

Changing the Balance of Power: Why a Treaty-trump Presumption Should Replace the Later-in-time Rule When Interpreting Conflicting Treaties and Statutes

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I. Introduction

In November 2005, the Supreme Court of the United States heard *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* in which Petitioners, a small group, approximately 140 people, challenged the Government's refusal to allow them the use of hallucinogens in their ceremonial rituals.¹ During oral arguments, the Government relied on a 160-nation treaty to defend the ban on hallucinogens.² The Court asked Petitioner how the group could claim an entitlement to use hallucinogens in the face of the international treaty. Justice Scalia came to counsel's rescue when he helpfully chimed in: "Statutes trump treaties."³ Justice Scalia's interjection is only partly true. While a statute enacted after a treaty's ratification does trump the treaty, a treaty ratified after a statute's enactment will trump the statute.⁴ This rule of interpretation, called the later-in-time rule, was first adopted in 1884.⁵

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1. *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006).

2. Transcript of Oral Argument at 32, *O Centro*, 546 U.S. 418 (No. 04-1084), available at http://www.oyez.org/cases/2000-2009/2005/2005_04_1084/argument/

3. *Id.* at 39.

4. *Edye v. Roberston*, 112 U.S. 580, 599 (1884).

5. *Id.*

This Note proposes a treaty-trump rule of statutory interpretation. In the absence of clear congressional intent that the statute should overrule an existing treaty, the treaty's provisions should control. Part II of this Note describes the historical roots of the canons of treaty interpretation. Part III explains why the later-in-time rule is an unconstitutional doctrine. Part IV addresses the policy rationale for adopting the treaty-trump rule in the twenty-first century: ensuring stability in international law as well as accountability and transparency in the legislative process. Finally, Part V discusses why transitioning to a treaty-trump rule will be relatively easy for the courts and Congress to accomplish because it more accurately reflects the actual practice of courts today. Because a treaty-trump rule more closely comports with the Constitution than the patchwork of interpretive techniques currently utilized by the judiciary, when courts are faced with a conflicting statute and treaty, the treaty should prevail absent a clear and explicit congressional determination that the statute should take priority.

II. Historical Roots of the Canons of Treaty Interpretation

Abu Ghraib brought to the forefront of American discourse the potential for torture and harm that can befall captives of war.⁶ Senators, Representatives, and the media harped on what they perceived were blatant violations of U.S. treaty obligations under the Geneva Convention.⁷ The Fourth Geneva Convention, adopted in 1949 and entered into force in 1950, prohibits the torture of every prisoner of war.⁸ This long-standing and well-known prohibition continues to be a source of considerable debate and discussion. Yet, Congress could pass a law that deals domestically with the

6. See, e.g., Darius Rejali, *Viewpoint: The Real Shame of Abu Ghraib*, TIME, May 20, 2004, <http://www.time.com/time/nation/article/0,8599,640375,00.html>.

7. See Steve Andreason, *Beyond the Roots of Abu Ghraib*, WASH. POST, Sept. 7, 2004, at A23 (encouraging Senators to "lay[] the foundation for a new [torture] policy, one that reaffirms America's commitment to international agreements [the Geneva Convention] that remain relevant in a dangerous world"); *Countdown with Keith Olberman* (MSNBC television broadcast June 8, 2004) (Democrat Senator Joe Biden responding to a question about the administration sanctioning torture by stating "[t]here's a reason why we sign these treaties, to protect my son in the military. That's why we have these treaties, so when Americans are captured, they are not tortured"); *Father Blames Bush, Rumsfeld for Son's Death*, N.Z. HERALD, May 15, 2004, at B16 (Democrat Senator Jack Reed reciting actions of U.S. troops and equating them to violations of Geneva Convention); Wayne Washington & Bryan Bender, *Lawmakers View Images of Abuse, Express Shock Some Urge Photos Be Made Public*, BOSTON GLOBE, May 13, 2004, at A1 (Democrat Representative Martin T. Meehan stating that "[t]here's no doubt in my mind that the abuses at Abu Ghraib constitute torture").

8. Geneva Convention Relative to the Treatment of Prisoners of War art. 17, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

treatment of prison inmates, and without clearly intending to do so, override some of the protections this carefully negotiated and internationally accepted treaty provides to prisoners of war. While it might be inconceivable for Congress to “accidentally” do away with some of the protections afforded by the Geneva Convention, this is not the case.⁹ The later-in-time rule—where a treaty and statute conflict, the one enacted most recently in time prevails—would enable a court to override the Geneva Convention if Congress enacted legislation that conflicted with the treaty, even if Congress did not intend for the legislation to reach that far.

Since 1884, the Supreme Court has recognized the “later-in-time” rule, which grants trump power to whichever of a statute or a treaty has most recently been enacted.¹⁰ Courts are encouraged to first attempt to construe the statute and treaty in such a way as to avoid a conflict between them.¹¹ However, when the court cannot reconcile the statute and treaty, the later-in-time statute will trump the treaty.¹²

Before addressing why a treaty-trump rule comports more closely with the text of the constitution than the later-in-time rule, it is important to understand the major canons of treaty interpretation. The Supreme Court has outlined three basic interpretive canons when dealing with treaties: (1) the presumption against extraterritorial application of statutes; (2) the *Charming Betsy* presumption; and (3) the later-in-time rule.

One additional important concept is that of legal dualism.¹³ Under this legal conceptualization, two distinct spheres of law act upon the United

9. It may be useful to understand the extent of the problem. Overall, the United States has been a party to some 13,000+ treaties. See Oceana Publications Online Titles, http://www.oceanalaw.com/gateway/main_catalog.asp (last visited Apr. 27, 2007). Since 1975 alone, the Senate has received over 700 treaties for ratification. See Treaty Search Page, <http://thomas.loc.gov/home/treaties/treaties.htm> (click on the “Search” button under the Congress section while highlighting “All Congresses”) (last visited Apr. 27, 2007). On the other hand, Congress has already sent the President 37 bills in the 110th session (2006-2007), and sent 581 bills to the President in the 109th session (2005-2006), 589 bills to the President in the 108th session (2003-2004), and 472 bills to the President in the 107th session (2001-2002). Search Multiple Congresses, <http://thomas.loc.gov/home/multicongress/multicongress.html> (check the appropriate session of Congress, choose “Enrolled Bills Sent to President” and “Both House and Senate” prior to clicking “Search”) (last visited Apr. 27, 2007). In fact, since 1990 alone Congress has passed over 2000 pieces of legislation. *Id.* It is not unfathomable for there to be an unanticipated conflict in such circumstances.

10. *Edye v. Roberston*, 112 U.S. 580, 599 (1884).

11. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

12. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (called the *Charming Betsy* presumption).

13. See, e.g., Boleslaw A. Boczek, *International Law: a dictionary* 6 (2005) (explaining the difference between monism and dualism).

States: foreign obligations and domestic statutes.¹⁴ Under this view of the law, U.S. courts apply domestic law unless a treaty is self-executing and confers a private right of action on citizens.¹⁵ As such, Congress could pass a new statute that specifically disavows a treaty and U.S. courts would be bound to apply the new law under the later-in-time rule. However, enactment of the new law would not, by itself, release the United States from its obligation under the treaty and the Government would still be liable for any damages caused by breaching the treaty.¹⁶ The treaty itself is not repudiated and voided, instead it remains in effect and enforceable against the United States despite the statutes preemptive power.¹⁷

A. Presumption Against Extraterritoriality

For almost one-hundred years, the Court has required that acts of Congress be presumed to apply only within the territorial boundaries of the United States.¹⁸ This presumption, against the extraterritorial reach of congressional legislation, can be overcome only when Congress uses clear language to indicate its intent to exercise its extraterritorial power.¹⁹ The canon “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”²⁰ This presumption effects two different classes of treaties: (1) only extraterritorial effects and (2) effects targeted within the United States.²¹ The first class of treaties are partially insulated from accidental encroachment by congressional statutes because Congress must first demonstrate intent for the law to apply extraterritorially.²² However, once Congress has

14. *See id.*

15. *See* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892, 917-27 (2004).

16. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 115(1)(b), 321 (1987).

17. *Id.*

18. *Arabian Am. Oil Co.*, 499 U.S. at 248; *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

19. *Foley Bros.*, 336 U.S. at 285. *But see* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (failing to apply the presumption to the Sherman Antitrust Act arguing that prior precedent had not required Congress to do so under Sherman and the Court would not disrupt precedent).

20. *Arabian Am. Oil Co.*, 449 U.S. at 248.

21. An example of a primarily extraterritorial treaty would be the Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 8. An example of a treaty whose effects are primarily felt within the United States would be the Migratory Birds Protection Agreement, U.S.-Can., Jan. 30, 1979, S. EXEC. DOC. W, 96-2 (1980). *See also* 16 U.S.C. § 712 (implementation domestically of the various bilateral migratory bird treaties entered into by the United States).

22. *See Arabian Am. Oil Co.*, 449 U.S. 224.

expressed a clear preference to act extraterritorially, the presumption fails to protect against congressional actions that might accidentally abrogate a treaty responsibility. As to the second class of treaties, this canon of interpretation offers no protection against accidental congressional abrogation of a treaty.²³

B. The *Charming Betsy* Presumption

The second major canon of statutory interpretation for interpreting statutes with potential ramification on treaties is to narrowly construe statutes so as to avoid a potential conflict with existing treaties.²⁴ Arising from an 1804 case, the presumption originally required that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”²⁵ The more modern version of the presumption is: “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”²⁶ Thus, the canon is only employed when a statute is ambiguous—when one potential interpretation of the statute conflicts with the treaty and the other potential interpretation avoids the conflict.²⁷ Moreover, the canon is not merely a restatement of the presumption against extraterritoriality.²⁸ Instead the canon serves as an alternative method for courts to limit the reach of congressional statutes only once the presumption against extraterritoriality has been overcome.²⁹

At its core, the *Charming Betsy* presumption is an attempt to avoid violations of international law.³⁰ This presumption affects both domestic and extraterritorially applicable treaties in the same way: statutes become penultimate to treaties where multiple interpretations of a statute exist and

23. *Avagliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (1982), *rev'd*, 457 U.S. 176 (1982) (failing to discuss the presumption against extraterritoriality because the actions of the Japanese company were occurring on American soil).

24. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

25. *Id.*

26. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

27. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 485 (1998).

28. *Id.*

29. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-16 (1993) (Scalia, J., dissenting) (explaining canon should be used to limit the reach of statutes when “the presumption against extraterritoriality has been overcome or is otherwise inapplicable”); *see also* *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *United States v. Vasquez-Velasco*, 15 F.3d 833, 839-40 (9th Cir. 1994); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

30. Bradley, *supra* note 27, at 491.

one possible interpretation avoids a direct conflict with a treaty.³¹ Thus, given an ambiguous statute, the *Charming Betsy* presumption prevents Congress from accidentally overriding a treaty. However, where a statute's language is unambiguous, Congress may nevertheless accidentally supersede a treaty provision without intending to do so.³²

C. The Later-in-time Rule

The third major canon of interpretation utilized by the courts, is the later-in-time rule. The Supreme Court affirmed the role of the later-in-time rule in 1871³³ and officially recognized it as such in 1884.³⁴ However, the first explanation and use of the rule came from a lower court decision in 1855.³⁵ Facing the question with no controlling precedent, the court asked: if a "treaty is in conflict with [an] act [of Congress], does the former or the latter give the rule of decision . . . in a case to which one rule or the other must be applied?"³⁶ Conveniently, Supreme Court Associate Justice Benjamin Curtis presided over the *Taylor* case in his capacity as a circuit justice.³⁷ Curtis listed several reasons for determining that the latest expression of the sovereign should control: (1) neither statutes nor treaties were given priority by the Supremacy Clause; (2) legislatures were free to override earlier statutes with later statutes and thus they could overrule an earlier treaty with a later statute; and (3) Congress could nullify a treaty through a declaration of war and thus Congress must possess the power to override any treaty through any form of legislation.³⁸

When the Supreme Court later established the later-in-time rule for all federal courts, it did so using the same rationale as Justice Curtis did in

31. This canon functions in very much the same way that canon of avoidance works with respect to ambiguous statutes that might conflict with the Constitution itself. *See, e.g.,* *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems" courts must construe the statute to avoid such problems "unless such construction is plainly contrary to the intent of Congress.").

32. *See* *Avagliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (1982), *rev'd*, 457 U.S. 176 (1982) (failing to discuss the *Charming Betsy* presumption because there was no ambiguity in Title VII).

33. *In re Clinton Bridge*, 5 F. Cas. 1060, 1062 (C.C. Iowa 1867) (No. 2,900), *aff'd*, 77 U.S. (10 Wall.) 454 (1872).

34. *Edye v. Roberston*, 112 U.S. 580, 599 (1884).

35. *Taylor v. Morton*, 23 F. Cas. 784 (C.C. Mass. 1855) (No. 13,799), *aff'd*, 67 U.S. (2 Black) 481 (1862).

36. *Id.* at 785.

37. *See id.*

38. *Id.* at 785-87.

Taylor.³⁹ The Court did add, however, that since a statute involves all three branches of the government, whereas a treaty involves only the President and Senate, it would seem that priority should be given to “an act in which all three of the bodies participate.”⁴⁰ Reaffirming the rule in 1904, the Supreme Court pithily stated that where there exists “a conflict between an act of Congress and a treaty . . . the one last in date must prevail.”⁴¹ Since this pronouncement, no court or dissenting opinion has challenged the later-in-time rule. However, academics have challenged not only the constitutional underpinnings relied on by Judge Curtis but the whole of the rule as well.⁴²

III. The Constitutional Underpinnings for a Treaty-trump Rule of Statutory Interpretation

The most prominent underlying basis for the later-in-time rule is that statutes and treaties have equal authority under the Constitution.⁴³ However, such a reading of the Constitution is too simplistic and ignores the significantly different treatment the Constitution gives to statutes and treaties. A cursory review of the plain text of the Constitution, historical analysis of the intention of the Framers, and an in-depth examination of the inter-textual aspects of the Constitution demonstrate that treaties and statutes were designed to be different. While the Constitution’s Supremacy Clause gives treaties and statutes equal authority *with respect to state law*, the Supremacy Clause is silent with respect to their authority relative to one another.⁴⁴ The rest of the Constitution, however, indicates that when in conflict, a treaty should take precedence where Congress has not explicitly sought to repeal the treaty. The discussion below does not challenge the constitutionality of the later-in-time rule, instead it is meant to suggest that

39. See *Edye*, 112 U.S. at 598-99. Since Curtis resigned from the Court in 1857, he did not take part in the *Edye* decision, which was handed down in 1884. See, e.g., THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 472 (Christopher Tomlins ed., 2005).

40. *Edye*, 112 U.S. at 599.

41. *Ribas y Hijo v. United States*, 194 U.S. 315, 324 (1904).

42. See Pitman B. Potter, *Relative Authority of International Law and National Law in the United States*, 19 AM. J. INT’L L. 315 (1925) (arguing that the rule is “unsound”); see also Howard Tolley, Jr., *The Domestic Applicability of International Treaties in the United States: A “Treaty Priority” Alternative to the “Last-in-Time” Rule*, 17 REV. JUR. U.P.R. 403 (1983) (supporting an “alternative norm of [c]onstitutional law, a principle of treaty priority”).

43. See, e.g., *Edye*, 112 U.S. at 599 (“The [C]onstitution gives [a treaty] no superiority over an act of [C]ongress . . . which may be repealed or modified by an act of a later date.”).

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

the logical basis for the century-old rule lacks support in the Constitution itself.⁴⁵

A. Textual Analysis Demonstrates That Allowing a Later-in-time Statute to Trump a Treaty Is Contrary to the Constitution.

The Supremacy Clause commands that “[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land.”⁴⁶ Neither a treaty⁴⁷ nor a statute⁴⁸ may trump the Constitution. Moreover, both statutes and treaties trump state law.⁴⁹ But, the Supremacy Clause does not affirmatively determine the relative priorities of a treaty and a statute where they conflict. Simply because they are given equal status with respect to the Constitution and state laws does not mean that they are given equal status with respect to each other. Put a different way, knowing that x (statutes) and y (treaties) are both less than one-hundred (power of the Constitution) and are both greater than twenty (power of state laws and Constitutions), tells us nothing about the relative values of x or y. It is possible that x = 40 and y = 60 or that x = 50 and y = 30. The Supremacy Clause itself fails to fully define the relative priorities of statutes and treaties. Thus, their relative importance must be determined from other aspects of the Constitution.

The Constitution gives significantly different status to statutes and treaties. Congress may create statutes pursuant to its Article I legislative power.⁵⁰ On the other hand, the President possesses the ability, pursuant to Article II, to enter into treaties as part of his executive power.⁵¹ Another difference between statutes and treaties appears within the Supremacy Clause itself. Article VI treats statutes and treaties differently by listing

45. Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677, 691 (2001). Professor Infanti offers an interesting analysis of the “later-in-time” rule and argues that it is patently unconstitutional itself when applied to statutes trumping treaties. *Id.* at 678. He draws a parallel to congressional authority with respect to legislative overrides. *Id.*; *see also* Clinton v. City of New York, 524 U.S. 417 (1998). Professor Infanti argues that because Congress cannot reserve itself the power to override an action taken by the President, Congress may also not override a treaty which is essentially the act of the President.

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

47. *See, e.g.*, Holden v. Joy, 84 U.S. 211, 225 (1872) (“The treaty power cannot usurp legislative power or interrupt and prevent the performance of duties imposed by the latter power on officers whose offices are established by law. Each power must move in its own orbit.”).

48. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803) (“An act of [C]ongress repugnant to the [C]onstitution cannot become a law.”).

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

50. U.S. CONST. art. I, §§ 1, 7-8.

51. U.S. CONST. art. II, § 2, cl. 2.

them in different phrases and using different language to describe their effects.⁵² For example, statutes must be made pursuant to the Constitution, but it is the full authority of the United States that creates the basis of power for treaties.⁵³ A third textual difference between statutes and treaties is that Article I limits Congress' authority to create statutes,⁵⁴ while treaties may have effects that extend beyond those powers specifically enumerated as belonging to Congress.⁵⁵

These distinct textual differences poke holes in the Supreme Court's logic in *Edye* that "the [C]onstitution gives [a treaty] no superiority over an act of [C]ongress . . . which may be repealed or modified by an act of a later date."⁵⁶ The Court's rationale makes two assumptions, both of which are demonstrably false. First, the Court's pronouncement assumes that just because treaties and statutes are given equal status with respect to state law and the Constitution itself, they are equivalent in all other respects. Second, the Court assumes that treaties are equivalent to an act of Congress.

The Court's first assumption cannot be squared with the actual text of the Constitution. The text of the Constitution reveals that other than the Supremacy Clause, statutes and treaties are different.⁵⁷ Professor Yoo, one of the preeminent constitutional and foreign affairs scholars in the nation, notes that all too often academics incorrectly believe that statutes and treaties are completely interchangeable.⁵⁸ To assume they are similar in all other respects ignores the plain text of the Constitution. Not only do statutes and treaties derive their enactment power from different branches

52. See U.S. CONST. art. VI, cl. 2.

53. *Id.*

54. See U.S. CONST. art. I, § 8; see also THE FEDERALIST NO. 45, at 296 (James Madison) (Isaac Kramnick ed., 1987) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

55. See *Missouri v. Holland*, 252 U.S. 416, 432-34 (1920) (holding that a treaty may be valid even it extends beyond the power the government would have if acting solely under Article I); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (holding power exercised extraterritorially is not limited by the enumerated grants of power to Congress).

56. *Edye v. Roberston*, 112 U.S. 580, 599 (1884).

57. See, e.g., John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 761 (2001) (noting that there are "severe textual and structural problems with eliding statutes and treaties").

58. See *id.* Professor Yoo, in arguing for the constitutionality of the congressional-executive agreement, stated that academics are "too willingly embrace complete interchangeability" between statutes and treaties on one extreme and the complete repudiation of congressional-executive agreements on the other. *Id.* Professor Yoo also notes that the founding fathers were not concerned "about whether statutes could do the job of treaties," but instead concerned themselves with "whether treaties might invade the province of statutes." *Id.* at 769

of government, but the extent of their power and reach within the federalism structure are considerably different.⁵⁹

The second assumption the Court makes, that treaties can be thought of as acts of Congress, serves as the lynchpin in the Court's later-in-time rationale. The assumption is textually false. It is abundantly clear that treaties are not acts of Congress.⁶⁰ First, the Constitution lists treaties among the powers of the Executive,⁶¹ only requiring ratification by one chamber of Congress, the Senate.⁶² Second, where a single chamber of Congress acts independently of the other, its actions cannot be considered an expression of the will of Congress.⁶³ For example, in *INS v. Chaha*, the Court struck down the concept of the legislative veto because it failed to follow the constitutional requirement of bicameralism and presentment.⁶⁴ The legislative veto, in *Chadha* gave each chamber of Congress the ability to independently override the determination of the executive branch with respect to the deportability of an illegal immigrant.⁶⁵ The Court held that Congress may only act *legislatively* through bicameralism.⁶⁶ In the treaty context, because only a single chamber of Congress is involved in the ratification process, a treaty cannot be considered a legislative act of Congress.⁶⁷ Thus, the later-in-time rule with respect to statutes makes sense because a subsequent legislative act of Congress, a statute, may overturn an earlier legislative act of Congress, since both are of the same type of congressional activity. But, the Court's assumption in *Edye* that a treaty is an act of Congress on par with statutory actions is simply false because a statute is a legislative act of Congress but treaty ratification,

59. Compare U.S. CONST. art. I, §§ 1, 7-8 (granting power to Congress to enact statutes) and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803) (limiting Congress's statute making ability to those powers enumerated in the Constitution) with U.S. CONST. art. II, § 2, cl. 2 (granting power to the President to enact treaties) and *Missouri*, 252 U.S. at 432-34 (extending the reach of treaties beyond those powers granted to Congress).

60. See *United States v. Lara*, 541 U.S. 193, 201 (2004) ("The treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, to make [t]reaties." (internal quotation marks omitted)).

61. See John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 VA. J. INT'L L. 163, 192 (2001).

62. U.S. CONST. art. II, § 2, cl. 2.

63. Cf. *INS v. Chadha*, 462 U.S. 919, 954-58 (1983) (holding the legislative veto unconstitutional because, *inter alia*, a single chamber of Congress was attempting to legislate to overturn an executive decision).

64. *Id.*

65. *Id.*

66. *Id.* (noting that not all acts of Congress require bicameralism and presentment, just those that are legislative in nature).

67. See *id.*

which does not involve both chambers, is not.

The bicameralism argument leads to another textual difference indicating why the later-in-time rule makes sense with respect to conflicting statutes but not when a treaty is involved. Alexander Hamilton noted that later-in-time rule should be employed to decide “between the interfering acts of an EQUAL authority”⁶⁸ Thus, the first question asked when determining whether to apply the later-in-time rule must be whether the interfering acts have equal authority. As discussed above, the Supremacy Clause is silent with respect to relative authority of statutes and treaties. Thus, one must look at the Constitution to determine whether statutes and treaties are of equal authority.

Under the Constitution, a congressional act becomes law in one of three ways: (1) a majority of each chamber and the signature of the President, (2) a majority of each chamber and ten days (excluding Sundays) pass without a presidential signature while Congress is still in session, or (3) a two-third majority in each chamber following a presidential veto.⁶⁹ Each of these three ways is discussed using the same language and in the same clause within Article I, Section 7.⁷⁰ The first and second methods are identical according to the Constitution. The language of Article I, Section 7 states that if the President does not return the bill to the Congress within ten days, then it “shall be a Law, *in like Manner as if he had signed it.*”⁷¹ The third method, overriding the veto, is also given identical authority based on the Constitution’s language. The Constitution states that a bill, “before it become a law,”⁷² must be approved of by the President. Failing that, however, if Congress overrides the veto then it “shall become a Law.”⁷³ The parallel language in the use of the phrase “become a law,” indicates that this method is also of equal authority. Thus, each of the three methods of legislative enactment are all treated equally under the Constitution, and it makes sense to have later passed laws supersede earlier passed laws under Hamilton’s viewpoint.⁷⁴

68. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 54, at 439. The basic idea of the “later-in-time” rule is that the latest expression of the sovereign should rule only when the latest expression has the same magnitude of effect as the former expression of the sovereign. *Id.*

69. U.S. CONST. art. I, § 7, cl. 2.

70. *Id.* (indicating that once the legislation is signed by the President it will “become a law,” and if it is not signed within ten days while Congress is still in session then the legislation “shall be a Law,” and if the veto is overridden by two-thirds of each chamber of Congress then it “shall become a Law”).

71. *Id.* (emphasis added)

72. *Id.*

73. *Id.*

74. The “later-in-time” rule for statutory interpretation expresses the belief that one body

Treaties, however, are not “equal” with respect to a statute in terms of how it is passed or the difficulty with which it is ratified. As a threshold matter, even though a treaty has the full effect of a law, it cannot be considered a law where that word refers to the legislative authority—Article I power—of the United States.⁷⁵ A treaty only takes effect once ratified, which requires both the President submitting it to the Senate and the Senate voting in favor of the treaty by a two-thirds majority.⁷⁶ Using Hamilton’s equality test, if a subsequent statute may override a treaty this would be tantamount to recognizing that the treaty ratification process and statute enactment process are equal. In effect, this would be the equivalent of stating that a treaty’s ratification could be made by a majority of each chamber plus the signature of the President or with two-thirds of each chamber voting after a presidential veto.⁷⁷ Yet, this is clearly contrary to the explicit Constitutional pronouncement that treaties may only be ratified in one way: when the President submits it to the Senate for approval and the treaty receives two-thirds of the Senate vote.⁷⁸ Thus, the later-in-time rule, which makes sense in the context of conflicting statutes, cannot be used in a textually consistent way when it is a treaty that conflicts with a statute.

Moreover, the later-in-time rule only applies when the latest expression has the same magnitude of authority as the former expression of the sovereign.⁷⁹ Yet, statutes and treaties are not of the same constitutional magnitude, as just discussed. Thus, the mere invocation of the later-in-time canon forces a court to determine which expression of the sovereign is stronger: the Executive or Legislative. The Court has previously noted that when acts of different branches of the government are in conflict, a different rule of interpretation ought to be followed, which takes into consideration prevailing policy considerations at the time.⁸⁰

may not control later actions of the same body. See Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress To Control the Future*, 13 HASTINGS CONST. L.Q. 185, 197-200 (1986) (discussing the origins of the “later-in-time” rule for conflicting statutes).

75. See *United States v. Lara*, 541 U.S. 193, 201 (2004) (“The treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, ‘to make [t]reaties.’”); Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1894-95 (2005) (commenting on the implications of *Lara* and noting that once the Senate ratifies a treaty it takes effect even without implementing legislation under Article I).

76. U.S. CONST. art II, § 2, cl. 2.

77. See U.S. CONST. art I, § 7.

78. See U.S. CONST. art II, § 2, cl. 2.

79. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 54, at 439 (discussing the later in time rule with respect to multiple conflicting statutes).

80. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J.,

While the Constitution does speak to the relative priority of statutes and treaties vis-à-vis the Constitution itself, the Constitution does not directly address the relative authority of statutes and treaties with respect to each other.⁸¹ The Court has tangentially discussed the relative weights of treaties and statutes in the past. Consider that the treaty itself, and not any formal resolutions made by the Senate, is supreme.⁸² Similarly, the treaty that is supreme under the Supremacy Clause not the laws that are made in pursuance thereof.⁸³ A perfect hypothetical to test the relative priority of treaties and statutes would be the following: Both Houses pass a bill, which purports to be an interpretation of an existing treaty; the President vetoes then bill; and the House and Senate successfully override the veto. Which law is supreme, the treaty itself or the later-in-time expression of the Congress? The Court has already addressed a similar circumstance in *Fourteen Diamond Rings v. United States*.⁸⁴ There, the Court held that courts should ignore the later-in-time expression of Congress and instead interpret the treaty as if the act of Congress had not occurred.⁸⁵ Thus,

concurring) (discussing how the President's authority to act should be divided into three situations: where Congress concurs, where Congress is silent, and where Congress disagrees. The extent of presidential power is determined by which situation is at hand and what the policy considerations are). Part IV of this paper will further explore how a "treaty-trump" rule, in the absence of congressional intent to override a treaty, makes more sense than the "last-in-time" rule on policy grounds.

81. See U.S. CONST. art. VI, cl. 2.

82. See *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 180 (1901) (stating that a resolution by the Senate passed with less than two-thirds support was "absolutely without legal significance" and that whatever view the House might take of a treaty was immaterial); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326, reporters' n.1 (1987) (ruling out any subsequent Senate action even if passed with more than two-thirds of those present); Moore, *supra* note 61, at 185.

83. See U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land."); see also Moore, *supra* note 61, at 193 ("That is, it is the *treaty* which is the supreme law of the land, not domestic conditions attached to treaties or a separate domestic interpretation of the Senate apart from the treaty.").

84. 183 U.S. at 180

85. *Id.* ("The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it."). There are distinct differences between this hypothetical and the actual implementation of the "later-in-time" rule. For one, the Act of Congress here might not be considered a "law" because it was not passed pursuant to Congress's legislative power. See *INS v. Chadha*, 462 U.S. 919, 952 (1983) (describing how use of legislative power requires an "action that ha[s] the purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the Legislative Branch."). On the other hand, it is possible that this action by Congress would be considered "legislative" since it seeks to affect the legal rights or duties of those presumably affected by a different interpretation of the treaty. A separate distinction between the hypothetical and traditional use of the "later-in-time" rule is that in the hypothetical the action by Congress was meant to tell the courts how to do their job in interpreting the treaty whereas a typical "later-in-time" case involves an act of Congress without

outside the context of later-in-time rule, the Court has indicated that treaties are slightly more controlling than a later-in-time expression of certain sorts: such as statutes that either interpret or implement treaties. However, despite the internal inconsistency within the Court's decisions, the later-in-time rule continues to be utilized as such.

Overall, from a textual perspective, the Constitution seems to disfavor overriding a treaty with a later-in-time statute. First, the underlying rationale of the seminal Supreme Court case with respect to using the later-in-time rule is demonstrably contrary to the Constitution. Second, treaties and statutes are not an "equal" expression of the sovereign as required before the later-in-time rule can even be applied. Treaties are constitutionally distinct from statutes, which further undermines the rationale for using the later-in-time rule where they conflict. Finally, the Court has demonstrated that where a later-in-time statute is meant to interpret or implement a treaty, the actually treaty is controlling and not the more recent expression of the sovereign.

B. The Original Intent of the Framers Was to Ensure the Preeminence of the Treaty Absent a Clear Expression from Congress to the Contrary.

The Framers knew that treaties and statutes were entirely different beasts. Their writings demonstrate that statutes should not be able to overrule the treaty-making authority of the Executive Branch. Under the Articles of Confederation, the treaty making authority was vested in the same body responsible for legislation, the Congress of the United States.⁸⁶ The delegates to the Constitutional Convention knew that they had to alter the treaty-making authority of the new government and sought to maintain the distinction between treaty making and legislation so prominent in the British system.⁸⁷ The Federalist Papers helped to capture the sentiments of those seeking ratification by expounding upon the nature of the treaty power as a hybrid between the power of the Executive and Legislative branches:

The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws,

regard for the treaty itself. One final distinction is that in the hypothetical it is clear that Congress is attempting to alter the treaty explicitly whereas a typical "later-in-time" case lacks the explicit statement from Congress as to its intent. Nonetheless, the hypothetical serves to demonstrate that tangentially, at least, the Supreme Court seems to be acknowledging that in certain circumstances a "later-in-time" expression of the sovereign will not be controlling.

86. ARTICLES OF CONFEDERATION art. IX (1778).

87. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2024 (1999).

nor to the enacting of new ones Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the Legislative nor to the Executive.⁸⁸

John Jay even wrote that “[t]hey who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them.”⁸⁹ Jay’s comment demonstrates two important understandings of the Framers. First, that different groups of people had the ability to make laws and statutes. And second, that only the same group of people that enacted a statute could override the statute. Similarly a different group of people had the authority to ratify treaties and to alter and cancel them. Jay’s writing recognizes the difference between the two powers. In restructuring the government the Framers determined that treaties would be placed in the province of the Executive with consultation from the states (in the form of Senators). The people (in the form of the House) had no say in the treaty making process.

Yet, leaving the House out of the treaty making process worried the Anti-federalists.⁹⁰ They sought to defeat the Constitution’s ratification, in part because they feared the Executive could trample individual rights in the absence of House intervention.⁹¹ In response to the Anti-federalist campaign, the Federalists noted that without the House’s participation treaties would not be successfully integrated into domestic law.⁹² Essentially, the Federalist argued that treaties with the potential to impact private citizens lives—those with domestic effect—needn’t worry the ratifiers of the Constitution because the House would protect citizens through denial of implementing legislation. The converse side of the Federalist argument presumed that for treaties that didn’t implicate citizens lives—those with strictly extraterritorial effect—no action by the House

88. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 54, at 425.

89. THE FEDERALIST NO. 64 (John Jay), *supra* note 54, at 379.

90. Yoo, *supra* note 87, at 2025.

91. *Id.* The anti-federalists feared that only the House could protect the citizens because only the House was responsive directly to the people. U.S. CONST. art. I, § 2, cl. 1. At the time the state legislators chose the Senators directly. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1. Because the House played no role in the ratification of treaties, the anti-federalists were concerned that if the Senate and President could not succeed at trampling individual rights through the legislative process, they would simply turn to the treaty ratification process in order to bypass the protections against such encroachment provided by the House.

92. Yoo, *supra* note 87, at 2025. Essentially the Federalist campaigned on the theory of legal dualism. See *supra* notes 13-17.

would be necessary at all. Thus, the belief of the Framers was that the legislative role in the treaty-making process was confined to treaties that had domestic effects. If the Framers believed that Congress did not need to legislate with respect to extraterritorial treaties, it is hard to see how the Framers would have believed that a subsequent act of Congress would be permitted to override the treaty. With respect to domestically-applicable treaties, the sole function of legislation was in implementation. Again, given the limited role legislation was to play in the post-treaty ratification process, it seems unrealistic that the Framers would have then allowed a subsequent act of Congress to overturn the treaty.

But such conjecture is not necessary. The writings of the Framers confirm that they prioritized treaties over statutes. Alexander Hamilton started his description of the treaty power by noting that “[t]he Constitution . . . considers the power of treaty as different from that of legislation.”⁹³ Subsequently Hamilton explained that a later-in-time treaty must supercede a preexisting statute: “A treaty must necessarily repeal an antecedent law contrary to it.”⁹⁴ Yet, Hamilton indicated the reverse might not be true since a treaty could “control and bind the legislative power of Congress.”⁹⁵ More succinctly he stated: “Though a treaty may effect what a law can, yet a law cannot effect what a treaty does.”⁹⁶ If the Framers truly believed in Hamilton’s words, how could a later-in-time statute override a treaty?

Overall, the Framers intended that the treaty making authority would rest in a different branch than the legislative authority. While both sets of laws—treaty and statute—were to be equally weighed when balanced against the Constitution, the Framers believed that treaties had significantly greater power than did statutes. As such, having the default presumption maintain the prominence of the treaty, even in the face of a later-in-time statute, would more appropriately comport with the original intent of the Framers.

93. ALEXANDER HAMILTON & HENRY CABOT LODGE, *THE WORKS OF ALEXANDER HAMILTON* 169 (Henry Cabot Lodge ed., G.P. Putnam’s Sons 1904).

94. *Id.* at 174.

95. *Id.* at 183.

96. *Id.* at 168. Hamilton’s statement here is not meant to say that laws may not supercede a treaty, only that because treaties are either bi-lateral or multi-lateral a mere act of Congress cannot alter the terms between the nations. An act of Congress can prevent the United States from fulfilling a treaty obligation, but that is not the same as physically altering the text of the treaty. Such an alteration could only come from a new treaty. However, his sentiments are instructive in that it again demonstrates that as a default, the Framers believed that treaties were more powerful than statutes because on its own a treaty could override a statute but the reverse implication was not true.

C. A Treaty-trump Presumption Better Harmonizes the Inter-textual Analysis Than the Later-in-time Rule

The question for the courts is what should the appropriate default rule be when dealing with a later-in-time statute that trumps a treaty provision. As has already been shown above, the text of the Constitution and the Framers favor giving the treaty priority. Favoring a treaty-trump presumption also comports with the interplay of other sections of the Constitution like Congress' ability to declare war and the role of Senators in treaty ratification.

One of Judge Curtis's reasons for determining that the later-in-time rule should be used when statutes and treaties conflict was that if Congress declared war⁹⁷ on a nation with which a treaty existed that act of Congress would abrogate any existing treaties.⁹⁸ Therefore, any act of Congress should be able to abrogate a treaty.⁹⁹ As an initial matter, a treaty-trump presumption would produce the same result. A declaration of war against a nation is an explicit acknowledgement by Congress that all formal ties between the nations, including treaties, are severed.¹⁰⁰ Thus, using a treaty-trump presumption would similarly permit Congress to abrogate treaties through the use of a declaration of war. It is not accidental; it is not later-in-time; instead it is a thoughtful decision made after considerable debate that Congress clearly intends to act in a particular way. Therefore, another one of the underlying rationales for the later-in-time rule would be subsumed under the treaty-trump rule.

Another aspect of inter-textualism that bears on this issue is the function of the Senate. When the states initially ratified the Constitution, Senators were chosen by the state legislature and not through direct election.¹⁰¹ Because treaties not only bound the federal government but all states as well, the Framers wanted to ensure that the states themselves had a say in which treaties the federal government would enter. Thus, the Framers chose for the Senate—a body in which all states are equally represented and in which the voting members were chosen by the states themselves—to ratify or reject the treaty by supermajority.¹⁰² At the time

97. See U.S. CONST. art I, § 8, cl. 11.

98. *Taylor v. Morton*, 23 F. Cas. 784, 786 (C.C. Mass. 1855) (No. 13,799), *aff'd*, 67 U.S. (2 Black) 481 (1862).

99. *Id.*

100. George Steven Swan, *Presidential Undeclared Warmaking and Functionalist Theory: Dellums v. Bush and Operations Desert Shield and Desert Storm*, 22 CAL. W. INT'L L.J. 75, 122 (1991).

101. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

102. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1098-99 (2000); *see also*

of the founding, this meant that if more than thirty percent of the states objected, a treaty could not proceed.¹⁰³ Yet, if the later-in-time rule were to be used, then a piece of legislation, not supported by both Senators of *any* state, could trump the will of the states.¹⁰⁴ This would essentially eliminate the careful planning that the Framers put into the role of the states in the legislative process.

One final aspect of inter-textualism that bears noting is that Congress is given the authority to regulate “commerce with foreign nations.”¹⁰⁵ The fact that this power is specifically enumerated among Congress’s Article I powers demonstrates that the Framers certainly felt that regulation of commerce with foreign nations was different than the treaty authority.¹⁰⁶ Because of this difference, allowing Congress to override a treaty, without placing additional procedural hurdles in its path,¹⁰⁷ would essentially treat the regulation of foreign commerce power and the treaty-making power on par with each other. In order to avoid having a part of the Constitution be redundant, the two powers should be read as distinct and different.

IV. Why a Treaty-trump Rule Makes Sense from a Policy Perspective.

Yet, even with the Constitution disfavoring use of later-in-time rule to have a statute trump a treaty, nothing in the Constitution *prevents* Congress from explicitly overriding a treaty where it is acting pursuant to any of the powers granted to it under the Constitution.¹⁰⁸ Several policy reasons weigh in favor of using a treaty-trump rule. First, requiring a plain

U.S. CONST. art. I, § 3.

103. The original Constitution applied to only thirteen states and thus twenty-six Senators. A two-thirds vote required eighteen Senators. Assuming that both Senators from a state voted the same way on treaty matters then nine states would be required to vote in favor of the treaty. This would leave four of the thirteen states opposed. Using the same hypotheticals for today (even though Senators are no longer beholden to the individual states) if thirty-two percent of the states opposed a treaty could not proceed.

104. Each set of Senators could split their vote such that no two Senators from the same state voted in favor of the bill.

105. U.S. CONST. art. I, § 8, cl. 3.

106. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1881 n.63 (2005) (explaining how the grammatical difference between the treaty authority in Article II and regulation of foreign commerce in Article I belies any suggestion that the powers are equivalent).

107. The additional procedural hurdle here is no different than the plain statement rule that the Supreme Court requires before Congress acts in a traditional realm of state authority. See discussion *infra* Part IV.A.

108. Indeed, how can the Constitution prevent explicit overrides of treaties where it permits implicit ones via the “later-in-time” rule.

statement from Congress to trump a treaty would harmonize how Congress must similarly use a plain statement when using its domestic power to encroach on sensitive areas of constitutional importance. Second, a treaty-trump rule ensures greater stability in international law. Third, a treaty-trump rule avoids accidental liability that might be incurred by the United States for violating a treaty provision. And fourth, following a treaty-trump rule would bring consistency to the scattered Supreme Court decisions in this area of the law.

A. Analogizing to the Plain Statement Rule

The plain statement rule requires that “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”¹⁰⁹ Accordingly “federal courts will construe a statute to alter the federal balance only when Congress expresses an ‘affirmative intention’ to do so.”¹¹⁰ The rationale behind the most recent recitation of the rule was that when federalism concerns were implicated, Congress should be prevented from accidentally using its power in a way that it did not mean for the power to be used.¹¹¹ The expansion of the plain statement rule when Congress was legislating under its Commerce Clause power was meant to “sen[d] a strong message to Congress that [the Court] takes state sovereignty seriously” and that the Court was becoming “increasingly hostile to congressional regulation of state governmental functions, particularly in the area of commerce.”¹¹² And plain statements are not new to Congress. Besides the most recent use in the Commerce Clause context, the Court has previously employed it in the context of the Fourteenth Amendment.¹¹³ And even before that, Congress’ spending authority was subject to plain statement rule when Congress attempted to have a state act in a particular way.¹¹⁴

The plain statement rule essentially forces Congress to “stop and

109. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (internal quotation marks removed).

110. *Muntaqim v. Coombe*, 366 F.3d 102, 115 (2d Cir. 2004) (quoting *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 169 (2d Cir. 1993)).

111. Bruce Dayton Livingston, *Gregory v. Ashcroft: The Supreme Court Announces a New Rule of Statutory Construction in Deference to Constitutionally Recognized Principles of Federalism*, 11 ST. LOUIS U. PUB. L. REV. 243, 243 (1992).

112. Deanna L. Ruddock, *Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations*, 70 N.C. L. REV. 1563, 1590-91 (1992).

113. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15-16 (1981).

114. See *Harris v. McRae*, 448 U.S. 297 (1980); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585-98 (1937).

think” before acting in a traditional realm of state authority.¹¹⁵ In summary, where Congress is acting outside of its traditional realm and interfering with the careful balance of power that the Constitution has created between the federal government and the states, it is required to make a plain statement. The same logic should apply where Congress is interfering with the careful balance of power that the Constitution has created between the Executive branch and the Legislative.¹¹⁶ To require Congress to state in its legislation that it intends for the statute to take precedence over any conflicting treaty would merely force Congress to “stop and think” before determining that the statute should override a carefully negotiated international accord.¹¹⁷

Requiring Congress to make a plain statement in the Spending Clause context,¹¹⁸ the Fourteenth Amendment context,¹¹⁹ and more recently in the Commerce Clause¹²⁰ context has not proved burdensome for Congress. Requiring them to also make a plain statement where, in its absence Congress might violate an Executive action, should be equally important and easy to accomplish.

B. A “Treaty-trump” Rule Would Ensure Greater Stability in International Agreements.

The sanctity of a treaty is one of the most fundamental aspects of international law.¹²¹ When American courts determine that a later-in-time statute ought to trump a treaty, they are intending to give effect to the expression of the latest will of the sovereign but at the same time ignore the

115. This is not to say that the rule is in any way designed to prevent Congress from acting. Only that it requires Congress to make it clear that they do intend to act in such a way. In some ways this can be analogized to Rule 11 of the Federal Rules of Civil Procedure, which essentially requires attorney’s to stop, think, and investigate before proceeding with a claim. See Patricia M. Graham, *Sanctions Unwarranted by Existing Law*, 52 BROOK. L. REV. 609, 623-24 (1986).

116. See *supra* notes 47-52 and accompanying text.

117. See Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1180 (1997) (noting that plain statement rules force greater accountability and transparency on Congress).

118. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (holding that Congress can explicitly require states to act in a particular way via the Spending Clause only if they “do so unambiguously”).

119. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (requiring Congress to make a “plain statement” of its intent when legislating “in areas traditionally regulated by the States”).

120. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (requiring Congress to make a plain statement before utilizing its Commerce Clause power intrusively against the states).

121. Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT’L L. 313, 323 (2001).

potentially harmful international effects of their decision.¹²² One of the important aspects of treaties is to allow for a stable rule of law upon which businesses can rely when conducting transactions abroad.¹²³ In fact, treaties that help create tariff and non-tariff barriers, in particular, “are an effective way to establish stability in the United States economy.”¹²⁴ Yet, when Congress legislatively overrides a tax-treaty, for example, it causes significant harm to the United States.¹²⁵ A treaty-trump rule would leave the status quo in place with respect to international agreements until Congress explicitly and openly revokes a treaty.¹²⁶ Because such a revocation would have to be explicit, businesses and the international community (the public at large) could weigh in on the implications of the new law and provide feedback as to the ultimate impacts on business.

Businesses in general dislike uncertainty and prefer to engage in activities with minimum risk and maximum certainty of outcomes.¹²⁷ When the courts determine that a later-in-time statute should trump a provision in a treaty, they are essentially changing the underlying legal system under which business have been operating. When the legal foundation upon which businesses have been managing expectations shifts suddenly and significantly, instability is created.¹²⁸ While the shift costs the court nothing, it has a substantial cost to business.¹²⁹ In the international context, this could mean that business investment made on a good faith belief in a treaty provision could be lost if a later-in-time statute trumps the treaty in a way that Congress never intended. The advantage of a treaty-trump presumption is that business would be alerted to potential

122. See *supra* notes 35,76-77, 81 and accompanying text.

123. Jonathan I. Miller, *Prospects for Satisfactory Dispute Resolution of Private Commercial Disputes Under the North American Free Trade Agreement*, 21 PEPP. L. REV. 1313, 1327-28 (1994) (“[T]reaties and international agreements have become the primary source for creating and enforcing obligations in the international trading field.”).

124. *Id.* at 1328 n.77.

125. Infanti, *supra* note 45, at 677 (discussing harms to the reputation of the United States and undermining the trust that treaty partners have placed in the federal government).

126. See *EEOC v. Arabian Am. Oil Co.*, 499 US 244 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). This case demonstrates the significant contortions of the law a court is required to make in order to preserve a treaty. Congress had expressed a desire to have its law apply extra-territorially but the Court instead had to twist the words of the statute to prevent extraterritorial reach. See *id.* at 260-66 (Marshall, J., dissenting).

127. Dudley Cooke, *October 2001 Newsletter: The Day the World Changed: Leading Amid Uncertainty*, <http://www.libertystrategies.com/newsletters/2001oct.htm> (last visited Apr. 27, 2007).

128. Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 689-90 (1990).

129. *Id.*

changes in legal status at a far earlier stage and would be able to make the appropriate risk analysis calculations.

As an additional benefit to the stability in international accords, greater transparency would result from a treaty-trump rule. Since Congress would be required to expressly state that it was attempting to trump portions of a treaty, it would allow for greater debate on the issues and protection of international accords. It would also give the President signing the legislation more knowledge about the potential international implications of such a statute. Since the Executive branch is the “sole organ” of foreign affairs,¹³⁰ it would be best for the President, when presented with the appropriate legislation and plain statement from Congress, to determine the foreign affairs needs of the country, and not to leave such a determination to the courts.¹³¹ Plain statements from Congress ultimately help increase the transparency of Congress’ decision-making,¹³² and consequently serve to increase the accountability of the decision-makers.¹³³ As such, a more “robust and meaningful deliberation by the electorate and their representatives” can take place.¹³⁴ Congress may ultimately decide that it wants to abrogate a provision of a treaty and the President may agree and sign the legislation. But, if that happens, at least the business and international community will have been afforded ample disclosure and a clear knowledge of what the new underlying legal framework will be. As such, switching to a treaty-trump rule can eliminate the risk and uncertainty—in the increasingly global business environment—that are associated with the later-in-time rule.

C. A “Treaty-trump” Would Force Congress to Weigh the Costs and Benefits of Violating an International Accord.

When a court determines that a later-in-time statute should trump an existing treaty provision, the United States is still obligated under international law to comply with the treaty.¹³⁵ Under the current later-in-

130. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *see also* U.S. CONST. art. II, § 2, cl. 2 (granting the President the authority to “appoint ambassadors”); U.S. CONST. art. II, § 3 (granting the President the authority to “receive ambassadors and other public ministers”).

131. *See Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982).

132. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 722 (1996).

133. Garrett, *supra* note 117, at 1180.

134. *Id.*

135. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 115(1)(b), 321 (1987); *see also* James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46

time regime, Congress could override a treaty without considering what the liability for the United States would be or the potential international harm that might result. This very concern is likely what was at the heart of the Supreme Court's decision in *EEOC v. Arabian American Oil Co.*¹³⁶

While no treaty was explicitly at stake in *Arabian American Oil*, the majority desperately sought to avoid the extraterritorial reach of Title VII despite relatively clear language from Congress to the contrary.¹³⁷ Imagine two situations: the first involves the extraterritorial application of Title VII in a country with whom the United States has a pre-existing treaty permitting employment on whatever basis the country chooses and providing tax penalties should the rule be altered; the second involves a country where no such treaty exists. In order to avoid the conflict under the later-in-time rule, the court would be required to utilize the twisted logic present in *Arabian American Oil*, which led to Congress immediately reversing the Court.¹³⁸ However, under a treaty-trump rule, the law would apply in the second hypothetical situation but not in the first. Because the law has extraterritorial reach and because Congress did not make it clear it wanted to abrogate any treaties with the passage of Title VII, the treaty would remain in tact in the first hypothetical. This would allow for two significantly positive effects. First, no penalty would be imposed upon Congress as would occur under the later-in-time analysis. Second, Congress could have extraterritorial effect in all nations where a treaty did not preclude such an enactment exactly as Congress desired. There would be no need for an all-or-nothing result. Instead, a more finely tuned result would be achieved.

Congress could simply attach a runner to any statute that stated "this statute takes precedence over any previously ratified treaty" in order to overcome the presumption.¹³⁹ This would suffice as a clear statement that

AM. J. COMP. L. SUPP. 421, 425 (1998).

136. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

137. *See supra* text accompanying note 126.

138. Congress amended Title VII less than a year after the Court handed down its decision. The amended version extensively rewrote the statute to ensure that the law would have an extraterritorial application. While the intent of the 1964 Congress, which originally enacted the law cannot be known for certain, it seems apparent that the Court misconstrued their original. The original version of Title VII contained an "alien exemption" clause and the EEOC had consistently interpreted it to apply extraterritorially. It seems likely, however, that the original Congress did intend for the law to have extraterritorial reach. *Arabian Am. Oil*, 499 U.S. at 249.

139. It could be argued that Congress is simply on notice today that it should attach a runner to all legislation that states "this statute should fail where in conflict with an existing treaty." Placing the presumption on favoring the treaty, however, allows Congress to make general

Congress was willing to accept whatever fallout occurred from the trumping effect of the statute. The President would also be put on notice that signing such legislation could have international ramifications. His signature on the legislation would indicate that the United States was willing to bear the cost of any broken treaty.¹⁴⁰

D. Employing a Treaty-trump Rule Would Settle the Uncertain State of the Law in this Field.

Over the past century, the Supreme Court has altered the intent requirements needed before lower courts could employ the later-in-time rule. In the early 1930s the Supreme Court essentially endorsed the treaty-trump rule when it required that Congress “clearly express[]” its intent before it would deem a treaty “to have been abrogated or modified by a later statute.”¹⁴¹ However, the Supreme Court never again cited this holding. Instead in the 1990s the Court reverted back to a less searching inquiry when employing the later-in-time rule.¹⁴² The Court restated the rule without the intent requirement at all: “when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”¹⁴³ In between, during the 1950s, the Court categorized the intent requirement as requiring only “some affirmative expression of congressional intent to abrogate the United States’ international obligations.”¹⁴⁴ In essence, the Supreme Court’s jurisprudence on this matter is scattered and inconsistent.¹⁴⁵ Creating a consistent and clearly defined rule would enable lower courts to more easily determine outcomes and bring certainty to the law.¹⁴⁶

changes to the status quo and exclude those changes in specific circumstances. Allowing Congress to state the statute would fail where conflicting with a prior treaty it essentially restricts Congress ability to alter the status quo in the general case.

140. In essence this requirement ensures that Congress has in fact “stopped” and “thought” and “considered” what it was doing and the ramifications of the action. *See* text accompanying notes 115, 117.

141. *Cook v. United States*, 288 U.S. 102, 120 (1933) (“A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”).

142. *See* *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (holding that the AEDPA trumped the Vienna convention despite the lack of findings on the part of Congress).

143. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

144. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

145. *See* *Bradley*, *supra* note 27, at 491 n.64.

146. *Cf.* *George M. Sirilla*, 35 *U.S.C. § 103: From Hotchkiss to Hand to Rich, the Obvious Patent Law Hall-of-Famers*, 32 *J. MARSHALL L. REV.* 437, 473 (1999) (discussing how the Supreme Court’s inconsistent holdings with respect to patent validity “provided little stability and guidance to the lower courts”).

V. A Treaty-trump Rule More Accurately Reflects Modern Day Court Practice.

Shifting to a treaty-trump rule would not cause much difficulty for either Congress or the lower courts because it more closely resembles what the lower courts actually do today.¹⁴⁷ As discussed in Part II, prior to employing the later-in-time rule, lower courts are first required to construe the statute as not applying extraterritorially and then to avoid a conflict with customary international law if at all possible.¹⁴⁸

The *Charming Betsy* presumption prevents Congress from violating “customary international law” without first making a plain statement of its intent to do so.¹⁴⁹ While not all treaties are considered “customary international law,”¹⁵⁰ this first presumption helps limit the application of the later-in-time rule. In essence, Court requires that Congress explicitly overrule customary international law, but allows for accidental overruling of a treaty! This creates the perverse circumstance in which the United States is more bound by laws that it hasn’t necessarily passed,¹⁵¹ than by the treaties that are ratified by two-third of the Senate and signed by the President.¹⁵² For example, in *United States v. Palestine Liberation Organization* the United States District Court for the Southern District of New York applied the *Charming Betsy* presumption even though the a later-in-time anti-terrorism statute seemed to abrogate the United States obligation to the United Nations.¹⁵³ The district court even noted that “Congress has the power to enact statutes abrogating prior treaties or international obligations entered into by the United States” and nonetheless applied the *Charming Betsy* presumption to save the treaty.¹⁵⁴

The second presumption that courts employ is the presumption against extraterritoriality.¹⁵⁵ Again, while not all treaties have an extraterritorial

147. See Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 231-232 (1993) (explaining how the Court uses the two canons to avoid “international complications by leaving such matters to Congress”).

148. See discussion *supra* Part II.A-B.

149. See discussion *supra* Part II.B.

150. Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT’L L. & POL’Y 71, 79 (1996) (noting that “if there are few bilateral treaties covering a particular subject,” they might not produce strong enough evidence that a customary international law has been formed).

151. Customary international law is part of American law. *United States v. Spanish Smack Paquete Habana*, 189 U.S. 453 (1903).

152. U.S. CONST. art. II, § 2, cl. 2.

153. *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988).

154. *Id.*

155. See discussion *supra* Part II.A.

effect, this presumption helps limit the later-in-time rule by ratcheting up the level of congressional findings needed before a court will override a treaty that has extraterritorial effects. For example, in *Commodity Futures Trading Commission v. Nahas* the District of Columbia Circuit Court of Appeals avoided application of the later-in-time rule by construing the legislation to not apply extraterritorially.¹⁵⁶ The D.C. Circuit noted that the lower court should have followed the rule of statutory construction that creates the presumption that Congress does not intend its law to apply extraterritorially.¹⁵⁷

The problem with relying on these two canons of interpretation to help prevent all later-in-time statutes from trumping treaties in the absence of a plain statement from Congress, is that not all treaties have extraterritorial application or involve the violation of customary international law. This situation was squarely presented in the Second Circuit's decision in *Sumitomo Shoji America, Inc v. Avigliano*.¹⁵⁸ In *Sumitomo*, Title VII came into conflict with the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan (the "Japanese Treaty").¹⁵⁹ The issue was whether a New York based wholly-owned subsidiary of a Japanese corporation was subject to Title VII's anti-discrimination provisions when the Japanese Treaty itself permitted management to hire personnel of their own choosing.¹⁶⁰ Neither of the above-discussed canons was applicable since the law applied domestically and customary international law does not speak to employment hiring practices. If the court gave effect to the treaty, then the subsidiary would be forced to comply with Title VII while a branch office *in the exact same building* would not.¹⁶¹ To avoid that conflict, the Second Circuit determined that the treaty should be applicable to both branches and subsidiaries despite the fact that the later-in-time rule would have resulted in the reverse effect.¹⁶² The Supreme Court reversed but avoided application of the later-in-time rule and permitted the very inconsistency about which the Second Circuit worried.¹⁶³ The Court found that because the wholly-owned subsidiary was an *American* company it

156. *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 493-95 (D.C. Cir. 1984).

157. *Id.* at 493.

158. *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (1981), *rev'd*, 457 U.S. 176 (1982).

159. *Id.* at 553.

160. *Id.* at 555.

161. *Id.* at 556.

162. *Id.* at 555-56.

163. *Sumitomo Shoji Am., Inc., v. Avagliano*, 457 U.S. 176, 189 (1982).

was not subject to the treaty at all.¹⁶⁴

Because many of the lower courts do attempt to avoid use of the later-in-time rule by employing the above canons,¹⁶⁵ altering the presumption to be one of treaty-trump would not be a significant burden for the courts today. With respect to Congress, the change in presumption will also mean very little. In the cases where Congress clearly intended for the legislation to override an existing treaty the result will be the same. The only difference will be in cases where the statute was not clear about whether it should trump the treaty. In such circumstances the courts will use the presumption to leave the treaty in tact and essentially force Congress to go back, and make the specific findings and engage in the open debate before reversing the Court. While legislating is not cost free, the error-cost seems to be better placed on Congress instead of the Executive. The cost of creating a new piece of legislation requiring the House, Senate and President to agree seems far less than the cost of creating a new treaty involving not only the President and a supermajority of the Senate, but a foreign country as well. Given the difference in error cost it seems reasonable to place the extra cost on Congress in situations where Congress has not acted in a clear and explicit way.

VI. Conclusion

The later-in-time rule has been a canon of statutory interpretation for over 120 years. Yet, when applied in the context of a later-in-time statute trumping an existing treaty, the canon seems to lack a constitutional basis. The principles underlying the later-in-time rule are significantly eroded when an act of the Executive branch conflicts with a later act of the legislative branch. Instead, the Constitution, the Framers, and general policy all favor a treaty-trump rule in the absence of a plain statement from Congress that the newly enacted law ought to trump an existing treaty.

A treaty-trump rule would ensure greater stability in the international realm—helping American businesses appropriately undertake risk assessment—and will allow for greater transparency and accountability domestically. Moreover, a treaty-trump rule would produce a better result with respect to the error-costs associated with a court decision that did not reflect the actual will of Congress. Finally, a treaty-trump rule is more soundly ground in the Constitution itself: first, both treaties and statutes remain inferior to the Constitution; second, it helps clarify the relative

164. *Id.* at 182-83.

165. Turley, *supra* note 147, at 227 n.216 (collecting cases where courts have avoided application of the “later-in-time” rule).

weight of treaties and statutes to each other given the text of the Constitution; and finally, the original intent of the Framers to make treaties more powerful than statutes is given effect.