,⁶¹ Hugo Grotius’s *On the Law of War and Peace*, Samuel von Pufendorf’s *Of the Law of Nature and Nations*, Jean-Jacques Burlamaqui’s *The Principles of Natural and Politic Law*, and most importantly Emerich de Vattel’s *The Law of Nations*.⁶² These are only a small subset of the treatises then in circulation that

52. See Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 779 (2003).

53. WILLIAM ARCHIBALD DUNNING, *A HISTORY OF POLITICAL THEORIES FROM LUTHER TO MONTESQUIEU* 163 (1913).

54. See, e.g., *infra* notes 351-353.

55. See, e.g., *infra* notes 73-73, 162, 203 (describing such instances).

56. John Adams, *Letter of John Adams to H. Nilis 14 January, 1818*, in 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 274, 275 (Charles Francis Adams, ed., 1856) (emphasis omitted).

57. *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 145 (1795).

58. *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 17 (1800) (emphasis omitted).

59. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 254 (1796).

60. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 31 (1967); see also Eskridge, *supra* note 40, at 1003 (naming Blackstone as the colonists’ main authority on the common law); Manning, *supra* note 36, at 35 (citing Blackstone as the most widely read English law treatise in late eighteenth-century America).

61. George C. Thomas III, *Stumbling Toward History: The Framers’ Search and Seizure World*, 43 TEX. TECH L. REV. 199, 220 (2010).

62. See BAILYN, *supra* note 60, at 27; RAY FORREST HARVEY, *JEAN JACQUES BURLAMAQUI: A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM* 75, 79-175 (1937); DONALD S. LUTZ, *A PREFACE TO AMERICAN POLITICAL THEORY* 113-40 (1992); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 7, 60 (1985); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 259-305 (1969); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 859-65 (1978); M. H. Hoeflich, *Translation & the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753, 770-71 (2002). Vattel is the most important of the writers on the subject

purported to unify legal, moral, and political principles into coherent frameworks for the design and administration of government.⁶³

When it came to international law, treatises that purported to set out the rules of the law of nations were even *more* authoritative.⁶⁴ Because pronouncements on the law of nations by courts and legislatures were somewhat rare and difficult to find, treatises were often used as evidence of binding international law and its principles.⁶⁵ This heightened authoritativeness is still built into international law today. Article 38(1) of the International Court of Justice statute advises, for instance, that “the teachings of the most highly qualified publicists of the various nations,” are to be treated as evidence of customary international law.⁶⁶ Grotius, Pufendorf, and Vattel are still on the list today.⁶⁷

While these writers are often cited for their arguments on the substance of international law, and are occasionally cited to note that courts and scholars once thought of treaties like contracts,⁶⁸ contemporary scholars have uniformly overlooked the fact that nearly all of these writers actually set out detailed rules for interpreting these instruments.⁶⁹ Not only did they set out interpretive rules: the rules they set out were cited by the Court of Appeals for Prize Cases under the Articles of Confederation and later by the Supreme Court well into the early American Republic. These interpretive rules guided Supreme Court deliberations in giving effect to American treaty commitments both before and after the ratification of the Constitution.

both because he was the most widely-read, well-known, and well-respected writer on the law of nations in the early republic and because “Vattel’s chapter on ‘The Interpretation of Treaties’ probably represents the most detailed discussion of the subject by any author of a general treatise.” H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT’L L. 48, 48 (1949).

63. For example, Alexander Hamilton directed the loyalist farmer, in debates over whether to sever ties with England because England had lost the right to rule the colonies due to its abuses, to “[a]pply [him]self, without delay, to the study of . . . Grotius, Puffendorf, Locke, Montesquieu, and Burlamaqui,” demonstrating the influence these writers had on the thinking of the Framers in conceiving of the proper role of government. Alexander Hamilton, *The Farmer Refuted, &c., reprinted in 1 THE PAPERS OF ALEXANDER HAMILTON DIGITAL EDITION* (Harold C. Syrett ed., 2011). Hamilton added: “I might mention other excellent writers on this subject [the law of nature and nations]; but if you attend, diligently, to these, you will not require any others.” *Id.*; see also, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 570 (2004).

64. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (citing *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)).

65. Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 824 (1989); see also Yoo, *Politics by Other Means*, *supra* note 43, at 243 (noting that Grotius, Vattel, Burlamaqui, and Pufendorf had a greater influence on the Framers than “publicists” do upon lawyers today).

66. Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, T.S. No. 993.

67. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 1, intro. Note, reporters’ note 1, at 21 (1987).

68. See, e.g., Glashauser, *supra* note 50, at 1267-68.

69. Professor Ramsey has come closest to recognizing that textualism formed an integral element of international law in the founding era, but stops short of a full-fledged exploration. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1635-36 (2002).

B. *Interpretation According to Vattel, Grotius, Pufendorf, Burlamaqui, Rutherford, Bacon, and Blackstone*

The following subsections briefly explain the fame, significance, and core tenets of the jurisprudential philosophies of the most important authorities on international law in the Founding era regarding matters of interpretation. Because their views were thought to be authoritative with respect to the content of the law of nations—and as the following sections show were familiar to and closely read by the Framers—their views regarding the proper approach to international treaty interpretation shed important light on the jurisprudential context in which the Constitution was drafted and ratified and against which treaties were interpreted in the decades following its ratification.

1. *Vattel's The Law of Nations*

Emmerich de Vattel (1714-1767) was a Swiss philosopher, diplomat, and legal expert whose *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* appeared in French in 1758 and within two years had been translated into a bevy of languages, including English.⁷⁰ The work was one of a collection of eighteenth-century works that sought to set out a definitive account of the principles of the law of nations.⁷¹

Early American lawyers and jurists were exuberant Vattelophiles.⁷² His name appeared in congressional debates,⁷³ ratifying and framing conventions,⁷⁴ judicial opinions,⁷⁵ and treatises.⁷⁶ He was the “most popular”

70. Albert de Lapradelle, *Introduction to EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* xxvii, xxix (Charles G. Fenwick & George D. Gregory trans., Carnegie Inst. of Wash. 1916) (1758).

71. See Edwin D. Dickinson, *The Law of Nations As Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 35 (1952); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 166 (1998).

72. Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 404-05 (2012). As Lapradelle declared, “Of all the authors, even the English, who have written on the law of nations, there is not one who is more often nor more extensively cited than Vattel.” Lapradelle, *supra* note 70, at xxxiv. See ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 161 (1954); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 67 (1999). Even though they were Vattelophiles, however, they may not have been entirely “Vattelian.” See Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT’L L. 547 (2012).

73. 6 ANNALS OF CONG. 2230-31 (1797) (statement of Rep. Swanwick); 4 ANNALS OF CONG. 749-52 (1796) (statement of Rep. Smith)

74. James Madison cited Vattel at the Constitutional Convention, see James Madison, *Journal (June 27, 1787)*, reprinted in 1 FARRAND’S RECORDS, *supra* note 2, at 437-38, 440, and James Wilson did so at the Pennsylvania ratifying convention, see James Wilson, *Pennsylvania Convention (Dec. 4, 1787)*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 454 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 2d ed. 1881) [hereinafter ELLIOT’S DEBATES].

75. See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 123 (1812); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 225 (1796); *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 15 (1781) (citing Vattel as a “celebrated writer on the law of nations”).

76. See, e.g., DANIEL GARDNER, *A TREATISE ON INTERNATIONAL LAW* 100-101, 243 (Troy, N. Tuttle ed. 1844) (citing Vattel’s views on national sovereignty and treaty formation); see also JAMES KENT, *COMMENTARY ON INTERNATIONAL LAW* 36 (J.T. Abby ed., Cambridge, Deighton, Bell & Co.

and the “most elegant” writer on the law of nations and the most widely cited.⁷⁷ His “was the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration. Publicists considered it sufficient to cite the authority of Vattel to justify and give conclusiveness and force to statements as to the proper conduct of a state in its international relations.”⁷⁸

In 1773, *The Law of Nations* was taught at Columbia University (then King’s College).⁷⁹ In 1775, Benjamin Franklin received three copies of a new edition on behalf of the Continental Congress and in thanking his friend Charles Dumas for sending them he remarked that they “came to us in good season, when the circumstances of a rising State make it necessary to frequently consult the law of nations” and that “[the book] has been continually in the hands of the members of our Congress now sitting.”⁸⁰ Centuries after his death it was found that George Washington had a number of overdue library books. One of them was *The Law of Nations*.⁸¹ Esteem for Vattel was even a rare point of common ground for Alexander Hamilton and Thomas Jefferson. To Hamilton, Vattel was one of “the most approved writers on the laws of Nations.”⁸² Jefferson once remarked that “we will not assume the exclusive right of saying what th[e] law [of nature] and usage [of nations] is. Let us appeal to enlightened and disinterested judges. None is more so than Vattel.”⁸³ Vattel’s treatise “undoubtedly was used by some of the members of the Second Continental Congress, which sat at Philadelphia; by the leading men who subsequently directed the policy of the united Colonies until the end of the [Revolutionary] war; and later by the men who sat in the Constitutional Convention of 1787-89 and framed up the Constitution of the United States.”⁸⁴

The Law of Nations is known principally, if rather unsurprisingly, for its account of the substance of the law of nations. Almost totally absent from

1878) (praising Vattel as the most elegant writer on the law of nations).

77. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 18 (New York, O. Halfsted 1826).

78. Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395, 395 (1913).

79. Lapradelle, *supra* note 70, at xxix.

80. Letter from Benjamin Franklin to Charles F. W. Duman, (Dec. 19, 1775) in 2 FRANCIS WHARTON, THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE 64, 64 (Washington, Government Printing Office 1889). St. George Tucker’s early treatise also relies on Vattel. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES app. at 310 (Philadelphia, William Young Birch & Abraham Small 1803).

81. The books were due November 2, 1789. It seems Washington accrued over \$300,000 in fines. See Kathleen Parker, *Finally, a Library for Our First President*, WASH. POST., Apr. 21, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/20/AR2010042003527.html>; *George Washington’s 221-Year Overdue Library Book: A Timeline*, THE WEEK, May 21, 2010, <http://theweek.com/article/index/203282/george-washingtons-221-year-overdue-library-book-a-timeline>.

82. Alexander Hamilton, Remarks on the Treaty of Amity Commerce and Navigation Lately Made Between the United States and Great Britain (July 9-11, 1795), in 18 THE PAPERS OF ALEXANDER HAMILTON 404, 413 (Harold C. Syrett ed., 1973).

83. Letter from Thomas Jefferson, Sec’y of State, to Genet, Minister Plenipotentiary of Fr. (June 17, 1793), in AMERICAN STATE PAPERS 154, 154 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales and Seaton 1833).

84. THOMAS WILLING BACH, THE UNITED STATES AND THE EXPANSION OF THE LAW BETWEEN NATIONS 3 (1915).

contemporary analysis of Vattel's seminal work is his lengthy discussion of treaty interpretation. Nonetheless, Chapter XVII of Book II is titled "Of the Interpretation of Treaties" and its first section, numbered 262 is on the necessity of establishing rules of interpretation.⁸⁵ Vattel thought it necessary to establish fixed, uniform rules of interpretation in order to avoid "uncertain[ty]" and "duplicity in forming the compact."⁸⁶ Vattel thus set out five general interpretive maxims, from which dozens of others would ultimately spring, but which at root encompassed the primary rules of interpretation.⁸⁷

§263—*First General Maxim*: If text is clear no additional "interpretation" should be done.⁸⁸

§264—*Second General Maxim*: If one "could and ought to have explained himself" and has not done so, it is to his own detriment.⁸⁹

§265—*Third General Maxim*: Neither of the contracting parties "has a right to interpret" the treaty "according to his own fancy."⁹⁰

§266—*Fourth General Maxim*: Manifestations in the treaty are to be taken as truthful.⁹¹

[§267, a minor qualification to §266, is omitted]

§268—*Fifth General Maxim*: Interpretation ought to be made according to "certain fixed" rules "as naturally understood by the parties concerned, at the time when the deed was drawn up and accepted."⁹²

Vattel followed upon his five maxims with a detailed list of canons of treaty construction tailored to specific issues that might arise in treaty cases. No party could claim they did not understand how a treaty would be construed if the maxims were set out in advance. A sampling of Vattel's further rules provides:

§271—The terms are to be interpreted according to their common usage.⁹³

§272—The usage of terms should be that usage common at the time the instrument was drafted.⁹⁴

§282—We ought to reject every interpretation that "leads to an absurdity."⁹⁵

§287—Interpretation may be founded on the reason of the deed, but we ought

85. VATTEL, *supra* note 23, at 244.

86. *Id.*

87. Where appropriate, I have paraphrased and clarified the translations in this Section.

88. *Id.* at 244-45.

89. *Id.* at 245.

90. *Id.*

91. *Id.* at 245-46.

92. *Id.* at 246.

93. *Id.* at 248.

94. *Id.* at 248-49.

95. *Id.* at 252.

to be very certain that we know the true and only reason of the law.⁹⁶

And so on through §322. Vattel's thirty-page chapter consists of sixty interpretive rules and is replete with dozens of examples and explanations. Several of the chapter's later sections go on to describe how interpreters are to deal with progressively harder cases, such as conflicts between "two laws, two promises, or two treaties, when a case occurs in which it is impossible to fulfill both at the same time"⁹⁷ (sections 311-322) and what to do in those instances where purpose cannot be divined (sections 301-310).⁹⁸ The structure of the chapter makes evident that interpreters are to begin with the more definite linguistic rules in the early sections and only proceed to the later sections as the interpretive issues present in the case become more difficult.⁹⁹ As Vattel writes at the outset, "[h]owever luminous each clause may be,—however clear and precise the terms in which the deed is couched,—all this will be of no avail, *if it be allowed* to go in quest of extraneous arguments to prove that it is not to be understood in the sense which it naturally presents."¹⁰⁰

Vattel's chapter is striking both for its textualism and its ironclad commitment to faithful-agent interpretation. As Vattel notes early on,

[T]he sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed,—*whenever we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly.* This is the general rule for all interpretations.¹⁰¹

While Vattel acknowledges that occasionally the treaty interpreter will need to resort to interpretive tools outside the scope of the author's *actual* original intention—such as custom or general purposes in cases of true textual ambiguity—he repeatedly cautions that such moves are "dangerous" demanding "certainty"¹⁰² and "circumspect[ion]."¹⁰³ "In most cases," wrote Vattel, "it is extremely probable that the parties have expressed themselves conformably to the established usage [of language]: and such probability ever affords a strong presumption, which cannot be over-ruled but by a still stronger presumption to the contrary."¹⁰⁴

Vattel's textualism is, in other words, motivated primarily by institutional considerations of honesty, transparency, and faithful-agency that have not changed much in kind or degree since he wrote in the 1750s.

96. *Id.* at 256.

97. *Id.* at 271.

98. *Id.* at 264-71.

99. See Lauterpacht, *supra* note 62, at 48 (reaching the same conclusion from the structure of the chapter). This is a step-wise textualist approach reminiscent of William Eskridge and Philip Frickey's famous "funnel of abstraction." William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990).

100. VATTEL, *supra* note 23, at 244-45 (emphasis added).

101. *Id.* at 247.

102. *Id.* at 256.

103. *Id.*

104. *Id.* at 248.

2. Grotius's *The Rights of War and Peace*

Hugo Grotius (1583-1645) was a Dutch legal scholar whose *The Rights of War and Peace* appeared in Latin in 1625.¹⁰⁵ Widely considered one of international law's seminal works,¹⁰⁶ *The Rights of War and Peace* has led many, James Madison among them, to declare Grotius "the father of the modern code of nations."¹⁰⁷

Grotius's words, much like Vattel's, were stitched to the lapels of early American lawyers and legislators. Like Vattel, citations to Grotius appear in astonishing numbers at the founding and after.¹⁰⁸ And unlike *The Law of Nations*, George Washington actually owned his copy of *The Rights of War and Peace*.¹⁰⁹ The Library Company of Philadelphia—to which Franklin sent one of Dumas's copies of *The Law of Nations*—listed four copies of *The Rights of War and Peace* in its 1807 catalog.¹¹⁰ John Jay christened his legal career "by carefully reading through Grotius 'De Jure Belli et Pacis.'"¹¹¹ As the book appears at the top of John Witherspoon's 1769 syllabus for students entering Princeton (then the College of New Jersey), it probably christened Madison's undergraduate education as well.¹¹² Madison later recommended that the Continental Congress acquire and its members read the book,¹¹³ and, with Hamilton, invoked Grotius in *The Federalist Papers*.¹¹⁴

Like Vattel's *The Law of Nations*, Grotius' *Rights of War and Peace* is known to modern scholars principally for its exposition of the substantive rights and obligations of nations in the international sphere.¹¹⁵ However, like Vattel who wrote after him, Grotius too saw the necessity of laying down a system of rules for treaty interpretation. Unlike the famously lucid Vattel, Grotius' section on interpretation requires some of its own, but nonetheless, Chapter Sixteen, titled "Of Interpretation, or the Way of explaining the Sense

105. The title has also been variously translated as *The Law of War and Peace* and *On the Laws of War and Peace*.

106. John MacDonell, *The Influence of Grotius*, in 5 TRANSACTIONS OF THE GROTIUS SOCIETY: PROBLEMS OF PEACE AND WAR xvii, xvii-xxiii (1919); William Rattigan, *Hugo Grotius*, 6 J. SOC'Y COMP. LEGIS. 68, 68-81 (1905); Charles J. Reid, Jr., *Hugo Grotius: A Case of Dubious Paternity*, 10 GREEN BAG 2D 109, 109-23 (2006).

107. James Madison, *Examination of the British Doctrine Which Subjects to Capture a Neutral Trade Not Open in Time of Peace*, in 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 1794-1815, at 229, 234 (Philip R. Fendall ed., 1865). Praise for Grotius tends to the superlative. See, e.g., David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 59 SYRACUSE L. REV. 235, 242 (2008) ("Hugo Grotius, [is] the most important writer of all time in international law . . .").

108. See *supra* notes 62-63.

109. Richardson, *supra* note 72, at 549.

110. CATALOG OF THE BOOKS BELONGING TO THE LIBRARY COMPANY OF PHILADELPHIA 115 (Philadelphia, Bartram & Reynolds 1807) [hereinafter CATALOG] (listing two in English and two in Latin).

111. GEORGE PELLEW, JOHN JAY 12 (Cambridge, The Riverside Press 1895).

112. Dennis F. Thompson, *The Education of a Founding Father: The Reading List for John Witherspoon's Course in Political Theory, as Taken by James Madison*, 4 POL. THEORY 523, 525 (1976).

113. *Id.*

114. THE FEDERALIST NO. 20, at 135 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961).

115. See, e.g., Ramsey, *supra* note 69, at 1570-71 (describing Grotius' influence).

of a Promise or Convention,”¹¹⁶ displays a textualism nearly as strong as Vattel’s. Planting seeds that would one day take root in Vattel’s work, Grotius wrote that “[B]ecause the inward Acts and Motions of the Mind are not in themselves discernible . . . therefore some certain Rule must be agreed on.”¹¹⁷ Having motivated his inquiry, Grotius, like Vattel, sets out an assortment of interpretive maxims that progress from text, to purpose, to considerations of circumstance and effect, stepping from each level only if the prior level of abstraction is insufficient to end the interpretive inquiry.¹¹⁸

Grotius sets out his interpretive rules in a numbered fashion (much like Vattel later would), beginning with.¹¹⁹

I.1. For promises to have any worth, they must be susceptible to objective interpretation.¹²⁰

I.2. “The best Rule of Interpretation is to guess at the Will by the most probable Signs, which Signs are of two Sorts, Words and Conjectures; which are sometimes considered separately, sometimes together.”¹²¹

II. “Words [are] to be understood as commonly taken unless there are good Conjectures to the contrary.”¹²²

III. “Terms of Art are to be explained according to the respective Art they belong to.”¹²³

IV.1. “Conjectures are necessary, when Words and Sentences are . . . *Ambiguous*” or “*A seeming Contradiction*.”¹²⁴

IV.2. “And sometimes the Conjectures themselves are so plain, that they carry

116. GROTIUS, *supra* note 23, at 848.

117. *Id.*

118. *See id.* at 848-83.

119. As was the case with Vattel, where appropriate, I have paraphrased and clarified the translations in this Section.

120. GROTIUS, *supra* note 23, at 848.

121. *Id.* at 848-49. By “Conjectures” Grotius seems merely to mean ambiguities in the text. I quote this text because Blackstone clearly read it in preparing his *Commentaries*, using many of the same words and even grammatical constructions. It is difficult to read the two texts side-by-side without concluding that Blackstone did a fair amount of borrowing directly from Grotius’ text. Wrote Blackstone, “[t]he fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.” BLACKSTONE, *supra* note 19, at *59. Indeed, Grotius’s first nine Roman-numbered interpretive rules seem to have formed the substance of Blackstone’s interpretive system, a system that would later inform Justice Story’s system in *his own Commentaries*. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 283 (2d ed. photo. reprint 2005) (1851) (citing BLACKSTONE *59-60) (remarking “Mr. Justice Blackstone has remarked, that the intention of a law is to be gathered from the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law”). Grotius has been called the father of international law, but he may also have a strong paternal claim to American statutory interpretation.

122. GROTIUS, *supra* note 23, at 849.

123. *Id.* at 850.

124. *Id.* at 851.

us to a Sense contrary to the more common Acceptation of the Words."¹²⁵

It is worth pausing here, as Grotius' Fourth Rule could be read broadly or narrowly. A broad reading would upset the contention that Grotius was a strong textualist. It could imply that Grotius here is saying that the "spirit" of a text can overcome its plain meaning. He himself says there is a difference between the *ex scripto* and the *sententia scripti* (distinguishing between *the words* and *the sense of the words*).¹²⁶

But Grotius, ever thorough, explains his understanding of Rule IV by way of an enormous number of examples drawn from ancient promises—examples that show, by their very narrowness, just how limited he thought the scope of the interpreter's discretion is. Wrote Grotius:

So the word *Arms* sometimes signifies Instruments of War, sometimes armed Soldiers, and is to be interpreted either in this or that Sense, as the Matter in hand requires. So he who has promised to restore Men, must restore them living, and not dead; not to trick and cavil as the *Plataeans* did. So when People are required to lay down their Iron, (*Ferrum*) they satisfy the Order, if they lay down their Weapons without their Buckles, as *Pericles* with his Shifts and Quirks pretended. And by a free going out of a City, is meant a safe Conduct, contrary to what *Alexander* did. And by leaving half the Ships, is meant half of the number of the Ships, whole, not cut in two, as the *Romans* basely dealt with *Antiochus*. The same Judgment may be formed in other like Cases.¹²⁷

Not satisfied that his point has been completely made, Grotius provides still more examples.¹²⁸ He describes an incident in which Brasidas, "having promised to depart out of the Land of the Boeotians," chose instead to remain with his army, on the grounds that wherever his army was encamped obviously did not belong to the Boeotians.¹²⁹ He describes how, when Homer's Menelaus and Paris agreed that Helen would belong to the "Conqueror," both understood "Conqueror" not in its literal sense, but to mean he who killed the other.¹³⁰ He describes how, if a gift is promised in obvious anticipation of a marriage, the gift need not be given if no marriage is consummated.¹³¹ He describes how a genus may be limited to one species peculiarly associated with it,¹³² how the masculine can encompass both genders,¹³³ and how "death" can mean either

125. *Id.* at 851-52.

126. *Id.* at 852.

127. *Id.* at 853.

128. Early in the chapter, Grotius gives another example, later borrowed by Pufendorf, *see* PUFENDORF, *supra* note 21, at 545: the Locrians put dirt in their shoes and garlic on their shoulders and then promised that they would keep faith with a peace treaty so long as they carried "Heads" on their shoulders, and trod upon the "Earth." Grotius argued that they could not escape their commitment by casting the garlic heads from their shoulders and the earth from their shoes. GROTIUS, *supra* note 23, at 849.

129. *Id.* at 854.

130. *Id.*

131. *Id.* at 855.

132. *Id.*

133. *Id.* at 856.

literal death or the figurative death of banishment.¹³⁴

These understandings of appropriate instances of deviation from otherwise clear text are not only consistent with proper textualism, but absolutely essential to it.¹³⁵ As Justice Antonin Scalia once put it, “a good textualist is not a literalist.”¹³⁶ Neither was Grotius. As *The Rights of War and Peace* conveys with great charm and candor, Grotius’s understanding of what it meant to speak of the law’s “spirit” was considerably less expansive than that invoked by some later jurists.¹³⁷ His interpretive rules evince a careful, thoughtful textualism, much like Vattel’s. And like Vattel, Grotius took interpretation seriously, outlining thirty-two interpretive rules, some with multiple sub-rules, spanning thirty-five pages.¹³⁸

3. *Pufendorf’s Of the Law of Nature and Nations*

Baron Samuel von Pufendorf (1632–1694) was a German law professor and historian whose *Of the Law of Nature and Nations* appeared in 1672.¹³⁹ Like the works of Grotius and Vattel, Pufendorf’s *Law of Nature and Nations*—though not as outlandishly popular—nonetheless secreted itself onto the bookshelves of early American lawyers, ready and waiting for deployment in moments of urgent need.¹⁴⁰ It appeared second (after Grotius’s book) on Witherspoon’s syllabus of works for the class entering Princeton (then the College of New Jersey) in 1769—and as such was likely among the first works Madison read there.¹⁴¹ The Library Company of Philadelphia listed two copies of *The Law of Nature and Nations* in its 1807 catalog,¹⁴² and the book was among the first volumes that Benjamin Franklin purchased for the Library at its founding.¹⁴³ When Robert Morris wrote from Philadelphia during the Constitutional Convention to his sons in Europe that “[t]he law of Nations, a knowledge of the Germanic system and the Constitutions of the several

134. *Id.*

135. See McGinnis & Rappaport, *supra* note 38, at 797 (“[I]nterpreting an ambiguous provision to accord with its spirit is consistent with textualism. It is only when the spirit takes priority over the text that one raises questions under textualism.”); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1835 (2010) (describing textualism).

136. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 24 (Amy Gutmann ed., 1997).

137. See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

138. The rules, like Vattel’s, gradually broaden to tackle situations calling for greater and greater abstraction, such as circumstances in which promises conflict or where certain substantive commitments conflict with promises made.

139. David Saunders, ‘*Within the Orbit of This Life*’—*Samuel Pufendorf and the Autonomy of Law*, 23 *CARDOZO L. REV.* 2173, 2174 (2002).

140. See *supra* notes 62–63.

141. Thompson, *supra* note 112, at 525. As Thompson notes, “Others who were students in the College at the same time as Madison, and were likely to have been exposed to Witherspoon’s course, include: John Beatty, Hugh Brackenridge, Gunning Bradford, William Bradford, Aaron Burr, Philip Freneau, John Henry, Henry Lee, Morgan Lewis, Aaron Ogden, and Caleb Wallace.” *Id.* at 529 n.5.

142. *CATALOG, supra* note 110, at 16, 217.

143. Edwin Wolf, *The First Books and Printed Catalogues of the Library Company of Philadelphia*, 78 *PA. MAG. HIST. & BIOGRAPHY* 45, 57 (1954).

Governments in Europe, and an intimate acquaintance with ancient and modern history are essentially necessary to entitle you to participate in the honor of serving . . . in the administration of this Government” it is not fanciful to imagine he was advising them to consult the German Pufendorf’s *Law of Nature and Nations*.¹⁴⁴

Pufendorf was principally known as a natural law theorist, but like Vattel and Grotius, Pufendorf’s writings were meant to convey principles of law as part of an integrated whole, and so like them, he included a chapter on interpretation: Chapter XII, “Of the Interpretation of Compacts and Laws.”¹⁴⁵ Pufendorf, like Grotius, thought objective interpretation necessary to enable binding promises to be made at all, and so argued that a system susceptible to objective interpretation was a necessity.¹⁴⁶ Pufendorf’s section is not as unique as Grotius’s and Vattel’s because he lifts much of his chapter from Grotius, often word-for-word, right down to Grotius’s examples.¹⁴⁷ Merely outlining the heads of each of his twenty-three rules reveals the same progression from linguistic rules to more difficult cases requiring greater abstraction. Pufendorf’s chapter on interpretation explains the following precepts of interpretation:¹⁴⁸

[Rules I and II, explaining the need to create interpretive rules, are omitted]

- III. The Words are ordinarily to be understood according to the common Usage. And
- IV. Words of Art according to the Art.
- V. Conjecture is sufficient, when Words are dubious.
- VI. Or seem to contradict one another.
- VII. Conjectures must be taken from the Matter treated on.
- VIII. From the Effect, or
- IX. From the Coherence, Original, and Place.
- X. How the Sense may be gathered from the Reason of them.
- XI. Some Words have both a large and a strict Signification.
- XII. Some Things are favourable, others odious.
- XIII. Rules are to be made from these Distinctions.
- XIV. An Example of Two who came to the Goal together.
- XV. How this Order is to be interpreted. No Man must wage War without the Command of another.

144. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 241 (1928).

145. PUFENDORF, *supra* note 21, at 534.

146. *Id.*

147. *See, e.g., id.* at 535-36. *But see id.* at 536 (contradicting Grotius’s definition of the word “Army”).

148. The following is transposed from PUFENDORF, *supra* note 21, at 534.

- XVI. Of these Words, Carthage shall be free.
- XVII. A Conjecture when a Law must be enlarged.
- XVIII. Of Tricks to evade a Law.
- XIX. A Conjecture when the Law ought to be restrained upon the Account of Some Defect in the Will of the Lawgiver.
- XX. An Observation upon this Conjecture.
- XXI. Or upon the Account of Some Accident inconsistent with his Will, as where it is either unlawful,
- XXII. Or too grievous in Respect of the Performance.
- XXIII. What if two Laws are contrary one to another.

As the entries in the list above reveal, especially those following XI, Pufendorf, like Grotius and Vattel, had a deep appreciation for hard cases.¹⁴⁹ He devoted several pages to a discussion of what was meant by the terms of the peace treaty that ended the Second Punic War (Rules XV and XVI), where the Romans simultaneously obtained total control over the governance of Carthage and promised that “Carthage should be a free City.”¹⁵⁰ Could the Romans command the Carthaginians, by virtue of Rome’s dominion, to tear down the city of Carthage, even if the Romans could not themselves destroy it?¹⁵¹

Pufendorf’s resolution of this case places him in league with textualists, revealing a sophisticated commitment to honoring word and sentence meaning. Pufendorf examines this case and concludes that the Carthaginians could not be instructed by the Romans to destroy Carthage because it was promised to them that the *city* would remain free. Pufendorf contrasts the text “Carthage should be a free City” with the text “the *Carthaginians*” “should be free.” If the treaty had said that the Carthaginians would remain free, rather than that Carthage should be a free city, the Romans might have been able to order them to destroy Carthage because the destruction of the city would not necessarily render them unfree.¹⁵² This conclusion puts a great deal of faith in the power of words.

In addition to this example, Pufendorf also concludes that interpreters should not provide for cases that were not originally contemplated, save where the exclusion would merely be a semantic trick (Rule XVII).¹⁵³ For example, although Pufendorf famously (or infamously, as the case may be) stated that meaning of words can be “enlarged” or “restricted” on occasion to meet the needs of particular cases, such enlargements or restrictions should not be

149. These cases included those in which the terms of a treaty spoke vaguely or generally. *See, e.g., id.* at 544-46.

150. *Id.* at 545 (emphasis omitted); *see also* George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH. L. REV. 967, 979-84 (1991) (recounting the major events of the Second Punic War).

151. PUFENDORF, *supra* note 21, at 545. Pufendorf concludes that the command was “[p]erfidious[.]” *Id.*

152. *Id.*

153. *See id.* at 545-46.

“easily admitted” unless the words are “entirely dissonant to common use.”¹⁵⁴ He concludes that restrictions on plain language should be narrow, applied only when certain that the case was not meant to fall within the rule’s fair import (Rules XIII-XXII).¹⁵⁵ Most importantly of all, he emphasizes that one is not to look to the law-giver or -enforcer for guidance, but to confine his inquiry to the instrument itself.¹⁵⁶ Pufendorf’s approach, like that of Grotius and Vattel, is remarkably sophisticated, crossing nineteen pages and twenty-three rules, examples, and cases.

4. *Burlamaqui’s The Principles of Natural and Politic Law*

Jean-Jacques Burlamaqui (1694–1748) was a Swiss law professor and legal and political theorist whose treatise *The Principles of Natural and Politic Law* was first published in 1747. The work found instantaneous popularity.¹⁵⁷ *The Principles* was generally available in an English translation as early as 1763.¹⁵⁸

Burlamaqui’s work stood shoulder-to-shoulder with those of other continental publicists in the minds of early American lawyers and statesmen. By 1780, *The Principles* was kept in important libraries from Philadelphia to Boston.¹⁵⁹ Harvard, Princeton (then the College of New Jersey), Brown (then Rhode Island College), Dartmouth, Columbia (then King’s College), Franklin and Marshall, and William and Mary all used Burlamaqui’s treatise as a textbook before 1800, several before 1790.¹⁶⁰ In 1793, Thaddeus M. Harris, then Harvard’s librarian, recommended Burlamaqui along with Blackstone as an essential textbook for legal study.¹⁶¹ James Wilson, an important Framing figure and eventual Supreme Court Justice, included references to Burlamaqui in his 1790 lectures at the University of Pennsylvania—lectures attended by “President George Washington and his Cabinet, the Governor, and Members of Congress and of the Legislature.”¹⁶²

Burlamaqui, like Grotius, Vattel, and Pufendorf, was a textualist, though he comments on interpretation only briefly. Rather than devote a chapter to interpretation, Burlamaqui discusses interpretation in the context of situations often arising in international relations and thereby breaks up his discussion into

154. *Id.*

155. *See id.* at 547-49.

156. *See id.* at 534-35 (explaining the need for objective rules); *id.* at 539-42 (explaining that meaning must be derived from the instrument itself).

157. HARVEY, *supra* note 62, at 185-87.

158. Thompson, *supra* note 112, at 526.

159. HARVEY, *supra* note 62, at 81-83.

160. *Id.* at 83-84. Several other universities used the textbook before 1810, including Williams College, Hampden-Sydney, Union College, and Dickinson College. *Id.* at 84.

161. THADDEUS M. HARRIS, A SELECTED CATALOGUE OF THE MOST ESTEEMED PUBLICATIONS IN THE ENGLISH LANGUAGE, PROPER TO FORM A SOCIAL LIBRARY WITH AN INTRODUCTION UPON THE CHOICE OF BOOKS (Boston, I. Thomas and E.T. Andrews 1793).

162. 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL 172 (1908); *see also* 1 JAMES WILSON, WORKS 8 (Philadelphia, Lorenzo Press 1804) (noting that “General Washington, then President of the United States, was present”); *id.* at 69 (citing Burlamaqui); 1 James Wilson, THE WORKS OF JAMES WILSON 118, 154 (Robert Green McCloskey ed., 1967) (citing Burlamaqui).

several chapters. Thus, in his volume on “Politic Law” Burlamaqui discusses “public treaties in general” (Part IV, Chapter IX), and various compacts such as those with an enemy and those that make a truce or a peace (Part IV, Chapters X-XIV).¹⁶³ While this means that many of Burlamaqui’s recommendations are linked to substantive principles drawn from agency law, the law of captures, and war and peace, nevertheless, some general interpretive principles do come to light upon close examination.

Motivating the need for objective interpretation with respect to promises made between nations, Burlamaqui wrote:

[S]overeigns are no less obliged, than individuals, inviolably to keep their word, and be faithful to their engagements. The law of nations renders this an indispensable duty; for it is evident, that were it otherwise, not only public treaties would be useless to states, but moreover, that the violation of these would throw them into a state of diffidence and continual war; that is to say, into the most terrible situation. . . . *The royal word* ought therefore to be inviolable, and sacred.¹⁶⁴

Burlamaqui explains what he means by “the royal word” only obliquely. He never explicitly states that other materials or considerations cannot be brought to bear on the interpretive inquiry, for instance. Nevertheless, Burlamaqui provides some evidence that he believes “royal word” to mean literally “words” in the treaty. He provides, for example, a few paragraphs setting forth interpretive canons he finds worthy of particular emphasis, pertaining to how parties should treat text in the treaty itself,¹⁶⁵ accompanied by a broad exhortation to “carefully attend to the rule of conventions in general” in the interpretation of public treaties.¹⁶⁶

Burlamaqui reveals his approach to more difficult interpretive questions indirectly, for instance through his discussion of the obligation of adhering to a treaty of truce and of peace even with a hated enemy.¹⁶⁷ Here, he mentions a disagreement he has with Pufendorf. Burlamaqui believed a truce “granted only for burying the dead” could not, by way of its failure to include explicit limiting terms, be used to “retire into a more secure post, nor entrench ourselves [T]hough Pufendorf indeed, is of a contrary opinion.”¹⁶⁸ But

163. BURLAMAQUI, *supra* note 22, at 314-59.

164. *Id.* at 315.

165. *See, e.g., id.* at 322-25. These are relatively minor and obvious to the modern ear, such as “I. A treaty, concluded for a certain time, expires at the end of the term agreed on.” *Id.* at 323. Whether these rather banal rules had particular salience for Burlamaqui or he legitimately thought they were especially worthy of careful attention is unclear.

166. *Id.* at 323. This has been taken by many to be an explicit invocation of the interpretive rules set out by Grotius and Pufendorf, and some editions include explicit footnotes referencing the pertinent chapters of these authors’ works. *See, e.g.,* JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 523 n.8 (Peter Korkman ed., Liberty Fund 2006) (1752) (“These rules are drawn from DGP II.15 §§14-15 and from DNG VIII.9 §11.”)

167. *See id.* at 325-43.

168. *Id.* at 338. Pufendorf’s willingness to tackle hard examples leaves many of his conclusions vulnerable. *See, e.g.,* PUFENDORF *supra* note 21, at 549 (describing a case in which Pufendorf would consider it excusable to open the city gates to allow in allies in a time of war. Depending on the nature of the prohibition, or the susceptibility of the gate’s guards to deception, one could easily see that this

this is a difficult interpretive question, one that has to do with notions of what a text or agreement reasonably implies, that would probably divide fair-minded textualists even today.

On the other hand, Burlamaqui found much to favor in Grotius and Pufendorf. In addition to his earlier reference to both in his exaltation of their interpretive systems as “the rule[s] of conventions in general,”¹⁶⁹ Burlamaqui refers to them again in saying that “several questions relating to safe conducts may be decided, either by the nature of the privilege granted, or by *the general rules of right interpretation*” by which he clearly, again, meant the rules laid down by Pufendorf and Grotius.¹⁷⁰

Thus, Burlamaqui, to the extent he spoke of interpretation, explicitly extended or incorporated the works of Grotius and Pufendorf, who had already set forth nuanced textualist programs. A treaty interpreter in the late eighteenth century would have found nothing in Burlamaqui to support a deviation from Vattelian or Grotian textualism that proceeded in a step-wise fashion from lesser to greater abstraction depending on the ambiguity in the instrument under consideration.

5. *Other Authorities (Blackstone, Lee, Bacon, Bynkershoek, Rutherforth and Wolff)*

At least a half-dozen other publicists were also important to treaty interpretation at the founding, either directly or indirectly.¹⁷¹ William Blackstone’s *Commentaries on the Laws of England*, for instance, was known to every American lawyer in the early republic and has long been considered one of the most authoritative and influential legal texts in American history.¹⁷² Matthew Bacon’s *A New Abridgment of the Law* appears dozens of times in early American cases in both federal and state courts. Christian Wolff (Wolfius), Cornelius van Bynkershoek, Richard Lee, and Thomas Rutherforth were also extremely influential, their names appearing explicitly in early Supreme Court treaty decisions.¹⁷³

Each could receive his own detailed treatment here, for each also included an aside on interpretation, if not a thorough discussion. Blackstone’s short treatment—those famous four pages beginning “before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation of laws*”—is plainly cribbed from Grotius (whom, to his credit, Blackstone cites

action falls well within the rule’s prohibition).

169. BURLAMAQUI, *supra* note 22. at 323.

170. *Id.* at 340 (emphasis added). Once again, some editions of *The Principles* make this reference to Grotius and Pufendorf explicit. See *supra* note 166 (citing one such edition).

171. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 689 (1972).

172. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996).

173. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 231, 239 (1796) (citing Rutherforth along with Bynkershoek, Lee, Burlamaqui and Vattel); *id.* at 230 (citing Wolfius); *id.* at 220, 226, 231, 243, 263 (citing Bynkershoek); *id.* at 231, 243 (citing Lee).

extensively in the *Commentaries*).¹⁷⁴ Rutherford's *Institutes of Natural Law*—which Justice Story would later “borrow almost in terms” in his own interpretation chapter in the *Commentaries on the Constitution*¹⁷⁵—were themselves just an English translation and commentary on Grotius, prepared and delivered as lectures at Cambridge.¹⁷⁶ Richard Lee's *A Treatise on Captures in War* “was largely a popularization of the views of Bynkershoek,”¹⁷⁷ while Vattel's treatise on *The Law of Nations* was probably better thought a translation and popularization of Wolfius than a work solely his own.¹⁷⁸

In other words, Grotius, Vattel, Pufendorf, and Burlamaqui are especially significant because they represent a sort of common denominator within a community of authors who, between themselves, freely borrowed, adapted and updated each other's ideas.¹⁷⁹ And in one essential respect there was profound consensus. According to these authors—and, at least as far as Burlamaqui was concerned, according to the law of nations itself¹⁸⁰—the proper approach to treaty interpretation was to interpret through a procession of abstraction. Clear text ended the inquiry. If the text was not clear, the next step was to look at to the common usage of the terms together, then their reasonable import, then finally, if necessary, context, subject matter, consequences, and purposes.

Not one authority counseled looking beyond the text, and several counseled explicitly against such detours.¹⁸¹ Blackstone in his capsule treatment on interpretation in the *Commentaries* wrote:

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to

174. BLACKSTONE, *supra* note 19, at *58-61 (citing both Pufendorf and Grotius by name in the text and distilling the same interpretive system originally set forth by Grotius that was then copied by Pufendorf and borrowed by Vattel, among others).

175. See STORY, *supra* note 121, at 285 n.1 (“The foregoing remarks are borrowed almost in terms from Rutherford's *Institutes of Natural Law* (B. 2, ch. 7, § 4 to 11), which contain a very lucid exposition of the general rules of interpretation. The whole chapter deserves an attentive perusal.”).

176. See THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW: BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLI ET PACIS READ IN S. JOHNS COLLEGE, CAMBRIDGE* (Cambridge, J. Bentham 1756).

177. Lofgren, *supra* note 171, at 689; see also HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775-1787*, at 181 (1977) (claiming Lee “largely parroted” the opinions of Bynkershoek).

178. See, e.g., Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 *YALE L.J.* 181, 227 (1945) (calling him a “popularizer of the work of an earlier German writer, Christian Wolff”); Gerald L. Neuman, *Whose Constitution?*, 100 *YALE L.J.* 909, 922 (1991) (calling Vattel a disciple of Wolff); Quincy Wright, *Toward A Universal Law for Mankind*, 63 *COLUM. L. REV.* 435, 439 (1963) (noting that “Emerich Vattel attempted to translate the rather difficult Latin of Wolff into readable French”).

179. See, e.g., BLACKSTONE, *supra* note 19, at *58-64 (citing Pufendorf and Grotius); Richardson, *supra* note 72, at 550 (noting Vattel “copied most of the formal rules he could cull from the treaties of his era” and “[w]ith some liberal borrowing” from Christian Wolff).

180. BURLAMAQUI, *supra* note 22, at 322-25, 340 (calling them “the rules of right interpretation,” or “the rules of conventions in general,” respectively).

181. The no recourse rule was among, for example, Francis Bacon's maxims. See FRANCIS BACON, *Containing a Collection of Some Principal Rules and Maxims of the Common Law, in THE ELEMENTS OF THE COMMON LAWS OF ENGLAND* 1, 92 (London, John Moore Esq. 1630).

decide particular disputes, is not only endless, but affords great room for partiality and oppression.¹⁸²

A point Rutherford also made in his *Institutes*, writing:

[T]he obligations that are produced by the civil laws of our country, arise from the intention of the legislator; not merely as this intention is an act of the mind; but as it is declared or expressed by some outward sign or mark which makes it known to us The collecting of a man's intention from such signs or marks is called interpretation.¹⁸³

While the views of these authorities could be set forth in more exhaustive detail, a more fruitful inquiry might instead be to ask not what these authors thought but whether this consensus among these authorities influenced the understanding of treaty interpretation among the Framers and in the early American courts. Did the Framers see the Grotian-Vattelien-Pufendorfian-Burlamaquian-Rutherfordian-Blackstonian requirement that instruments be interpreted according to their words alone as inherent in the definition of the word “treaty”? Did they perhaps only have in mind the more general Grotian-and-Vattelien prescription that whatever rules there may be, that they be “certain” (i.e. fixed and definite)?¹⁸⁴ The following Section takes up these questions.

C. *Interpretation as a Distinctive Concern in the Framing and Ratification*

The following section makes explicit what might otherwise be merely implicit—that these authorities and their particular interpretive approach profoundly shaped the design of the U.S. Constitution, and, in particular, the delegation to the Judiciary the power to construe the nation's treaty commitments. It explains the great importance the founding generation placed on enacting a *written* constitution, a priority that derived from the very legal and jurisprudential context that shaped the founding generation's commitment to textualism itself.

1. *The Radicalism of a Written Constitution*

The decision to set down written constitutions as compacts between “the People” was a major American innovation.¹⁸⁵ Prior to the revolution, arguments over the existence and authority of the ancient British constitution incorporated documents like colonial charters, the 1688 Bill of Rights, and the Magna Carta merely as *evidence* of its content.¹⁸⁶ But the British constitution

182. BLACKSTONE, *supra* note 19, at *58.

183. RUTHERFORTH, *supra* note 176, at 307-08.

184. VATTEL, *supra* note 23, at 246 (arguing that interpretation should proceed according to rules that are “certain”).

185. Baade, *supra* note 37, at 1013; see WOOD, *supra* note 62, at 291-95.

186. WOOD, *supra* note 62, at 259-73.

was ultimately ineffable—it resided in a collection of written and unwritten rules and conventions embodied in no single authoritative text.¹⁸⁷ This approach to constitutionalism infused British legal culture. In the eighteenth-century British legal system, where much law—even fundamental law—was unwritten, semantic interpretation often stood beside, or even beneath, moral and political arguments *justifying* a written law in the face of the asserted existence of a superior unwritten law.¹⁸⁸

The notion that the fundamental laws of the states and the federal government would hereafter be *written* imported into American legal thought a novel and enormous preoccupation with interpretation.¹⁸⁹ Thomas Paine wrote glowingly in 1794 of the Constitution as America’s “political bible”:

Scarcely a family was without it. Every member of the Government had a copy; and nothing was more common when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed Constitution out of their pocket, and read the chapter with which such matter in debate was connected.¹⁹⁰

But the very notion that written text could be limiting in this way—and therefore worth thrusting into debates over the Constitution’s meaning in the manner Paine describes—presupposes that on some grave interpretive questions it was thought that there was no difference to be split; that when the Constitution said one thing it could not mean another, and that the way of deciding was *semantic*, not moral or political.¹⁹¹

This idea, that text mattered enormously, is evident from the Framers’ and ratifiers’ obsession with words. In the Constitutional Convention, dozens of proposals were struck or modified for vagueness, ambiguity or indefiniteness. “On the proposition for giving ‘Legislative power in all cases to which the State Legislatures were individually incompetent,’” Charles Pinckney and John Rutledge “objected to the vagueness of the term *incompetent*, and said they could not well decide how to vote until they should see an exact enumeration of

187. See BLACKSTONE, *supra* note 19, at *85; EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWE OF ENGLAND (1642), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 745, 750 (Steve Sheppard ed., 2003); A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (9th ed. 1959).

188. For a thoughtful discussion, see WOOD, *supra* note 62, at 265-67; Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 170 (1928); Manning, *supra* note 36, at 22-56.

189. Powell, *supra* note 37, at 892-94.

190. 2 THOMAS PAINE, RIGHTS OF MAN 28 (4th Am. ed. 1794), *reprinted in* THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE 345, 378 (Philip S. Fonder ed., 1945). *Cf.* THOMAS PAINE, COMMON SENSE (1776) (“[I]n America the law is King.”).

191. But see Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 Harv. L. Rev. 4, 45-46 (2001) (arguing that “[c]ontrary to a common misperception among present-day constitutional lawyers” the American founders “did not believe that putting a constitution into writing altered its fundamental character” and that, as such enacting written constitutions had a limited impact on the methods of constitutional reasoning and constitutional argument already used in interpreting the English constitution). Kramer’s conclusion seems open to question. See WOOD, *supra* note 62, at 259-305; Baade, *supra* note 37, at 1014-24.

the powers comprehended by this definition.”¹⁹² In response to Pinckney’s motion “that the National Legislature should have authority to negative all Laws which they should judge to be improper,”¹⁹³ John Dickinson replied it was “impossible to draw a line between the cases proper & improper for the exercise of the negative.”¹⁹⁴ The list of such scuffles was long,¹⁹⁵ pervading the subsequent ratifying conventions with equal vigor.¹⁹⁶

Objections to the Constitution’s capacious terms, and the interpretive space they opened, only grew more cataclysmic in the ratification period. Edmund Randolph, the delegate to the Constitutional Convention who proposed the Virginia Plan and played an influential role in drafting the final constitutional text as a member of the Committee of Detail,¹⁹⁷ refused to sign it because he thought its language too vague and manipulable—and published a widely-read pamphlet saying so.¹⁹⁸ Elbridge Gerry, another delegate turned dissident, did and said the same.¹⁹⁹ By the “undefined meaning of some parts,” wrote Gerry, “and the ambiguities of expression in others . . . [the Constitution is] dangerously adapted to the purposes of an immediate *aristocratic tyranny* . . . [and] *uncontrolled despotism*.”²⁰⁰

But it was “[a] series of essays published in the *New York Journal* from October 1787 through April 1788 under the byline ‘Brutus’ [that] constituted by far the most powerful and sustained attack on the Constitution from an anti-hermeneutical perspective.”²⁰¹ Brutus was a powerful intellectual force, and a sharp essayist, and it has been argued that the power of his objections impelled Hamilton to author *Federalist Nos.* 78 and 81.²⁰² Wrote Brutus:

192. 1 FARRAND’S RECORDS, *supra* note 191, at 53 (May 31, 1787); *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1789, at 17 (Max Farrand ed., 1911) (July 16, 1787) [hereinafter 2 FARRAND’S RECORDS] (reiterating the objection).

193. 1 FARRAND’S RECORDS, *supra* note 2, at 164 (June 8, 1787).

194. *Id.* at 167 (June 8, 1787).

195. Objections were raised to the precision of the words “giving aid and comfort” to the enemy, 2 FARRAND’S RECORDS, *supra* note 192, at 345-47 (Aug. 20, 1787), “disability” as a ground for impeachment and removal, *id.* at 427 (Aug. 27, 1787), whether the power to define and punish “felonies” on the high seas was unacceptably vague, *id.* at 315-16 (Aug. 17, 1787), and whether Congress needed the powers to both define *and* punish such crimes, or whether the words “and punish[]” were superfluous, *id.* at 315. There are several more. *See, e.g., id.* at 276 (Aug. 13, 1787) (noting that the word “revenue” is “ambiguous”); *id.* at 301-02, 304-05 (Aug. 15-16, 1787) (raising a concern that “bills” would not read to include “resolutions” and “votes”); *id.* at 348-49 (Aug. 20, 1787) (emphasizing the importance of placing the word “sole” before “power”).

196. *See, e.g.,* Donald H. Zeigler, *Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change*, 19 VT. L. REV. 673, 685 & n.56 (1995) (listing in extraordinary detail the recurrent objections to the vagueness of “arising under” jurisdiction appearing throughout ratifying conventions and pamphlets).

197. John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765, 776 (1990) (describing Randolph’s role in pressing for express enumerations of the federal powers).

198. *Letter on the Federal Constitution from Edmund Randolph to the Virginia Legislature* (Oct. 16, 1787), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES: 1787-1788, at 264-65 (P. Ford ed., 1888) [hereinafter PAMPHLETS].

199. Elbridge Gerry, *Observations on the New Constitution, and on the Federal and State Conventions By a Columbian Patriot* (1788), reprinted in PAMPHLETS, *supra* note 198, at 9.

200. *Id.* at 6.

201. Powell, *supra* note 37, at 907.

202. Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729,

2d. The judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity.

By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.

From this method of interpreting laws (says Blackstone) by the reason of them, arises what we call equity; which is thus defined by Grotius, "the correction of that, wherein the law, by reason of its universality, is deficient["]; for since in laws all cases cannot be foreseen, or expressed, it is necessary, that when the decrees of the law cannot be applied to particular cases, there should some where be a power vested of defining those circumstances, which had they been foreseen the legislator would have expressed; and these are the cases, which according to Grotius, ["]lex non exacte definit, sed arbitrio boni viri permittet."

...

They will give the sense of every article of the constitution that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution.²⁰³

Four points are immediately worth making about the passage above—a passage that prompted some of the most famous lines in *Federalist Nos. 78* and *81*.

First, Brutus, among the Constitution's most merciless and intelligent opponents,²⁰⁴ saw Blackstone and Grotius as authorities on the proper methods of interpretation. Second, he invoked them because he believed that his audience—those who were set to vote on the Constitution's text—*agreed* that Grotius and Blackstone were interpretive authorities whose methods were likely to be applied by judges. He sought to use the Federalists' own authorities against them. Third, Brutus's description of Blackstone and Grotius's interpretive methods is almost laughably unfair.²⁰⁵ As set out in the earlier sections explaining the interpretive methods of Grotius and Blackstone, they thought of text as the very centerpiece of interpretation.²⁰⁶ Or as Hamilton bristled in *Federalist No. 83*, "equity is to give relief IN EXTRAORDINARY CASES, which are EXCEPTIONS to general rules."²⁰⁷ Fourth, given Hamilton's strenuous denial that judges would possess much interpretative discretion, it

816 (2005).

203. Brutus Essay No. 11 (Jan. 31, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 417, 419-20 (Herbert Storing ed., 1981).

204. See, e.g., Arthur E. Wilmarth, Jr., *Evasive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 137 (2003).

205. See Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 30 (2000) (collecting authorities who agree that Brutus's is an "exaggerated" reading of Grotius and Blackstone).

206. See *supra* Subsections II.B.2 and II.B.5.

207. THE FEDERALIST NO. 83, at 505 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Note that this emphasis is Hamilton's. He explained further in a footnote that "[i]t is true that the principles by which that relief is governed are now reduced to a regular system; but it is not the less true that they are in the main applicable to SPECIAL circumstances, which form exceptions to general rules." *Id.*

would seem that one profound source of common ground for Federalists and Anti-Federalists alike was that judges would not substitute their “WILL” for “JUDGMENT” and that interpretation would be constrained and limited.²⁰⁸

2. *The Framers’ Confidence in Judicial Expertise and Integrity as a Restraint on Discretion*

As remarkable as Brutus’s denigration of Grotius and Blackstone’s textualism is and was, perhaps equally remarkable was the certainty among the Constitution’s advocates that judicial decisions really would be text-bound. Time and again, as skeptics argued that judges would interpret the law according to their politics, constitutional advocates responded that text would rein them in. At the Constitutional Convention, in response to a motion to allow judges to participate in the revision of laws, it was objected that “[j]udges ought not to be subject to the bias which a participation in the making of laws might give in the exposition of them.”²⁰⁹ Madison replied:

[This objection] had some weight; but it was much diminished by reflecting that . . . a small part of [the laws coming before a council Judge] . . . would be so ambiguous as to leave room for his prepossessions; and that but a few cases [would] probably arise in the life of a Judge under such ambiguous passages. How much good on the other hand would proceed from the perspicuity, the conciseness, and the systematic character [which] the Code of laws [would] receive from the Judiciary talents.²¹⁰

In the mad pamphleteering that followed the Convention prior to the ratification, Alexander Contee Hanson responded to charges that the Constitution’s “sweeping clause”—the clause that allows Congress to make all laws “necessary and proper” to the effectuation of its enumerated powers—would “afford pretext, for freeing congress from all constitutional restraints.”²¹¹ Wrote Hanson:

Consider the import of the words.

I take the construction of these words to be precisely the same, as if the clause had preceded further and said, “No act of congress shall be valid, unless it have relation to the foregoing powers, and be necessary and proper for carrying them

208. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *id.* at 471 (arguing that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case”).

209. 1 FARRAND’S RECORDS, *supra* note 2, at 138 (June 6, 1787); 2 FARRAND’S RECORDS, *supra* note 192, at 79-80 (July 21, 1787) (“Mr. Wilson. The proposition is certainly *not* liable to all the objections which have been urged agst. It. According to (Mr. Gerry) it will unite the Executive & Judiciary in an offensive & defensive alliance agst. The Legislature . . . To the . . . objection stated . . . it might be answered that supposing the prepossession to mix itself with the exposition, the evil would be overbalanced by the advantages promised by the expedient.”).

210. 1 FARRAND’S RECORDS, *supra* note 2, at 138-39.

211. Alexander Contee Hanson, *Remarks on the Proposed Plan of a Federal Government by Aristides*, reprinted in PAMPHLETS, *supra* note 198, at 218, 233.

into execution."²¹²

Later in the essay, he repeated this even more emphatically:

[W]hen the compact ascertains and defines the power delegated to the federal head, then cannot this government, without manifest usurpation, exert any power not expressly, or by necessary implication, conferred by the compact.

This doctrine is so obvious and plain, that I am amazed any good man should deplore the omission of a bill of rights.²¹³

And in refuting Brutus's charges in *Federalist Nos.* 78 and 81, Hamilton responded with overwhelming force. He argued that judges who misbehaved would be removed by impeachment.²¹⁴ He argued that the whole branch could be subdued if other branches ignored its judgments.²¹⁵ This famously made the judiciary the "least dangerous" branch, one whose claim to authority stemmed from its reason not its power.²¹⁶ Most importantly for present purposes, he argued that judges would engage in interpretation of a distinctly legal and legitimate character. Courts are "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them," he wrote.²¹⁷ This demanded:

[L]ong and laborious study to acquire a competent knowledge . . . [T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And . . . the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.²¹⁸

This claim, that judges would need to be, and would be, men of unusual expertise and integrity, learned in ways of a distinctive legal method, not only appeared and reappeared in the section on the judiciary in *The Federalist Papers* but also in the debates over the Constitution's design in the Constitutional Convention.²¹⁹

The need for interpretation founded on knowledge and integrity was a

212. *Id.* at 234.

213. *Id.* at 242 (emphasis omitted).

214. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

215. THE FEDERALIST NO. 78, at 465-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 81, at 484-85 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

216. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

217. *Id.* at 471.

218. *Id.*

219. For such invocations in *The Federalist Papers*, see *id.*; THE FEDERALIST NO. 81, at 483, 491 (Alexander Hamilton) (Clinton Rossiter ed., 1961); and THE FEDERALIST NO. 83, at 504 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For invocations in the Constitutional Convention see, for example, 1 FARRAND'S RECORDS, *supra* note 2, at 138-39 (June 6, 1787) (Madison describing "Judiciary talents"); 2 FARRAND'S RECORDS, *supra* note 192, at 73-74 (July 21, 1787) (quoting Mr. Elseworth as arguing that "[t]he aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess. The law of Nations also will frequently come into question. Of this the Judges alone will have competent information"); and *id.* at 429 (Aug. 27, 1787) (quoting General Pickney as arguing that the "the Judiciary will require men of the first talents").

distinct and important concern for those who framed and ratified the Constitution. The authorities on interpretation were—as Brutus himself pointed out—Grotius and his enthusiasts (e.g., Blackstone). That these systems were seen, as Hamilton explains in *Federalist No. 78*, as “strict rules”²²⁰ that “bound down”²²¹ judges was, as Hanson explained, “obvious and plain.”²²² The Constitution’s advocates, in other words, placed their faith in an idea that interpretation could be predictable, rational, and textual.

3. *International Trust Through Judicial Treaty Interpretation*

As lofty discussions of constitutional interpretation beat on velivolant, arguments over stability and uniformity in treaty interpretation floated in their wake. The need, reiterated repeatedly, was to create a nation *other nations* could trust to keep its promises.²²³ This could only be done if the judiciary was required to interpret treaties as they would laws and thereby give them uniform nationwide effect.

At the Constitutional Convention these themes emerged in far-reaching deliberations over where to vest treaty-making and treaty-enforcement powers. When presenting the Virginia Plan in the Convention’s opening weeks, Edmund Randolph, not wishing to bog the Convention down in particularities early, thought that all could agree that the scope of federal court jurisdiction should be broad enough to protect “the security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof.”²²⁴ This was “[a]greed to unanimously.”²²⁵ Six days later Madison savaged the New Jersey Plan for its weak judiciary’s inability to “prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars” even though “the tendency of the States to these violations has been manifested in sundry instances.”²²⁶

The reasons the Framers thought the judiciary the unanimous choice to protect against violations were twofold: judges would be *independent* and they would be *expert*. These qualities were considered by members of the convention to be vital to obtaining the trust of other nations because they would ensure that treaty interpretation would be faithful to the commitment made in the instrument itself.

Discussion of independence as an essential ingredient of good faith in international commitments arose in discussions of term length for members of the legislature. James Wilson argued on June 26 that because the Senate would probably be the repository of the treaty-making power:

It ought therefore to be made respectable in the eyes of foreign nations. The

220. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

221. *Id.*

222. Hanson, *supra* note 211, at 218, 242.

223. Golove & Hulsebosch, *supra* note 31, at 934.

224. 1 FARRAND’S RECORDS, *supra* note 2, at 238 (June 13, 1787).

225. *Id.*

226. *Id.* at 316 (June 19, 1787).

true reason why Britain has not yet listened to a commercial treaty with us has been, because she had no confidence in the stability or efficacy of our Government. 9 years with a rotation, will provide these desirable qualities . . .
²²⁷

Wilson would repeat the point later that day:

What is the reason that Great Britain does not enter into a commercial treaty with us? Because congress has not the power to enforce its observance. But give them those powers, and give them the stability [of nine year terms] . . . and they will have more permanency than a monarchical government.²²⁸

The idea that long service would ensure fidelity to treaties was further amplified later by Gouverneur Morris. Explaining why he thought the Senate should have *life* terms a few days later, he argued:

4. An independence for life, involves the necessary permanency. If we change our measures no body will trust us: and how avoid a change of measures, but by avoiding a change of men. Ask any man if he confides in Congs. if he confides in <the State of> Pena. if he will lend his money or enter into contract? He will tell you no. He sees no stability. He can repose no confidence. If G. B. were to explain her refusal to treat with us, the same reasoning would be employed.²²⁹

Discussion, meanwhile, of expertise as essential to ensuring that the United States would respect the law of nations arose in discussions of the role the judiciary might play in revising and enforcing the laws. Oliver Ellsworth argued as part of a valiant motion to reconsider creating a Council of Revision that:

The aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess. The law of Nations also will frequently come into question. Of this the Judges alone will have competent information.²³⁰

These sentiments, which echoed Madison's own exhortation that the nation would benefit from "Judiciary talents"²³¹ by means of such a council, found renewed support from James Wilson alongside George Mason who further remarked: "[the judges'] aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences."²³²

Ultimately, the choice of the Convention was as elegant as it was deliberate. Article III would vest federal courts with jurisdiction over all cases

227. *Id.* at 426 (June 26, 1787).

228. *Id.* at 433 (June 26, 1787).

229. *Id.* at 513 (July 2, 1787).

230. 2 FARRAND'S RECORDS, *supra* note 192, at 73-74 (July 21, 1787).

231. 1 FARRAND'S RECORDS, *supra* note 2, at 138-39 (June 6, 1787).

232. 2 FARRAND'S RECORDS, *supra* note 192, at 78 (July 21, 1787).

arising under “this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;”²³³ while Article VI would proclaim as supreme law “[t]his Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States.”²³⁴ As Professor Akhil Amar has elsewhere observed, “Even though one clause appears in Article III and the other in faraway Article VI, intratextual analysis suggests that they were indeed designed to be read together, as interlocking parts of a coherent whole”²³⁵ The records of the Philadelphia Convention reveal this to be so.²³⁶

Giving the federal courts treaty jurisdiction, while simultaneously making treaties national laws, resolved a deep tension between three rival concerns: the need to ensure that States would cease placing the nation in breach of its treaty commitments; the need to ensure against the possibility that a recalcitrant Congress might refuse to execute a treaty already signed; and the need to ensure that treaty interpretation would not be the self-serving work of a parochial executive branch.²³⁷ As Madison explained on the Convention floor:

There was an analogy between the Executive & Judiciary departments in several respects. The latter executed the laws in certain cases as the former did in others. The former expounded & applied them for certain purposes, as the latter did for others. The difference between them seemed to consist chiefly in two circumstances—1. the collective interest & security were much more in the power belonging to the Executive than to the Judiciary department. 2. in the administration of the former much greater latitude is left to opinion and discretion than in the administration of the latter.²³⁸

The concerns of the Convention converged, in other words, on the need to obtain international trust, while simultaneously obtaining national uniformity and enforcement. The judiciary with its “[lesser] latitude . . . and discretion” was the natural repository of this awesome task.²³⁹

And in the face of blistering Antifederalist opposition, the Constitution’s advocates stood by these convictions.²⁴⁰ John Jay wrote in *Federalist No. 3* that by vesting treaty interpretation in the federal judiciary, “treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner.”²⁴¹ He pressed the argument

233. U.S. CONST. art. III, § 2.

234. U.S. CONST. art. VI.

235. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 766 (1999).

236. See 2 FARRAND’S RECORDS, *supra* note 192, at 430-31 (Aug. 21, 1787) (rewording the Supremacy Clause to render it “conformabl[e]” to wording of the federal question jurisdiction clause).

237. Further evidence of this from within just the Constitutional Convention itself can be adduced. For detailed accounts see, for example, Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties As “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095, 2123-24 (1999); and Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1918 (2005).

238. 2 FARRAND’S RECORDS, *supra* note 192, at 34 (July 17, 1787).

239. *Id.*

240. Golove & Hulsebosch, *supra* note 31, at 995-1000 & nn.265-87.

241. THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961).

further in *Federalist No. 64*.²⁴² Throughout, Jay emphasized that “the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it.”²⁴³ Responding to those who “insist[ed], and profess[ed] to believe, that treaties . . . should be repealable at pleasure,” Jay replied that by vesting treaty interpretation in the judiciary other nations would know they could trust that such treaties would be binding against the United States.²⁴⁴ This was an understanding shared, and widely enunciated by other influential Federalists.²⁴⁵ In response to a letter by George Mason²⁴⁶—who ultimately refused to sign the Constitution, and led the opposition to its ratification in the Virginia Convention—James Iredell replied:

Did not Congress very lately unanimously resolve, in adopting the very sensible letter of Mr. Jay,²⁴⁷ that a treaty when once made pursuant to the sovereign authority, *ex vi termini* became immediately the law of the land? . . . If it was not, what foreign power would trust us?²⁴⁸

This notion of the need for international trust and acceptance was, in other words, an important consideration—some have argued a *primary* consideration²⁴⁹—in the design of the Constitution itself.

The crucial leap is this: for the Framers to have thought that the decision to invest treaty interpretation in the judiciary would *work* as a pre-commitment strategy, they must have believed that judges could be trusted to properly construe them. The Framers and ratifiers must have understood that American federal judges would construe treaties not only in a regular, predictable manner, but also that their methods of interpretation would be of a kind acceptable to the fledgling nation’s European counterparts.

242. THE FEDERALIST NO. 64, at 390-94 (John Jay) (Clinton Rossiter ed., 1961).

243. *Id.* at 392.

244. *Id.* at 394.

245. Alexander Hamilton, for example, makes all of the same points, in the same order, at considerable length and with considerable clarity, in *Federalist No. 22*. See THE FEDERALIST NO. 22, at 150-51 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 15, at 108-09 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

246. George Mason, *Objections to the Federal Constitution*, reprinted in PAMPHLETS, *supra* note 198, at 327.

247. Iredell is referring to a very influential letter by John Jay. See John Jay, *An Address to the People of the State of New York, on the Subject of the Constitution. Agreed Upon at Philadelphia, the 17th of September, 1787. By a Citizen of New York*, in PAMPHLETS, *supra* note 198, at 67. George Washington commented on the Jay Letter: “The good sense, forcible observations, temper and moderation with which the pamphlet is written, cannot fail, I should think, of making a serious impression upon the antifederal mind, where it is not under the influence of such local views as will yield to no argument, no proof.” *Id.* S. B. Webb and Noah Webster made similar contemporaneous remarks. *Id.*

248. James Iredell, *Observations on George Mason’s Objections to the New Constitution, Recommended by the Late Convention*. By Marcus, reprinted in PAMPHLETS, *supra* note 198, at 333, 355. The pamphlet was originally published in the *State Gazette of North Carolina*, and was republished in pamphlet form, together with pieces by Archibald Maclaine and William R. Davie. The original pamphlet has itself been lost, but this section reflects putative excerpts from J.G. McRee’s *Life of James Iredell* (1858), “a work of considerable rarity; and in consequence the above title is certainly not that of the pamphlet.” *Id.* at 333.

249. See Golove & Hulsebosch, *supra* note 31.

The most powerful evidence of this view is that John Jay observed that this was precisely the point and purpose of investing treaty interpretation in the Courts, in exactly these words, in a letter to the Continental Congress in 1787 while serving as the new republic's Secretary of Foreign Affairs under the Articles of Confederation. Jay, who had been the young nation's chief treaty negotiator in securing the 1783 Treaty of Peace with Great Britain, rendered for the Continental Congress a letter, meant for distribution to the individual states, instructing them that their legislatures possessed no power to pass laws interfering with the manifest purposes of the 1783 Treaty of Peace with Great Britain. Wrote Jay:

All doubts . . . respecting the meaning of a treaty . . . are to be heard and decided in the courts of justice having cognizance of the causes in which they arise, and whose duty it is to determine them according to the rules and maxims established by the laws of nations for the interpretation of treaties.²⁵⁰

And so we come full circle in observing that in the year leading up to the Constitutional Convention it was twice repeated by John Jay to the members of the Continental Congress—a fair contingent of whom would later attend the Convention and draft its Constitution—that there *was* an international understanding of the proper methods of treaty interpretation. In vesting treaty interpretation in the judiciary, the Framers sought to leverage this international law of treaty interpretation as a tool to convince other more established nations that it would be capable of making binding promises.

4. *How Treaty Textualism Influences the Self-Execution Debate*

There is an important point that can be derived from the foregoing materials, and it is one that is nuanced enough, but also important enough, to be worth addressing specifically. These materials show that there is subtle distinction between “self-execution” and “presumptive self-execution.” The foregoing historical materials reveal that the original understanding was that if a treaty was *meant* to be domestically enforceable federal law, it would be domestically enforceable federal law. To that extent treaties are obviously “self-executing.” But nothing in these materials suggests that these instruments would be *presumed* to be law.²⁵¹ If the bargain called for legal effect, the treaty would be domestic law. If it did not, it would not. This conclusion deviates from what appears to be a consensus view among legal scholars that self-execution was originally meant to be presumed unless a treaty explicitly disclaimed it. That is, ambiguity meant self-execution. For instance, Professor Martin Flaherty looks at all the materials presented here, but he argues these materials point toward a doctrine of presumptive treaty self-execution. Quoting

250. 4 SECRET JOURNALS OF CONGRESS, *supra* note 1, at 205. Jay reiterated his understanding in identical terms again in March 1787. *Id.* at 332.

251. On this point, Professor Yoo is indisputably correct. See Yoo, *Globalism*, *supra* note 43, at 2056-57.

the precise passage from *Federalist No. 64* set out above,²⁵² Flaherty argues that “[t]hese and other statements make clear that the [Constitutional] Convention’s understanding that treaties would be presumptively self-executing extended into the ratification process.”²⁵³ If by “presumptively self-executing” Flaherty simply means that a treaty would be a binding international commitment to which the United States, as a nation, could be held accountable in federal court, then his position is incontestable. But Flaherty seems to imply more than this. He seems to be saying that if a treaty was vague or ambiguous with respect to the precise nature of its domestic effect, it should be “presume[d]” to be domestic law.²⁵⁴ Professor Carlos Vázquez is even more emphatic that the Supremacy Clause created a “presumption” that treaties would be judicially enforceable domestic law.²⁵⁵

But not a single Framers said anything about *interpretive* presumptions of self-execution. The Framers speak, rather, only of the enablement of self-execution. That is, where a treaty contemplates or demands self-execution, it is certainly a federal law. But, in terms of the founding materials, a “presumption” of self-execution is suspiciously absent. Neither Vázquez nor Flaherty produce any statements, writings, correspondences, or other sources that say that treaties were domestic law in instances in which their intended domestic legal effect was ambiguous. The founding materials instead seem to indicate that treaties were no more thought “presumptively” self-executing, as an interpretive matter, than ambiguous federal statutes are “presumed” to create a federal cause of action today.²⁵⁶

This result arises because the Framers did not intend for treaties to be interpreted liberally, or narrowly, but *textually*. As such, there simply was no presumption one way or the other.²⁵⁷ A treaty would be determined to be enforceable on the basis of its text, structure, subject matter, context, purposes, and consequences. Without an indication one way or the other, however, a federal court would enforce a treaty if it were the kind of treaty that called for such enforcement, not employ a one-size-fits-all presumption. This was the approach the Court took in *Foster v. Neilson*, and, at the end of their articles it seems both Flaherty²⁵⁸ and Vázquez²⁵⁹ relent and embrace it too.

252. See *supra* text accompanying note 244.

253. Flaherty, *supra* note 237, at 2129.

254. See *id.* at 2152.

255. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 710 (1995).

256. Cf. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (holding that a treaty is “self-executing” and hence judicially enforceable only if it creates a private right of action).

257. See *infra* Section III.D.

258. Flaherty, *supra* note 233, at 2152 (“[W]hat can be said is that the original understanding of the treaty power comports perfectly well with the traditional understanding of *Foster v. Neilson*. Treaties may be judicially enforced as the law of the land without further action by the House. Treaties in which the sovereigns agree to take further affirmative action to implement their terms will require legislation taking such steps.”).

259. See Vázquez, *supra* note 255, at 722-23 (“First, a treaty might be judicially unenforceable because the parties (or perhaps the U.S. treaty makers unilaterally) made it judicially unenforceable. This is primarily a matter of intent.”).

D. *Treaty Textualism in the Founding Era*

The most powerful evidence that textualism was the understood method of treaty interpretation at the founding comes from the practice of the courts at the time. Courts deciding treaty cases both before and after the enactment of the Constitution employed treaty textualism, a fact made plain not only from the reasoning of the cases but also from their citations to authority. Alongside citations for the substance of the law of nations in Vattel, Grotius and other sources, the courts freely cited these authors' *interpretive rules* to decide important issues in treaty interpretation cases.

The following sections explain how courts deciding cases under the Articles of Confederation and, later, the Supreme Court, interpreted treaties. Their highly textualist approaches would seem to indicate that the original method of treaty interpretation was a textualism almost indistinguishable from that used by textualists today.

1. *Treaty Interpretation Under the Articles of Confederation*

In 1777 thirteen States still at war with Great Britain joined together in "Articles of Confederation and Perpetual Union,"²⁶⁰ delegating to the Continental Congress the authority to "enter[] upon treaties and alliances" on their behalf, so long as its commercial treaties did not trammel their rights to regulate certain imposts, duties, imports, and exports.²⁶¹

Without courts of its own, the Continental Congress relied on state courts to adjudicate foreign affairs cases—including treaty cases—with the possibility of limited recourse to a Congressional "Committee on Appeals" (1775-1780) and later a national Court of Appeals for Prize Cases (1780-1787).²⁶² After the adoption of the Constitution, state courts kept concurrent jurisdiction with the federal courts, but all cases in which one of the parties thought a state court's decision to be "against the title, right, privilege or exemption [provided by a treaty]" would be appealable, ultimately, to the Supreme Court.²⁶³

Records of cases from the pre-Constitutional era are scarce.²⁶⁴ Not only are there no reported cases, there appears to be no extant *record* of cases heard

260. ARTICLES OF CONFEDERATION of 1781. Although the Articles were not ratified by all the States until 1781, a final version of the Articles was sent to the States for ratification in November 1777. Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 801 (1993).

261. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

262. See Alex Glashauser, *The Extension Clause and the Supreme Court's Jurisdictional Independence*, 53 B.C. L. REV. 1225, 1229-30 (2012); Golove & Hulsebosch, *supra* note 31, at 1001; James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 207-08 (2007); Franklyn C. Setaro, *The Formative Era of American Admiralty Law*, 5 N.Y.L.F. 9, 33-35 (1959).

263. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86 (codified as amended at 28 U.S.C. § 1257 (2006)); see also Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 861-64 (2010) (describing the practical operation of the Judiciary Act of 1789).

264. See Setaro, *supra* note 262, at 33.

by the Committee on Appeals prior to September 9, 1776. In 1889, on the Supreme Court's one-hundredth anniversary, J.C. Bancroft Davis, then the Supreme Court reporter, compiled a comprehensive account of all materials respecting the work of the Continental Congress's Committee on Appeals and the Court of Appeals for Prize Cases.²⁶⁵ The Committee on Appeals was staffed by many men who would later frame the Constitution or play prominent roles in the early republic. Its members included, at various points, James Wilson, Samuel Chase, Roger Sherman, John Adams, and Edmund Randolph.²⁶⁶ And Pennsylvania's refusal to enforce the Committee of Appeals' judgment in a case concerning the sloop *Active* is thought to have had a formative effect on the thinking of the members of the Continental Congress when they later designed the federal court system.²⁶⁷

Yet, so far as Davis could find, no written reports in the nature of opinions were made by the Committee of Appeals, while the Court of Appeals filed only eight. When in the summer of 1946 the Supreme Court requested and obtained the help of the National Archives to reassess and preserve these materials, Davis's conclusions were affirmed to be a comprehensive account of the work of the Committee and the Court.²⁶⁸ Moreover, as the Court of Appeals for Prize Cases was a court of appeals with limited jurisdiction to adjudicate disputes over *prizes*, which are incidents to armed conflict,²⁶⁹ its docket shrank steadily over the years following the Revolution,²⁷⁰ and its decisions in treaty cases were limited to instances in which prize decisions implicated a treaty (as opposed to the law of nations or admiralty simpliciter).²⁷¹ Thus, not much remains of pre-constitutional foreign affairs cases, and of treaty cases even less survives.

265. J.C. BANCROFT DAVIS, APPENDIX TO THE REPORTS OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES FROM SEPT. 24, 1879, TO THE END OF THE OCTOBER TERM, 1888, AT 131 U.S. app. i, i-xxxv (New York, Banks & Brothers 1889). Davis is probably best known today for writing a now-controversial headnote in the 1886 case *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394 (1886). See, e.g., Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1643.

266. DAVIS, *supra* note 265, at xxiii-xxv; see also BOURGUIGNON, *supra* note 177, at Preface (noting that the Court of Appeals for Prize Cases remained "fresh in the minds" of those designing the Constitution's federal judiciary).

267. For an entertaining account of the case, see Hampton L. Carson, *The Case of the Sloop "Active,"* 7 GREEN BAG 17 (1895). For an account of its impact on the Framing, see, for example, BOURGUIGNON, *supra* note 177, at 133-34; and Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 774 n.113 (1984). See also Sylvester, *supra* note 72, at 15-16 (describing the Continental Congress's frustration over the failure presented by the case of the *Active*).

268. NAT'L ARCHIVES, THE REVOLUTIONARY WAR PRIZE CASES: RECORDS OF THE COURT OF APPEALS IN CASES OF CAPTURE 1776-1787, at ix (1949) [hereinafter PRIZE CASES].

269. BOURGUIGNON, *supra* note 177, at 3-40 (explaining prize courts, letters of marque, and privateering).

270. PRIZE CASES, *supra* note 268, at vi (noting that by 1784 the court stopped meeting on a regular basis and that the salaries of the judges were rescinded in 1785, though the court would be called into session again on a per-diem basis in 1786 for a handful of appeals).

271. BOURGUIGNON, *supra* note 177, at 238 ("Cases determined by the judges of appeals involving issues of treaty interpretation were necessarily rare The only treaties the Americans entered into during the war were the commercial treaty and the treaty of alliance with France in 1778 and the commercial treaty with the Netherlands, concluded just six months prior to the cessation of hostilities.").

But what remains speaks, however softly. References to Vattel, Grotius and other writers on the law of nations lace the extant records of the Committee and the Court of Appeals cases.²⁷² The case of the *Lusanna*, one of the few cases with a detailed record of the argument still surviving, essentially fell to a debate over which among Richard Lee, William Blackstone, and Emmerich de Vattel was the more authoritative on a particularly subtle question in the law of captures.²⁷³ Turning to treaties, only one reported case before the Court of Appeals involved more than a cursory examination of treaty interpretation.²⁷⁴ It involved the ship *Resolution*. Treaty textualism featured prominently.

i. *Miller v. the Resolution*

Miller v. the Resolution was an admiralty case decided by the Pennsylvania Admiralty Court in 1781, and later reversed (in relevant part) by the Court of Appeals for Prize Cases.²⁷⁵ It occupies the enviable position of the first reported federal case: 2 U.S. (2 Dall.) 1.²⁷⁶ The case turned on the interpretation of two agreements: the alliance between France and America, and the terms of the British surrender of the Isle of Dominica to France.

The facts of the case are suitably swashbuckling. The good ship *Resolution*, belonging to Brandlight and Sons, merchants in Amsterdam, sailed from Texel, a Dutch island in the Wadden Sea, on the 9th of January, 1780, bound for the island of St. Eustatius in the Caribbean. From there, she set sail for the island of Dominica, where she arrived on the 1st of October, 1780. In March 1781, she sailed from Dominica for Amsterdam, with a valuable cargo of sugar and coffee, belonging to various Dominican merchants, on consignment to Brandlight and Sons, the aforementioned Dutch merchants and owners of the *Resolution*.

She was captured by a British armed vessel and taken to Nevis, an island in the Caribbean, where Admiral George Brydges Rodney—the 1st Baron Rodney—examined her papers and determined that she could not be taken as a British prize. She was released, only to be captured by another British vessel shortly thereafter. She was then captured from her British captor by an American privateer, then from this American privateer was taken by another British ship, and then captured by yet another American, one Peter Miller, the

272. *Id.* at 179-90, 253-75 (describing extensive use of these authorities by the Committee).

273. *Id.* at 244-52 (describing the arguments in *Lusanna* in depth).

274. *But see id.* at 276 (noting two other unreported cases that implicated the American treaties with France, both construed to return the vessels to the French). The report of the case of the *Resolution* is not simply the only case to deal extensively with treaty interpretation, it is by far the longest and most detailed of the reported cases from this period—the others are confined to about a page or less, sometimes only a paragraph. *See, e.g.*, *The Experiment*, 2 U.S. (2 Dall.) 41 (1787); *Luke v. Hulbert*, 2 U.S. (2 Dall.) 41 (1787); *The Speedwell*, 2 U.S. (2 Dall.) 40 (1784); *The Squirrel*, 2 U.S. (2 Dall.) 40 (1783).

275. *Miller v. The Resolution*, 17 F. Cas. 347 (Adm. Pa. 1781), *aff'd in part, rev'd in part*, 2 U.S. (2 Dall.) 1 (1781). The account that follows, with minor license, is derived from the Pennsylvania Admiralty Court's recitation of the facts.

276. Cases in the first volume of the U.S. Reports are cases from the Pennsylvania Supreme Court. *See, e.g.*, *Hyam's Lessee v. Edwards*, 1 U.S. (1 Dall.) 1 (Pa. 1759).

libellant in the case. From there, *Resolution* was sent into the port of Philadelphia.

Ownership of the vessel was easily resolved in the admiralty court. If the British thought they could not take the vessel because it was a neutral vessel, the American libellant could not take it as a prize either, even if he captured it from the British.²⁷⁷ But the case of the cargo—the valuable sugar and coffee in the *Resolution*'s hold—was more complicated.²⁷⁸ It was a Dutch ship, but it was a Dominican cargo.

The ownership of the *Resolution*'s cargo, wrote the Admiralty court, “rests principally on one question, viz. whether the United States by their alliance with France, are, or are not to be considered as parties in the capitulation made by the Marquis De Bouillé with the inhabitants of Dominica.”²⁷⁹ The Pennsylvania Admiralty Court held this to be a matter of treaty interpretation:

[H]ad Governor Stuart, when he surrendered the island to the Marquis De Bouillé expected that the United States should be bound by the terms of the capitulation, he would have made this one of the articles, and not entrusted so important a point to a speculative question, how far one ally may or may not be virtually bound by the engagements of the other. This, however, he has not done, either because it would imply an acknowledgment of the sovereignty of the United States, or because he deemed the objects of the capitulation to be limited to property within the island. Be this as it may, the British could not reasonably complain that the French had violated the articles of the capitulation, should the Americans take the goods of the inhabitants of Dominica found upon the high seas, because such an assurance made no part of the stipulation. “If he who can and ought to have explained himself clearly and plainly, has not done it, it is the worse for him; he cannot be allowed to introduce subsequent restrictions which he has not expressed.” Vatt. Law Nat. bk. 2, c. 17, § 264.²⁸⁰

The Pennsylvania Admiralty Court thus applied Vattel's interpretive rule as if it were the substantive rule of treaty interpretation.²⁸¹

The case was appealed to the Court of Prize Cases, where Gouverneur Morris and James Wilson, working as advocates for Miller,²⁸² sought to reverse the Pennsylvania Admiralty Court's judgment with respect to the lawfulness of the capture of the *Resolution*, and to defend the Pennsylvania

277. See *The Resolution*, 17 F. Cas. at 349.

278. *Id.*

279. *Id.*

280. *Id.* This, it will be recalled, is Vattel's second maxim. VATTEL, *supra* note 70, at 245.

281. There was another ground for the court's holding with respect to the cargo as well. Judge Hopkinson reasoned that “from a scrutiny of the papers found on board this vessel, there is strong reason to believe that this cargo, however artificially covered, is, in fact British property” and was thus an independent ground for awarding the cargo to Miller. *The Resolution*, 17 F. Cas. at 349.

282. BOURGUIGNON, *supra* note 177, at 221 (noting that Gouverneur Morris and James Wilson were Miller's counsel in the case).

court's judgment with respect to awarding Miller the cargo.²⁸³ The appeals court, however, held against them, affirming the admiralty court's judgment as to the vessel, and reversing the judgment of the admiralty court with respect to the cargo. The Court of Appeals came to this conclusion, in essence, by flipping the default expectations respecting American privateering. Whereas the Admiralty Court thought that it would have been reasonable for Governor Stuart to obtain assurances against American captures from the French in the treaty itself, the Court of Prize Cases thought it eminently more reasonable for the Governor to expect that the Americans—as France's allies—would be thought automatically bound by France's compact.²⁸⁴ Wrote the court:

Vattel, a celebrated writer on the laws of nations, says, "when two nations make war a common cause, they act as one body, and the war is called a society of war; they are so clearly and intimately connected, that the *Jus Postliminii* takes place among them, as among fellow subjects."²⁸⁵

Thus, because the cargo would not have been legally subject to capture by France according to the terms of its agreement with Britain, so too was it shielded from capture by the Americans.²⁸⁶

While Wilson and Morris could not have been pleased with the outcome of the case, both the Pennsylvania Court of Admiralty and the Court of Prize Cases engaged in textual analyses where the terms of an unclear treaty were in issue. Both courts made specific recourse to Vattel and the law of nations to settle the interpretive question. And while they disagreed in outcome, their methodologies were remarkable more for their similarities than their differences.²⁸⁷

What can be gathered from *The Resolution* is this. In the time before the Constitution was drafted, two influential Framers and a future Supreme Court Justice, Gouverneur Morris and James Wilson, litigated over treaty interpretation and the admiralty case employed Vattel's rules to resolve the interpretative question. And in other cases from the same pre-constitutional period, Vattel, Grotius, and other authorities were cited voluminously in the Court of Appeals for Prize Cases—and in state courts—for other substantive propositions relating to international law. Leading into the Framing convention, where Wilson and his allies would testify to the capacity of judges to render regular, constrained interpretations in treaty cases, it is likely he carried these experiences and understandings of the judicial role with him.

283. *The Resolution*, 2 U.S. (2 Dall.) at 1.

284. *Id.* at 15.

285. *Id.*

286. *Id.*

287. James Wilson sought and obtained rehearing in the case on the basis of new evidence showing that British merchants truly were using Dominica as a base of operations to evade American privateers. The Court of Appeals reversed with respect to such cargo as could be proven to belong to British merchants. See *Miller v. The Resolution*, 2 U.S. 19, 33 (1781) (rehearing). Nonetheless, the court reaffirmed that the United States was otherwise bound by the terms of the treaty between France and Britain with respect to Dominica's surrender to the French. *Id.*

2. *Treaty Interpretation in the Pre-Marshall Court, 1790-1801*

President Washington signed the Judiciary Act of 1789 in the City of New York on September 24, 1789.²⁸⁸ John Jay was appointed Chief Justice of the new Court, and soon thereafter John Rutledge, William Cushing, James Wilson, John Blair, and James Iredell were made Associate Justices.²⁸⁹

The practices of the early Supreme Court of the United States in the years between these first appointments and the appointment of John Marshall to the Chief Justiceship have a special importance in constitutional history. There can be no doubt that, as many of these men participated actively and vigorously in the development and ratification of the governing constitutional document, they had particular knowledge of its intentions. More than this, however, to the extent that the document left certain questions to be confirmed or set down by practice and convention, it was these early Justices who were picked to set those precedents.²⁹⁰ As the remainder of this section reveals, the interpretive approaches and practices of the early Supreme Court confirm that treaties were initially understood as instruments to be construed textually. Disputes over interpretation in this first decade never wavered from this peremptory commitment. Arguments about reasonable expectations and understandings of text arose, but the Justices did not waver from their devotion, first and foremost, to the text.

Treaty cases were relatively frequent in this formative period.²⁹¹ Nearly all of these cases related to the 1783 Treaty of Paris²⁹² (the peace treaty that ended the Revolutionary War²⁹³), the 1788 Treaty of Amity and Commerce with France,²⁹⁴ and, in the latter half of the Court's first decade, the Jay Treaty with Great Britain²⁹⁵ (a commercial treaty that also resolved some outstanding issues with the Treaty of Paris²⁹⁶).²⁹⁷ In the years prior to Marshall's 1801 Chief Justiceship, the number of treaty cases the Supreme Court either docketed or adjudicated stood at ninety one.²⁹⁸ Beginning with *State of*

288. DAVIS, *supra* note 265, at xi.

289. *Id.* at xi-xii.

290. See, e.g., Charles A. Lofgren, *The Original Understanding of Original Intent?*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 117, 140-41 (Jack N. Rakove ed., 1990).

291. See Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 884 (2005).

292. See Yoo, *Treaties*, *supra* note 43, at 2076.

293. Definitive Treaty of Peace, Between the United States of America and his Britannic Majesty (Treaty of Paris), U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

294. Treaty of Amity and Commerce, Between the United States of America and His Most Christian Majesty, U.S.-Fr., Feb. 6, 1788, 8 Stat. 12 (annulled July 7, 1798).

295. Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of Their Senate (Jay Treaty), U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

296. See Yoo, *Globalism*, *supra* note 291, at 2076.

297. See Lavinbuk, *supra* note 291, at 884. Other cases related to the 1778 Treaty of Alliance with France and the 1795 Treaty of Madrid with Spain. *Id.*

298. Charles Anthony Smith, *Credible Commitments and the Early American Supreme Court*, 42 LAW & SOC'Y REV. 75, 96 (2008).

Georgia v. Brailsford, defendants relied on a treaty in 22 cases, and plaintiffs relied upon a treaty in nine.²⁹⁹ In other words, a substantial number of the cases heard by the Supreme Court between the Court's first meeting and the beginning of the Marshall Era involved at least some treaty interpretation, with a small number involving significant disputation over the proper interpretation of a treaty's terms.

i. *Georgia v. Brailsford*

The first important case involving treaty interpretation was *Georgia v. Brailsford*,³⁰⁰ the third in a line of *Brailsford* cases that would occupy the Court from 1792 to 1794. The case was unusual. It arose under the Supreme Court's original jurisdiction,³⁰¹ and was argued to a jury.³⁰² Yet, for all its quirks, the Court's interpretation of the 1783 Treaty of Paris in the case casts remarkable light upon both treaty textualism and presumptive self-execution.

To understand *Brailsford* requires a brief foray into contentious issues in the early republic involving the confiscation of the property of British loyalists and creditors by the states.³⁰³ As one might imagine, the states were unhappy with those who had remained loyal to the Crown. Words like "treason" were occasionally thrown around.³⁰⁴

Into the fray entered a few enterprising jurisdictions, like Georgia, that sought to take all of the property they could from those they disliked—such as British loyalists and British creditors.³⁰⁵ So it came to pass that in May of 1782, near the end of the Revolutionary War and before both the Constitution and the Treaty of Paris, Georgia enacted a law indicating that henceforth, debts due to British merchants were going to be paid to Georgia.³⁰⁶ Needless to say, British creditors in the years following responded by doing what creditors do: they pretended Georgia's law did not exist and went about collecting their debts.³⁰⁷ Since the Americans had represented to Great Britain in the Treaty of Paris that its creditors would be paid and its citizen's property returned, lawsuits to enforce Article IV of the Treaty ensued.³⁰⁸

299. *Id.* at 98.

300. 3 U.S. (3 Dall.) 1 (1794). See Daniel D. Blinka, "This Germ of Rotteness": *Federal Trials in the New Republic, 1789-1807*, 36 CREIGHTON L. REV. 135, 163-66 (2003).

301. Blinka, *supra* note 300, at 163.

302. *Id.*

303. Golove, *supra* note 50, at 1116-17; see also Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757, 773-74 (2002) (describing various creditor protection mechanisms, including the Contract Clause, to prevent the expropriation of British wealth by States); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1920-23 (1983) (describing the conditions leading to the controversy in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

304. *Georgia v. Brailsford (Brailsford I)*, 2 U.S. (2 Dall.) 402, 402-03 (1792) (describing a Georgia act "for inflicting penalties on, and confiscating the estates of, such persons as are therein declared guilty of treason, and for other purposes therein mentioned").

305. *Id.* at 403 (describing how Georgia had elected to confiscate the property of such persons).

306. *Id.*

307. *Id.* at 404.

308. See, e.g., *id.* at 402-04; *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 201-02 (1796).

Brailsford made three appearances in the Supreme Court. In the first, *Brailsford I* in 1792, the facts were as follows. Three British creditors (one of them a British citizen, who had always resided in Britain, named Brailsford) sued in federal court in Georgia to recover a debt from 1774.³⁰⁹ Georgia sought to intervene in the action, arguing that *it* was owed the debt and had never relinquished the right—by joining the United States or otherwise—it had given itself by virtue of its 1782 confiscation law.³¹⁰ The question for the Court in *Brailsford I* was thus whether the district court had properly denied Georgia's motion to intervene, and whether Georgia was entitled at least to an injunction pending resolution of the jurisdictional question.³¹¹ Georgia obtained the injunction, but was denied leave to intervene, since Georgia was both entitled to, and limited to, the Supreme Court's original jurisdiction (at least according to Justice Iredell who had heard the case below while riding circuit³¹²).³¹³ Justices Blair, Wilson, and Jay nominally agreed, and were at least willing to grant the injunction and allow Georgia to go back and file an action against the debt in the proper court and manner.³¹⁴ Wilson, for instance, thought Georgia—if she elected to do so—could bring an action anywhere.³¹⁵ Justices Cushing and Johnson would have placed the burden on Georgia to sue Brailsford separately in an action at common law to recover the debt, but did not reach the question of where that suit might be filed.³¹⁶

Brailsford I thus resolved little and offered much, at least in the way of pathways to future litigation. The parties obliged. In February 1793 they returned to the Supreme Court for *Brailsford II*.³¹⁷ Chief Justice Jay, writing for the Court, declared that except for Justices Iredell and Blair, "All the Court . . . are of opinion, that, if the State of Georgia has a right to the debt . . . it is a right to be pursued at common law" and that therefore Georgia needed to sue Brailsford and his compatriots rather than inject itself in an action between Brailsford and his debtors. If, however, it did not do so before the next Term, Georgia's injunction would be dissolved.³¹⁸

These petite issues resolved, the Court finally reached the weighty question in the case—whether the Georgia law was valid given its manifest conflict with the 1783 Treaty of Paris. The Court confronted the question in

309. *Brailsford I*, 2 U.S. (2 Dall.) at 404.

310. *Id.*

311. *Id.* For an in-depth account of the precise arguments in the case, see John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1440-45 (1998).

312. Circuit riding was a particularly onerous task required of all Supreme Court Justices in the early republic. For more information about the practice, see Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1753 (2003).

313. *Brailsford I*, 2 U.S. (2 Dall.) at 406 (opinion of Iredell, J.).

314. *Id.*; *id.* at 407 (opinion of Blair, J.); *id.* at 407 (opinion of Wilson, J.); *id.* at 409 (opinion of Jay, J.).

315. *Id.* at 407 (opinion of Wilson, J.).

316. *Id.* at 405 (opinion of Johnson, J.); *id.* at 408 (opinion of Cushing, J.).

317. *Georgia v. Brailsford (Brailsford II)*, 2 U.S. (2 Dall.) 415, 416 (1793).

318. *Id.* at 418.

Brailsford III.³¹⁹ Georgia elected to bring its action, per Justice Iredell, in the Supreme Court of the United States.³²⁰ The Court empaneled a special jury, and the Court's unanimous opinion is thus unique³²¹ in that it is also a jury charge.³²² The Court instructed the jury that Brailsford was entitled to his debt "as the very terms of the treaty [of Paris], revived the right of action to recover the debt," and that were Georgia allowed to intercede even to "sequester[]" the debt its actions would constitute an "impediment to the recovering of a bona fide debt, due to a British creditor, in direct opposition to the fourth article of the treaty."³²³ After this explanation, the jury, "without going again from the bar," returned a verdict for Brailsford and his co-defendants.³²⁴

The *Brailsford* Court's interpretation of the Treaty of Paris is a remarkable example of the Court's early use of treaty textualism. The terms of Article IV of the Treaty of Paris could not have been clearer. The Article reads, in its entirety, "[i]t is agreed that Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted."³²⁵ Georgia sought to evade the Treaty for a half-dozen pretended reasons, including that the Treaty of Paris was not self-executing and that the treaty by its terms only referred to future confiscation and not debts *already* confiscated.³²⁶ Notably, the Court dealt with these arguments not by reference to clumsy presumptions about self-execution or prospectivity,³²⁷ but by reference simply to language. The treaty's text was manifestly clear, and "the very terms . . . revived the [state law] right of action to recover the debt."³²⁸ Case closed.

ii. *Ware v. Hylton*

Similarly Brailsfordian issues arose in one of the Supreme Court's most

319. *Georgia v. Brailsford (Brailsford III)*, 3 U.S. (3 Dall.) 1, 1 (1794).

320. *Id.* at 1.

321. Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 208-10 (2013) (noting that "the nation's highest federal court has presided over a jury trial in only one reported case, *Georgia v. Brailsford* (1794)," although it has presided over two unreported cases).

322. *Brailsford III*, 3 U.S. (3 Dall.) at 4.

323. *Id.* at 5.

324. *Id.*

325. Definitive Treaty of Peace, Between the United States of America and His Britannic Majesty (Treaty of Paris), U.S.-Gr. Brit., Sept. 3, 1783, 2 U.S.T. 151.

326. *Brailsford III*, 3 U.S. at 2. For an account of Georgia's "embarrassing" positions on this issue with respect to the young republic's international reputation, see Gibbons, *supra* note 303, at 1920-23.

327. As added insurance, however, counsel for the defendants cited Vattel, Grotius, and Pufendorf, among many other writers, for interpretive rules that favored allowing the creditors to recover under the terms of the treaty. *Brailsford III*, 3 U.S. at 3.

328. *Id.* at 5. The Supreme Court was hardly alone in discarding such arguments without comment. The Supreme Court of Pennsylvania drew the same conclusion on the same issue six years earlier on the precisely the same terms in *Respublica v. Gordon*, 1 U.S. (1 Dall.) 233 (Pa. Jan. 1788). Georgia sought refuge in a Pennsylvania Common Pleas case that had ruled that a Connecticut citizen was not covered by Article IV of the Treaty of Peace because he was not a British citizen but an American traitor. See *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393 (Pa. Com. Pl. Dec. 1788). This would seem a straightforward textual distinction.

famous early treaty cases, the 1796 case of *Ware v. Hylton*.³²⁹ *Ware* is a case where all of the Justices but Iredell focused intensely on the text of the treaty though, ironically, Justice Iredell had no vote.³³⁰

Ware involved Virginia's version of the Georgia law at issue in *Brailsford*.³³¹ In 1777, Virginia passed an act allowing citizens of the State to pay their debts to British creditors to Virginia, with the promise that the balance of their British debt would be prorated by the amount paid to Virginia.³³² Hylton had paid at least some part of the debt to Virginia in 1780, three years before the Treaty of Paris, and had received a receipt (signed by Governor Thomas Jefferson) indicating his payment.³³³ In 1779, Virginia passed a true confiscation act in the style of the Georgia Act, doubly insulating Hylton from the responsibility to pay (or so he argued).³³⁴ Hylton further argued that because Britain had not withdrawn some its troops from the United States, it was in violation of the peace treaty, obviating Hylton's responsibility to pay.³³⁵ Finally, he contended that the outbreak of war nullified all debts contracted before the war.³³⁶

All of these arguments turned, in the end, on the Court's understanding of the Treaty of Paris. *Ware* rested his case on Article IV,³³⁷ which as we have seen, could not have been written more plainly.³³⁸ The lower court resolved all issues in favor of *Ware*, except the issue of the payments made to the State of Virginia according to the Act of 1777. The general question for the Supreme Court was thus reduced to this: whether, by paying into the loan office of Virginia, Hylton was discharged from his debt to *Ware*.³³⁹

We now know quite a lot about the circumstances of the negotiations that led to the 1783 Treaty of Paris. We know, for instance, that the treaty-negotiators for the United States were unsure at the time the treaty was negotiated that they could actually keep their promise to the British that the States would abide by Article IV.³⁴⁰ We know that the British wanted, first and foremost, to ensure their creditors would be paid.³⁴¹ The Justices on the Supreme Court were probably as aware of the circumstances of the negotiations

329. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

330. Justice Iredell heard the case below while riding circuit and was not permitted to vote upon his own judgment. 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, 220 (Maeva Marcus ed., 2003) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT 1789-1800].

331. *Id.* at 199; see also *supra* text accompanying notes 300-308. (describing enactment of Georgia law providing for confiscation of debts owed to Great Britain and British subjects).

332. *Ware*, 3 U.S. (3 Dall.) at 199-200.

333. *Id.* at 200.

334. *Id.* at 200-01.

335. *Id.* at 201-02.

336. *Id.* at 203.

337. *Id.* at 203-05.

338. *Id.* at 206-07.

339. *Id.* at 207.

340. Golove, *supra* note 50, at 1116-18.

341. *Id.* at 1116.

that led to the Treaty's terms as contemporary scholars are.³⁴² If ever there were grounds for a Justice to account for the circumstances of a treaty's negotiation—its aims, purposes, and negotiating history—given its immense importance, *Ware* would be the case.

Yet, the parties who argued the case relied not on the record of negotiations or the peculiar circumstances under which the treaty was made but instead molded their arguments to the text. Though he could have made crushing policy arguments about the need to honor British claims, or drawn the Court's attention to the primacy British negotiators' placed on ensuring that British creditors received full compensation, the attorney for the plaintiffs, Edward Tilghman, a prominent Philadelphia attorney, argued the case entirely through the lens of Vattel's textual interpretive rules.³⁴³

When future Chief Justice John Marshall rose to speak for the defendants in *Ware*,³⁴⁴ he too did not invoke drafting history or extrinsic foreign policy considerations. Rather, with the plain import of the text against him, he sought to appeal to the Court's sense of equity, arguing, that the British creditors should sue Virginia for the debts, not his clients.³⁴⁵ After all, "the fair and rational construction of the instrument itself, is sufficient for the defendant's cause. The words ought, surely, to be very plain, that shall work so evident a hardship, as to compel a man to pay a debt, which he had before extinguished."³⁴⁶ His co-counsel Alexander Campbell attempted to buoy Marshall's arguments with extensive citations to Vattel, though not for his interpretive rules. Rather, Campbell sought to argue that Vattel's default rules with respect to the laws of war and peace somehow superseded the treaty's plain terms.³⁴⁷

The Justices rendered their opinions in *Ware* seriatim. Justice Chase spoke first. He held that Virginia, as a matter of the law of nations, had a right to pass the law of 1777. As such, the case turned on the status of the Treaty of Paris and its capacity to rescind the law.³⁴⁸ The text of the Supremacy Clause resolved the status of the treaty because of its intended retrospective application.³⁴⁹ Thus, the question was simply this: Did the Treaty of Paris abrogate the Virginia law? Here is how Chase interpreted the treaty: "It is evident on a perusal of it [the treaty] what were the great and principal objects in view by both parties."³⁵⁰ He listed its great and principal objects at length then continued:

342. *Id.* at 1116-22.

343. *Ware*, 3 U.S. (3 Dall.) at 209-10 (recounting the arguments of Edward Tilghman).

344. Notably, though he enjoyed "considerable prestige as an attorney," this would be the future Chief Justice's only appearance before the Supreme Court. Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 753 (2000).

345. *Ware*, 3 U.S. (3 Dall.) at 213-14 (recounting the arguments of John Marshall).

346. *Id.* at 213 (recounting the arguments of John Marshall).

347. *Id.* at 215-17.

348. *Ware*, 3 U.S. (3 Dall.) at 235 (opinion of Cushing, J.).

349. *Id.* at 236.

350. *Id.* at 238-39 (opinion of Chase, J.).

Before I consider this article of the treaty, I will adopt the following remarks, which I think applicable, and which may be found in Dr. Rutherford and Vattel. (2 Ruth. 307 to 315.³⁵¹ Vattel lib. 2. c. 17. sect, 263 and 271.³⁵²) The intention of the framers of the treaty, must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from probable or rational conjectures. If the words express the meaning of the parties plainly, distinctly, and perfectly, there ought to be no other means of interpretation³⁵³

Justice Chase then dissected Article IV of the treaty (as short as it is) word-by-word and clause-by-clause.³⁵⁴ He continued, “[i]f the words of the fourth article taken separately, truly bear the meaning I have given them, their sense collectively, cannot be mistaken, and must be the same.”³⁵⁵ Chase’s textual analysis continues in incredible sophistication and detail for several pages more, finally concluding that the text is unambiguous.³⁵⁶ Justice Patterson, who spoke next, agreed with Justice Chase, also on purely textual grounds, also invoking Vattel’s interpretive rules, writing, “[t]he fourth article appears to me to come within the first general maxim of interpretation laid down by Vattel.”³⁵⁷ Thus, Justices Paterson and Chase both held for the plaintiffs irrespective of equitable arguments in favor of the sympathetic American debtor, both on the ground that the text of the Treaty of Paris was indisputably clear.

Justice Iredell, who had heard the case below, read his opinion—as was the practice of the time—but it was of dubious precedential consequence as he was not permitted to vote upon the case (having heard the case while riding circuit).³⁵⁸ He alone among the Justices would have found that there was no debt—because Hylton had paid Virginia—and thus nothing for the words of Article IV “to operate upon.”³⁵⁹ Yet even his argument was ultimately textualist. He argued that “if Congress thought such a case [as the one before the Court] ought to have been comprehended, I presume they would have recommended a special provision, clearly comprehending such cases, and accompanied with a full indemnity.”³⁶⁰ As such, Justice Iredell would have flipped the presumption—as John Marshall had asked the Court to do—and required the British negotiators to speak more clearly if they sought to collect debts that had already been paid into State treasuries. While Iredell thought

351. RUTHERFORTH, *supra* note 176, at 307-15 (these are the opening pages of Rutherford’s chapter on interpretation).

352. VATTEL, *supra* note 70, at 252. These are Vattel’s First General Maxim that further interpretation is unnecessary where the text is clear, *id.* at 263, and that terms are to be explained conformably to common usage, *id.* at 271.

353. *Ware*, 3 U.S. (3 Dall.) at 239-40. (opinion of Chase, J.).

354. *Id.* at 240-42.

355. *Id.* at 242.

356. *Id.* at 242-45.

357. *Id.* at 253 (opinion of Paterson, J.).

358. DOCUMENTARY HISTORY OF THE SUPREME COURT 1789-1800, *supra* note 330, at 220.

359. *Id.* at 221 & n.85. (quoting *Ware*, 3 U.S. at 284 (opinion of Iredell, J.)).

360. 3 U.S. at 280 (opinion of Iredell, J.).

other considerations—such as fairness and justice—succored his position, he ultimately fell back on an argument about text in the treaty.

Justice Wilson announced his opinion in six short paragraphs. He thought the text so unmistakably clear it warranted but one of them. Wrote Wilson, “[T]he treaty annuls the confiscation. The fourth article is well expressed to meet the very case It is impossible by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital.”³⁶¹

Finally, Justice Cushing spoke. Keeping his opinion brief as well, he focused only on Article IV. Cushing rejected the defendant’s arguments that the understanding of the negotiators should bear on the Court’s disposition of the case, writing, “I do not see that we can collect the private opinion of the negotiators, respecting their powers, by what they did not do; and if we could, this court is not bound by their opinion, unless the reasons on which it was founded, being known, were convincing.”³⁶² Like Wilson, Cushing thought the text of the treaty unmistakable, writing, “[T]he words, ‘shall meet with no lawful impediment,’ etc. are as strong as the wit of man could devise, to avoid all effects of sequestration, confiscation, or any other obstacle thrown in the way, by any law, particularly pointed against the recovery of such debts.”³⁶³

On the issue of the clarity of the treaty’s text, the case was 4-0. The Justices not only looked to the text of the treaty: Justice Cushing specifically renounced recourse to the understandings of the treaty’s negotiators. Justices Wilson, Paterson, and Chase each found the text unmistakable. Justices Paterson and Chase both explicitly invoked Vattel’s deeply textualist interpretive rules to support their positions in the case. The only Justice who would have found that Article IV of the Treaty of Paris did not require that Hylton pay the debt at issue, Justice Iredell, did not even have a vote. And even he, ultimately, would have relied upon the text to reach his conclusion.

iii. *Other Treaty Interpretation Decisions from the Court’s First Decade*

The significance of *Ware* cannot be overstated. Justice Iredell called the case “the greatest Cause which ever came before a Judicial Court *in the World*.”³⁶⁴ *Ware* settled the fate not just of Daniel Hylton, but thousands of American debtors.³⁶⁵ *Ware* was the case that the young nation had been waiting for, bracing for, perhaps even hoping for—proof to the world of its maturity.³⁶⁶ “When the federal courts opened in 1790, British creditors leapt at

361. *Id.* at 281 (opinion of Wilson, J.).

362. *Id.* at 284 (opinion of Cushing, J.).

363. *Id.* at 284 (opinion Cushing, J.). This was, it seems, a reference to the fact that the negotiators may have thought that they were *unable* to bind the states to Article IV when they negotiated the Treaty. See *supra* text accompanying notes 340-342. Justice Cushing thought their opinion on the subject irrelevant.

364. DOCUMENTARY HISTORY OF THE SUPREME COURT 1789-1800, *supra* note 330, at 203 & n.1.

365. *Id.* at 203.

366. Golove & Hulsebosch, *supra* note 31, at 1057-61 (describing the impact of *Ware* on the

the opportunity, finally, to sue their Virginian debtors. Despite a jurisdictional amount-in-controversy requirement of \$500, the circuit court docket filled up with these suits.³⁶⁷ The original plaintiff in the case, William Jones, filed more than twenty suits alone against his debtors when the circuit courts opened in 1790.³⁶⁸

But *Brailsford* and *Ware* are hardly unique. They are, rather, exemplars of a strong treaty textualism practiced by the Supreme Court in the republic's first decade. In case after case, the Court hewed to a steady fidelity to text. This was the Supreme Court the Framers had envisioned, a court that could protect "the security of foreigners where treaties are in their favor."³⁶⁹ It was a court that would construe treaty text in a manner free from local prejudice according to fixed rules and precedents.³⁷⁰

To give more examples, in *The Betsey* the Court was famously called upon to construe whether the federal courts possessed a general prize jurisdiction as part of their constitutionally conferred admiralty jurisdiction.³⁷¹ A lesser-known argument in the case involved whether an American admiralty court, even if it had jurisdiction, would be barred from adjudicating the status of a French prize according to the 1788 Treaty of Amity and Commerce between the United States and France. The French captor attempted to argue that the treaty's seventeenth article³⁷² precluded any inquiry by an American court into whether an American or neutral vessel, rather than an enemy vessel, had been lawfully captured. Counsel for the appellants replied to this strange argument thusly:

The words [of the seventeenth article] . . . are directly against that construction; and even were it otherwise, the absurdity and injustice of the consequences which flow from it, would demand a different construction. Vatt. b. s. p. 369. Gro s. 22. p. 365.³⁷³ Puff. 544. s. 19. p. 1.³⁷⁴ rot. 358 s. 12. p. 2. Vatt. b. s. 282.p. 380.381.³⁷⁵ The sense must be limited, as the subject of the compact requires; and when a case arises, in which it would be too prejudicial to take a law according to the rigor of the terms, a restrictive interpretation should be

international reputation of the United States).

367. DOCUMENTARY HISTORY OF THE SUPREME COURT 1789-1800, *supra* note 330, at 204 & nn.6-7.

368. *Id.* at 206.

369. 1 FARRAND'S RECORDS, *supra* note 2, at 238 (June 13, 1787) (statement of Edmund Randolph, agreed to unanimously by the delegates to the Constitutional Convention).

370. *But see* Eskridge, *supra* note 40, at 1064 (criticizing the Justices' interpretation of Article IV of the treaty in *Ware* as not a "persuasive exposition of the treaty's words"). Professor Eskridge further contends that "the Justices typically paid due regard to statutory words and often spoke of their primacy, but often failed to analyze the import of statutory language in any careful way." *Id.*

371. *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 6 (1794); DOCUMENTARY HISTORY OF THE SUPREME COURT 1789-1800, *supra* note 330, at 296-312.

372. Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, U.S.-Fr., art. 17, Feb. 6, 1788, 8 Stat. 12 (annulled July 7, 1798).

373. GROTIUS, *supra* note 20, at 875 (arguing that one may impose a restriction on the meaning of words where it is plain the speaker never meant them to encompass the case).

374. PUFENDORF, *supra* note 21, at 547-48.

375. VATTTEL, *supra* note 70, at 252 (arguing that we ought to reject every interpretation that leads to an absurdity).

used. Vatt. b.s. 292.p.391.³⁷⁶ Grot. s.27.p. 361.³⁷⁷ Vatt. b.s.295.p.392.³⁷⁸

The Court unanimously held the district courts possessed prize jurisdiction and remanded the case to Maryland district court for further proceedings.³⁷⁹ While I have been unable to locate a record of the district court's subsequent judgment on remand, it would have been quite surprising for the Supreme Court to grant such jurisdiction without mentioning the treaty issue unless the Court expected the district court to exercise that jurisdiction to protect American and neutral vessels from capture by the French.

In *United States v. Lawrence* the Supreme Court faced another early test, this one over the Consular Convention between the United States and France.³⁸⁰ A federal judge in New York, Judge Lawrence, refused to issue an arrest warrant for an alleged French sailor-deserter, and the Attorney General of the United States sought a writ of mandamus to require Lawrence to issue the warrant.³⁸¹ France's authority to seek an arrest warrant, in turn, arose from Article 9 of the 1788 Consular Convention between the United States and France, which held that the consuls of each nation could seek the arrest of naval deserters found in each other's territory.³⁸²

At issue for the Supreme Court was the judicial administration of the antidesertion Article. The Article set forth the method of proving a man was a deserter: Consuls could come to court demanding in writing that deserters be arrested and could prove the legitimacy of their demand "by an exhibition of the register of the vessel, or ship's roll, that those men were part of the said crews."³⁸³ The Article continues "on this demand, so proved, (saving, however, where the contrary is proved) the delivery shall not be refused; and there shall be given all aid and assistance to the said Consuls and Vice-Consuls for the search, seizure, and arrest, of the said deserters . . ."³⁸⁴

The federal judge said he could not issue the arrest warrant because the Article provided one, and only one, means of proving that a man was a deserter: the "exhibition" of the ship's roll.³⁸⁵ The Supreme Court found this interpretation of the treaty absurd—not on grounds that it would interfere with American foreign policy nor because the Executive branch had urged the court to construe the treaty a certain way—but based solely on the treaty's text.³⁸⁶

376. *Id.* at 258.

377. GROTIUS, *supra* note 20, at 877-79.

378. *The Betsey*, 3 U.S. at 12; *see* Vattel, *supra* note 23, at 260;.

379. 3 U.S. at 16.

380. *United States v. Judge Lawrence*, 3 U.S. 42 (1795); *see also* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, 522-29 (Maeva Marcus ed., 2003) (describing the case).

381. *Lawrence*, 3 U.S. at 42

382. *Id.* at 43.

383. *Id.*

384. *Id.*

385. *Id.* at 51. Note that this was likely a subtle importation into the treaty of the old-fashioned rule of lenity, since deserters could be imprisoned and deported based upon whatever ex parte proof the court ultimately accepted.

386. *Id.* (citing Vattel and Rutherford's interpretive rules).

Indeed, the Attorney General argued that “the Executive of the United States had no inclination to press upon the Court, any particular construction of the article” but that he sought mandamus because in “the spirit of our political Constitution, the Judiciary Department is called upon to decide [treaty questions]; for it is essential to the independence of that department, that judicial mistakes should only be corrected by judicial authority.”³⁸⁷ The Court ultimately decided it could not issue the writ, even though it strongly disagreed with the interpretation of the district court, because the decision was within the district judge’s discretion.³⁸⁸

More examples could be tendered, for more abound. In *The Phoebe Anne*, a case construing the 1788 Treaty of Amity and Commerce with France, Chief Justice Ellsworth decided the case for the Court, textually, in a single paragraph. On the assertion that the United States should not allow French privateers to obtain repairs in American ports because it might involve the United States in the ongoing naval conflict between France and Britain, Ellsworth replied (in a two sentence opinion): “Suggestions of policy and convenience cannot be considered in the judicial determination of a question of right.”³⁸⁹ The text being clear, the decree of the circuit court was affirmed.³⁹⁰

These cases converge on a few basic principles. In case after case, before John Marshall’s ascent to the Chief Justiceship in 1801 and the ascent of the Supreme Court that followed, the early Supreme Court eschewed questions of policy and convenience, recourse to history and subjective intent, and instead construed treaties according to the textual interpretive rules set out by authorities like Vattel, Grotius, Pufendorf, Burlamaqui, Rutherford, and others.³⁹¹ This practice reflected the embodiment of the intention of the Framers to create a judiciary that would render binding, uniform, predictable interpretive decisions. And upon this careful, restrained judicial path, Chief Justice Marshall’s Court would follow that early Court’s lead.

3. *Treaty Interpretation in the Marshall Court, 1801-1835*

John Marshall’s appointment to Chief Justice of the United States Supreme Court came in the Adams administration’s waning days.³⁹² Night seemed to be falling on the Federalist dream.³⁹³ The prevailing Republican

387. *Id.* at 48-49.

388. *Id.* at 53-54.

389. *Moodie v. The Phoebe Anne*, 3 U.S. 319, 319 (1796).

390. *Id.*

391. For cases taking similarly textual approaches to treaty interpretation, see *Hunter v. Fairfax’s Devisee*, 11 U.S. (7 Cranch) 603 (1812); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800); *Sims’ Lessee v. Irvine*, 3 U.S. (3 Dall.) 425 (1799); *Geyer v. Michel (The Donzeker)*, 3 U.S. (3 Dall.) 285 (1796); *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795); *Bingham v. Cabbot*, 3 U.S. (3 Dall.) 19 (1795); and *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54 (1795).

392. Eskridge, *supra* note 40, at 1070-71.

393. *Cf.* Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1236-38 & nn.1-9 (2003) (describing the Jefferson Administration’s and Republican Congress’s refusal to recognize President Adams’s late-term appointments, arbitrary impeachment of Federalist judges, revocation of statutory authority for the federal circuit courts, and shuttering of the Supreme Court for the June 1802 Term).

candidate, Thomas Jefferson, was set to assume the presidency along with overwhelming majorities in Congress.³⁹⁴ Federalist judges manned the judiciary, but the courts were fragile, and it was uncertain whether the new party in power would preserve the Constitution's parchment promises of an independent, life-tenured federal judiciary.³⁹⁵ As it was, in their bid to hold onto power, the Federalists had compromised some of their own high ideals—jailing newspaper editors³⁹⁶ and vastly expanding the size of the federal judiciary in a bid to hold onto the third branch.³⁹⁷ The Republicans, for their part, began their tenure by fulfilling the Federalist's worst fears: repealing the Judiciary Act of 1801, cancelling the Supreme Court's 1802 term, and embarking on a program of judicial impeachments.³⁹⁸ It was a constitutional crisis.

The appointment of John Marshall to the Chief Justiceship may have been the decision that saved the Constitution. An influential and ardent Federalist, he was, also, thankfully, one of the most brilliant lawyers and politicians of his generation.³⁹⁹ Casting off partisanship in favor of high judicial authority, Justice Marshall steered a course of careful, consensus-driven jurisprudence founded on deep principles that earned the Court nationwide respect and, with it, newfound constitutional powers.⁴⁰⁰ In doing so, Justice Marshall defined the Court's identity in a way that the briefly-tenured Chief Justices Jay, Rutledge, and Ellsworth had been unable to.⁴⁰¹

In the area of treaty interpretation what Chief Justice Marshall brought to the Court was continuity. While he revolutionized the way in which the Justices rendered their opinions—cementing the practice of single “majority” opinions rather than opinions seriatim and driving for consensus over ideological purity⁴⁰²—his Court maintained a careful attention to text in the treaty cases

394. *Id.*

395. Eskridge, *supra* note 40, at 1070-71.

396. Kurt T. Lash, “Tucker’s Rule”: *St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343, 1363-65 (2006); William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 329-30 (2004).

397. Weinberg, *supra* note 393, at 1236-37.

398. *See, e.g.*, David E. Engdahl, *John Marshall’s “Jeffersonian” Concept of Judicial Review*, 42 DUKE L.J. 279, 318-20 (1992); Eskridge, *supra* note 40, at 1070-71.

399. *See* 1-4 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1916). He also knew the stakes of his appointment: “Of the importance of the judiciary at all times, but more especially the present I am very fully impressed & I shall endeavor in the new office to which I am called not to disappoint my friends.” John Marshall, *Letter from John Marshall to Charles Cotesworth Pinckney* (Mar. 4, 1801), in 6 *THE PAPERS OF JOHN MARSHALL* 89 (1990). So did Thomas Jefferson: “So great is his sophistry you must never give him an affirmative answer, or you will be forced to grant his conclusion. Why, if he were to ask me whether it were daylight or not, I’d reply, ‘Sir, I don’t know, I can’t tell.’”) GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 434 (2009).

400. *See, e.g.*, Stephen B. Presser, *Samuel Chase: In Defense of the Rule of Law and Against the Jeffersonians*, 62 VAND. L. REV. 349, 365-66 (2009); Mark A. Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 639-41 (2003); Jean Edward Smith, *Marshall Misconstrued: Activist? Partisan? Reactionary?*, 33 J. MARSHALL L. REV. 1109, 1115-16 (2000).

401. *See* Olken, *supra* note 344, at 743 & n.2.

402. *See* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 286-87, 311-25 (2007); Charles F. Hobson, *Defining the Office: John*

decided during his tenure. While the Court heard dozens of treaty cases during Chief Marshall's Chief Justiceship—more than could be chronicled in the pages that follow—a selection from its outset, middle-period, and close well illustrate the Court's careful, textualist approach to treaty interpretation during his time on the Court.

i. *Early Marshall Court Treaty Cases*

There are at least a half-dozen treaty cases from the early Marshall period, but the interpretive questions are pedestrian. In *United States v. Schooner Peggy* the Marshall court construed a treaty settling the Quasi-War between the United States and France. The treaty provided that the United States would restore ships captured on the "high seas" to the French if they had not yet been "definitively condemned."⁴⁰³ Whether the schooner was captured on the high seas was a question for another court, and that the ship had not been definitively condemned was easily discerned.⁴⁰⁴

In *Ogden v. Blackledge*, in a one-paragraph opinion, the Court held that Article IV of the Treaty of Paris required North Carolina to allow a British creditor to sue beyond the statute of limitations because the confiscation law, and the war, had constituted an impediment to the collection of the debt.⁴⁰⁵ Similarly, in *Dunlop & Co. v. Ball*, the Court decreed that Virginia's common law statute of limitations would be tolled to account for the State's obstruction of the implementation of the Treaty of Peace.⁴⁰⁶ These debt and confiscation issues returned to the Supreme Court again and again in this period—always without much or any discussion of interpretation—all with the same result under the language of the treaty.⁴⁰⁷ Prosaic issues also arose with respect to the rights of British subjects and citizens to inherit property, but those cases turned more on the law of nations and common law than interpretation, as the relevant treaties were either clear or silent about inheritance and title to property.⁴⁰⁸ A neat insurance case involving whether an American vessel attempted to run the blockade of the port of Cadiz did arise in 1808, but the fact that the Court was "of opinion that these facts do not amount . . . under the treaty between the United States and Great Britain, to a breach of the blockade of Cadiz" is not particularly illuminating.⁴⁰⁹

Marshall As Chief Justice, 154 U. PA. L. REV. 1421, 1442-43 (2006); Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 414-15 (2004).

403. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 103-04 (1801).

404. *Id.* at 109-10.

405. *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272, 278-79 (1804).

406. *Dunlop & Co. v. Ball*, 6 U.S. (2 Cranch) 180, 184-85 (1804).

407. *See, e.g.*, *Smith v. Maryland*, 10 U.S. (6 Cranch) 286, 306 (1810); *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 347-48 (1809); *Higginson v. Mein*, 8 U.S. (4 Cranch) 415, 418-19 (1808); *Hopkirk v. Bell*, 8 U.S. (4 Cranch) 164, 164-65 (1807); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806).

408. *See, e.g.*, *McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209, 214-15 (1808) (noting that whatever rights there are, they do not arise from the "terms of the treaty"); *McIlvaine v. Coxe's Lessee*, 6 U.S. (2 Cranch) 280, 305 (1805); *Lambert's Lessee v. Paine*, 7 U.S. (3 Cranch) 97, 108-09 (1805).

409. *Fitzsimmons v. Newport Ins. Co.*, 8 U.S. (4 Cranch) 185, 202 (1808). Notice, however,

Rather, the next truly important treaty case would not arise until *Fairfax's Devisee v. Hunter's Lessee*,⁴¹⁰ fully a decade after Marshall assumed the title "Chief Justice," at the dawn of the Marshall's Court's middle period.

ii. *The Middle Period: 1812-1828*

The years bookended by *Fairfax's Devisee v. Hunter's Lessee* in 1812 and *Foster v. Neilson*⁴¹¹ in 1829 were years of enormous tumult in the United States and on the Supreme Court.⁴¹² Justice Joseph Story was appointed to the Court by James Madison in 1811, and would stand alongside Chief Justice Marshall as Marshall's colleague, mythologizer, promoter, and a force of nature in his own right for decades.⁴¹³ The War of 1812 would occur, and the British would burn the White House.⁴¹⁴ The Court would be pressed to decide such landmark constitutional cases as *Martin v. Hunter's Lessee* (1816),⁴¹⁵ *McCulloch v. Maryland* (1819),⁴¹⁶ *Cohens v. Virginia* (1821),⁴¹⁷ *Johnson v. M'Intosh* (1823),⁴¹⁸ *Gibbons v. Ogden* (1824),⁴¹⁹ and *Osborn v. Bank of the United States* (1824).⁴²⁰

But throughout the period, at least in the area of treaty interpretation, the Court maintained a careful adherence to text. In case after case, the Court held true to the principles set down by the Framers, the ratifiers, and the practices of the early Supreme Court.

a. *The Land Ownership Cases*

The middle 20 years of the Marshall Court are a swelter of treaty cases, some of them among the most important in the Court's history, such as the "Fairfax Estate" cases, *Fairfax's Devisee v. Hunter's Lessee*,⁴²¹ and *Martin v.*

that the case is an excellent example of treaty textualism in action, however low the stakes. *See, e.g., id.* at 200.

410. 11 U.S. (7 Cranch) 603, 614 (1812).

411. 27 U.S. (2 Pet.) 253 (1829).

412. For a fascinating account of this Court and its era, see G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1 (1984); Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1126-44 (2001); and Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999).

413. For more on the judicial tenure of Justice Story see Gerald Dunne's excellent multipart effort in the Harvard Law Review: Gerald T. Dunne, *Joseph Story: The Middle Years*, 80 HARV. L. REV. 1679 (1967); Gerald T. Dunne, *Joseph Story: The Great Term*, 79 HARV. L. REV. 877, 878 (1966); Gerald T. Dunne, *Joseph Story: 1812 Overture*, 77 HARV. L. REV. 240, 246 (1963); and Gerald T. Dunne, *Joseph Story: The Germinal Years*, 75 HARV. L. REV. 707 (1962).

414. Griffin B. Bell III, *John Marshall: Presidential Power and Foreign Intelligence*, Address at the Awarding of the John Marshall Foundation Medal in Law (Sep. 27, 2009), in 18 J.S. LEGAL HIST. 265, 266-67 (2010).

415. 14 U.S. (1 Wheat.) 304 (1816).

416. 17 U.S. (4 Wheat.) 316 (1819).

417. 19 U.S. (6 Wheat.) 264 (1821).

418. 21 U.S. (8 Wheat.) 543 (1823).

419. 22 U.S. (9 Wheat.) 1 (1824).

420. 22 U.S. (9 Wheat.) 738 (1824).

421. 11 U.S. (7 Cranch) 603 (1812).

Hunter's Lessee.⁴²² Yet even though the cases were extraordinarily important, the interpretive issues could not have been less doubtful. Foreign citizens were promised all the incidents of ownership,⁴²³ and the Supreme Court was going to ensure they received them. While the Supreme Court's ringing rejection of a federalism clear statement rule⁴²⁴ in *Fairfax's Devisee*⁴²⁵ could be thought noteworthy—the Court's rejection of a similar clear statement rule with respect to the collection of British debts in *Ware v. Hylton* (notably pressed by future Chief Justice Marshall),⁴²⁶ makes it not particularly surprising. The textualism practiced by the Marshall Court did not, it seems, make widespread use of clear statement rules. The most scandalous thing that can be said about the Fairfax Estate cases is that they required the Supreme Court to intervene at all.

The reason the Supreme Court *had* to intervene, of course, was not because the interpretive issues were difficult, but because Republicans fervently disagreed with the Supreme Court's nationalist conception of federal power.⁴²⁷ Virginia wanted to reserve to itself the power to decide the question of who could own and inherit property in Virginia. The Treaty of Paris and the Jay Treaty deprived the state of control over that question, and in so doing, the Supreme Court became the final arbiter of who inherited and owned property like Fairfax's estate.⁴²⁸ When the Court confronted the same resistance to federal power from Maryland with respect to the ownership by French citizens under the French Treaty of 1778 and Convention of 1800, *Chirac v. Chirac's Lessee* was the result—again finding that a treaty assured all the accoutrements of ownership to French citizens.⁴²⁹ Weighty though it was, like the Virginia cases, it was also easy as an interpretive matter.⁴³⁰ The sheer number of similar treaty cases that came before the Supreme Court in the period, dealing simply with *enforcement* of the rights to inherit and devise property promised by various international treaties, is absolutely astonishing.⁴³¹

422. 14 U.S. (1 Wheat.) 304 (1816).

423. See, e.g., The Jay Treaty, art. 9, U.S.-Gr. Brit., Nov. 19, 1794, 2 U.S.T. 245, 253-54; Preliminary Articles of Peace art. 6, U.S.-Gr. Brit., Nov. 30, 1782, in 2 U.S.T. 96, 99 (“[T]here shall be no future Confiscations made . . .”); Treaty of Amity and Commerce art. 13, U.S.-Fr., Feb. 6, 1778, 2 U.S.T. 3, 11-12 (promising full incidents of ownership to French citizens).

424. That is, a rule that would require a treaty to speak clearly if it were intended to displace state law or impinge on important state interests. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (embracing a clear statement rule disfavoring federal regulation where laws “would upset the usual constitutional balance of federal and state powers”). See generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599-611 (1992) (discussing federalism clear statement rules).

425. See Golove, *supra* note 50, at 1202.

426. See *supra* text accompanying notes 344-347.

427. For an excellent account of the *Fairfax* cases and their nationalist implications, see Golove, *supra* note 50, at 1193-1210.

428. *Id.*

429. 15 U.S. (2 Wheat.) 259 (1817).

430. See, e.g., *id.* at 271 (“Upon every principle of fair construction, this article [of the treaty] gave to the subjects of France a right to purchase and hold lands in the United States.” (emphasis added)).

431. See, e.g., *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181 (1825); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489 (1824); *Blight's Lessee v. Rochester*, 20 U.S. (7 Wheat.) 535 (1822); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 463 (1819); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594 (1818); *Jackson ex dem.* The

b. *The Spanish Treaty Cases*

A second line of treaty cases almost wholly opposite the land ownership cases (opposite in the sense that, rather than important but uninteresting they are interesting but not nearly so important) also occupied the Court in this period. The cases arose under a seemingly innocuous 1795 Treaty between the United States and Spain that sought to partially displace the law of captures between the two nations. Congress could hardly have imagined that so elementary an aim could lead to so much litigation.

One set of cases arose from American privateering during the War of 1812 and begins in 1815 with *The Nereide*. The case called for the Court to construe Article XV of the treaty with Spain, in which the nations stipulated to each other that “free ships make free goods.”⁴³² That is, if enemy goods were found on a Spanish ship, they would not be subject to capture. It was contended to the Court that, by virtue of the fact that Spain and the United States had modified the ordinary law of nations in this manner, they must have also meant the negative: *enemy ships make enemy goods*.⁴³³ Chief Justice Marshall found this position hard to take seriously.⁴³⁴ Justice Johnson was less generous, calling it “wholly irreconcilable to any principle of logical deduction.”⁴³⁵ Interestingly, Chief Justice Marshall signaled openness to inspecting “correspondence between the secretary of state of the United States and the minister of the French republic in 1793” to see if American treaty negotiators at the time of the Spanish treaty understood that the “character of the cargo should be determined by the character of the flag,” but “[n]ot being in possession of this correspondence” he was unwilling to wait for the parties to produce it, since he thought it would not resolve the interpretive question anyway.⁴³⁶ This “openness” may have been nothing more than an excuse to lavish praise on Washington’s first cabinet.⁴³⁷

Cases centering on this somewhat entertaining interpretive bauble (“free

People of the State of New York v. Clarke, 16 U.S. (3 Wheat.) 1 (1818); Harden v. Fisher, 14 U.S. (1 Wheat.) 300 (1816).

432. *The Nereide*, 13 U.S. (9 Cranch) 388, 395 (1815); see Treaty of Friendship, Limits and Navigation, Spain-U.S., Oct. 27, 1795, 2 U.S.T. 318.

433. *The Nereide*, 13 U.S. (9 Cranch) at 395.

434. *Id.* at 421. (“Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral in the vessel of a friend shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall be safe.”)

435. *Id.* at 431 (Johnson, J., concurring).

436. *Id.* at 421-22.

437. *Id.* After all, Marshall uses his quasi-invitation to introduce evidence of the intentions of Washington’s first cabinet as an opportunity to wax:

On the talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribed, on the wisdom of the rules it adopted, no panegyric has been pronounced at the bar in which the best judgment of this Court does not concur.

Id. at 422. The implications of these statements are that Justice Marshall saw an opportunity to say that the opinions of Washington’s first cabinet, *because* it was Washington’s first cabinet, might hold a special pride of place for the Court even if otherwise the Court would not look to such evidence.

ships make free goods”) would, like the swallows to Capistrano, return to the Court. The problem with the clause is that it is almost entirely impossible to administer. The Spanish were trading freely with the British during the War of 1812, and by the treaty’s terms, once merchandise made it onto a Spanish ship it was “free.” This created strange incentives, both for British merchants and American privateers. So it was that the Court confronted *The Pizarro* in 1817.⁴³⁸ The *Pizarro*, laden with British goods, lacked passport documents—the documents that under the Spanish treaty’s seventeenth article were presumptively sufficient to prove it was Spanish.⁴³⁹ The captors thought that since the ship *lacked* the right papers, by negative implication it was presumptively captureable (and, therefore, salvageable) as a British prize.⁴⁴⁰ They further argued that the owners of the ship were not “subjects” of Spain but merely merchants operating out of Spain and thus not within the Spanish treaty.⁴⁴¹ Justice Story for a unanimous Court dismissed both contentions in two paragraphs, using ordinary textualist approaches to statutory interpretation calling the first baseless⁴⁴² and the second “very clear[ly] . . . not the true interpretation of the language.”⁴⁴³

The 1795 Treaty with Spain was called to do service in settings its makers could hardly have foreseen when civil war broke out between Spain and her former colonies.⁴⁴⁴ When, in the Court’s words, “James Chaytor, styling himself Don Diego Chaytor” captured the Spanish ships *Santissima Trinidad* and *St. Ander*, their Spanish owners contended that “Don Diego” was American, and thus even though he commanded the *Independencia* for the United Provinces of Rio de la Plata—a military vessel⁴⁴⁵ in that nation’s valiant fight for independence against the Spanish—he was not entitled to the ship because the 1795 Treaty prohibited Americans from capturing Spanish vessels.⁴⁴⁶ Though counsel for Don Diego made valiant points about the policy implications of allowing a treaty between Spain and the United States to bind third parties like Rio de la Plata, Justice Story, writing for a unanimous Court, held that the treaty’s terms simply did not reach the case.⁴⁴⁷ Article XIV prohibited American *privateering*, not captures undertaken by military commanders who happened also to be American citizens. Wrote Story, “[I]t is not for this Court to make the construction of the treaty broader than the apparent intent and purport of the language.”⁴⁴⁸ And when Americans *did* engage in privateering against the Spanish, the Court, true to its word, restored

438. 15 U.S. (2 Wheat.) 227 (1817).

439. *Id.* at 244.

440. *Id.* at 233-38.

441. *Id.* at 245.

442. *Id.*

443. *Id.* at 245-46.

444. *The Divina Pastora*, 17 U.S. (4 Wheat.) 52, 63-64 (1819).

445. In the language of admiralty, a “public” vessel.

446. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 330 (1822).

447. *Id.* at 346-47.

448. *Id.* at 347.

their captures to Spain.⁴⁴⁹

c. *The Amiable Isabella*

These Spanish treaty cases are important, however, if only because they weave the intellectual fabric surrounding the most difficult and thus, for present purposes, significant, treaty interpretation decision of the Marshall Court's middle period: *The Amiable Isabella*.⁴⁵⁰ The *Isabella* was a merchant cargo ship flying Spanish colors and bearing Spanish documents captured by the cruiser *Roger Quarles*.⁴⁵¹ The captors contended that the *Isabella* and her cargo were really British and that the *Isabella* was disguised under Spanish documents and bound for a British port.⁴⁵² The Spanish claimants disagreed, insisting ship and cargo were "*bona fide* Spanish."⁴⁵³ Moreover, unlike the *Pizarro*, the *Isabella* carried a passport document of the kind that was meant to signal she was *presumptively* Spanish under the 1795 Treaty.⁴⁵⁴ The case would center on this document's legal sufficiency.

The captors' attorneys argued the document was either fraudulent, improperly issued, or not the right document, and, most weightily, that the treaty's provisions providing for the presumptive verity of such documents were inoperative.⁴⁵⁵

Putting aside all other questions, the Court held that the entire case hinged on just one: whether the provision of the treaty that made passports presumptive evidence of Spanish nationality was null and void because the parties ultimately never affixed a model passport document to the treaty.⁴⁵⁶ Justice Story concluded, for six of the Court's seven justices—Chief Justice Marshall, Washington, Livingston, Todd, Duvall and Story—"that the form of the passport not having been annexed to the 17th article of the treaty, the immunity, whatever it was, intended by that article, never took effect, and therefore, in examining and deciding on the case before us, we must be governed by the general law of prize."⁴⁵⁷ Justice Johnson vigorously dissented.⁴⁵⁸

As one can imagine, the stakes of depriving so significant a treaty provision of legal effect—the lynchpin of an international regulatory scheme—could not have been greater. The Court ordered the case reargued.⁴⁵⁹ Then the

449. *The Bello Corrunes*, 19 U.S. (6 Wheat.) 152, 171-72 (1821) (restoring property taken by American privateers to Spanish owners); *see also* *The La Nereyda*, 21 U.S. (8 Wheat.) 108, 172-74 (1823) (restoring the *La Nereyda* to Spain).

450. *In re The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821).

451. *Id.* at 5, 66.

452. *Id.* at 66.

453. *Id.* at 67.

454. *Id.*

455. *Id.* at 67-68.

456. *Id.* at 68-69.

457. *Id.* at 76.

458. *Id.* at 81-97 (Johnson, J., dissenting).

459. *Id.* at 65-66.

Executive intervened and the case was argued again.⁴⁶⁰

The intervention of the Executive is a matter of some importance to the case proper. The Attorney General argued *in favor* of invalidating the treaty's operative provisions. It is unclear precisely what motivated this. In his dissent, Justice Johnson postulated Executive shortsightedness,⁴⁶¹ or alternatively, and more plausibly, that the United States had become a sufficient naval power that the unilateral right to search Spanish ships was thought worth granting Spain the reciprocal right to search American ships (and thus any excuse to nullify the treaty was a good one).⁴⁶²

Some light can be shed on the position of the Executive by a contemporaneous discussion of the case by the House Committee on the Judiciary. In 1822, the claimants in the case petitioned the Committee to indemnify them for the value of their soon-to-be-lost ship on the belief that the Supreme Court was about to rule against them.⁴⁶³ The allegations of the claimants are somewhat hysterical, "insinuat[ing] very strongly that the Attorney General was not moved in this course by a sense of official duty, but by the interest he felt in the case as counsel of the captors, with a large contingent fee depending on the event."⁴⁶⁴

Nonetheless, the allegations reveal that it was the Attorney General—upon the orders of President Monroe—who pressed for the destruction of the treaty's operative provisions. The Committee's conclusion that this was the proper course and the right outcome sheds additional light on why the Executive branch may have sought the treaty's invalidation:

If such a paper, however obtained, was to preclude all investigation, there was all end, in time of war, to the right of capture, and the United States would have been entirely stripped of the means of maritime warfare—an unarmed and defenceless victim of any foe, however contemptible . . .⁴⁶⁵

The Executive's motives, whatever they were, are important to understand insofar as the Attorney General largely *withheld* them from his arguments in the case and instead molded his arguments around the treaty's text. In the first argument before the Court, in tandem with private counsel for the captors, seemingly every style of argument was brandished—that the passport was fraudulent, improperly issued, and was not presented to the captors in compliance with the treaty's terms thereby entitling a Prize Court to adjudicate it.⁴⁶⁶ On the issue of sound policy, he argued that the treaty

460. *Id.*

461. *Id.* at 86-87.

462. *Id.* at 87.

463. CONG. GLOBE, 17th Cong., 1st Sess. 872 (1822) (entitled "Capture of the Ship Amiable Isabella and Cargo: Communicated to the House of Representatives, May 4, 1822").

464. *Id.*

465. *Id.*

466. See *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 26-36 (transcribing the arguments of Mr. Wheaton, for the captors and respondents, which included that the passport in the case had been "fraudulently obtained and used" but even if it had not been, it was "not such as the treaty requires"). The Attorney General, William Wirt, amplified Mr. Wheaton's arguments in his first presentation of the

provision was so poorly designed that it defeated the whole purpose of having the treaty, and then invoked Vattel's interpretive rules in support of the proposition that "[t]he spirit and intention of a treaty is always to be regarded in its interpretation," citing "*Vattel. Droit des Gens, l. 2. c. 17. s. 268-270. 274-282.*"⁴⁶⁷ While probably a misleading citation to Vattel—whose very first maxim is "if the text is clear, stop"⁴⁶⁸—it is fascinating nonetheless that the Attorney General thought the only manner by which he could sneak policy into his arguments was with Vattel's imprimatur, however oblique.⁴⁶⁹ Indeed, at re-argument, he limited his remarks purely to text and separation of powers issues: "admitting that the Court can supply the form, how is it to be done?"⁴⁷⁰ He asked—finding that such a judicial determination would be entirely policy-driven and divorced from the text, he cautioned, "[t]he office of this Court is to construe, not to make or amend treaties."⁴⁷¹

If ever there were a case calling for a saving construction by the Court—some means or method of interpretation that could give effect to the provision at issue—*The Amiable Isabella* would seem to have been the case. Yet, the Court held to textualism. Muscular textualism. Justice Story devoted much of his nearly eight-page examination of Article XVII to the materials the Court *could not* and *would not* look to in interpreting the provision at issue.⁴⁷² Wrote Story, Article XVII of the Treaty said that the form of the Passport will be "annexed to this treaty."⁴⁷³ But "[i]n point of fact, no form of a passport was made out and annexed to the treaty." As such:

There is no room here left for interpretation, on account of ambiguous language of the parties. They have expressed themselves in the clearest manner, and it is to the passport, whose form is to be annexed to the treaty, and to none other, that the effect intended by the treaty, whatever that may be, either as conclusive

case:

The Attorney-General, on the same side, insisted that the case was not within the protection of the treaty, because the vessel was not documented according to its provisions, and the only paper which could possibly answer to the description of the sealetter or passport, required by the 17th article, was concealed, and not shown by the master to the captors, as provided by the 18th, so that they had a right to detain and send in the vessel for adjudication.

Id. at 36. The Attorney General continued: "the very terms of the document produced, which state it to have been issued 'for want of royal passports'" showed it was not a passport document, and further that, the papers and depositions produced by the ship owners, "so far from satisfying the conscience of the Court, increase the suspicions excited by the want of the documents required by the treaty, documents so easily procured where the property is really Spanish, and the vessel fairly entitled to the privileges of a Spanish ship, that it is incredible any such vessel should want them." *Id.* at 37-38. See generally *id.* at 36-41 (transcribing the arguments of the Attorney General in the case).

467. *Id.* at 38.

468. VATTEL, *supra* note 23, at 244-45.

469. The provisions cited in Vattel do not actually stand for the proposition that one should look broadly to a statute's purpose. Section 282 of Vattel, for instance, counsels against interpretations that lead to absurdities. *Id.* at 252. This is hardly a ringing endorsement of purposivism.

470. *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 49.

471. *Id.* at 47.

472. *Id.* at 68-76.

473. *Id.* at 69.

or *prima facie* evidence of proprietary interest, is attributed.⁴⁷⁴

Over the five pages that followed, Justice Story argued that separation of powers meant the Supreme Court had only the power to “construe” not to “make” treaties.⁴⁷⁵ He argued that the Court could not supply omitted terms whether “small or great, important or trivial.”⁴⁷⁶ He made reference to the idea that the method of interpretation had independent valence in the Law of Nations, writing,

We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.⁴⁷⁷

He argued that unlike “civil concerns of private persons” in which *cy pres* is “just and appropriate,” in the solemn compacts of nations so “far as judicial tribunals are called upon to interpret or enforce them . . . [w]e can as little dispense with forms as with substance.”⁴⁷⁸ He argued that it was not even entirely clear that the omission of the annexation was an error—it may very well have been the result of a substantive issue with the execution of the treaty.⁴⁷⁹ Perhaps the parties never came to agreement on the point, or could not get the form of the passport ratified, or found that it would be impossible to design a document that could not be counterfeited with unacceptable ease.⁴⁸⁰ Whatever the case, Story and the other Justices thought it beyond the Supreme Court’s powers to supply so central an element to an international treaty.⁴⁸¹

Not a word in Justice Story’s opinion makes reference to whether the holding of the Court will have good or bad consequences for the United States.⁴⁸² Not a word of reference is made to the intentions of the drafters,⁴⁸³ though it was placed in evidence and argued extensively what they “must have” thought when they created the passport provision.⁴⁸⁴ The Court read the text, and interpreted accordingly.

Indeed, this self-denying interpretive approach is cast in even starker relief by the fireworks in Justice Johnson’s dissent.⁴⁸⁵ Justice Johnson disagreed with the Court’s entire interpretive framework, arguing that, in interpreting a treaty, the Court should look to “history, analogy, and policy, as

474. *Id.* at 70.

475. *Id.* (“It would be to make, and not to construe a treaty.”).

476. *Id.*

477. *Id.*

478. *Id.* at 73.

479. *Id.* at 74.

480. *Id.* at 74–76.

481. *Id.* at 76.

482. *See id.* at 65–81.

483. *See id.*

484. *See, e.g., id.* at 63 (argument by Harper, counsel for the claimants, that so important a change in the treaty would have been accompanied by a provision explicitly repealing the passport provisions).

485. *See id.* at 85 (Johnson, J., dissenting).

well as language.”⁴⁸⁶ On this basis he would have repaired the operation of the passport provisions via judicial surgery—essentially piecing together a form for the passport document from descriptions of the document present in the rest of the treaty.⁴⁸⁷ He thought the Executive’s intervention in the case wholly disingenuous, founded either on shortsighted policy considerations or raw opportunism, both of which were unfit for judicial endorsement.⁴⁸⁸ He thought it manifestly reasonable for the Court to take some liberty in repairing a treaty that the nation had gone to such lengths to negotiate. He closed his dissent with a rousing appeal to the purposes and intentions of the treaty negotiators, writing: “No one who reads and compares these four articles, the 15th, 16th, 17th, and 18th, and considers the historical events in which they originated, can for a moment suppose, that this was the object which led to the insertion of the two latter of those articles.”⁴⁸⁹ Justice Johnson, who was appointed by President Jefferson in 1804 and served until 1834,⁴⁹⁰ was the Court’s “first great dissenter” for a reason⁴⁹¹: his views were often out of step with those of the rest of the Marshall Court.⁴⁹² *The Amiable Isabella* was no exception. While the rest of the Justices on the Court saw the case as a difficult one, ultimately bounded by unmistakable text, only Justice Johnson thought inquiry into motives—those of the drafters of the treaty and the Attorney General at the bar—should have had an impact on the outcome of the case.

The Amiable Isabella is truly an important case in the quest to discern the original understanding of treaty interpretation because the differences between the majority and dissent turn on the method of interpretation the Court employs. It reveals in unmistakable terms that the interpretive methodology of six Justices of the Supreme Court even thirty years after the ratification of the Constitution remained a sophisticated textualism grounded in interpretive rules like those of Vattel—rules that were cited to the Court by the prevailing side in the very case.

d. *Other Middle-Period Treaty Cases*

The end of the Marshall Court’s middle period witnessed something of a renaissance of declarations of faith in textual interpretation. In addition to *The Amiable Isabella* the Court would pledge its allegiance to treaty textualism in at

486. See *id.*; see also Michael S. Straubel, *Textualism, Contextualism, and the Scientific Method in Treaty Interpretation: How Do We Find the Shared Intent of the Parties?*, 40 WAYNE L. REV. 1191, 1198-99 (1994) (“Quite clearly, Justice Johnson stated that a treaty should not be interpreted according to common law rules used to interpret a criminal statute. Rather, the intent of the parties should be drawn from ‘history, analogy, and policy, as well as language.’” (quoting *The Amiable Isabella*, 19 U.S. at 85 (Johnson, J., dissenting))).

487. *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 89, 92 (Johnson, J. dissenting).

488. *Id.* at 86-92.

489. *Id.* at 96.

490. Mark R. Killenbeck, *William Johnson, the Dog That Did Not Bark?*, 62 VAND. L. REV. 407, 408 (2009).

491. Meredith Kolsky, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2077 (1995).

492. *Id.* at 2095-97; Killenbeck, *supra* note 490, at 408 (calling him the Court’s “first true contrarian”).

least two other cases in the period: *Green v. Biddle*,⁴⁹³ and *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*.⁴⁹⁴ Neither case possessed the panache or the sophistication of *The Amiable Isabella*. Nonetheless, each occasioned comments from the author of the majority opinion on the importance of strict adherence to text.

In *Green v. Biddle*, an otherwise obscure 6-to-1 decision interpreting the impact on private property rights of the interstate compact between Kentucky and Virginia that created Kentucky out of Virginia,⁴⁹⁵ Justice Washington wrote:

[T]hat where the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.⁴⁹⁶

Justice Johnson dissented.⁴⁹⁷

Later that same term, Justice Washington would reaffirm the Court's treaty textualism explicitly in *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*, another of the seemingly inexhaustible land ownership cases.⁴⁹⁸ *Society for the Propagation of the Gospel in Foreign Parts* dealt with whether foreign corporations were granted the ability to hold and own land in Vermont under the 1783 Treaty of Peace, and if so, whether that entitlement was again lost by virtue of the War of 1812.⁴⁹⁹ Writing for what he termed a "majority of the Court"⁵⁰⁰ (though there were no published dissents), Justice Washington wrote:

The terms in which this article [Article VI of the Treaty of Paris] is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the Court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction.⁵⁰¹

Notably, counsel for the defendants in the case thought that "[t]he British treaties are to be construed, not only as to the sort of *title* meant to be protected,

493. 21 U.S. (8 Wheat.) 1 (1823).

494. 21 U.S. (8 Wheat.) 464 (1823). It is also worth noting that these cases are hardly cherry-picked. The land ownership cases, Spanish Treaty cases, *Biddle* and *Society for Propagation in Foreign Parts* comprise a large proportion of all the treaty cases decided in the Marshall Court's middle period.

495. *Green*, 21 U.S. (8 Wheat.) at 69-71 (1823) (describing the issues to be decided).

496. *Id.* at 89-90.

497. *Id.* at 94 (Johnson, J., dissenting).

498. *Society for the Propagation of the Gospel in Foreign Parts*, 21 U.S. 464 (1823).

499. *Id.* at 479.

500. *Id.* at 495.

501. *Id.* at 490.

but also the sort of *persons and property* meant to be protected⁵⁰² and thus argued that the negotiators did not reasonably intend to include corporations within the class of those protected by the treaty's terms. He cited Vattel for support, arguing that Vattel holds that "[i]n the interpretation of treaties, the probable intention of the Framers is to be taken as the guide, and the sense of the terms they use is to be limited and restrained by the circumstances of the case" citing "*Vattel, Droit des Gens*, l. 2. c. 17. s. 270"⁵⁰³ and quoting from the French Edition of the treatise at length.⁵⁰⁴ While not a precise characterization of Vattel, even if it had been one, Justice Washington's response that "the language of the parties is clear of all ambiguity" seems the appropriate textualist rejoinder.⁵⁰⁵ This was especially so given Vattel's First Maxim that "*It is not allowable to interpret what has no need of interpretation.*"⁵⁰⁶

Ultimately, what these cases reveal is that as Chief Justice Marshall entered his final years on the Court, and decided *Foster v. Neilson*⁵⁰⁷ and *United States v. Percheman*,⁵⁰⁸ the intellectual foundations for his interpretive approach were deeply rooted. Far from introducing a new notion into treaty interpretation in *Foster*, Chief Justice Marshall's interpretation of the treaty arose directly from his understanding that treaties were to be interpreted textually—as they had long been interpreted and as they were meant to be interpreted.

iii. *The Late Period: Foster v. Neilson and United States v. Percheman*

This last section focuses on the late Marshall Court, the period bookended by *Foster v. Neilson*, on one end, and *United States v. Percheman* on the other. Chief Justice Marshall passed away in 1835, only a few years after the decision in *Percheman*.⁵⁰⁹ At the time of his passing, the nation and the Court were in the midst of a revolutionary transition as Jacksonian Justices replaced the old Federalists and the Court's linkages to the Framers began to fray.⁵¹⁰ Nonetheless, Marshall's opinions in both *Foster* and *Percheman* adhere to the old treaty textualism of the first Supreme Court, right down to extensive citations to Vattel by the litigants, and deeply textual approaches by the Court.

502. *Id.* at 476-77.

503. *Id.* at 476 (1823). The relevant provision of Vattel cited says that "whenever we meet with any obscurity in it [a written treaty], we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly." VATTEL, *supra* note 23, at 247.

504. *Society for the Propagation of the Gospel in Foreign Parts*, 21 U.S. (8 Wheat.) at 476.

505. *Id.* at 490.

506. VATTEL, *supra* note 23, at 244-45.

507. 27 U.S. (2 Pet.) 253 (1829).

508. 32 U.S. (7 Pet.) 51 (1833).

509. Michael J. Gerhardt, *The Lives of John Marshall*, 43 WM. & MARY L. REV. 1399, 1402 (2002).

510. See *id.* at 1401-05 (explaining the revolution in American political thought that coincided with Chief Justice Marshall's passing); Albert Broderick, *From Constitutional Politics to Constitutional Law: The Supreme Court's First Fifty Years*, 65 N.C. L. REV. 945, 950-53 (1987) (creating a similar account).

a. *Foster v. Neilson*

The Court in *Foster v. Neilson* confronted a seemingly modest problem: deciding who between the plaintiffs and defendants had a better claim to ownership over certain land in Florida.⁵¹¹ But the claim depended on when the land passed from the sovereignty of Spain to the United States,⁵¹² and because the territory was disputed for almost two decades, the Court was forced to construe multiple contradictory statutes and treaties passed and entered into by Spain and the United States—with each nation acting as if *it* had sovereignty over some amorphous portion of the territory for some indistinct period.⁵¹³ As Chief Justice Marshall wrote when he began wading into the interpretive morass these mutually conflicting laws and treaties fashioned, “[t]he Court will not attempt to conceal the difficulty which is created by these articles.”⁵¹⁴

But rather than shy away from textualism and the difficulty it entails, Marshall engaged in article-by-article, clause-by-clause analysis of each of the treaties in issue,⁵¹⁵ performing, in essence, a search for chain of sovereignty over the territory from 1756 onward.⁵¹⁶

Other issues aside, the crucial difficulty lay in the fact that as of 1803 the United States began to act as if all of the territory in Florida belonged to the United States,⁵¹⁷ but in entering into a treaty with Spain in 1819 to end a long-simmering territorial conflict and resolve all claims, the 1819 treaty included language that indicated *not* all of the land in question belonged to the United States or to Spain.⁵¹⁸ Because it neither acknowledged that the land was wholly Spain’s or wholly the United States’ but rather acquiesced and acknowledged that some indiscernible portion had in 1819 belonged to one, while some had belonged to the other, the case was almost irresolvable.

Chief Justice Marshall lamented that the case would be easy if the treaty simply ceded all of Spain’s “territory” to the United States without qualification.⁵¹⁹ But, Marshall lamented, the insertion of words qualifying the grant could not “be rejected as surplusage. They have a plain meaning, and that meaning can be no other than to limit the extent of the cession. We cannot say they were inserted carelessly or unadvisedly, and must understand them according to their obvious import.”⁵²⁰ While he acknowledged that it was “not improbable” that the “terms were selected which might not compromise the dignity of either government” it nonetheless rendered the treaty almost wholly nonjusticiable for want of criteria by which to determine which lands were

511. *Foster*, 27 U.S. 253, at 299-301

512. *Id.* at 253-56.

513. *Id.* at 310-11.

514. *Id.* at 310.

515. *Id.* at 300-01.

516. *Id.* at 300.

517. *Id.* at 305-07.

518. *Id.* at 310-11.

519. *Id.* at 311.

520. *Id.*

under the sovereign control of which nation at any point in time.⁵²¹

Chief Justice Marshall nevertheless soldiered on, casting about for some evidence of *which* lands were meant by the 1819 treaty still to belong to Spain.⁵²² Marshall explained the divided conclusions the Court drew implicitly from other provisions in the treaty before revealing that, thankfully, one the provisions in the 1819 treaty cut the Gordian Knot because it reserved to Congress the decision of who owned the Florida land.⁵²³ Justice Marshall, writing for the Court, thus found that the eighth article of the treaty did not anticipate judicial determinations, but rather delegated the decision to Congress to resolve.⁵²⁴ As Marshall noted, “when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”⁵²⁵ As such, since the treaty’s eighth article did not proclaim that grants given to Spanish landowners in the territories to be ceded would be confirmed as valid in the United States, but rather said that the land grants “shall be ratified and confirmed” it indicated an anticipation that Congress would do the ratifying and confirming.⁵²⁶

It would be fair to say this is a fine distinction that the text hardly bears, but it is worth pausing to note that textualism is not literalism. Given the manifest difficulty—if not impossibility—of discerning which lands were actually ceded by Spain according to suitable judicially administrable criteria, the inference that the treaty anticipated future legislative action was significantly bolstered. As Marshall wrote, “[t]he judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided”⁵²⁷ and later, in the opinion reiterated that “[a] question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question.”⁵²⁸ Given the difficulty of a judicial construction of the treaties at issue, and given that the language was susceptible to the interpretation the Court put upon it, Justice Marshall’s textual opinion could be thought the fullest expression of a mature textualism sensitive to the interpretive gravity of the Constitution’s separation of powers framework.

Even so, there was an alternative, and powerful, counterargument pressed in the case by Daniel Webster, one the Court passed over largely in silence. Representing the landowners whose titles were traceable to Spain only if the lands in question did not pass to the United States until 1819 (rather than in 1803), Webster sought to invoke Vattel to the Court for the proposition that since the 1803 treaty’s language was precise and clear, unmistakably designed

521. *Id.* at 311.

522. *Id.* at 313.

523. *Id.* at 314.

524. *Id.*

525. *Id.*

526. *Foster*, 27 U.S. 253, 314-15 (1829).

527. *Id.* at 307.

528. *Id.* at 309.

to protect the property rights of those with Spanish titles still residing in Spanish Florida, the Court should have given it maximal effect, while heavily discounting the vague imprecise language in the 1819 treaty.⁵²⁹ This argument derived from Vattel's Second Maxim, which counsels interpreting ambiguity against the party that benefits from the ambiguity.⁵³⁰

The Court in *Foster*, however, saw interpreting the treaty as non-self-executing the more reasonable understanding of the text, a tenuous construction that the Court would revisit four years later in *United States v. Percheman*.

b. *United States v. Percheman*

United States v. Percheman famously overturned the Court's holding in *Foster v. Neilson* by interpreting the 1819 land cessation treaty at issue in *Foster* to call for a judicial determination of the validity of the claimant's title in the case.⁵³¹ The formal difference between *Percheman* and *Foster* is that a new English translation of the treaty came to light in *Percheman* that changed the fair import of the words of the provision construed in *Foster*.⁵³² A more nuanced understanding of *Percheman* would probably be that *Percheman* gave the Court an opportunity to revise the weaknesses in the textualism in *Foster* and place the judicial construction of the treaty on stronger textual footing.

Attorney General Roger Taney, the man who would be the next Chief Justice,⁵³³ pressed the case on behalf of the United States, arguing that *Foster* was properly decided and the Court should dismiss the claim.⁵³⁴ But this time, unlike Daniel Webster, whose citation in *Foster* was just a toss off to "*Vattel*, Book II. Ch. XVII. upon the interpretation of treaties,"⁵³⁵ the counsel for *Percheman* came to the Court prepared to launch an all-out assault on the Court's weak textualism in *Foster*. White, the attorney for *Percheman*, began by proposing that the purpose for which the 1803 treaty was entered was *precisely* to protect the property rights of Spanish landowners, and thus, according to Vattel and other "most esteemed publicists," this counseled, to the degree it was ambiguous, giving a reading favorable to the Spanish title holder in the subsequent 1819 treaty.⁵³⁶ White thus began: "Before proceeding to examine the language of the treaty, a few observations on the rules of interpretation may, perhaps, be pardoned."⁵³⁷ He then proceeded to discuss

529. *Id.* at 295 (argument of Daniel Webster, counsel for the plaintiffs).

530. VATTEL, *supra* note 23, at 245 ("If he who could and ought to have explained himself, has not done it, it is to his own detriment.").

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

532. This was, for instance, Chief Justice Roberts's understanding of the case in *Medellin v. Texas*, 552 U.S. 491, 514 (2008).

533. See John J. Gibbons, Book Review, 75 COLUM. L. REV. 222, 223 (1975) (reviewing CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME V: THE TANEY PERIOD, 1836-64 (1974)).

534. See *Percheman*, 32 U.S. at 59-60, 82 (describing the arguments of Attorney General Taney).

535. *Foster v. Neilson*, 27 U.S. 253, at 295 (describing the arguments of Daniel Webster).

536. *Percheman*, 32 U.S. at 68.

537. *Id.*

Vattel and Grotius at length.⁵³⁸ His next move was to confront directly the Court's reading of the ambiguous text in *Foster*, arguing that it contradicted these rules.⁵³⁹ He then threw the Court a lifeline: an opportunity to easily distinguish *Foster*. He did this by arguing that a recent translation of the Spanish Treaty showed that the language was not the same in the Spanish and English copies: "The English side of the treaty leaves the ratification of the grants executory—they shall be *ratified*; the Spanish, *executed*—they shall *continue acknowledged* and confirmed, *quedaran artificados*."⁵⁴⁰

Chief Justice Marshall, again writing for the Court, took hold of the opportunity Percheman's counsel offered and distinguished *Foster* while moving onto solidly textualist ground. Wrote Marshall, "[h]ad this circumstance been known [that the text of the Spanish treaty was self-executory], we believe it would have produced the construction which we now give to the article."⁵⁴¹ With the presumption flipped, the Court held that the treaty was susceptible to direct judicial enforcement, and affirmed the decision below allowing Percheman to go forward in his lawsuit.⁵⁴²

E. Treaty Textualism as Interpretive Consensus

What this history shows is that the judicial practices of the Supreme Court's first decade and through the end of Marshall's more than thirty years as Chief Justice, bore an astonishing characteristic—interpretive consensus. It was a consensus traceable to the way lawyers were socialized into the legal profession. It was a consensus that also informed the design, drafting, and ratification of the United States Constitution. And it was not a naïve method—those who expounded it understood its limitations. Rather, treaty textualism was followed because among all of the available modes of interpretation, it was considered the least likely to lead to error and mischief. Grounded in Grotius' 1625 work, as enhanced and expounded by Vattel, Burlamaqui, Pufendorf, Rutherford, Blackstone, and others, treaty textualism was the end product of a nearly two-century conversation about the best way to interpret and enforce promises between nations. And as the preceding cases reveal, it worked, even when the Supreme Court confronted knotty and difficult interpretive questions.

IV. TREATY INTERPRETATION AND CONSTITUTIONAL DESIGN

Four views might be advanced concerning the constitutional status of the original understanding of treaty interpretation. Two possible understandings of the Constitution's design might indicate that judges construing treaties cannot "derogate" from treaty textualism. Two others might indicate that treaty

538. *Id.* (invoking VATTEL, *supra* note 23, at 245, 247; GROTIUS, *supra* note 20, at 848.

539. *Id.* at 69-70 (invoking VATTEL, *supra* note 23 at 252, 265, as inconsistent with the Court's holding in *Foster*).

540. *Id.* at 69.

541. *Id.* at 89.

542. *Id.* at 91-94 (construing the effect of statutes passed subsequent to the 1819 treaty on Percheman's rights).

textualism is or was merely a “default rule” that is not constitutionally required.

First, it might be contended that because the prevailing understanding of treaty interpretation was textual interpretation, the Constitution’s advice and consent procedures were designed with an expectation of treaty textualism in mind. Derogating from treaty textualism almost assuredly aggrandizes the Executive Branch at the expense of the Senate, since the Senate has little or no ability to alter the strategies of the President’s negotiators. Chief Justice Roberts seemed to put forward such a view in *Medellin*, writing, “we do think it rather important to look to the treaty language . . . [t]hat is after all what the Senate looks to in deciding whether to approve the treaty.”⁵⁴³ These kinds of separation of powers arguments largely mirror arguments over the constitutionality of looking to legislative history, though in reverse. Since the President cannot veto legislative history, which he may not even know about, the constitutional balance is disturbed when Courts lend it interpretive weight.⁵⁴⁴ In the same way, when Courts construe treaties based on practice, executive interpretation, or negotiating history, they construe them according to criteria that the Senate had very little opportunity to take into account and control. These arguments might possess special gravity in the treaty context insofar as all of the evidence—from the framing convention to the ratification to the early practice of the federal courts—indicates a strong, settled consensus as to treaty interpretation. On this view, textual treaty interpretation was so woven into the fabric of the document that it cannot be extricated from the very essence of the Constitution itself.⁵⁴⁵

A second view, fully consistent with the first, would hold that treaties are special and that the Constitution treats them as such by the very act of terming them “treaties” in the Supremacy Clause and in Article III. Textual analysis of the Constitution seems to suggest that treaties were not just understood to be different from ordinary laws, but to be different from “Compacts and Agreements,” which were international combinations which States could enter even though they could not enter into treaties proper.⁵⁴⁶ That treaties are special was noted explicitly in early Supreme Court decisions, such as *Gibbons v. Ogden*, where the Court held that treaties differed from compacts and agreements by virtue of their weightiness, their duration, their tendency to involve multiple interlocking instruments, and their ability to bind the whole nation.⁵⁴⁷

But even if one concedes that treaties are not merely “laws,” and not

543. *Medellin v. Texas*, 552 U.S. 491, 514 (2008).

544. See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 698-99 (1997).

545. Given that *The Federalist Papers* represented that the federal courts would render certain interpretive outcomes, to the degree that other interpretive methods are adopted that deviate from those views, it might be thought that those interpretive methods deviate from the original understanding of how treaties would be interpreted. *Federalist No. 78*, for example, represents that judges shall be “bound down by strict rules and precedents.” THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

546. See *Gibbons v. Ogden*, 22 (9 Wheat.) U.S. 1, 62 (1824).

547. *Id.*

merely “Compacts and Agreements,” this still leaves open whether they were meant to be treated differently from an *interpretive* perspective. Here there is in fact strong, credible evidence that treaty interpretation was thought to be a distinctive concern and a substantive point of contention in the framing and ratification of the Constitution. As Part II.C. explains in detail, the central preoccupations in making treaties supreme law enforceable by federal (rather than merely state) judges was to create international trust.⁵⁴⁸ Yet all of the concerns that animated the creation of a life-tenured federal judiciary—the threat of state provincialism, the need for stability, the need for judicial integrity and the need for legal expertise—were ultimately just means of ensuring an outcome, namely, that the methods of interpretation actually employed would be acceptable to European counterparties and would thereby convince them to enter into treaties with the United States.⁵⁴⁹

Some judicial comments on treaty interpretation in the early republic seem to confirm the view that treaty interpretation was special. In *Chisholm v. Georgia*, Justice Iredell wrote that, in interpreting the Constitution’s text, “No part of the Law of Nations can apply to this case, as I apprehend, but that part which is termed ‘The Conventional Law of Nations’; nor can this any otherwise apply than as furnishing rules of interpretation.”⁵⁵⁰ In *The Pizarro*, some decades later, Justice Story commented that “the language of the law of nations . . . is always to be consulted in the interpretation of treaties.”⁵⁵¹ In *The Amiable Isabella* he would further hint that the Court was bound to apply “just rules of interpretation,” and seemed to suggest these rules were derived from the law of nations.⁵⁵² And in case after case between 1780 and 1835, the interpretive rules set out by the treatises on the law of nations were cited alongside and, indeed, without distinction from, substantive precepts of the law of nations itself.

The foregoing are all powerful evidence that treaties had a special character in the minds of the Constitution’s Framers and ratifiers, and that they believed that treaties were meant to be interpreted in a certain way by virtue of the very use of the word “treaties” in the Supremacy Clause. If this is so, then treaty textualism may very well be embedded in the Constitution itself.

On the other hand, two arguments might be made that imply that the methodology of treaty interpretation was open to change in the minds of the Constitution’s Framers and ratifiers.

First, one might imagine that the use of the word “treaties” in the Supremacy Clause, even if it *was* designed to incorporate customary international law understandings of treaty interpretation, was meant to incorporate *contemporary* customary international law at whatever point in time a treaty was signed and ratified. On this view, the word “treaties” in the

548. See *supra* Section II.C.

549. See *id.*

550. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449 (1793).

551. *The Pizarro*, 15 U.S. (2 Wheat.) 227, 246 (1817).

552. In re *The Amiable Isabella*, 19 U.S. (5 Wheat.) 1, 71 (1821).

Supremacy Clause changes when the times change, much like one might argue that “cruel and unusual” in the Eighth Amendment changes with changing social norms and understandings. On this view, the Vienna Convention on the Law of Treaties, which has been recognized by some courts to embody the customary international law of treaty interpretation,⁵⁵³ is entirely sufficient to displace treaty textualism and may in fact already have.

Second, one might posit that the interpretation of treaties is merely a constitutional default rule that was meant to fall within the powers of the representative branches to change. On this view, it may be possible that Congress could enact rules of treaty interpretation under the Necessary and Proper Clause as a way of construing and constraining the judicial power. Alternately, the Senate and President may be able to modify the rules of treaty interpretation by treaty even if customary international law cannot change the method used in American courts. Since all would acknowledge that a treaty can prescribe the rules for *its own* interpretation (by setting out a definitions section, for instance) it may be possible to contend, by analogy, that the United States could enter into a general international arrangement modifying the method of treaty interpretation applicable to all treaties.

The choice among these four approaches depends on one’s view of the relative importance of the semantic and institutional choices made by the Framers and ratifiers of the Constitution. The Supreme Court has interpreted treaties for nearly a century using a total evidence approach without significant controversy or incident, while the early Supreme Court employed treaty textualism for at least forty years with similar success. On purely pragmatic grounds, all things being equal, one might imagine that textualism’s other virtues—its disciplining, channeling, and constraining features—would make it the superior approach.⁵⁵⁴ On the other hand, the House of Lords ultimately abandoned its strict fidelity to treaty textualism because interpreting treaties in a manner inconsistent with other nations was more likely to lead to international conflict, perhaps showing that pragmatic considerations point the other way.⁵⁵⁵

Regardless of one’s ultimate views on the issues involved, one could certainly make a very powerful case that the Constitution’s Framers and ratifiers placed such outsized importance on the use of textual treaty interpretation that it is a substantive constitutional commitment built into the separation of powers and the Supremacy Clause, and is therefore

553. See Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1351 (2008); Telman, *supra* note 14, at 417-18 (describing the Vienna Convention on the Law of Treaties and the degree to which it has been recognized as embodying principles of customary international law, both internationally and in United States courts). *But see* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 474-75 (2004) (raising independent concerns about the Vienna Convention’s ability to bind American judges).

554. For powerful arguments that textualism is the best approach to judicial interpretation on institutional and pragmatic grounds, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).

555. Straubel, *supra* note 486, at 1206.

constitutionally required.

V. CONCLUSION

This Article has had both a narrow and a broad aim. Its narrow aim has been to reveal that treaty textualism was originally understood as the Constitution's prescribed method of treaty interpretation and it has sought to show that the Constitution's Framers and ratifiers fought to ensure that treaties would be interpreted textually. The practice of the Supreme Court in the fifty years following the Revolutionary War was muscular textualism employed even in hard cases when other approaches might have tempted the Court to abandon this textual commitment. Also in a narrow vein, this Article bears importantly on questions in the long simmering debate over treaty self-execution. What the materials seem to reveal is that treaties were not meant to be presumptively self-executing or non-self-executing—they were simply meant to be interpreted textually. Since the text of most treaties at the time clearly provided that they would bind the States automatically, the distinction was seldom a significant one in the early republic.

More broadly, this Article also contributes to a nascent literature dedicated to illuminating the interrelationship between the Framers' interpretive expectations and their decisions about substantive institutional commitments: the distribution of power and decisional authority between the branches of the federal government, and between the federal government and the states. The Framers' expectation that federal judges, especially those on the Supreme Court, would remain committed textualists motivated their unusual decision to withdraw supreme interpretive authority regarding critical international agreements from the executive and legislative branches and vest them in the judiciary.

In revealing the crucial interplay between substantive constitutional structures and expected and actual interpretive practices, this Article invites consideration of whether sudden shifts in interpretive commitments—even if they do reflect a return to original meanings—are necessarily appropriate. Interpretive practices have a kind of precedential value in themselves. Interpretive practices are substantive. The very fact that the Framers allocated powers among the branches of the government because they expected judges would be textualists—rather than purposivists or pragmatists—reveals this. As such, altering interpretive commitments and practices has ripple effects beyond individual cases. Interpretive commitments necessarily shape separation of powers and federalism. On this measure, the doctrines that govern separation of powers and federalism and the expectations of individuals in the other branches and in the states, have evolved for more than a century alongside a variant of pragmatic treaty interpretation in the judiciary. As such, even an interpreter committed to a strong form of originalism may need, nonetheless, to respect these interpretive practices.

This shift is in some ways unfortunate because textualism may be the primary justification for investing treaty interpretation in the judiciary. Pragmatic, all-things-considered treaty interpretation is almost

indistinguishable from the kind of interpretation likely to be performed by the executive branch. Madison drew this conclusion at the Philadelphia convention.⁵⁵⁶ And, indeed, in *Medellin*, it was the dissenters, led by Justice Breyer, who voted to endorse the executive's interpretation of the treaty at issue; it was the court's textualists, reading the treaty textually, who applied the brakes. Moreover, the primary rationales for textualism have not waned since the Constitution's adoption. The United States' interests in interpretive stability, certainty, and international trust are no less salient now than they were in 1787. And textualism, as this Article has shown, has a remarkable, nearly four-hundred year old pedigree dating back to the writings of Hugo Grotius.

Ultimately, "treaty textualism" is about much more than a method of interpretation; it is also about the Constitution's institutional arrangements, which were structured to ensure that the United States' international promises would be credible ones. Interpretation was and is an important piece of that arrangement. This Article concludes that treaty textualism was the consensus interpretive approach among those who designed, ratified, and first implemented the Constitution. As such, it was a critical element of the Constitution's structure at the founding and after.

556. 2 FARRAND'S RECORDS, *supra* note 192, at 34 (July 17, 1787).