ARTICLES

AGAINST FREE-FORM FORMALISM

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Article II, Section 2 of the Constitution provides that the President shall have the power to make treaties by and with the consent of two-thirds of the Senate. Yet, most of the international agreements into which the United States has entered over the last fifty years, including NAFTA and the WTO Agreement, have been concluded as congressional-executive agreements–a procedure by which the President submits an agreement to both houses of Congress for simple majority approval. In an article in the Harvard Law Review *entitled "Is NAFTA Constitutional?," Professors Bruce Ackerman and David Golove attempted to provide this practice with constitutional foundations. Pointing to the decisive shift away from traditional isolationism and toward internationalism at the close of World War II, they argued the resulting "constitutional moment" transformed the meaning of the Treaty Clause and legitimized the congressional-executive agreement. Professors Ackerman and Golove also advanced a narrower argument for which it was unnecessary to rely on the full thrust of Professor Ackerman's theory of higher lawmaking. They claimed that, notwithstanding contrary practice during the nation's first 150 years, the constitutional text is indeterminate and can plausibly be construed to support the congressional-executive agreement.*

In a subsequent article, Professor Laurence Tribe sharply criticized this latter aspect of Professors Ackerman and Golove's article, charging that their claim that the text is indeterminate reflects a dangerous "free-form" approach to constitutional interpretation in which arguments are selectively chosen to reach preordained conclusions without concern for fidelity to the text. In order to preserve interpretive objectivity and the ability of the Constitution to constrain government, Professor Tribe urged that constitutional interpretation, at least as to "architectural" provisions, should be based strictly on the original meaning of the text. He then sought to illustrate the proper application of his own "topological" model of textual interpretation by closely focusing on the Treaty Clause. Developing an elaborate set of textual arguments, he claimed that there is only one plausible construction of the text: The Treaty Clause is exclusive and renders the congressional-executive agreement unconstitutional.

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In this Article, Professor Golove responds to Professor Tribe on the latter's own terms by offering a serious textual and structural analysis of the Treaty Clause that supports its nonexclusivity. Professor Golove shows that the constitutional text is in fact indeterminate and that, contrary to Professor Tribe's claims, textualism cannot render a singularly persuasive construction of the Treaty Clause. By analyzing each of Professor Tribe's arguments, Professor Golove shows that equally strong formal arguments can be constructed in favor of the nonexclusive reading. Professor Golove thus seeks to demonstrate by illustration that textualism is just as open to manipulation as the interpretive methodologies that Professor Tribe decries and, given the pervasive ambiguities in the text, is generally incapable of yielding unique, objective resolutions to constitutional disputes, even those over concrete provisions of the text. Only by systematically ignoring these equally plausible formalist counterarguments was Professor Tribe able to reach his favored reading of the Treaty Clause. In the final analysis, Professor Tribe's article reflects free-formism in its most paradoxical form: free-form formalism.

> [Professor] Tribe is a skilled litigator, and he does not lightly set aside arguments in favor of his positions.[1]

INTRODUCTION

Professor Tribe is indeed a skilled litigator, but far more than that, he is one of the great advocates in our constitutional history. No one would seriously deny the grace and power of his rhetoric and oratory. Nor, in my opinion, is there any other constitutional scholar who has made a larger or more admirable contribution to the advancement of our collective project. Like Justice Brennan, he is the builder of an inspired edifice of doctrine that, in Professor Dworkin's sense, makes our Constitution "the best it can be"[2] and lays the foundation for its further realization far into the future.

Yet, my admiration for his prodigious accomplishments notwithstanding, there are times when even the most accomplished among us go astray. And in those moments, elegant prose and formidable rhetorical skills, called into action by the imperatives of internecine battle, can make a deadly combination. Incisive critique, persuasive arguments, and arresting insights fly by so fast that we are swept along without a chance to scrutinize their deeper merits. But when the dust settles—if it ever settles before most of us just move on—there is an accounting that ought to be done, a searching assessment of what has been said, the critiques, the arguments, and the insights, for they may

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[1] Ronald Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve, 65 Fordham L. Rev. 1249, 1261 (1997).

[2] Ronald Dworkin, Law's Empire 62 (1986) [hereinafter Dworkin, Law's Empire]; see also Ronald Dworkin, Freedom's Law 11 (1996) [hereinafter Dworkin, Freedom's Law] (declaring that when more than one construction "fits" the relevant constitutional materials, interpreters are to "decide on their own which conception does most credit to the nation").

have been less persuasive than at first appeared and they may have wider implications that reveal deeper flaws in our methodologies and commitments.

With these preliminary remarks, I will turn to my own assessment of Professor Tribe's most recent contribution to the *Harvard Law Review*,[3] for I fear it suffers from some of the flaws I have identified and provides an occasion to examine critically some of the interpretive methodologies he now favors. Not that I am wholly unimplicated in the dispute; indeed, I am a participant, one of the objects of Professor Tribe's heated rhetoric. For that reason, if not on general principles alone, I invite others to assess my own arguments, to find where I have missed the obvious or perhaps unconsciously overlooked the subtle in my effort to defend my own role. Yet, my thesis is that, despite having turned a microscope to the Constitution and scoured the text for any supporting evidence, Professor Tribe has not made a *single* argument beyond the familiar that supports his exclusive reading of the Constitution's Treaty Clause, nor given us a *single* reason for accepting his exclusivist view as the *only* plausible construction of the text. By demonstration, however, he has given us powerful reasons for skepticism about formalist interpretive methodologies that require a blinkered, single-minded focus on the original meaning of the text.

The main target of Professor Tribe's ire is what he calls "free-form method" in constitutional interpretation. In his view, free-formism has, regrettably, become all too common among constitutional scholars and is particularly marked in the work of Professor Bruce Ackerman of the Yale Law School. Although unusually clever, Professor Ackerman is among the most egregious purveyors of the practice, and his much-discussed theory of higher lawmaking and informal constitutional amendments very nearly reeks of it.[4] Exhibit Number One for the prosecution is a lengthy article Professor Ackerman and I coauthored in the *Harvard Law Review*, entitled "Is NAFTA Constitutional?"[5] We sought there to explain the constitu-

[3] See Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995) [hereinafter Tribe, Taking Text].

[4] Professor Ackerman's theory is given its fullest presentation in 1 Bruce Ackerman, We the People: Foundations (1991), and in 2 Bruce Ackerman, We the People: Transformations (1998).

[5] Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995) (tracing rise of congressional-executive agreement and so-called interchangeability doctrine, whereby Congress may approve by majority vote any international agreement that President could submit for two-thirds approval by Senate under Article II, Section 2 of Constitution); see also Bruce Ackerman & David Golove, Is NAFTA Constitutional? (1995) (reprinting same as book).

tional foundations for a long-settled practice whereby the United States enters into international agreements on the authority of an act of Congress rather than by the constitutionally specified procedure requiring the advice and consent of two-thirds of the Senate.[6] Although the vast bulk of our post-War international commitments have been concluded in this form, two recent examples are particularly dramatic: the North American Free Trade Agreement (NAFTA)[7] and the Agreement Establishing the World Trade Organization (WTO Agreement).[8]

Professor Tribe fiercely disagrees with our constitutional views. Unembarrassed by the fact that they are supported nearly unanimously by contemporary scholars of foreign relations law[9] and have been reflected in actual constitutional practice on thousands of occasions during the past fifty-plus years[10]—indeed, even though it requires a *volte face* from his own earlier constitutional views[11]—Professor Tribe believes that our constitutional claims can only be supported by free-form interpretive methods. Nevermind that our express purpose was to show that the constitutionality of the so-called congressional-executive agreement procedure rests upon an *extratextual* act of popular sovereignty in the wake of the unprecedented devastation of World War II and the widespread belief that the Treaty Clause had been at least partly responsible for the tragic events following the rejection of the Treaty of Versailles. Professor Tribe nevertheless believes that free-formism is conspicuously on display throughout our argument. Applying the precept that the most effec-

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6 See U.S. Const. art. II, § 2, cl. 2.

7 See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (authorizing by two-house majority vote the North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 (1993)).

8 See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (authorizing by two-house majority vote the Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, 33 I.L.M. 1144 (1994)).

9 See, e.g., Restatement (Third) of Foreign Relations Law § 303(2) (1987) [hereinafter Restatement] (upholding constitutionality of interchangeability doctrine); id. § 303 cmt. e (elaborating on same); Louis Henkin, Foreign Affairs and the United States Constitution 215-18 (2d ed. 1996) (same); Memorandum of Law from Professors Bruce Ackerman, Abram Chayes, Kenneth Dam, Thomas Franck, Charles Fried, David Golove, Louis Henkin, Robert Hudec, John H. Jackson, Harold Hongju Koh & Myres McDougal to Members of Congress and Executive Branch Officials (Nov. 11, 1994) (on file with the *New York University Law Review*) (same); see also Ackerman & Golove, supra note 5, at 805 n.12 (citing authorities).

10 For a number of examples, see the discussion in Ackerman & Golove, supra note 5, at 875-907; see also Executive Agreements, 14 Whiteman Digest § 22, at 196, 210 (noting that vast bulk of our international commitments since World War II have been concluded as congressional-executive agreements).

11 See Laurence H. Tribe, American Constitutional Law § 4-5, at 228 n.18 (2d ed. 1988) [hereinafter Tribe, Constitutional Law] (endorsing interchangeability doctrine).

tive teaching is by example, he therefore sets out to demonstrate how a rigorous and detailed textual exegesis of the Treaty Clause should be done. When it is over, it establishes, conclusively in his view, that Professor Ackerman and I, and all the leading scholars in the field—not to mention the many presidents, senators, and representatives from both parties who have consistently upheld the interchangeability doctrine over many years[12]—are wrong: The Treaty Clause is subject to only one plausible construction. It is wholly exclusive; there is no such constitutional animal as the congressional-executive agreement.

Perhaps even more startling than this conclusion is Professor Tribe's understanding of what a rigorous, as opposed to a free-form, interpretive methodology requires. I will not be the only one surprised by his turn towards strict textualism in constitutional interpretation.[13] Distinguishing between what he calls "architectural" and "aspirational" provisions of the Constitution, he insists that the former, which include the Treaty Clause, must be read as if frozen in time circa 1787 while the latter may (though they need not necessarily) be given more room to evolve and expand.[14] In any case, at least as to his vaguely specified architectural provisions, Professor Tribe self-consciously joins ranks with Justice Scalia[15] and takes up the cudgels for a formalist interpretive methodology that relies solely upon text and insists that the interpreter's goal is simply to uncover its original meaning. Indeed, like Justice Scalia, he believes that the intent of the Framers is largely irrelevant, except as it is instantiated in the text, and he is highly skeptical about the use of precedent and practice to inform constitutional interpretation.[16]

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12 For numerous examples, see Ackerman & Golove, supra note 5, at 861-907.

13 Even Professor Tribe has excused those who might find "some amusement" in his endorsement of textualism. Tribe, Taking Text, supra note 3, at 1248 n.91 (citing Sanford Levinson, Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment, 11 Const. Commentary 101, 105 (1994)); see also Jordan Steiker et al., Taking Text and Structure *Really* Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility, 74 Tex. L. Rev. 237, 243-52 (1995) (parodying, I believe, Professor Tribe's original meaning textualism).

14 Tribe, Taking Text, supra note 3, at 1247 & n.90; see also infra notes 35-37 and accompanying text (elaborating on Tribe's distinction between architectural and aspirational provisions).

15 Indeed, the two have recently canvassed the commonalities, and differences, in their perspectives. See 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 (Amy Gutmann ed., 1997) [hereinafter Scalia, Common-Law Courts]; Laurence H. Tribe, Comment, in A Matter of Interpretation, supra, at 65 [hereinafter Tribe, Comment]; Antonin Scalia, Response, in A Matter of Interpretation, supra, at 129, 133-43 [hereinafter Scalia, Response].

16 See infra note 38 and accompanying text.

Rather than addressing the meta-interpretive questions raised by Professor Tribe's views directly, I focus on the details of his elaborate textual arguments. Through close analysis of those arguments, I shall attempt both to liberate the Treaty Clause from his narrow exclusive construction of its language and to demonstrate the rigid, unconvincing character of his formalistic interpretive methodology. In the process, moreover, I hope to illustrate some of the central defects in Professor Tribe's and Justice Scalia's unrelenting focus on text and original meanings to the exclusion of more nuanced, inclusive interpretive methodologies.

In the first two parts of this Article, I draw the contours of the present dispute between Professor Tribe on the one hand and Professor Ackerman and me on the other, and then rehearse what I take to be the main *textual* arguments on both sides of the question. In my view, those arguments are ultimately indeterminate, leaving the original meaning proponent ample room to read the Treaty Clause as either exclusive or nonexclusive. In Part III, I then undertake a painstaking assessment of each and every argument that Professor Tribe urges in favor of his insistent claim that the exclusive view is *the only plausible interpretation of the text*.[17] What emerges is that beyond the rather straightforward arguments that I contend make the exclusive reading one plausible construction of the text, Professor Tribe has failed to make a single persuasive argument to support his view. And while he makes a number of thought-provoking general observations about the nature of textual interpretation, he fails to heed his own advice, disregarding the dictates of his own "topological" model of interpretation that charges us with taking text, structure, and architecture seriously. Clever though many of the long series of arguments he

[17] I make a determined effort to address *all* of Professor Tribe's arguments addressed to the interpretation of the Treaty Clause. I do not address all of his arguments against Professor Ackerman's larger constitutional views nor the other interpretive disputes between Professors Tribe and Ackerman, and between Professors Tribe and Amar. Compare Tribe, Taking Text, supra note 3, at 1243-47, 1288-92 (criticizing Ackerman's and Amar's interpretive methods generally, and their interpretations of Article V specifically), with Bruce Ackerman, Higher Lawmaking, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment 63, 71-82 (Sanford Levinson ed., 1995) (describing non-Article V process of "higher lawmaking" whereby "We the People," acting as national sovereign, may amend Constitution), Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457 (1994) (defending reading of Constitution that allows amendment outside Article V), and Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043 (1988) (same). Although I touch on some of the main points, especially as they relate to my larger argument, see infra notes 403; 415-33, and accompanying text, I leave a fuller defense to those who have made the arguments under siege, who are fully capable of defending their own views. For Professor Ackerman's most extended textual defense of his construction of Article V, see 2 Ackerman, supra note 4, at 71-92.

puts forth may be, ironies abound, and, in the end, the arguments collapse in contradiction and indeterminacy, leaving us with no choice but to condemn him for the very sin which he sought to lay on the heads of Professor Ackerman and me: free-form method in constitutional interpretation. Only in his case, this method takes on a most paradoxical form: free-form formalism.

Still, the important point is not really about the rigor of Professor Tribe's arguments. As our preeminent scholar of constitutional doctrine, he is at least as well placed as anyone to offer a convincing illustration of how a textualist methodology can yield a singularly persuasive construction of constitutional text. All the more so, then, when he offers an extended textual exegesis of a relatively concrete provision that was uniformly construed in accord with his view during the first 150 years of the Republic. If his arguments prove unpersuasive and ultimately self-defeating even in this context, this surely says something of wider significance about the weaknesses of the textualist project as a whole: The pervasive textual ambiguities in the Constitution, exemplified by the Treaty Clause, will most often prove unresolvable by application of purely formalist interpretive techniques.

Once having made good on these admittedly bold claims, I turn to some larger theoretical concerns. Professor Tribe's central thesis appears to be that Professor Ackerman's theory of constitutional moments is itself a deplorable example of free-formism, one that needs to be extirpated in order to save the field from loose interpretive techniques and shoddy scholarship. But this is a category error of the first order. Whatever else it may be, Professor Ackerman's theory is not an interpretive theory at all, although it certainly has interpretive implications. Rather, it is a theory of informal higher lawmaking, of constitutional transformation outside the confines of Article V. Ironically, and quite contrary to Professor Tribe's charged rhetoric, it is motivated in significant measure precisely by the need to liberate ourselves from reliance on free-formism to justify our basic political institutions.

Given Professor Tribe's preeminent stature in the community of constitutional scholars, judges, and advocates, I believe this extended response to his article warranted. In the final analysis, his recent arguments disserve the Treaty Clause; disserve the wider field of foreign relations law; disserve the project of defending the Constitution and realizing its full potential as the charter of our political community, a project for which he has long been at the forefront; and disserve even those committed to textualism and original meaning methodologies in constitutional law.

I
ANATOMY OF THE DISPUTE

Let us begin with what is in dispute and with what has already been said, both of which can be summarized in a few pages. At stake is how the United States enters into binding international commitments. There are basically three procedures which are used, although only one, the treaty procedure, is specified in the constitutional text.[18] Under the treaty mode, the President negotiates an agreement and then seeks the advice and consent of the Senate. In order to obtain constitutional authority to make the treaty internationally binding, he must convince two-thirds of the Senators present to give their approval. Under the congressional-executive agreement procedure, in contrast, the President may conclude an agreement under the authority of an act of Congress, which, like all other legislation, must be approved by simple majorities in both houses. Finally, the President sometimes concludes unilateral executive agreements on his sole authority.

The present dispute concerns only the second category, the so-called congressional-executive agreement.[19] This category, in turn, breaks into two sub-types: those agreements Congress authorizes the President ex ante to conclude in accordance with whatever guidelines it chooses to enact and those Congress, mimicking the Senate in its treaty mode, authorizes ex post after the President has negotiated an agreement and sought legislative approval.[20] NAFTA and the WTO

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18 See U.S. Const. art. II, § 2, cl. 2.

19 As a sidelight, our accounts have importantly different implications for the constitutional underpinnings of the third category, the unilateral executive agreement, as well, but that is a secondary, though not necessarily less important, concern in the present controversy. For further discussion, see infra notes 358, 376; 327-29, 340-43, and accompanying text.

20 There is a fourth type of agreement, sometimes known as the executive agreement ancillary to a treaty. In these cases, the President, without further authority, concludes a special agreement that is more or less explicitly called for in a treaty that has already received the Senate's advice and consent. In effect, this is a kind of ex ante agreement, approved by the Senate at the time it gives its advice and consent to the treaty. There is, no doubt, a cognate executive agreement ancillary to a congressional-executive agreement. By a parity of reasoning, moreover, although there is little if any practice to confirm the view, it may be the case that the Senate could give its ex ante consent authorizing the President to conclude treaties on particular subjects in accordance with its stipulated requirements. To my knowledge, it has never done so, and in the famous dispute over the Hague arbitration treaties around the turn of the century, the Senate adamantly refused to go even half way there. For further discussion, see John Bassett Moore, Treaties and Executive Agreements, 20 Pol. Sci. Q. 385 (1905). Some senators did worry that the 1943 Connally Resolution, which called for the creation of an international organization to keep the peace, might be construed as the Senate's ex ante consent to the then forthcoming United Nations Charter. See 89 Cong. Rec. 9066 (1943) (remarks of Sen. Connally) (noting concerns of senators to this effect). In any case, the constitutional question raised, as in

Agreement are important, but by no means unique, examples of the latter. The longstanding majority view, and the settled practice, is that treaties and congressional-executive agreements, whether ex ante or ex post, are wholly interchangeable.[21] This means that the President has the option for *any* agreement to seek the Senate's consent by two-thirds vote or the approval of Congress by simple majority vote.[22] Of course, there is nothing to prevent the Senate from insisting as the price of its cooperation that the President opt for the treaty route. But, likewise, the House may insist on the congressional-executive agreement form by refusing to enact legislation necessary to implement the agreement as a treaty.

Since "[c]onstitutional doctrine to justify Congressional-Executive agreements is not clear or agreed,"[23] Professor Ackerman and I sought to provide the needed constitutional foundations. It nevertheless remains an open question whether our efforts have furthered or hindered that goal. For the main burden of our extended argument was to show that the best and most widely accepted account[24] rests upon false historical premises and that the real origin of the practice is to be found in the decisive internationalist movement led by President Roosevelt during World War II.[25] In short, we painstakingly sought to demonstrate that the conventional historical accounts developed in the 1940s were wrong in claiming that the congressional-executive agreement had roots going back to the earliest days after the founding and had always been a consistent part of the nation's agreement-making practices. Contrary to the claims of leading scholars and executive branch officials in the 1940s, we argued that during the first 150

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the case of ex ante congressional-executive agreements, would be the scope of the Senate's power to delegate its treaty responsibilities to the President. Cf. Field v. Clark, 143 U.S. 649, 693-94 (1892) (upholding congressional delegation of authority).

21 See Ackerman & Golove, supra note 5, at 805 n.12 (citing authorities); supra notes 9-10 (same).

22 This common formulation of the interchangeability doctrine is not entirely precise. In fact, the doctrine asserts that Congress may approve any international agreement submitted by the President that falls within one of its enumerated (or implied) powers in Article I, Section 8 of the Constitution or elsewhere. For further discussion and some additional refinements, see infra notes 28-49, 56, and accompanying text.

23 Henkin, supra note 9, at 216.

24 Indeed, it is the only account that has seriously been offered in the literature.

25 We did note that important, though circumscribed, inroads were made upon the traditional understanding during the early New Deal period, when limited uses of the ex ante congressional-executive agreement were first made. See Ackerman & Golove, supra note 5, at 845-61. Further, we left open the degree to which this more limited practice might have been legitimized as part of the sweeping domestic transformations that were realized in 1937 of the commerce and other powers. We nevertheless did make unmistakably clear our view that whatever status these changes may have achieved, they in no way approached the modern interchangeability doctrine. See id. at 851-56, 860-61.

years of our history, there was *no* practice which supported interchangeability or even the existence of the congressional-executive agreement form in its modern guise.[26] The Framers' intent, moreover, was consistent only with an exclusive reading.[27] Having thus cast doubt on the existing foundations for the practice, we offered a more controversial alternative account: The people in the mid-1940s, exercising their popular sovereignty through an act of informal higher lawmaking, had transformed the meaning of the Treaty Clause to constitute the modern congressional-executive agreement and render it interchangeable with the traditional treaty.[28]

Although Professor Tribe mostly agrees with our history, he most assuredly rejects our theory. This might well have led one to expect him to focus on his theoretical objections to Professor Ackerman's larger project, and he does make some arguments, which I come to later,[29] against the idea of informal higher lawmaking. But by far the main subject of his remarks is interpretive. He vehemently objects to our claim that the text of the Treaty Clause is indeterminate and need not necessarily be read to require that all international agreements be

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[26] See id. at 813-45.

[27] See id. at 808-13.

[28] See id. at 861-96. There are actually two versions of the interchangeability doctrine, one stronger and the other weaker. We explicitly defended the weaker version, but the stronger is probably also consistent with our argument. The weaker claims only that Congress has the power under the Necessary and Proper Clause to approve international agreements that are within the reach of its enumerated and implied powers. The stronger claims, without support in the text, that Congress has the power to approve any international agreement. For all practical purposes, there seems to be no difference between the two. Congress's foreign affairs powers are very broad, perhaps plenary. See Henkin, supra note 9, at 64-80 (detailing source and breadth of Congress's foreign affairs power); Louis Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U. Pa. L. Rev. 903, 928-29 (1959) (arguing that any agreement that is beyond Congress's enumerated powers would nevertheless fall within its implied foreign affairs powers). Thus, the two versions tend to collapse into one another. If some gap still remains, moreover, it might be filled by the President's independent powers. Some have argued that because the President and Congress together are the repositories of American sovereignty, all agreements they make together must be within their combined powers. See Henkin, supra note 9, at 216. But this argument overlooks the fact that there is another relevant alternative to be considered—the President and the Senate acting as the treaty makers. It is theoretically possible, then, that an agreement would be beyond both Congress's, the President's, and their combined authority. While the textual arguments I make in this Article are consistent only with the weaker version, it is by no means clear that the constitutional compromise reached in 1945 is not best read as supporting the stronger view. In that case, it would be completely clear that the interpretive points Professor Tribe raises are irrelevant to our argument. There is, however, no need to consider this possibility here.

[29] See infra Part IV.

validated by two-thirds of the Senate.[30] This claim was only a minor theme in our overall argument and was offered in the hope that it would make it easier for some to accept the implications of Professor Ackerman's theory of informal higher lawmaking. Although the movement of 1945 was, in our view, sufficient to create an informal amendment of the Constitution, such a sweeping proposition was unnecessary to establish the constitutionality of the congressional-executive agreement. Because the text is indeterminate, our argument could rest upon a weaker claim: A constitutional movement of the kind we described justifies the adoption of a construction of the text in conflict with long-settled constitutional practice and original intent, so long as that construction can claim a plausible basis in the text. Although the textual argument was quite clearly unnecessary to our main point, Professor Tribe believes it reflects a free-form interpretive methodology that infects our entire argument, as well as Professor Ackerman's wider theory, and consequently warrants an extended protest.[31] He thus undertakes to develop his own elaborate interpretive model for constitutional law and to illustrate its proper and rigorous application through detailed examination of the Treaty Clause.

Professor Tribe prefaces his interpretive foray by developing an intriguing, extended metaphor between the fields of topology and constitutional law.[32] Topologists investigate the nature of certain continuously transforming objects in space, seeking to describe what alterations of their shapes leave their fundamental properties intact and which transform them into essentially new objects. Bending and stretching may not fundamentally alter the structure of a geometric configuration, but tearing or cutting would. For Professor Tribe, the governmental system established by the Constitution is in some ways like a multidimensional geometric object and, like it, the integrity of its architecture can be fundamentally altered by interpretive moves that amount to tearing or cutting, not just bending and stretching. "[T]he consequences of any such tearing may be that we end up with a

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[30] See Tribe, Taking Text, supra note 3, at 1278-79 (concluding that "textual and structural considerations leave no genuine doubt as to the exclusivity of the Treaty Clause," and charging that we strained to find ambiguity in text).

[31] According to Professor Tribe, our

> NAFTA article . . . presents a significant threat to the whole enterprise of constitutional dialogue and decisionmaking—a threat implicit in [Professor Ackerman's] earlier works but made manifest here. The danger arises from a facile treatment of constitutional text and structure and a free-form approach to saying what they mean . . . .

Id. at 1233.

[32] See id. at 1235-49.

system different in very basic ways from that envisioned by the Constitution."[33] That is precisely the consequence, he believes, of accepting the constitutional validity of the congressional-executive agreement.

For Professor Tribe, this conclusion arises not from the combined effect of the intentions of those who framed and ratified the Constitution, of the text, and of the understandings during the first 150 years of our history. Instead, he insists that his conclusion can be—and indeed only should be—drawn on the basis of the "original meaning" of the text, which, he thinks, can bear only one plausible construction.[34] Three basic commitments underlie this turn towards originalism in its textualist garb. First, he argues that the Constitution's provisions come in two basic types, "architectural" and "aspirational."[35] The former, which include the structural provisions of the Constitution, "ought to be given as fixed and determinate a reading as possible—one whose meaning is essentially frozen in time insofar as the shape, or topology, of the institutions created is concerned."[36] In contrast, aspirational provisions might best be read through evolving lenses.[37] Second, the unenacted intentions of a lawmaker, whether a legislature or the framers of a constitutional text, are largely irrelevant to the interpretive task. What matters is only what they said, not what they hoped or expected or assumed the consequences of their lawmaking would be.[38] Finally, precedent has only a very limited role to play in

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[33] Id. at 1237.

[34] Id. at 1242 n.66.

[35] Id. at 1247 n.90.

[36] Id. at 1247.

[37] See id. Professor Tribe, however, has not been entirely consistent in his attitude towards the text. For example, despite his frequent affirmations of the text's primacy and of the imperative to seek "the *best reading* . . . identified in terms of interpretive canons that are as immune as we can make them from the pushes and pulls of our own policy predilections," id. at 1279, he suggests at other points that the text exerts only a much looser constraint on the interpreter. It is only that "nothing irreconcilable with the text can properly be considered part of the Constitution." Tribe, Comment, supra note 15, at 77; see also Tribe, Taking Text, supra note 3, at 1237 (describing his topological model which, taken literally, allows for bending and stretching, just not cutting or tearing text). Of course, there is a world of difference between these views. If his searching efforts at Treaty Clause exegesis suggest a commitment to the former, then the glibness with which he affirms modern Commerce Clause jurisprudence, the shift in substantive due process doctrine from Lochner v. New York, 198 U.S. 45 (1905), to the contemporary privacy decisions, and the expansion of the President's unilateral agreement-making powers (as well as his past interpretive efforts in a variety of other areas), see infra notes 420-23, 449-50, and accompanying text, suggest the latter. Despite these apparent inconsistencies, I shall take him at his word and assume that he endorses the stricter view.

[38] See Tribe, Taking Text, supra note 3, at 1242 n.66 (declaring that concerning "consultation of the Framers, it should be axiomatic that it is enacted law—whether in the form of a statute or a constitution—that governs, never the unenacted intentions of any lawgiver");

constitutional interpretation. The fact that the governmental departments have repeatedly and for lengthy periods engaged in conduct that cannot be squared with the best interpretation of the text simply represents usurpation, not grist for the evolutionist's interpretive mill.[39]

But giving an abstract account of his interpretive model is only Professor Tribe's first task. The main part of his argument is a prodigious effort to "illustrate[ ]" his "approach to constitutional text, struc-

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see also Tribe, Comment, supra note 15, at 65-66 (stressing primacy of text's meaning over lawmakers' expectations or intentions). Only to the limited extent that the latter would point us toward "the linguistic frame of reference within which the people to whom those words or phrases were addressed would have 'translated' and thus understood them" might they be relevant in determining the original meaning of the text the lawmakers actually adopted. Id. at 65.

[39] See Tribe, Taking Text, supra note 3, at 1281-82. In addition to these three commitments, Professor Tribe's "topological" model enjoins us to beware the hazards of construing the sounds of constitutional silences, see id. at 1241, to avoid the pitfall of mistaking gaps in the Constitution's text as holes in constitutional space to be filled in at will, see id. at 1239-45, and to attend to how the entities created by the Constitution connect and interlock, see id. at 1248-49. It enjoins us as well to take not only text but structure and architecture seriously, "the pattern and interplay in the governmental edifice that the Constitution describes and creates, and in the institutions and practices it propels." Id. at 1236.

As with regard to the text, Professor Tribe is not wholly consistent in his attitude towards the use of history. In the past, he has been unwilling to articulate his own methodological commitments, expressing skepticism about the possibility of defending a global account, including textualism. See Laurence H. Tribe, Constitutional Choices 3-6 (1985) [hereinafter Tribe, Choices] (finding "all legitimating theories not simply amusing in their pretensions but, in the end, as dangerous as they are unconvincing"). Try as I may, however, I am unable to discern a coherent view other than textualism that could underlie his Treaty Clause argument. Most tellingly, he eschews the use of historical evidence in determining the meaning of the Treaty Clause, even though that evidence would decisively bolster his case. That is one of the central points of the article by Professor Ackerman and me, and with our history, if nothing else, Professor Tribe fully concurs. See Tribe, Taking Text, supra note 3, at 1230-31, 1270, 1280-81 (acknowledging that post-War rise of congressional-executive agreement marked break with prior, longstanding constitutional understanding). On the other hand, he at one point affirms that "constitutional interpretation would certainly be robbed of much if it were conducted in an historical vacuum—or even through historical lenses that could see only up to the point of a constitutional provision's adoption and not a moment beyond." Id. at 1280; see also id. at 1280-81 (affirming importance of early practice extending back to nation's founding). At another, he offhandedly makes passing reference to the understandings during the first century-and-a-half to support one of his textual claims. See id. at 1270; see also infra notes 223-24 and accompanying text (discussing page 1270 at length). And at still others, he supports the President's textually doubtful sole organ power and his power to conclude unilateral executive agreements by reference to early practice. See id. at 1255, 1265; see also infra notes 308-18 and accompanying text (discussing source and scope of sole organ power). Notwithstanding these apparent inconsistencies, I have assumed that Professor Tribe's basic position, at least as to the Treaty Clause, is textualist. Any other explanation would be inconsistent with the main thrust of his argument and would seem to trivialize the interpretive dispute between us.

ture, and history"[40] by an extended analysis of the Treaty Clause. Here, his three interpretive commitments—to the unchanging quality of architectural provisions, to the irrelevance of original intent, and to the limited value of historical precedent—lead him to embrace an interpretation of the Treaty Clause that obliterates the accepted constitutional basis for most of the international agreements concluded by this nation over the past half-century. It is somewhat embarrassing, given the zeal with which he now holds that view, that his own interpretive efforts have shifted quite dramatically on several past occasions, ranging from endorsing interchangeability, to various middle ground positions, to his current strictly exclusivist view.[41] Indeed, despite the sharpness of our disagreement over the WTO Agreement, Professor Tribe's position during the debate, and only a few months before his article was published, was actually remarkably close to our own. He publicly advised the President and the Senate that only the most monumentally important agreements, such as the WTO Agreement, require the sanction of two-thirds of the latter body. All other agreements, even important but less foundational bargains, could be approved by Congress.[42] In our article, we pointed out the instability of that reading from both the perspectives of history and of text and argued that the only plausible textual constructions were the ex-

[40] Tribe, Taking Text, supra note 3, at 1276.

[41] See Tribe, Constitutional Law, supra note 11, § 4-5, at 228 n.18 (endorsing interchangeability); Letter from Laurence H. Tribe, Professor, Harvard Law School, to Sen. Robert Byrd (July 19, 1994) (on file with the *New York University Law Review*) [hereinafter Tribe Letter to Sen. Byrd of July 19, 1994] (suggesting that only extremely important agreements need be submitted as treaties to Senate); Memorandum from Laurence H. Tribe, Professor, Harvard Law School, to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, et al. 8 (Oct. 5, 1994) (on file with the *New York University Law Review*) [hereinafter Tribe Memo of Oct. 5, 1994] (same); GATT Implementing Legislation: Hearings on S. 2467 Before the Senate Comm. on Commerce, Science, and Transportation, 103d Cong. 301 (1994) (prepared statement of Laurence H. Tribe, Professor, Harvard Law School) [hereinafter GATT Hearings] (widening net to include NAFTA and other important congressional-executive agreements); Tribe, Taking Text, supra note 3 (arguing for exclusivist view under which congressional-executive agreement form is unconstitutional). There is, of course, nothing wrong with changing one's view. Indeed, Professor Ackerman and I made some claims during the debate on the WTO Agreement that I would not now defend. See Ackerman & Golove, supra note 5, at 812 & n.45 (providing different interpretation of early comment by Madison than we had during debate on WTO Agreement, as Professor Tribe has pointed out, see Tribe, Taking Text, supra note 3, 1264 n.146). A radical shifting of views such as Professor Tribe's, however, does at least raise doubts about the clarity of the text in question.

[42] See Tribe Memo of Oct. 5, 1994, supra note 41, at 8 (noting that if "one looks at the agreements other than NAFTA that have a remotely comparable impact [to that of the WTO Agreement], one will only find the United Nations Treaty [sic] itself and perhaps the establishment of the North Atlantic Treaty Organization," and implying constitutionality of all other congressional-executive agreements); see also GATT Hearings, supra note 41, at 301 (similar).

clusivist view or the modern interchangeability doctrine.[43] In response, Professor Tribe abandoned his earlier view, as it were, biting the bullet and announcing with yet increased fervor his new-found attachment to the largely archaic exclusivist camp.[44]

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[43] See Ackerman & Golove, supra note 5, at 922:

> Both the modern and traditional readings have a clarity and elegance to them—either (as moderns think) Congress can create binding international obligations *whenever* it thinks it 'necessary and proper' under Article I, or (as was generally believed before Versailles) Article I is *never* a source of this power and the Senate must *always* give its advice and consent.

[44] The consequence of his current view is that the congressional-executive agreement *form*, not any particular congressional-executive agreement, is unconstitutional, and while he obscures the point, see Tribe, Taking Text, supra note 3, at 1234-35 & 1234 n.47, 1265 (attempting to imply that only ex post agreements are affected), this applies to both ex ante and ex post agreements. This result is breathtaking in its potential implications: It means not only that NAFTA, the WTO Agreement, and a host of other foundational ex post agreements are presumptively unconstitutional, but that the vast bulk of all agreements the United States has entered during the past fifty years are as well, since approximately 90% of our post-War commitments have been concluded as ex ante congressional-executive agreements. See Executive Agreements, 14 Whiteman Digest § 22, at 210; supra note 10 and accompanying text.

Given the enormity of this view, Professor Tribe unsurprisingly attempts to soften the blow, but the points he musters in mitigation are neither convincing nor particularly comforting. He notes first that some congressional-executive agreements actually received more than two-thirds support in the Senate, and, while carefully avoiding endorsing the argument, he suggests that this might cure any constitutional defect. See Tribe, Taking Text, supra note 3, at 1227 & n.18, 1276. The reason for his equivocation is evident: The ex ante choice of the applicable voting rule may well influence the ultimate outcome, and it cannot be assumed that an agreement that generated a two-thirds majority as a congressional-executive agreement would necessarily have won the same support had it been submitted as a treaty. Moreover, Powell v. McCormack, 395 U.S. 486 (1969), at least arguably stands for the proposition that a congressional vote premised on the incorrect assumption that a simple majority rule applies must be invalidated even though there were enough affirmative votes to prevail under the properly applicable supermajority rule. See id. at 508 (refusing to validate vote in excess of two-thirds to exclude Representative Powell from House because vote was taken under misapprehension that simple majority vote was sufficient when in fact two-thirds rule for expulsions applied). More importantly, Professor Tribe intimates that many of the agreements concluded under congressional authorization may well have been within the President's unilateral authority in any case, and hence valid on that basis. See Tribe, Taking Text, supra note 3, at 1269, 1276-77. This portentous expansion of contemporary and historical understandings of the scope of the President's unilateral powers is hardly comforting. It is precisely the dangers posed by such broad conceptions of independent executive authority that have been the preoccupation of foreign relations scholars for decades. In any case, Professor Tribe does not explain how he squares this view with his commitment to the frozen-in-time character of architectural provisions. It is scarcely imaginable that he thinks such broad unilateral powers accord with the best interpretation of the text of 1787. For further discussion, see infra notes 423; 374-77 and accompanying text. None of this, moreover, addresses the potentially devastating impact that requiring senatorial advice and consent for large numbers of international agreements may have on the conduct of our foreign relations in the future.

II
ANATOMY OF THE TREATY CLAUSE

Before examining Professor Tribe's wide-ranging textual claims, it will be useful to provide an overview of the nature of the interpretive dispute between us. This can be accomplished in two ways. First, in the mathematical spirit introduced by Professor Tribe, I begin with a "Venn" diagram. This will help situate the dispute in the larger textual context of Articles I and II. Second, I will set out in summary form what I take to be the basic textual arguments on both sides of the debate. This will serve a number of functions. First, it will demonstrate the heavy burden Professor Tribe has assumed in insisting on the exclusive reading as the *sole* plausible construction of the text. Second, it will set the stage for my claim that Professor Tribe has not provided an ounce of additional support for his preferred construction beyond some straightforward and familiar arguments I articulate here. Finally, it will provide a road map that will help us to avoid getting lost in the maze even as we consider the dizzying array of constitutional provisions that the dispute over the Treaty Clause requires us to consult.

Despite our disagreements, Professor Tribe is right in one respect: Until now, defenders of the congressional-executive agreement have not paid much attention to the text. Spurred by Professor Tribe's determined textualist challenge, I begin by filling this gap.

A. The Treaty Clause in Textual Perspective

The Treaty Clause, in its elusive simplicity, provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[45] In Illustration 1, the circle on the right represents the entire set of international agreements that the United States may conclude, or to put it somewhat differently, the federal agreement-making power; the circle on the left represents the entire set of congressional powers over foreign affairs, which are largely set out in Article I. At issue is how these two sets of powers are interrelated. We can easily identify three possible constructions—two extreme views and one middle position. The first claims that the Article II treaty power is comprehensive and is exclusively vested in the President and the Senate. As a consequence, the treaty power is coextensive with Areas B and C, and Congress's Article I powers do not extend even to agreements the subject matter of which falls within Area B. This is

[45] U.S. Const. art. II, § 2, cl. 2.

Professor Tribe's view.[46] The second view takes the contrary approach. The treaty power does not extend to any subject matter falling within the zone of Congress's Article I powers marked by Area B. Thus, the President and the Senate can conclude only those agreements falling within Area C—those matters that are in any case beyond Congress's reach. Area B, in contrast, belongs exclusively to Congress. As we shall see, this view was articulated early on by Thomas Jefferson and memorialized in his influential *Manual of Parliamentary Practice*.[47]

In contrast to these two polar positions, the third view claims the middle ground. Like both views, it acknowledges the Senate's exclusive power over Area C. And like the first view, it acknowledges the Senate's power over agreements falling in Area B. But the Senate's power over Area B is not exclusive; acting under its Article I powers, Congress may, as in the second view, approve agreements falling in Area B as well. In adopting this middle position, I defend the modern consensus: The Senate has plenary power over all international agreements, but exclusive authority only over those falling outside the scope of Congress's legislative authority. The interchangeability thesis is simply this: Because Congress's powers over foreign affairs are

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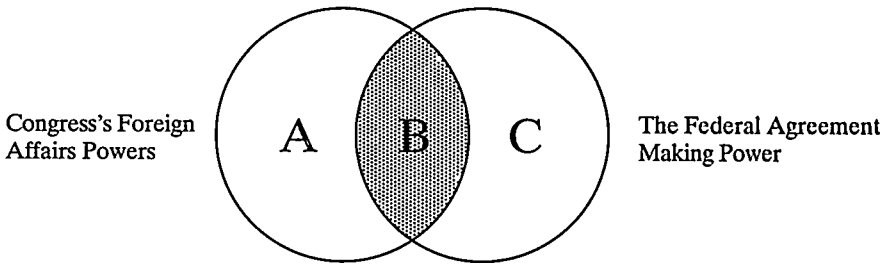
[46] Actually, Professor Tribe's position is slightly different than I have indicated in the text. He believes that some agreements are not significant enough to rise to the level of an Article II "treaty." See infra Part III.D.2. Although he denies the implication, this would appear to mean that the treaty power is not fully coextensive with the agreement-making power, and so some portion of Areas B and C would not be covered by the Senate's powers. The gap belongs neither to the Congress nor to the Senate but to the President acting alone. See infra Part III.D.2. As will become evident, this claim is wholly fallacious. See infra Part III.D.2.

[47] See Thomas Jefferson, A Manual of Parliamentary Practice § 52 (1801), reprinted in Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 104-272, at 115, 298-99 (1997). According to Jefferson, the Framers must have meant "to except those subjects of legislation in which it gave a participation to the House of Representatives." Id. § 52, at 299. Admittedly, though, it is uncertain whether Jefferson would have allowed Congress the power to approve agreements, only added the House as an additional participant along with two-thirds of the Senate, or denied altogether that the agreement-making power extends to subjects within Congress's legislative authority and required that those subjects be regulated purely through domestic statutes. See id. I assume the first alternative, but if I am wrong, the only point affected is the attribution to Jefferson. In any case, the somewhat awkward latter two positions, with different variations, were held by a number of early authorities. See, e.g., 1 Charles Henry Butler, The Treaty-Making Power of the United States §§ 300-316 (1902) (discussing early debates); Treaties, 5 Moore Digest § 735, at 164 (reprinting response by Secretary of State Calhoun to assertion of this kind in Senate Foreign Relations Committee report that recommended rejecting a tariff reciprocity treaty on ground that it infringed on Congress's power over foreign commerce). For Hamilton's vigorous attack on these positions during the Jay Treaty controversy, see Alexander Hamilton, The Defence Nos. 36-38 (Jan. 2, 6, 9, 1796), reprinted in 20 The Papers of Alexander Hamilton 3, 5-10, 13-34 (Harold C. Syrett ed., 1974) (writing as Camillus).

ILLUSTRATION 1



(virtually) plenary,[48] the two circles are entirely (or nearly entirely) overlapping. Thus, in virtually all cases, either the Senate or the Congress can approve an international agreement; the two procedures are for all practical purposes interchangeable.

By pairing Jefferson's exclusivist view along with Professor Tribe's, I do not mean to suggest that it is a plausible third contender. As I explain below, however, my reasons for rejecting it are historical, not textual. Analytically, Jefferson's polar reading presents Professor Tribe's view with a serious challenge—to which, as we shall see, he never responds.

B. The Basic Textual Arguments

I turn now to a summary of the argument in favor of the nonexclusive or middle view. It has two parts: first, the affirmative case for the congressional-executive agreement, and second, the negative case against the exclusivity of the Treaty Clause, which includes responses to what I take to be the two principal arguments in favor of Professor Tribe's view.

The affirmative argument rests principally on Congress's Article I, Section 8 enumerated powers and the Necessary and Proper Clause.[49] In Article I, the Framers provided amply for Congress's authority over matters touching on foreign affairs, giving it, most importantly, the power to regulate foreign commerce,[50] to declare war,[51] and to raise and support armies.[52] There is every reason to suppose that Congress might find it necessary in exercising one of these powers, for instance the power over foreign commerce, to authorize the President to conclude an agreement with a foreign nation, say one

[48] For further discussion, see supra note 28; infra notes 49-52, 298, 301-05, and accompanying text.

[49] See U.S. Const. art. I, § 8, cl. 18.

[50] See id. art. I, § 8, cl. 3.

[51] See id. art. I, § 8, cl. 11.

[52] See id. art. I, § 8, cl. 12.

that lowers tariffs. In that event, given *McCulloch v. Maryland*'s[53] expansive reading of the Necessary and Proper Clause,[54] Congress would seem to have the authority to pass, as "necessary and proper for carrying into Execution"[55] the foreign commerce power, a law authorizing the President, ex ante or ex post, to conclude the agreement. The approval of an international agreement is simply a means, like chartering a bank or making greenbacks legal tender,[56] for achieving the substantive aims which the enumerated powers allow. Hence, the interchangeability doctrine: Congress may approve any agreement the subject matter of which falls within its substantive powers enumerated or implied in Article I, Section 8 (or elsewhere in the text). Additional support for this reading of Congress's necessary and proper powers can be found in the Supremacy Clause.[57] The Supremacy Clause instructs that treaties are to be the "Law of the Land,"[58] suggesting the legislative character of the procedure through which they are promulgated.[59]

Of course, the fact that the Necessary and Proper Clause is sufficiently roomy to contain the congressional-executive agreement does not mean that the modern procedure is necessarily constitutional. Perhaps, in Justice Holmes's elegant phrase, it is still ruled out "by some invisible radiation from the general terms"[60] of the Treaty Clause. Hence, the negative argument against the exclusivity of the Treaty Clause, which responds to the two principal arguments—one textual and the other structural—in favor of the exclusive view.

Consider first the textual argument for exclusivity, which rests on the maxim *expressio unius est exclusio alterius*.[61] According to this view, we should draw a negative inference as to Congress's power to approve agreements from the fact that the Treaty Clause is the only provision in the Constitution that explicitly specifies a procedure

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53 17 U.S. (4 Wheat.) 316 (1819).

54 See id. at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

55 U.S. Const. art. I, § 8, cl. 18.

56 See infra notes 112, 238, and accompanying text.

57 See U.S. Const. art. VI, cl. 2.

58 Id.

59 For further discussion of the Necessary and Proper Clause, see infra Part III.B.1. For further discussion of the Supremacy Clause, see infra note 250.

60 Missouri v. Holland, 252 U.S. 416, 434 (1920) (Holmes, J.) (rejecting any implicit limits on treaty power emanating from Tenth Amendment).

61 Professor Tribe relies upon the maxim heavily, although he also relies on a number of other textual and structural arguments. I consider all of these arguments in Part III, infra.

through which the federal government may make international agreements.[62] The Framers assigned the federal treaty power to the President and the Senate; the expression of one thing is the exclusion of others.

In response, the textual argument for the nonexclusive view begins with the Compact Clause, which prohibits states from entering into treaties, alliances, or confederations, but permits them, with *Congress's consent*, to conclude agreements or compacts with foreign states.[63] This clause demonstrates that the Framers had no aversion to congressional involvement in agreement-making: It expressly gives Congress, not the Senate or the President, responsibility for supervising agreements and compacts negotiated by states. This suggests that the Framers created the advice and consent procedure to give the President a special option, not to rule out resort to the usual congressional procedures.[64] Furthermore, early practice, thrice affirmed by the Supreme Court,[65] supports the President's authority to make unilateral executive agreements incident to his foreign affairs powers. But it stands to reason that if notwithstanding the Treaty Clause the President may make (some) agreements without the advice and consent of the Senate, then Congress has a parallel power to approve agreements incident to its enumerated powers over foreign affairs. Thus, a consistent exclusivist view would deny not only Congress's power to approve agreements but the President's power to shortcircuit the Treaty Clause as well. Yet, as we shall see, even Professor Tribe is unwilling to go that far, repeatedly affirming the President's power to act independently of the Senate.[66] Nor, finally, should we be daunted by the text's contrasting explicitness in Article II and silence in Article I. The Framers had good reason to be explicit about the Senate's role because senatorial advice and consent is an extraordinary procedure that could not otherwise be inferred from the constitutional text. This stands in sharp contrast to congressional authorizations which could be inferred from the implied powers doctrine written explicitly into the text in the Necessary and Proper Clause.[67]

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[62] The only other procedure for making agreements specified in the text applies strictly to the *states*. See U.S. Const. art. I, § 10, cls. 1, 3 [collectively referred to hereinafter as the "Compact Clause"].

[63] See id.

[64] For further discussion, see infra notes 378-79 and accompanying text.

[65] See infra notes 329, 351-55, and accompanying text.

[66] For further discussion, see infra Part III.D.2.

[67] For further discussion, see infra text accompanying note 100.

Second, consider the structural argument in favor of the exclusive reading. It claims support in what it takes to be the Framers' purposes for assigning the advice and consent power to the Senate. On this view, it was no accident that the Framers assigned the advice and consent function to the Senate, in which the states, large and small, are equally represented. This tended to equalize their influence over the content of treaties. The exclusion of the House probably reflected the concern that its short term of office and large number of members made it unsuitable for the task. Most importantly, by including a two-thirds supermajority voting requirement, the Framers effectively protected regional and sectional interests that might otherwise have been prejudiced by a treaty supported by a simple majority. In light of these apparent purposes, it would hardly be a matter of indifference whether treaties are to be approved by two-thirds of the Senate or by majorities in both houses.[68]

For the nonexclusivist, text and structure yield a different explanation for the Treaty Clause. To be sure, the Framers must have included the Senate in part because of the equal representation of the states, just as they had included the Senate in normal lawmaking functions in part for this reason. And they excluded the House because the short terms of Representatives and their large numbers might make their participation problematic in some cases, given the imperatives of secrecy, dispatch, and long-term perspective in international negotiations. However, the two-thirds requirement was added not to protect sectional or minority interests, but to make up for the occasional unavoidable absence of the House. As Madison put it, "a concurrence of two-thirds at least is made necessary, as a substitute or compensation for the other branch of the legislature, which, on certain occasions, could not be conveniently a party to the transaction."[69] In this respect, the Treaty Clause follows an established pattern in the text for dealing with the absence of one of the normal lawmaking organs: To substitute for the absence of the President in the case of a

[68] For further discussion, see infra notes 273-75 and accompanying text. It might further be supposed that the two-thirds rule reflected the Framers' wish to make entering treaties difficult. The supermajority requirement would encourage the young country to avoid entangling alliances. Although this is certainly a plausible interpretation, I do not discuss it explicitly in the text hereafter. The same arguments that respond to the federalism argument—that the two-thirds rule embodies special protections for the states—also reply to the isolationism argument.

[69] James Madison, Letter of Helvidius No. 1 (Aug.-Sept. 1793), in 6 The Writings of James Madison 138, 148 (Gaillard Hunt ed., 1906) [hereinafter Helvidius No. 1]. I quote Madison's views not as evidence of the Framers' intent, but of a leading Framer's construction of the text itself. Indeed, I assume that Madison held a contrary "intent," in the sense that, as a participant in the founding and state ratifying conventions, he was fully aware that one of the central purposes of the two-thirds rule was to protect sectional interests.

veto, the text requires a two-thirds vote in both houses;[70] to make up for his or her nonparticipation in constitutional amendment proposals,[71] two-thirds of both houses must give their assent;[72] to fill in for the House in treatymaking, two-thirds of the Senate, as well as the President, must consent.[73] The House's participation in agreement-making, however, is not inappropriate in all cases. It was enough to give the President the option of consulting the Senate alone, when secrecy, dispatch, or other considerations so required. When those concerns were absent, there was no reason to preclude him from seeking the approval of the Congress as a whole and no reason to read the Treaty Clause as commanding the contrary.[74] We have especially powerful reasons, moreover, to give a narrow construction to a provision derogating from the usual bicameral procedure designed to empower broad-based majorities and protect our liberties.[75]

By briefly rehearsing these arguments, I do not mean to suggest that there is no more to be said on either side. My claim is simply that for all his efforts, Professor Tribe has failed to contribute anything new or compelling to the textual case for exclusivity and that from the purely textualist point of view he espouses, neither his reading nor my own—nor Jefferson's for that matter—can oust the others from the field of reasonable construction. As an initial matter, none can claim the mantle, "best reading of the text." But even for a strict adherent of original meaning textualism, constitutional interpretation is never *ab initio*, never conducted entirely in a historical vacuum. And when the interpreter is faced with a long-settled practice, deeply woven into the fabric of day-to-day governmental practices and widely perceived as essential to the conduct of government, and when that practice has been accepted or acquiesced in by presidents, senates, and houses of representatives for over half a century, the situation is most assuredly not *ab initio*. The procedure will be entitled to a strong presumption in favor of its constitutionality, and even the textualist will have no choice but to uphold the practice if there is a plausible and persuasive

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[70] See U.S. Const. art. I, § 7, cls. 2, 3.

[71] See Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 378-379, 382 (1798) (affirming that President has no role in amendment proposal process).

[72] See U.S. Const. art. V.

[73] See I.N.S. v. Chadha, 462 U.S. 919, 955 & n.21 (1983) (citing U.S. Const. art. II, § 2, cl. 2). Likewise, to substitute for the absence of the House and the President, conviction on impeachment, the sole prerogative of the Senate, requires the concurrence of two-thirds of the members present. See id. (citing U.S. Const. art. I, § 3, cl. 6). For further discussion, see infra note 186.

[74] See Henkin, supra note 9, at 494 n.156 (suggesting similar reading of Framers' purposes). The Compact Clause provides further support for this view, as discussed infra note 378.

[75] For further discussion, see infra notes 183-88 and accompanying text.

construction of the text that permits it.[76] We should therefore expect that justices who, like Professor Tribe, place heavy emphasis on text will have little trouble upholding the congressional-executive agreement, should a justiciable controversy raising the question ever reach the Court.[77] If trouble is to be expected, it will more likely come from other quarters—from justices slavishly devoted to original intent and to subsequent history reflecting original understandings, for these justices will no doubt find themselves feeling ill-at-ease when they discover the gaping chasm between modern practice and the Framers' designs. Should they strike down this basic strut of our constitutional practices, or bend their principles to the will of the people circa 1945?[78] If the constitutional history developed by Professor Ackerman and myself is right, they are likely to uphold the practice, uncomfortable though they may feel, perhaps only partially aware of the larger historical patterns into which their actions fit.[79]

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[76] Despite Professor Tribe's heavy reliance on it, the Court's decision in *Chadha* is not to the contrary. The Court repeatedly made clear that the legislative veto was entitled to a presumption of validity. See *Chadha*, 462 U.S. at 944, 951-52. The Court simply believed that the original intent and the text were not open to more than one plausible and persuasive construction, characterizing them as "crystal clear," id. at 958-59, as providing an "unmistakable expression," id. at 959, and as "[e]xplicit and unambiguous," id. at 945. In addition, presidents had from the beginning protested against the legislative veto on constitutional grounds. See id. at 942 n.13 (noting that 11 presidents from Wilson to Reagan objected to legislative veto). In contrast, the Senate has long acquiesced in the congressional-executive agreement form—indeed, a congressional-executive agreement cannot be approved without the consent of at least a majority of the Senate. See Ackerman & Golove, supra note 5, at 889-916 (providing history).

[77] Perhaps Justice Scalia fits this description, but despite some rather strong statements denigrating the use of history in favor of text, see Scalia, Common-Law Courts, supra note 15, at 29-37, and affirming textualism, see id. at 23-25, in practice he seems far more willing than Professor Tribe to consider at least the early precedents. His recent opinion in Printz v. United States, 117 S. Ct. 2365 (1997), among many others, is a case in point. See id. at 2370-71 (considering early federal statutes that imposed certain administrative and judicial duties on state courts in determining whether federal government may require state law enforcement officers to perform background checks on purchasers of handguns). In response to Professor Tribe's comment on his recent Tanner Lectures, Justice Scalia placed some distance between himself and Professor Tribe on a closely related point, emphasizing the unduly narrow character of Tribe's version of original meaning methodology. See Scalia, Response, supra note 15, at 133-34 (highlighting differences with Professor Tribe on role of contemporary understandings of text); see also Scalia, Common-Law Courts, supra note 15, at 38 (explaining his view on role of contemporary understandings).

[78] The Court may yet get a chance to consider the issue. Suit was recently brought challenging the constitutionality of NAFTA. See Made in the U.S.A. Found. v. United States, No. CV-98-PT-1794-M (N.D. Ala. filed July 13, 1998).

[79] In this respect, however, *Chadha* presents a contrary indicator. There, the Court resisted the force of the New Deal revolution in refusing to uphold the legislative veto. See *Chadha*, 462 U.S. at 959.

III

ANATOMY OF AN ORIGINAL MEANING TEXTUALIST ARGUMENT: THE HAZARDS OF CLEVERNESS UNBOUND

I turn now to Professor Tribe's extended efforts to buttress the exclusive reading by a host of novel arguments. By examining them in depth, I hope to aid in the liberation of the Treaty Clause from the clutches of his exclusivist textual construction. I also hope to demonstrate the flaws in an interpretive methodology that, despite its own pretensions, ultimately rests heavily on formalistic mechanical rules and word games rather than on serious contextual and structural analysis.

In considering his many substantive arguments,[80] I have for ease of exposition divided them into two somewhat arbitrary categories: arguments resting principally on purely linguistic or textual concerns and arguments drawing their force from larger structural considerations. I have divided these categories again into affirmative arguments for the exclusive reading and negative arguments seeking to undermine the case for the nonexclusive view. I have already briefly described what I believe are the two principal arguments for the exclusive reading—the arguments from *expressio unius* and from the states' rights orientation of the Framers (the structural federalism argument). Surprisingly, Professor Tribe says little about these arguments beyond conclusory assertion. This may implicitly reflect his recognition that they are insufficient on their own to ground a definitive original meaning construction—hence, his concentration on other arguments which he hopes, taken together, will do the trick.

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[80] At my request, Professor Tribe was gracious enough to provide me with detailed comments on the manuscript of this Article after it was accepted for publication. See Letter from Laurence H. Tribe, Professor, Harvard Law School, to David M. Golove, Professor, University of Arizona College of Law (Apr. 30, 1998) (on file with the *New York University Law Review*) [hereinafter Tribe Letter to Golove of Apr. 30, 1998]. In his letter, he pointed out that at a few points I had attributed to him arguments which he had not intended to make. See id. In response, I have in most cases accepted his comments at face value and modified my arguments accordingly. In one instance, however, I comment in a footnote on why I believe his text strongly lends itself to my interpretation, but I still avoid in my text any attribution of that view to Professor Tribe. See infra note 104. In another instance, I have continued to attribute to Professor Tribe a view which he has now disowned because, notwithstanding his subjective intentions, I believe that the argument is unequivocally articulated in his original text. I do indicate in a footnote that Professor Tribe has now stated that in fact he did not intend to make that argument, see infra note 105, and I have added some additional material responding to how he now articulates his position on that point, see infra notes 124-38 and accompanying text.

A. *Affirmative Textual Arguments*

In this section, I address Professor Tribe's claims grounded in the *expressio unius* maxim and then turn to his arguments based on the Appointments[81] and Compact Clauses.[82]

1. Expressio Unius *and its Limits*

As I have already made clear, the principal textual argument in favor of the exclusive reading is, in my view, the canon *expressio unius est exclusio alterius*, and Professor Tribe repeatedly invokes it as a definitive point in favor of his construction of the text. But the logical force of this maxim is limited, and the strength of any inference of exclusivity it offers depends significantly upon context. Even when the linguistic context is particularly supportive, its application is often tempered by other considerations.[83] When the wording of the text renders the inference less compelling, as in the Treaty Clause, the persuasive force of the maxim is at a minimum.

It has long been recognized that drawing the *expressio unius* inference can be a risky venture.[84] In constitutional adjudication, if the Court has sometimes applied the canon, it has often explicitly rejected it.[85] Commentators, too, have singled it out for criticism as resting upon unrealistic assumptions and have pointed out the mistaken consequences it may produce.[86] Even classical formulations of the principle have been quick to warn against its unthinking application,

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81 U.S. Const. art. II, § 2, cl. 2.

82 Id. art. I, § 10, cls. 1, 3.

83 For example, consider the Court's unwillingness in Springer v. Philippine Islands, 277 U.S. 189, 206 (1928), to apply the maxim in the face of the most compelling textual considerations. The inference must yield, said the Court, "whenever a contrary intention on the part of the law-maker is apparent." Id. (construing Organic Act for Philippine Islands during period of United States colonial rule); see also infra notes 175-77 and accompanying text (discussing *Springer*).

84 Professor Tribe himself recognizes that *expressio unius* arguments "have their limits." Tribe, Taking Text, supra note 3, at 1273.

85 See, e.g., *Springer*, 277 U.S. at 206 (rejecting application of *expressio unius*); The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 544-47 (1870) (same); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 232-33 (1821) (same).

86 See, e.g., William N. Eskridge, Jr., Dynamic Statutory Interpretation 278-79 (1994) (observing that legislators do not always, and sometimes cannot, draft in accordance with interpretive canons such as *expressio unius*); Richard A. Posner, The Federal Courts: Crisis and Reform 282 (1985) (criticizing *expressio unius* canon as relying on mistaken assumption that all legislative omissions are deliberate and warning that misuse of canon may defeat legislative objectives); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 455-56 (1989) (warning that "[t]he *expressio unius* canon should not be used mechanically").

cautioning that "it leads to safe and satisfactory conclusions" only when the appropriate conditions are present.[87]

Professor Tribe has not exercised the necessary caution in arguing that the maxim entails his reading of the Treaty Clause. Begin by returning to the Venn diagram introduced in Illustration 1. The Jeffersonian position, it will be recalled, reads Congress's Article I powers over foreign affairs as exclusive of any overlapping Article II power in the President and the Senate to make treaties on matters subject to congressional regulation. This view confronts Professor Tribe's confident *expressio unius* argument with an immediate embarrassment. In all critical respects, the Jeffersonian view is just the mirror image of Professor Tribe's and can rely as readily upon the *expressio unius* inference. For it is not at all clear *ab initio* which power should be taken as "expressed" and which as "excluded." Consider, for example, Congress's foreign commerce powers and the Senate's treaty powers. Professor Tribe would have us deem the treaty power "*expressio*" and then exclude any congressional power to regulate commerce by approving agreements. But why is Jefferson's opposite reading any less persuasive? Congress is expressly given the power to regulate foreign commerce in Article I; hence, the treaty power should not extend to any agreement that encroaches upon its authority over that subject. *Expressio unius est exclusio alterius*.[88] To be sure, Jefferson's view has been overwhelmed by the march of events;[89] but this is true of Professor Tribe's reading as well. Given Jefferson's stature—and the bluntness of *expressio unius* as an inter-

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[87] J.G. Sutherland, Statutes and Statutory Construction 410 (Chicago, Callaghan & Co. 1891).

[88] Nor for Jefferson was it any objection that this might leave precious little for the President and the Senate. See Jefferson, supra note 47, § 52, at 299 ("The less the better, [some] say .... The Constitution thought it wise to restrain the Executive and Senate from entangling and embroiling our affairs with those of Europe."). On the other hand, he seems to have believed that this was not actually so. See id. (pointing out that most matters would still properly remain as subjects of treaties). This latter point reflects a constricted view of the scope of Congress's legislative powers that can no longer be sustained today.

[89] See Treaties, 5 Moore Digest § 735, at 164 (reprinting note by Secretary of State Calhoun stating that "[i]f this be the true view of the treaty-making power, it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution"). Nonetheless, arguments of this kind were still current as late as the early part of this century and formed the principal basis of Senator Lodge's constitutional objections to the Covenant of the League of Nations. See the report of the Senate Foreign Relations Committee, of which Senator Lodge was the Chairman, S. Rep. No. 66-176, pt. 1, at 5-6 (1919) (claiming that Article X of Covenant unconstitutionally purported to limit Congress in exercise of its Article I war powers). For a contemporary discussion of the constitutional issue, see Quincy Wright, Treaties and the Constitutional Separation of Powers in the United States, 12 Am. J. Int'l L. 64, 65-85 (1918) (responding implicitly to Senator Lodge's arguments); see also Quincy Wright, The Control of American Foreign

pretive instrument—his use of the maxim is entitled to no less respect than Professor Tribe's.

The point, however, is not to enter the fray on behalf of either of these approaches. From a purely textual perspective, Jefferson's reading is no more compelling than Professor Tribe's, and vice versa. What bears emphasis is Professor Tribe's failure even to consider Jefferson's mirror image reading and its implications for the exclusivist view. In making his categorical *expressio unius* argument, Professor Tribe just assumes that the maxim points his way. But when we expand the interpretive horizon, the self-defeating character of the argument becomes evident.[90] And it gives us powerful reasons for giving a skeptical greeting to arguments rooted in the kind of rigid interpretive rules he now seems to favor.

Nor do matters improve when we descend to the details of Professor Tribe's *expressio unius* argument. He cites Alexander Hamilton in *The Federalist* as a strong proponent of the interpretive canon.[91] But he neglects to mention that in the very number on which he relies, Hamilton expressly denies that *expressio unius* applies to the construction of the Constitution.[92] On the contrary, Hamilton's careful discussion makes clear that it is only the underlying common sense inferences, not the maxim per se, that have any application to the Constitution. And his illustrations reveal the proper scope of common sense reasoning: When a nonexclusive reading would render a provision mere surplusage, the inference may properly be drawn.[93] Thus, Article I's enumeration of Congress's powers and Article III's

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Relations, § 54, at 97-98 (1922) [hereinafter Wright, Control] (arguing that treaty may constitutionally limit Congress's discretion in future exercise of power to declare war).

[90] This is not to claim that the two views cannot be harmonized. Indeed, Jefferson might well have thought that the *expressio unius* inference was properly applied to support both the exclusivity of the treaty power and its limitation to matters not falling within Congress's legislative authority. I assume, however, that Professor Tribe would not find this an appealing solution to the textual dilemma posed by Jefferson's argument. He supports application of *expressio unius* in the one case (i.e. to the Treaty Clause) but not in the other (i.e. to Congress's foreign affairs powers).

[91] See Tribe, Taking Text, supra note 3, at 1242-43 (citing The Federalist No. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[92] See The Federalist No. 83, at 497 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton wrote: "Even if these maxims had a precise technical sense, corresponding with the ideas of those who employ them upon the present occasion, which, however, is not the case, they would still be inapplicable to a constitution of government." Id.

[93] Hamilton is not alone among the early greats to hold this view. Chief Justice Marshall, for example, made the same point in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-75 (1803) (reasoning that "in this case, a negative or exclusive sense must be given to [the words of the Original Jurisdiction Clause], or they have no operation at all"), and then again in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-401 (1821) (explaining that *expressio unius* was properly applied in *Marbury* because "otherwise, the [Original Jurisdiction Clause] would have no meaning whatever"). For further discussion, see infra Part III.E.

enumeration of the judicial power are exclusive because any other reading would leave them without any operation at all.[94] In this respect, Hamilton's view accords with classical formulations of the *expressio unius* canon which emphasize that it "is not presumed that the legislature intended any part of a statute to be without meaning."[95]

It should be immediately evident that this analysis does not apply to the Treaty Clause. As even Professor Tribe concedes, the nonexclusive reading does not render the clause a nullity but leaves the President with a powerful option: He can bypass "the fires of bicameral approval"[96] and seek approval for his agreement through an extraordinary single house procedure, albeit one requiring a supermajority vote, or he can seek approval by simple majorities in both houses.[97] From a purely textual perspective, it is by no means clear that the President will always, or even more often, prefer the two-house route to the one-house advice and consent procedure.[98] Thus, the exclusive reading cannot rely upon the (relatively) more persuasive inference Hamilton was able to draw in the case of Articles I and III.

This is not to suggest that there is no force to the inference in favor of exclusivity in the case of the Treaty Clause, only that it is far weaker because it must rest upon an attenuated, less persuasive, chain of inferences: The Framers were explicit in granting the treaty power

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[94] As Hamilton explains in regard to congressional powers: "This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd as well as useless if a general authority was intended." The Federalist No. 83, supra note 92, at 497. Likewise as to judicial power: "The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority." Id. See also his discussion in The Federalist No. 32, at 199-200 (Alexander Hamilton) (Clinton Rossiter ed., 1961), in which he argued that the power to tax domestic articles must be interpreted as being nonexclusive as between the federal and state governments to avoid rendering Article I, Section 10, Clause 2's prohibition on state taxation of imports and exports surplusage.

[95] Sutherland, supra note 87, at 412. For criticisms of this common sense view, consider Posner, supra note 86, at 281 (rejecting "no surplusage" canon as resting on mistaken assumption of "legislative omniscience").

[96] Tribe, Comment, supra note 15, at 75.

[97] See Tribe, Taking Text, supra note 3, at 1250 n.98 (conceding this point).

[98] Witness, for example, the resistance of the early nineteenth-century executive to efforts by the House to end the practice of making treaties with Indian tribes and to require congressional approval of Indian agreements instead. See 2 Asher C. Hinds, Hind's Precedents of the House of Representatives of the United States § 1534 (1907) (recounting President Jackson's opposition to House participation in negotiation of Indian treaties); Jefferson, supra note 47, § 52, at 300 (noting that "in earlier times, [the Indian treaty] prerogative had been jealously guarded by the Executive"). For a discussion of the history of Indian agreement-making, see infra note 241.

to the President and the Senate in Article II; this suggests that they believed it to be an important power, which in turn suggests that they would have been equally explicit had they intended to vest any comparable power in Congress as a whole in Article I; the grant to Congress of the power to make all laws that are necessary and proper to carrying its enumerated powers into execution does not satisfy this standard; hence, it is not to be construed as a grant of power to Congress to authorize the President to conclude agreements on subjects within its enumerated powers. Perhaps this chain of reasoning, or some suitably refined alternative, accurately describes the Framers' intent. But, since, according to Professor Tribe, we may not consult the historical evidence, the inferences are highly speculative. It seems equally plausible, for instance, to think that the Framers were explicit about senatorial advice and consent because they were creating an extraordinary procedure that could not have been inferred from any other grant in the text, and because they wanted to make clear that the President would not have the power to make treaties unchecked by legislative scrutiny.[99] In the case of congressional approvals, in contrast, they could rest upon the implied powers doctrine that they explicitly wrote into the text in the Necessary and Proper Clause. Given the weakness of the exclusivity inference, *expressio unius* hardly provides the basis for a confident plain-meaning construction of the text. The contrast with a provision that would have no meaningful application in the absence of an exclusive reading is glaringly evident.[100]

Professor Tribe nevertheless repeatedly invokes *expressio unius* in support of his position.[101] After discussing Hamilton's view, he asserts broadly that the maxim "applies to provisions of the Constitution that both create entities and describe the powers those entities may wield."[102] Of course, any reliance on Hamilton for this claim would be fanciful, for, as we have seen, Hamilton never expressed anything remotely like this sweeping endorsement of exclusivity.[103] He rested instead on the more sensible and narrow proposition that an exclusive

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99 To the extent that the Framers believed that there was any ambiguity about whether approving agreements is properly regarded as a legislative or an executive function, the latter concern would have been more pressing. For discussion of the view of a number of key Framers that the power to approve agreements is properly legislative in character, see infra notes 247-62 and accompanying text.

100 See supra note 67 and accompanying text.

101 See Tribe, Taking Text, supra note 3, at 1241-43, 1269-71, 1273.

102 Id. at 1243.

103 See supra notes 93-94 and accompanying text.

interpretation may be proper when necessary to avoid rendering a provision in the text nugatory.[104]

In any case, Professor Tribe's characterization of the *expressio unius* maxim is itself ambiguous in an important respect. Because of his reference to Hamilton's argument, one might suspect that he is endorsing a position that is at least parallel to Hamilton's. Thus, the principle might be thought to mean that the institutions created in Articles I, II, and III only have the powers specified in those articles: Congress is limited to the powers enumerated in Article I, the President to those in Article II, and the courts to those in Article III. On this reading, Professor Tribe presumably would argue that since no power to approve agreements is expressly specified in Article I, Congress has no such power. Alternatively, the quoted passage might be thought to mean that all of the powers enumerated in the articles creating those institutions should be construed as exclusively vested in the branch to which they are granted. So, all the powers granted to Congress in Article I are exclusively vested in it and cannot be exercised by any other branch, and so on for the other branches. On this reading, the argument presumably would be that Article II's grant of the treaty power to the President, with the participation of the Senate, is exclusive of any concurrent power in Congress under Article I.

Initially, it is unclear why Professor Tribe might think either of these versions of the *expressio unius* principle advance the argument for an exclusive reading.[105] On a conceptual level, both are stymied

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[104] In a letter, Professor Tribe indicates that the view stated in the passage quoted in the text is solely his own and that he did not intend to attribute it to Hamilton. See Tribe Letter to Golove of Apr. 30, 1998, supra note 80, at 3-4 (commenting, at my request, on this Article after its acceptance for publication). Without questioning this assertion, I note that there are strong textual reasons for interpreting the quoted passage otherwise. It is the final sentence in a paragraph devoted to discussion of Hamilton's view, and although that sentence never mentions Hamilton explicitly, the previous three sentences, along with an extended block quote from *The Federalist No. 83*, do so expressly, leaving the reader with a strong impression that Hamilton's discussion supports the principle asserted in the concluding sentence. See Tribe, Taking Text, supra note 3, at 1241-43. This effect is dramatically heightened by Professor Tribe's description of Hamilton's position as supporting the application of *expressio unius* "to provisions enumerating the limited powers of Congress and the limited jurisdiction of the federal courts." Id. at 1242 (citing The Federalist No. 83, supra note 92, at 496-97). While strictly accurate, this statement omits Hamilton's reasons for holding these views. Without such an explanation, not only is it a misleading description of Hamilton's position, but it also creates the impression that Hamilton's view supports Professor Tribe's immediately subsequent conclusion that *expressio unius* "applies to provisions of the Constitution that both create entities and describe the powers those entities may wield." Id. at 1243. The important point, however, is that Professor Tribe and I are in agreement that nothing in Hamilton's discussion in *The Federalist* supports the broad view expressed in the passage quoted in the text.

[105] Indeed, in his letter, Professor Tribe indicated that he actually meant to endorse neither of these views and in fact supports only a narrower principle of exclusivity. See

by the Necessary and Proper Clause. Take the first alternative. Even assuming that each of the branches is strictly limited to the powers enumerated in the text, we still must determine whether the Necessary and Proper Clause, on which the nonexclusive reading principally rests, grants Congress the power to approve agreements. That clause is undeniably a part of Article I and an express grant of legislative authority. Likewise, the second version rests on the assumption that

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Tribe Letter to Golove of Apr. 30, 1998, supra note 80, at 1-3. According to Professor Tribe, what he meant to rest on is the more limited proposition "that constitutional provisions specifying *how law is to be made* should be presumed to be setting forth exclusive means of lawmaking." Id. at 1-2 (citing Tribe, Taking Text, supra note 3, at 1244). Notwithstanding this subjective intention, however, Professor Tribe's text virtually compels the far broader construction I have suggested. The quoted passage culminates his most sustained and explicit discussion of the maxim, and I am uncertain what other construction it, or a number of other passages, could be given. They all seem to express unequivocally the view that *expressio unius* should be applied generally to architectural provisions of the Constitution—provisions "that both create entities and describe the powers those entities may wield." Tribe, Taking Text, supra note 3, at 1243; see also id. at 1242 (attributing to Hamilton with apparent approval view that *expressio unius* is "properly applied to provisions enumerating the limited powers of Congress and the limited jurisdiction of the federal courts"); id. at 1246 (implicitly applying *expressio unius* to attack Professor Amar's claim that explicit, "architectural" provision granting immunity from civil arrest to members of Congress might be read to invite similar constitutionally-based immunity for President, and noting defects in Professor Ackerman's and Professor Amar's treatment of "architecture-defining, power-conferring provisions of the Constitution as merely suggestive"); id. at 1273 (applying *expressio unius* to Appointments Clause and arguing that Treaty Clause should be similarly construed); id. at 1274 n.181 (arguing that it is "a wiser course in constitutional interpretation to begin with the presumption that those provisions of the Constitution that call into being the very architecture of our government provide specific and exclusive instructions, not mere options").

Professor Tribe's apparent support for strict application of the *expressio unius* canon is further suggested by other arguments he presses at various points. See, e.g., id. at 1269-70 (arguing for application of *expressio unius* to provisions of Article I enumerating various consent-giving powers of Congress, thereby rendering them exclusive set); id. at 1271 (arguing for application of *expressio unius* to Compact Clause, thereby rendering Congress's power to approve state agreements and compacts exclusive of any other congressional power over agreement-approving); id. at 1275-76 (arguing implicitly for application of *expressio unius* to Original Jurisdiction Clause and approving Chief Justice Marshall's controversial application of canon in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), discussed in Part III.E, infra). To be sure, Professor Tribe's article also made the narrower argument he now articulates in his letter. See, e.g., id. at 1244 (arguing that "the most plausible way of reading the Constitution . . . would be to read as exclusive those provisions that specify how elements of the supreme law of the land are to be adopted"). But in his original text, that argument was additional to, and separate from, the broader *expressio unius* argument that he also articulated at numerous points in his discussion. It was cast, moreover, as a structural argument resting principally upon federalism grounds. As so understood, I criticize this view at length in Part III.C.1, infra. See also infra note 126 (noting Professor Tribe's emphasis on Framers' concern for state sovereignty). Because the broader *expressio* argument is so strongly suggested by his text, I continue to attribute it to Professor Tribe. In doing so, however, I do not mean to question his characterization of his subjective intention. This confusion over the "plain meaning" of Professor Tribe's text is itself an ironic commentary on the very hazards of textualism I hope to illustrate.

the power in question is granted only to one branch, but where there is a textual basis for finding an overlapping grant in both Articles I and II, the principle would seem to have little or no application. Overlapping powers require harmonization, not categorical division. Before drawing Professor Tribe's *expressio unius* inference, then, one must first interpret the grants in Article I to determine whether they include a power to authorize agreements. To be sure, in the interpretive enterprise, the more modest *expressio unius* argument that I have endorsed may indeed be relevant, but Professor Tribe has given us no reason to suppose that his strict version of the canon adds to the analysis.

In any case, application of either version of the principle would yield a government unrecognizable to We the People, for it fundamentally contradicts the way the Court and the political branches have construed the text over the long course of our constitutional history. Take the first interpretation—that each branch is strictly limited to the powers enumerated in the article that creates that branch. Hamilton himself expressly rejected this reading of Article II in his famous argument defending Washington's controversial 1793 declaration of neutrality in the war between France and Great Britain. He claimed that the explicit enumerations of executive power in Article II, in contrast to those in Articles I and III, were merely exemplary of the President's powers,[106] and that Article II's vesting of the executive power "in a President of the United States of America"[107] constituted a lodging of any and all powers that are executive in character.[108] There is surely some irony in Hamilton's argument, given his earlier endorsement of an exclusive reading of Articles I and III to avoid rendering their provisions nugatory. But this contrast only underscores the importance of Hamilton's caution about the dangers of invoking the *expressio unius* principle, even when strong linguistic arguments can be made to support it. It is doubly ironic that Professor Tribe himself explicitly endorses Hamilton's nonexclusive reading of Article II, but never pauses to consider the far stronger grounds for applying *expressio unius* to Article II than to the Treaty Clause.[109]

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106 See Alexander Hamilton, Pacificus No. 1 (June 29, 1793), reprinted in 15 The Papers of Alexander Hamilton 33, 39 (Harold C. Syrett ed., 1969) [hereinafter Pacificus No. 1]. Writing as Pacificus in the celebrated Pacificus-Helvidius debate with Madison, Hamilton claimed that the enumerated powers were "intended by way of greater caution, to specify and regulate the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of power." Id. at 39.

107 U.S. Const. art. II, § 1.

108 See Pacificus No. 1, supra note 106, at 39.

109 See Tribe, Taking Text, supra note 3, at 1269 & n.165 (explicitly endorsing Hamilton's view); see also Tribe, Constitutional Law, supra note 11, § 4-2, at 210-11 & 210

Now, consider the application of this version of the principle to the powers of Congress enumerated in Article I.[110] *Pace* Hamilton,

n.1 (same). In contrast to Professor Tribe, many still find Hamilton's position unsettling (myself among them), see infra note 342 and accompanying text, but it is difficult to deny its force without casting doubt upon important aspects of the modern presidency. See Henkin, supra note 9, at 39-41 (describing difficulty of accounting for President's expansive power over foreign affairs on basis of enumerated powers alone).

Like Hamilton, Professor Tribe rests his view largely on differences in the wording of the vesting clauses of Articles I and II. Article I provides that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States," U.S. Const. art. I, § 1 (emphasis added), whereas Article II begins: "The executive Power shall be vested in a President of the United States of America," id. art. II, § 1. On this basis, Professor Tribe argues that the Framers intended thereby to limit Congress to its enumerated powers (i.e., the powers "herein granted") but to allow the President to exercise full executive powers, the express enumerations in Article II apparently being merely exemplary of, or in some manner limiting, the more general grant. See Tribe, Constitutional Law, supra note 11, § 4-2, at 210-11 & 210 n.1; Tribe, Taking Text, supra note 3, at 1269. There are numerous and obvious textual difficulties with the argument. Not the least of these is its inability to explain persuasively why the Framers would have burdened Article II with a list of enumerated powers that would obviously have been subsumed under the Hamiltonian Executive Power Clause—such as, for example, the commander-in-chief power, see U.S. Const. art. II, § 2, cl. 1; the power to require written opinions of the heads of departments, see id.; the pardon power, see id.; and the duty to faithfully execute the laws, see id. art. II, § 3. Curiously, given his reliance on the *expressio unius* maxim, Professor Tribe never confronts this powerful *expressio unius* objection. Equally important, Article III, like Article II but unlike Article I, unreservedly vests the "judicial Power of the United States . . . in one supreme Court." Id. art. III, § 1. Yet, it is settled that the judicial power extends only to the jurisdictional grants enumerated in Article III, Section 2. See, e.g., Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) (holding that Congress may subtract from, but not add to, jurisdiction granted to lower federal courts in Article III). But see Kansas v. Colorado, 206 U.S. 46, 81-84 (1907), in which Justice Brewer argued in obscure dicta for a Hamiltonian reading of Article III on the same textual grounds Hamilton advanced in relation to Article II—an opinion no doubt meriting in this respect the appellation "derelict on the waters of the law." Ironically, the wording of all three articles was the same until late in the Convention when Gouveneur Morris, charged with making purely stylistic revisions, surreptitiously slipped the qualifying language into Article I. Some have thought, with substantial justification, that he did so in an effort to work substantive changes without calling the Convention's attention to his handiwork. See Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 37 (1976). In any event, Professor Tribe's acceptance of the Hamiltonian reading simply suggests how weak the *expressio unius* principle is even in his constitutional universe. If the compelling case for its application presented by Article II can be overcome by the admittedly weak textual case which both he and Hamilton accept as sufficient, then surely the far weaker *expressio unius* inference from the Treaty Clause—which cannot take strength from the imperative to avoid rendering constitutional language nugatory—can be overcome by the considerably more persuasive textual basis for authorizing agreements found in the Necessary and Proper Clause.

[110] If powers are expressly enumerated in other parts of the Constitution, as they in fact are in a number of cases, Congress can of course exercise them even if we were to give Article I an exclusive reading. Consider, for example, the powers listed in Article IV, which include certain authority over the implementation of the Full Faith and Credit Clause, see U.S. Const. art. IV, § 1; the power to admit new states, see id. art. IV, § 3, cl. 1; the power to dispose of and make all needful rules and regulations respecting the territory and property of the United States, see id. art. IV, § 3, cl. 2; and whatever powers are implied in the obligation to guarantee each state a republican form of government, see id.

much judicial rhetoric, and even the Tenth Amendment,[111] the claim that Congress is strictly limited to the enumerated powers is simply as a categorical matter untrue. At times, the Court has slipped in new powers Congress wished to exercise under the Necessary and Proper Clause door.[112] At others, it has largely eschewed reliance on the text and simply found important powers to belong to Congress because they are inherent in the concepts of nationhood and sovereignty under international law. In *United States v. Curtiss-Wright Export Corp.*,[113] the Court claimed that the federal government's powers of external sovereignty do not depend upon the affirmative grants in the Constitution but are vested in it "as necessary concomitants of nationality."[114] One does not have to accept the full implications of Justice Sutherland's controversial theory, however, to notice that throughout our history the Supreme Court has affirmed congressional powers nowhere to be found within the four corners of the text but premised on the inherent sovereignty of the United States.[115]

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art. IV, § 4. The powers enumerated in Article I would be exclusive of any powers not included in that article or in any other part of the Constitution.

111 See id. amend. X. The Tenth Amendment directs that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id.

112 Under the Necessary and Proper Clause, the Court has permitted Congress to charter banks and other corporations, see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding Congress's power to charter second Bank of United States); The Pacific Railroad Removal Cases, 115 U.S. 1, 14-15 (1885) (upholding Congress's power to charter railroad corporations); to make paper money a legal tender, see The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870) (upholding implicitly Congress's power to make treasury notes legal tender in payment of all debts and obligations); and to undertake investigations with the power to issue subpoenas and punish contempts, see McGrain v. Daugherty, 273 U.S. 135 (1927) (upholding Congress's investigatory power, including its power to compel testimony by subpoena); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821) (upholding Congress's power to hold nonmembers in contempt of Congress for attempting to bribe member).

113 299 U.S. 304 (1936).

114 Id. at 318.

115 Perhaps the most famous instance was the Court's opinion in the Chinese Exclusion Case, 130 U.S. 581, 603-04 (1889) (upholding power to exclude aliens on ground that it is an incident of every independent nation). But there are many others. See, e.g., Perez v. Brownell, 356 U.S. 44, 57-60 (1958) (upholding power of Congress to withdraw citizenship of citizens who vote in foreign elections), overruled on other grounds in Afroyim v. Rusk, 387 U.S. 253 (1967); Blackmer v. United States, 284 U.S. 421, 436-38 (1932) (upholding power to compel U.S. citizens to return from abroad to testify in criminal proceedings); Fong Yue Ting v. United States, 149 U.S. 698, 705-14 (1893) (finding power to exclude or expel aliens inherent in sovereignty); Jones v. United States, 137 U.S. 202, 212 (1890) (finding authority to acquire territory by discovery and occupation and exercise jurisdiction over it in rights of nations under international law); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890) (upholding power to acquire territory by conquest or treaty); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542-43 (1828) (Marshall, C.J.) (same). The latter three cases, among others, resolved any

doubts about whether the Constitution permitted the United States to acquire new territory, a question that had been opened by President Jefferson's ruminations over the constitutionality of the Louisiana Purchase. See 1 Westel Woodbury Willoughby, The Constitutional Law of the United States § 232, at 410-12 (2d ed. 1929) (discussing Jefferson's views). For an excellent discussion of the many cases in which courts have upheld congressional powers on the basis of American sovereignty and actual practices of Congress that have never received judicial sanction but are best explained on that basis, see Henkin, supra note 9, at 21, 70-72 & 361-65 nn.29-49, 366 n.53. Among the former are those described above as well as the power to provide for extradition in the absence of a treaty, to require aliens to register, and to take away the citizenship of women who marry aliens (now archaic). Among the latter are the power to regulate foreign diplomatic activities in the United States, to freeze the assets of foreign states, to assert national sovereignty in airspace or in special zones at sea, to pass laws protecting the civil rights of aliens, and to enact a comprehensive criminal code applying to citizens abroad. See id. Professor Tribe has recognized that some of Congress's powers cannot be derived from any particular grant in the text. See Tribe, Constitutional Law, supra note 11, § 5-3, at 304-05 (noting that "certain peripheral congressional powers" result from "the aggregate of national powers and the 'nature of a political society'").

An advocate of this version of Professor Tribe's original principle will also have difficulty explaining the inconsistency between a strong affirmation of *expressio unius* and another key aspect of our constitutional structure. Consider how after enumerating Congress's powers, Article I then devotes a section to specifying which of those powers are to be exclusive of the states. See U.S. Const. art. I, § 10. Section 10 lists a number of powers that are specifically denied the states, and most of these are direct cognates of the powers given to Congress in Section 8. Compare, e.g., id. art. I, § 8, cl. 5 (granting power to coin money and regulate value thereof), with id. art. I, § 10, cl. 1 (prohibiting states from coining money). This structure, in turn, reflects the fact that before the Constitution the states were largely independent, and with the adoption of the Constitution their sovereignty was left intact except insofar as the document indicates otherwise. See, e.g., Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 192-93 (1819) (Marshall, C.J.) (describing same in holding bankruptcy power nonexclusive). Thus, there are strong grounds for construing those Section 8 powers for which there is no Section 10 cognate exclusion as nonexclusive, as the Supreme Court has often indicated. See, e.g., id. at 193; see also The Federalist No. 32, supra note 94, at 199-201 (advocating same principle). Still, the determination as to whether a particular grant is exclusive of state authority will depend upon a careful examination of its nature and purposes. As Marshall put it: "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures, as if they had been expressly forbidden to act on it." *Sturges*, 17 U.S. (4 Wheat.) at 193; see also Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 574 (1840) (opinion of Taney, C.J.) (concurring in this view); The Federalist No. 32, supra note 94, at 220 (same). Examples of Section 8 powers that are exclusive vis-a-vis the states notwithstanding their noninclusion in Section 10 are the power to borrow money on the credit of the United States, see U.S. Const. art. I, § 8, cl. 2; to establish post offices and post roads, see id. art. I, § 8, cl. 7; and to constitute tribunals inferior to the Supreme Court, see id. art. I, § 8, cl. 9. There are others. See supra note 105. Even though the states are expressly denied a number of foreign affairs powers in Section 10, in Zschernig v. Miller, 389 U.S. 429 (1968), the Court found a further unenumerated limit on the states that barred Oregon from denying inheritance to an East German citizen in accordance with its policy to deny estates to citizens of the former German Democratic Republic. Under a strict *expressio unius* interpretive regime, it would seem that all of the powers enumerated in Section 8 for which there is no Section 10 cognate ought to be deemed nonexclusive. That this is simply not so merely reflects the fact that we do not live in a strict *expressio unius* regime, Professor Tribe's protestations notwithstanding.

The second version of the *expressio unius* principle suggested by Professor Tribe's text fares no better—indeed, far worse—as a description of our constitutional heritage. Under this reading, the claim is that a power granted to one branch ought to be read as exclusive of any overlapping power in the other branches. If this argument applies to individual grants of power, a fortiori it would apply to the broad categorical grants of Articles I, II, and III—legislative power to the Congress, executive power to the President, and judicial power to the Courts.[116] Yet, even on this macro plane, the thesis ill fits our practices. Consider the so-called independent agencies. Acting under its Article I authority and the Necessary and Proper Clause, Congress is free to create a shadow executive branch substantially independent of presidential control by prohibiting the President from removing officers of independent agencies except for cause.[117] Or, consider the Court's longstanding endorsement of Article I courts. Acting under Article I and the Necessary and Proper Clause, Congress may vest

116 This reading is supported by Professor Tribe's sweeping but unsupported assertion that "those provisions of the Constitution that call into being the very architecture of our government provide specific and exclusive instructions, not mere options." Tribe, Taking Text, supra note 3, at 1274 n.181. If this were true, how could we explain, as discussed below, independent executive agencies, Article I courts, federal common law, and the President's legislative powers in foreign affairs? See infra notes 117-18 and accompanying text. Here, too, I suspect that Professor Tribe would not now endorse the apparent implications of his text.

117 Humphrey's Executor v. United States, 295 U.S. 602 (1935), is the leading case, from which the Supreme Court has never substantially retreated. See id. at 629-31 (affirming power of Congress to restrict presidential removals of officers of quasilegislative agencies); Wiener v. United States, 357 U.S. 349, 353-56 (1958) (discussing and following *Humphrey's Executor* in context of quasijudicial agency); Morrison v. Olson, 487 U.S. 654, 687-91 (1988) (same). In *Morrison*, the Court upheld the power of Congress to restrict the removal of even some core executive officers, in that case independent counsel appointed pursuant to the Ethics in Government Act. For further discussion of the Appointments Clause, see infra Part III.A.2. Despite the unambiguous grant of the executive power to the President, Professor Tribe himself agrees that "there is nothing to stop the legislature from vesting executive authority in officers substantially independent of the White House." Tribe, Constitutional Law, supra note 11, § 4-10, at 253. For good discussions of the issues posed by the independent agencies, see Peter M. Shane, Independent Policymaking and Presidential Power: A Constitutional Analysis, 57 Geo. Wash. L. Rev. 596 (1989); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984). For recent debates about the Framers' intentions, compare Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 642-45 (1994) (arguing that members of First Congress conceived of executive as unitary branch and agreed that President either had power to remove all inferior executive officers or none), with Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1788-92 (1995) (disputing idea that Framers shared any clear conception of scope of executive branch and hence of Congress's power to create independent agencies), and Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 106-08 (1994) (arguing that insulating offices such as Federal Reserve Board from presidential authority is consistent with Framers' intended scheme).

judicial business that could have been assigned to the federal courts under Article III to tribunals presided over by judges not enjoying the special protections afforded Article III judges.[118]

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[118] See U.S. Const. art. III, § 1. Federal judges, of course, are entitled to life tenure and salary protection. See id. The leading contemporary case is Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69-70, 83-84 (1982) (striking down bankruptcy courts but affirming wide area for Article I courts in cases arising under federal law). The earlier cases begin with Chief Justice Marshall's opinion in *Canter*, 26 U.S. (1 Pet.) at 545 (upholding congressional power to assign territorial courts jurisdiction over admiralty cases), and have continued unimpeded since. See, e.g., Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 275, 282-85 (1856) (distinguishing between matters that are inherently judicial and those raising questions of public right that may be assigned to non-Article III tribunals); Ex parte Bakelite Corp., 279 U.S. 438, 458-59 (1929) (holding that Court of Customs Appeals was Article I court); O'Donoghue v. United States, 289 U.S. 516, 551 (1933) (holding courts of District of Columbia to be Article III courts); Williams v. United States, 289 U.S. 553, 581 (1933) (holding Court of Claims to be Article I court); Glidden v. Zdanok, 370 U.S. 530, 541-43 (1962) (holding Court of Claims and Court of Customs and Patent Appeals to be Article III courts). The Court's decisions may be "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night." *Northern Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring) (characterizing Justice White's view of Court's past precedents). Nevertheless, even in the midst of the epochal battle between Justices Brennan and White over how to preserve the soul of Article III, neither called into question the very substantial power of Congress to give cases arising under federal law over to Article I tribunals and administrative agencies. Compare id. at 69-70, 83-84 (Brennan, J.), with id. at 113-15 (White, J., dissenting). Justice Brennan, speaking for a plurality, sought to confine the nonexclusivity of Article III to three categories: territorial courts, courts-martial, and courts or agencies adjudicating claims falling under the vaguely drawn "public rights" doctrine (i.e., cases between the government and others which could have been resolved solely by the executive without any judicial role). See id. at 63-70 (Brennan, J.). Justice White thought the Court's past precedents could not be so easily cabined and preferred to recognize far more discretion in Congress to assign matters within the judicial power to non-Article III tribunals. See id. at 103-05, 114-15 (White, J., dissenting) (arguing for loose balancing test under which Congress would be free to assign cases to non-Article III tribunals so long as Article III values are not substantially undermined). Both, however, sought to assure Congress that the administrative state as we know it was not under a constitutional cloud. See id. at 69-70, 83-84 (Brennan, J.) (affirming that Congress may provide that persons seeking to enforce particular statutorily created rights must do so before administrative tribunals); id. at 113-15 (White, J., dissenting) (concluding, in light of large body of precedent, that it was "too late" to deny constitutionality of administrative agencies). Even the careful limits Justice Brennan sought to establish in *Northern Pipeline* for state law actions, moreover, have not been strictly respected by the Court in subsequent decisions. See Commodity Futures Trading Comm'n v. Shor, 478 U.S. 833 (1986) (allowing non-Article III tribunal to adjudicate state law claims in certain cases); cf. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (expanding public rights exception).

Furthermore, when we turn from legislative intrusions on the executive and judicial realm to judicial and executive trespasses on the legislative function, we continue to discover overlapping powers. The quasilegislative powers of the federal courts to promulgate federal common law are well known if still controversial. For recent examples, see Boyle v. United Techs. Corp., 487 U.S. 500, 511-13 (1988) (fashioning federal common law defense for federal contractors sued in state law products liability actions); Westfall v. Erwin, 484 U.S. 292, 295-98 (1988) (considering limits of the federal common law immunities of federal officials); United States v. Little Lake Misere Land Co., 412 U.S. 580, 592 (1973) (ap-

When we descend from the heights of these meta-examples to the level of individual powers, this version of the *expressio unius* principle is equally unsustainable. It is simply false that the powers granted to a branch are uniformly exclusively held by that branch.[119] Counterexamples are legion. Thus, the President has been allowed to invade a

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plying *Clearfield Trust* federal common law test, see Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943), to determine law applicable to contract suits brought by United States). The federal courts often create a kind of quasiconstitutional common law. The dormant Commerce Clause cases, among others, are probably best understood in this light. See Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 17 (1975) (arguing in favor of this view). But see Thomas S. Schrock & Robert C. Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117, 1138-41 (1978) (rejecting common law account of Commerce Clause jurisprudence). In the foreign affairs context, the most important example is Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964) (establishing, as matter of federal common law, modern act of state doctrine). The separation of powers concerns raised by judicial lawmaking underlie the longstanding dispute over implied private rights of action, compare, e.g., Thompson v. Thompson, 484 U.S. 174 (1988) (refusing to imply right of action under Parental Kidnapping Prevention Act of 1980), with Cannon v. University of Chicago, 441 U.S. 677 (1979) (implying a right of action under Title IX of Education Amendments of 1972, and debating, in sharply divided decision, separation of powers issues posed by implied rights of action), and, to some degree, over the scope of *Bivens* actions, see, e.g., Schweiker v. Chilicky, 487 U.S. 412 (1988) (dividing over propriety of implying *Bivens* remedy when Congress has enacted elaborate remedial scheme on subject).

Less well known, perhaps, are the President's legislative powers in foreign affairs, including, for example, his recognized power, in the absence of an act of Congress, to determine whether a foreign state will be accorded sovereign immunity by courts in the United States. See Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945) (upholding executive authority to make binding suggestion of immunity); Ex parte Republic of Peru, 318 U.S. 578, 588 (1943) (same). Professor Henkin provides an instructive discussion of the President's legislative powers in foreign affairs. See Henkin, supra note 9, at 54-61. For a detailed description with supporting citations of the legislative and judicial powers of the President in war zones and in occupied territory, see Clarence Arthur Berdahl, War Powers of the Executive in the United States 152-64 (1921); see also Madsen v. Kinsella, 343 U.S. 341, 348 (1952) (acknowledging President's power to establish and regulate tribunals in territory under military occupation); Cross v. Harrison, 57 U.S. (16 How.) 164, 189-90 (1853) (affirming President's authority to form civil government, establish port regulations, and impose duties on imports and tonnage in conquered territory).

[119] That is the point, I take it, of Justice Jackson's famous tripartite division of executive activities in the Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring): "[T]here is a zone of twilight in which [the President] and Congress may have concurrent authority . . . ." Id. at 637. Nowhere is the overlap more extended than in foreign affairs. As Professor Henkin puts it:

> Jackson wrote in the *Steel Seizure Case*, which the Court treated as domestic, not as involving foreign affairs. Even in domestic matters, Jackson implies, there is a "twilight zone" clearly within the constitutional domain of Congress in which the President could also act. In foreign affairs, surely, where the President admittedly has large power, the fact that Congress can act does not, of itself, prove that the President could not; Presidents, we have seen, have acted unilaterally in foreign affairs matters which Congress might undoubtedly have regulated, where Congress had not in fact done so.

variety of Congress's express powers,[120] and Congress has returned

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Henkin, supra note 9, at 95 (footnote omitted); see also id. at 92-123 (describing some areas of overlap in foreign affairs). Specific examples are discussed infra notes 120-23, 131-35, 138, 197-209, 398-403, and accompanying text.

Of course, exclusivity, in the constitutional context, lies more on a spectrum than in two opposite poles. The question is usually better stated as exclusivity as to what and as against whom, rather than exclusivity per se. Even the concepts of exclusivity and nonexclusivity have many variegated meanings depending upon context. The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, is a case in point. Professor Tribe believes that it is common ground that the senatorial advice and consent procedure is exclusive as to other means of appointment in the case of principal officers. See Tribe, Taking Text, supra note 3, at 1272. But even this much is not entirely so. Congress has long purported to insist that (some) appointees meet specified qualifications. See Henkin, supra note 9, at 122 & 400 nn.104-05. More significant, although the Appointments Clause explicitly mandates the senatorial advice and consent procedure for "Ambassadors, other public Ministers and Consuls," U.S. Const. art. II, § 2, cl. 2, presidents, with the acquiescence of senates and congresses, have from the beginning disregarded this command for certain presidential appointees charged with carrying out foreign policy tasks on his behalf. As Corwin put it nearly a century ago:

> Such agents have been justified as "secret agents," yet neither their existence nor their mission is invariably secret. They have been called "private agents of the President," his "personal representatives," yet they have been sometimes commissioned under the great seal. They have been justified as organs of negotiation and so as springing from the Executive's power in negotiating treaties, yet this is also a normal function of our regular representatives. They have been considered as agents appointed for special occasions, but, as we have seen, the term "public ministers" of the Constitution is broad enough to include all categories of diplomatic agents. . . . In short, the only test which is generally available for distinguishing this kind of agents [sic] from the other kind is to be found in the method of their appointment.

Edward S. Corwin, The President's Control of Foreign Relations 65 (1917) [hereinafter Corwin, President's Control]; see also Edward S. Corwin, The President: Office and Powers, 1787-1984, at 236-37 (Randall W. Bland et al. eds., 5th rev. ed. 1984) [hereinafter Corwin, The President] (noting that beginning with George Washington presidents have appointed "secret agents" without advice and consent of Senate); Corwin, President's Control, supra, at 58-66 (same); Henkin, supra note 9, at 42 & 340 n.22 (same). See generally Henry Merritt Wriston, Executive Agents in American Foreign Relations (1929). For an early Attorney General opinion upholding the practice, see 7 Op. Att'y Gen. 186, 204-06, 212-13 (1856). This practice, with its roots in President Washington's administration, ought to provide a clear warning against categorical thinking and rigid demarcations in the field of foreign affairs. In any case, it is not only the Appointments Clause's procedure for appointing principal officers that is nonexclusive in part. The same applies to the President's power to remove principal officers. While Congress may not participate directly in removals, it may in some cases limit the substantive grounds on which the President may remove. See, e.g., *Morrison*, 487 U.S. at 685-91 (holding that Congress has power to establish a "good cause" requirement for removal of independent counsel). In others, however, where it would undermine the President's ability to carry out his constitutional duties, it cannot. See id. (stating test).

120 Consider, for example, Congress's power to make rules for the government and regulation of the land and naval forces. See U.S. Const. art. I, § 8, cl. 14. Despite the explicit grant to Congress, presidents have asserted, and the Court has held, that the President has inherent power as Commander-in-Chief to constitute courts-martial and impose other rules for governing military life. See Swaim v. United States, 165 U.S. 553, 557-58 (1897) (upholding President's power to constitute courts-martial); see also Kurtz v. Moffitt, 115

the favor, exercising fully or partially concurrent authority in a number of areas of enumerated presidential power.[121] Congress has also legislated in areas assigned to the judiciary.[122] It thus seems that the expansive understanding of the *expressio unius* maxim suggested by Professor Tribe's text is utterly unfounded.[123]

U.S. 487, 503 (1885) (giving effect to regulations providing rewards for apprehension of deserters promulgated on President's own authority); United States v. Eliason, 41 U.S. (16 Pet.) 291, 301 (1842) (stating that "power of the executive to establish rules and regulations for the government of the army, is undoubted," although in that case there was act of Congress); Berdahl, supra note 118, at 138-42 (stating that Commander-in-Chief Clause empowers President to convene and regulate courts-martial); Henkin, supra note 9, at 46 (noting that presidents have claimed authority to make rules for government and regulation of land and naval forces based on commander-in-chief power).

Likewise, under his powers as sole organ of the nation in conducting its foreign affairs and as Commander-in-Chief, the President has invaded the spheres of many other congressional powers, including even the power to regulate foreign commerce. See Henkin, supra note 9, at 41-46, 54-61, 92-96, 103-05 (providing examples). Consider, for example, the case of foreign sovereign immunity, the international law doctrine that affords foreign sovereigns immunity from suit in United States courts. Until 1976, when Congress enacted the Foreign Sovereign Immunities Act, Pub. L. No. 94-583 § 4(a), 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. §§ 1602-1611 (1994)), the State Department could in any case involving a foreign sovereign submit a "suggestion" as to immunity that would bind the court. See *Hoffman*, 324 U.S. at 36 (upholding Executive Branch's power); *Ex parte Republic of Peru*, 318 U.S. at 589 (same). In 1976, however, Congress dethroned the Executive and, promulgating an elaborate regulatory scheme, asserted its right, presumably at least in part under its foreign commerce powers, to control the field. See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, 1611 (1994) (removing presidential authority to make suggestion of immunity and replacing it with objective standards for judicial application). Several presidents, without statutory authority, have permitted the landing of foreign submarine cables, see 22 Op. Att'y Gen. 13 (1898); Corwin, The President, supra note 119, at 226-27, and the introduction of electricity from abroad, see 30 Op. Att'y Gen. 217 (1913); Corwin, The President, supra note 119, at 227. Without statutory authority, President Wilson ordered the closure of a foreign radio station because of noncompliance with naval censorship regulations. See 30 Op. Att'y Gen. 291 (1914) (justifying closure of Marconi station under commander-in-chief power); Corwin, The President, supra note 119, at 227 (noting same); Henkin, supra note 9, at 345 n.43 (same).

Under his power to make unilateral executive agreements, the President has frequently done the same. See Henkin, supra note 9, at 43, 219, 225-26 (giving examples). The war powers of the two branches are also substantially overlapping, see infra note 209; so too may be the commander-in-chief power and the power to make rules for captures on land and water. See infra note 209; infra notes 197-98 and accompanying text.

121 The pardon power is entirely nonexclusive, see infra notes 199-201 and accompanying text, while the power to require written opinions by the heads of departments seems largely, if not entirely, so, see infra notes 202-04 and accompanying text. For other examples, see infra note 209 and accompanying text.

122 See the discussion of the admiralty and maritime power infra notes 131-34 and accompanying text.

123 Perhaps an even more telling example is the immigration power. Not only has the Court long recognized it as an unenumerated power of Congress implied in the nation's sovereign status under international law, see supra note 115 and accompanying text, it has also found that the President has a partially concurrent implied power over the subject. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542-43 (1950) (holding that power to exclude aliens is "inherent in the executive department of the sovereign"). For

Fortunately though, it now appears that this conclusion is common ground and that Professor Tribe wishes to stand on what he believes is a less sweeping version of the *expressio unius* principle.[124] As he explains in a recent communication, in this version of the argument not all provisions creating entities and describing their powers should be given an exclusive construction; only those specifying how elements of the supreme law of the land are to be adopted need be accorded this presumption.[125] Professor Tribe made a similar argument in his original text, but in that formulation the argument appeared to be structural, resting chiefly on federalism considerations.[126] As so understood, I devote a separate section to criticizing that argument below.[127] But in his current articulation, he seems to have something more general in mind, implying that this principle can be unmoored from its federalism underpinnings and pressed directly as an *expressio unius* argument.[128] Unfortunately, though, he never says why—nor why it should be framed in the way he now suggests. In any case, his current approach proves on analysis to be as categorical as the more sweeping principle he defended in his original text and ultimately no more persuasive.

Begin with its historical implausibility. Like the "broader" argument he now disowns, the current variant fails the test of history. In the first place, it is in serious tension with—if not entirely irreconcilable with—such established and essential practices as agency rulemaking, judicial fashioning of federal common law, and the President's legislative authority in foreign affairs. If the bicameral congressional lawmaking procedure were presumptively exclusive in accordance with Professor Tribe's categorical principle, how could Congress delegate lawmaking authority to administrative agencies, which in turn

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further discussion, see Henkin, supra note 9, at 44 & 342 n.32. Thus, even unenumerated powers can be overlapping.

124 So Professor Tribe indicates in his letter commenting on the manuscript of this Article after it was accepted for publication. See Tribe Letter to Golove of Apr. 30, 1998, supra note 80, at 1-3.

125 See id.

126 In his most explicit statement of this narrower claim, Professor Tribe argued:

> [T]he most plausible way of reading the Constitution as a legal text, in light of the historical background against which it was adopted—and particularly in light of the overarching concern with state sovereignty that both Article II and Article V reflect—would be to read as exclusive those provisions that specify how elements of the supreme law of the land are to be adopted.

Tribe, Taking Text, supra note 3, at 1244.

127 See infra Part III.C.1.

128 See Tribe Letter to Golove of Apr. 30, 1998, supra note 80, at 1-3 (stating that his *expressio* argument is limited to lawmaking provisions of Constitution, but not mentioning federalism concerns in support of this version of argument).

promulgate rules with the binding force of law?[129] Likewise, if Article I truly provided the exclusive avenue for lawmaking, how could the federal courts, in the absence of an act of Congress, fashion rules of decision for cases within their jurisdiction? At least equally mysterious, how could the President, on his own steam, make law in the field of foreign affairs?[130] Were we to accept the apparent implications of Professor Tribe's principle, it is exceedingly difficult to see how these practices could survive constitutional scrutiny.

Nor do the difficulties end here. Perhaps even more starkly, Professor Tribe's principle is flatly contradicted by the admiralty power. The Constitution expressly grants the courts power to fashion rules in this area under the extension of the judicial power "to all Cases of admiralty and maritime Jurisdiction."[131] Although this provision specifies a procedure by which supreme law of the land is to be fashioned—and although there is no grant of a comparable congressional power—the Court in *In re Garnett*[132] held that Congress's power over the subject was "coextensive" with that of the courts, rendering the two powers fully interchangeable.[133] And notwithstanding the appar-

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129 See American Trucking Ass'n v. United States, 344 U.S. 298, 310-13 (1953) (upholding power of Congress to delegate power to make binding regulations).

130 For further discussion of these two questions, see supra note 118.

131 U.S. Const. art. III, § 2, cl. 1. This is the only mention of the admiralty and maritime power in the Constitution.

132 141 U.S. 1 (1891).

133 Id. at 12; see also Panama R.R. Co. v. Johnson, 264 U.S. 375, 385-86 (1924) (reaffirming holding in *Garnett*). The Court in *Garnett* held that Congress's legislative authority over admiralty and maritime law is "coextensive with that law. . . . [I]n maritime matters, it extends to all matters and places to which the maritime law extends." *Garnett*, 141 U.S. at 12.

The admiralty power is a good case in point because of its close parallels to the treaty power. Although it has long been an area of plenary federal control, Article I is silent on the subject, just as it is on the power to authorize agreements. In contrast, just as Article II grants the treaty power to the President and the Senate, Article III expressly grants the admiralty power to the federal courts. The Article III grant led the Court in early decisions to limit Congress's authority over admiralty to what it could otherwise reach under the Commerce Clause. See, e.g., The Daniel Ball, 77 U.S. (10 Wall.) 557, 564-65 (1871) (holding that Congress has no power to regulate intrastate shipping over navigable waters); Moore v. American Transp. Co., 65 U.S. (24 How.) 1, 39 (1860) (holding that Limitation of Liability Act can only apply to vessels engaged in foreign commerce or commerce between states); The Passenger Cases, 48 U.S. (7 How.) 283, 400 (1849) (opinion of McLean, J.) (stating that Congress could not impose licensing requirements on vessels engaged in intrastate commerce). Moreover, the Court initially viewed the judicial role as limited to applying the maritime law of nations. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816) (reasoning that Constitution vests admiralty jurisdiction in federal courts because "the law and comity of nations" form an "essential inquiry" in such cases); see also American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545-46 (1828) (Marshall, C.J.) (denying that maritime cases arise under Constitution or laws of United States but rather are ruled by "the law admiralty and maritime, as it has existed for ages"). As time went on, however, the Court took a more assertive role. See, e.g., The Lottawanna, 88 U.S. (21 Wall.)

ently irremediable conflict this settled understanding creates with Professor Tribe's categorical presumption, he has elsewhere fully affirmed this result.[134]

But Professor Tribe's argument fails not only on historical grounds. His more "modest" view is also defective on a conceptual level. Indeed, like his broader argument, it founders on the shoals of the Necessary and Proper Clause. By failing to bear that clause in mind, Professor Tribe unjustifiably conflates two separate—and importantly different—questions: whether we ought to presume that express lawmaking procedures are exclusive of entirely *unspecified* alternative procedures, and whether we ought to indulge the same presumption when there are two textually *specified* procedures that

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558, 576-77 (1874) (asserting expanded conception of Court's role in declaring maritime law, while affirming traditional view that only Congress can "make the law"). For an excellent historical account of the various metamorphoses in the construction of the admiralty and maritime power, see Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L. Rev. 1214, 1230-37 (1954); see also Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty 45-47 (2d ed. 1975) (detailing sources of U.S. admiralty law).

Apparently, Gilmore and Black thought the *expressio* inference linguistically strong, referring to the "constitutional puzzle" of plenary congressional power over general maritime law and to the Court's reasoning in later cases affirming plenary congressional power as "forced." Gilmore & Black, supra, at 47. Of course, this troubled them not an iota. See id. (affirming modern practice). Nor has it troubled Professor Tribe. See Tribe, Constitutional Law, supra note 11, § 5-3, at 304 & n.13 (same). One might seek to overcome the *expressio* inference by arguing that Congress's necessary and proper power to carry into execution the jurisdictional power granted to the courts gives it power to prescribe the law to be applied by the courts in maritime cases, although such a view might have problematic implications for the Diversity Jurisdiction Clause, see U.S. Const. art. III, § 2, cl. 1. Presumably, something like this line of reasoning underlies Professor Tribe's view. But the linguistically powerful retort, from the *expressio unius* side, would be that the Framers, had they intended a plenary authority in Congress, would hardly have specified the jurisdictional grant but failed to mention the substantive power. In this sense, the *expressio unius* argument against a necessary and proper congressional power over maritime law is stronger than the argument against congressional power to authorize agreements.

Another difference between the admiralty power and the power to approve agreements is that the former implies congressional supremacy, whereas the latter does not. Indeed, given general limits on the legislative powers of the courts, implied congressional power is not only supreme over the explicit judicial power but may even outstrip it in extent. Thus, for example, there may well be changes in maritime law that Congress may make, but that would be seen as beyond the proper authority of the courts. In contrast, like statutes and treaties, congressional-executive agreements and treaties are equal in status. As a result, the last in time controls. See The Chinese Exclusion Case, 130 U.S. 581, 599-600 (1889) (applying later-in-time statute which was inconsistent with earlier treaty obligation and declaring that treaties and statutes have equal constitutional status); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (declaring that treaties and statutes have equal constitutional status and that later in time controls); Restatement, supra note 9, § 115(1), (2) (affirming later-in-time principle); id. § 115 cmt. c (indicating that congressional-executive agreements supersede inconsistent prior law or agreement).

134 See supra note 133.

can plausibly be construed as overlapping in coverage. In the former case, it may well be reasonable to begin with a presumption of exclusivity.[135] But in the latter, context controls, and rigid categorical presumptions will simply not avail the interpretive enterprise. In these cases, there is no neutral baseline from which to proceed, no way of harmonizing the two procedures that we can presume a priori the Framers would have preferred. Perhaps, they wished one procedure to cover a particular field because they believed special considerations required unique procedural protections in that area. On the other hand, perhaps they only wished to provide an alternative procedure to be utilized in cases where for some reason the usual lawmaking procedure proved inconvenient or inadequate to reach the subject matter. To be sure, contemporary interpreters may take comfort where the Framers made clear whether the procedures they created were to be exclusive or concurrent. But where they failed to do so, no categorical

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[135] Professor Tribe does not tell us why this should be so, but a number of arguments suggest themselves. From an historical perspective, the lawmaking provisions—particularly those dealing with statutemaking—were carefully honed to protect a number of fiercely competing interests, and the balance struck might be undermined by permitting the use of textually unspecified procedures: "Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" Clinton v. City of New York, 118 S. Ct. 2091, 2103-04 (1998) (quoting I.N.S. v. Chadha, 462 U.S. 919, 951 (1983)). This conclusion is also supported by more theoretical concerns. Consider the perspective of the drafters of any well-framed constitution. Arguably, they would be vitally concerned to establish the basic rules governing lawmaking. This would be necessary to avoid endless contestation over lawmaking procedures and to ensure the realization of the procedural protections built into the legislative process. See Christopher I. Eisgruber, Should Constitutional Judges Be Philosophers? 13 (1997) (unpublished manuscript) (on file with the *New York University Law Review*) (arguing that ideal framers would adopt fixed concrete provisions so as to establish basic rules of political game and avoid prolonged destructive contestation over procedures). For this reason as well, then, it might be reasonable to assume that when a constitution does define those procedures, they ought to be deemed exclusive of any textually undefined alternatives. As a corollary to this principle, moreover, it is equally sensible to presume that the legislature cannot create alternative lawmaking procedures under its general legislative powers, e.g., under the Necessary and Proper Clause. Otherwise, a temporary majority could extend or even entrench its own power by assigning legislative powers to, say, its preferred political party, or, less dramatically, it could undermine the procedural safeguards built into the text-based procedures. The Supreme Court seems to agree. See *Clinton*, 118 S. Ct. at 2102-03, 2107 (striking down Line Item Veto Act on ground that Article I, Section 7's procedure for adopting, amending, and repealing laws is exclusive, thereby ruling out any textually unspecified repeal power in President, and noting that "Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution"); cf. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-23, 537 (1935) (striking down congressional delegation of legislative authority in National Industrial Recovery Act in part because delegatees were private parties, viz., representatives of affected industries).

Although I cannot pursue the matter here, I believe that the grounds for applying the presumption discussed in the text to provisions for constitutional amendments are far weaker than the grounds for applying it to basic lawmaking provisions.

presumption can settle the resulting interpretive difficulties. These ambiguities can only be resolved by careful consideration of context, and even then no construction will necessarily prove most persuasive on the basis of text alone.[136]

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[136] The Court's recent decision in Clinton v. City of New York illustrates the distinction between these two questions. None of the justices, including the three dissenters, believed there was any plausible textual basis for a presidential power to repeal acts of Congress. In the absence of any textual basis for the line item veto, they all agreed, unsurprisingly, that the Article I, Section 7 procedure for making and repealing laws was exclusive. See *Clinton*, 118 S. Ct. at 2103-04; id. at 2115-16 (Scalia, J., concurring in part and dissenting in part); id. at 2121 (Breyer, J., dissenting). The dissenters sought to uphold the Line Item Veto Act on entirely different grounds—that it did not authorize the President to repeal acts of Congress within the meaning of Article I, but only to exercise delegated legislative power, which Congress could properly delegate under its Article I, Section 8 powers. See id. at 2116-18 (Scalia, J., concurring in part and dissenting in part); id. at 2125-31 (Breyer, J., dissenting).

Consider, in contrast, the President's legislative powers in foreign affairs. See supra note 118. In this area, the President acts not on the basis of a delegation from Congress, but on the basis of his own substantive powers over foreign affairs and the implied powers doctrine. See infra notes 328-29 and accompanying text for further discussion of the implied powers doctrine as applied to the President's powers. Incident to his diplomatic powers, for example, the President has the implied power to determine on a case-by-case basis whether the courts should invoke sovereign immunity to dismiss suits against foreign states. For further discussion, see supra note 118. Here, then, there is an arguable textual basis for overlapping legislative powers in both Congress and the President. As a consequence, Professor Tribe's principle of presumptive exclusivity is inapplicable, and the Court has found, *pace* Professor Tribe, that all things considered, the President should have concurrent legislative powers in this context. See supra note 118. Ironically, Professor Tribe takes no note of the far stronger textual grounds for congressional power to authorize the President to approve agreements, given its status as the national legislative body and the explicit incorporation of the implied powers doctrine in the Necessary and Proper Clause, see supra notes 49-56, 67, and accompanying text; infra notes 235-37 and accompanying text, than for the President to make law in the field of foreign affairs.

For a middle ground example—and one closely related to the line item veto controversy—consider the much vexed question of impoundments. Presidents have sometimes claimed an executive power, even in the absence of an act of Congress, to decline to spend funds appropriated for specific purposes by Congress. Here, the claim is that the President's explicit Article II power to execute the law gives him the authority to impound. For further discussion, see Tribe, Constitutional Law, supra note 11, § 4-12, at 258 (discussing issue and relevant Supreme Court decisions). While I agree that this argument ought properly to be rejected, as the Court implicitly did in Train v. City of New York, 420 U.S. 35, 41-49 (1975) (refusing to construe congressional statute to permit impoundment), this position cannot be persuasively defended on the basis of any presumption of exclusivity but only on a contextual assessment that textual and structural considerations argue strongly against recognizing the power. See Tribe, Constitutional Law, supra note 11, § 4-12, at 258-59 (arguing against presidential impoundment power not on basis of any presumption of exclusivity but on historical, structural, and textual grounds, including conflict impoundment power would create with veto provisions of Article I, Section 7). As Professor Tribe has always seemed to recognize in the past, there is simply no way to avoid the difficult interpretive questions these kinds of cases present, and categorical presumptions will not advance the effort.

Notwithstanding these considerations, Professor Tribe has not been careful to notice the distinction between these two questions in applying his "narrow" *expressio unius* principle to the Treaty Clause. The question is not whether treaties can be made, say, by a committee appointed by the Supreme Court. The Treaty Clause is exclusive in that sense—exclusive, that is, of any textually undefined lawmaking procedure. What is in issue is whether the Article I lawmaking procedures—procedures carefully defined in the text—cover agreement-making, or more precisely, whether they allow Congress to adopt laws authorizing the President to conclude international agreements. In this context, Professor Tribe's presumptions—as opposed to particularized arguments based on the language and structure of the Constitution and, I might add, on its interpretive history—are of no help. Indeed, this is all the more emphatically the case with the Treaty Clause because it defines a specialized procedure for dealing with a narrow category of lawmaking and does not specify how it is to interrelate with Congress's general legislative powers and its virtually plenary authority in the field of foreign affairs.[137] No presumption can tell us whether the Framers intended the Treaty Clause to be the exclusive means by which international commitments could be tied or whether it was only to be an extraordinary procedure affording the President an option, to be used in his discretion.[138] Indeed, Professor Tribe's retreat to categorical presumptions may best be understood as an implicit recognition that the interpretive scales do not tip decidedly one way or the other—that is, without the placement of a heavy thumb on one side of the balance. Beyond the limited weight which I have described, then, application of *expressio unius* to the Treaty Clause adds nothing to the argument for the exclusive view.

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137 For further discussion of Congress's foreign affairs authorities, see supra notes 28, 49-52, and accompanying text; infra notes 298-304 and accompanying text.

138 As Justice Breyer recently put it in reaffirming the pervasiveness of overlapping powers:

> This Court has frequently found that the exercise of a particular power, such as the power to make rules of broad applicability or to adjudicate claims, can fall within the constitutional purview of more than one branch of Government. The Court does not "carry out the distinction between legislative and executive action with mathematical precision" or "divide the branches into watertight compartments," for as others have said, the Constitution "blend[s]" as well as "separat[es]" powers in order to create a workable government.

Clinton, 118 S. Ct at 2123 (1998) (Breyer, J., dissenting) (citations omitted) (quoting Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting)); see also 1 Kenneth Culp Davis, Administrative Law Treatise § 1.09, at 68 (1958) (observing that solutions to contemporary administrative challenges may require that executive, legislative, and judicial powers be blended in a single agency).

2. *An Offense to Good Neighborliness: Ignoring the Appointments Clause*

Professor Tribe next argues strenuously that the Appointments Clause bears importantly on the proper reading of the Treaty Clause. It grants the President the power to appoint principal officers of the United States by and with the advice and consent of the Senate, but permits Congress to provide separately for the appointments of inferior officers.[139] It is common ground, Professor Tribe argues, that the advice and consent procedure for confirming the President's nominations of principal officers is exclusive.[140] From this he seeks to draw two conclusions: First, he thinks that the express nonexclusivity of the procedure for confirming inferior officers implies the exclusivity of the Treaty Clause because of the latter's failure to include comparable language of nonexclusivity.[141] Let's call this the linguistic argument. Second, he is emphatic that the fact that the two clauses are "next-door neighbor[s],"[142] are really two halves of the same clause,[143] and, indeed, are "contained in the *same sentence*,"[144] is persuasive grounds for giving them a parallel reading. If the procedure for confirming principal appointments is exclusive of Congress's Article I, Section 8 powers, as all allegedly agree, then the procedure for approving treaties must be as well. Let's call this the same sentence rule.

Neither of these arguments is persuasive even on its own terms, and they both reflect the highly formalistic character of Professor Tribe's methodological approach. Let us begin with the linguistic argument. Not only are the inferences he wishes to draw from the Ap-

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139 Specifically, the Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

140 As we have already seen, however, this claim is not in fact accurate. See supra note 119. From the outset, presidents have appointed various diplomatic agents qualifying in all relevant respects as ambassadors or public ministers, without obtaining the Senate's advice and consent. See supra note 119. Of course, the fact that the procedure for appointing principal officers is not, as Professor Tribe blithely assumes, wholly exclusive seriously undermines his Appointments Clause argument. I nevertheless leave this point aside. Even were the Appointments Clause exclusive, as he claims, his argument fails on the various other grounds that I elaborate below.

141 See Tribe, Taking Text, supra note 3, at 1272-73.

142 Id. at 1272.

143 See id. at 1273.

144 Id. at 1274.

pointments Clause weak, they illustrate the manipulability of arguments from constitutional silences and the care one must take in assessing their probative force.

Contrary to Professor Tribe's claims, there are crucial differences in text and structure between the Appointments and Treaty Clauses that render any effort to analogize from one to the other fatuous.[145] Begin with crucial differences in the language of the two clauses, the significance of which Professor Tribe simply dismisses.[146] While the first part of the Appointments Clause, much like the Treaty Clause, gives the President the power, by and with the advice and consent of the Senate, to make appointments of "Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law,"[147] the second part, without parallel in the Treaty Clause, adds a proviso specifying a different rule for inferior officers: "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[148] This proviso, as the Supreme Court long ago recognized, strongly suggests that Congress has no power over appointments of principal officers and that its role in inferior appointments is limited to vesting that power in the President, the heads of departments, or the courts. One would hardly have expected the Framers to have included the proviso had they intended Congress to retain plenary authority under Article I, Section 8 over appointments. The language at best would have been confusing surplusage. Why explicitly carve out a special category of inferior officers for the sole purpose of giving Congress express supervisory authority over them when it already has implied supervisory authority over appointments generally, including over the very class of officers from which the inferior officers category is being shorn? The proviso would not only be unnecessary; given its obvious implications, it would invite misunderstanding,[149] or, as Hamilton put it in a compa-

145 On the ambiguity of the concept of exclusivity, see supra note 119.

146 Indeed, he believes that placing any weight on these differences is "particularly odd." Tribe, Taking Text, supra note 3, at 1274 n.182.

147 U.S. Const. art. II, § 2, cl. 2.

148 Id.

149 Reading the Appointments Clause as not excluding a congressional role in principal appointments would not literally render the proviso surplusage. Other reasons for retaining the language can be imagined; they are just implausible for textual and structural reasons. For example, it might be suggested that the Framers wanted Congress to retain plenary authority over principal appointments but to have a more limited authority over inferior appointments. Under this view, the language of the proviso would be limiting, specifying a more constricted range of options for Congress over inferior appointments. This interpretation, however, stands the Framers' evident intention on its head, turning the appointments power into a largely legislative rather than executive function. In any case, it

rable context, "it would be both unnecessary and dangerous."[150] And so the Supreme Court recognized in *Myers v. United States*,[151] the leading case construing the Appointments Clause:

> Here, then, is an express provision [the proviso], introduced in words of exception, for the exercise by Congress of legislative power in the matter of appointments and removals in the case of inferior executive officers. The phrase "But Congress may by law vest" is equivalent to "excepting that Congress may by law vest." By the plainest implication it excludes Congressional dealing with appointments or removals of executive officers not falling within the exception . . . .
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> . . . Article II expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices.[152]

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founders on the shoals of the text itself. Finding a limitation rather than an augmentation in a clause that begins "but the Congress may . . .," id. art. II, § 2, cl. 2, is not just linguistically awkward, but virtually textually absurd. The structure of the clause, moreover, is inconsistent with this reading. It *authorizes*—"but the Congress may . . ."—but does not require Congress to treat some officers as inferior. Congress, however, would have no reason ever to do so if by deeming an officer inferior it thereby limited its range of options. In other words, if the proviso was a limitation on, rather than an expansion of, Congress's powers, then the Framers would certainly not have left the invocation of those limits entirely to Congress's discretion. Alternatively, it might be argued that the Framers assumed that under Article I Congress would have the power to vest appointments in itself, either by reserving to itself the power to appoint or by requiring its approval of the President's nominations, but that it would not have power to delegate the appointments power to any other organ of government. The proviso, then, would expand Congress's power over appointments of inferior officers by giving it vesting options that would not apply to principal officers. This argument, however, simply trades one implausibility (that the proviso constricts rather than expands congressional power) for another: If the Framers had intended to give Congress Article I legislative power to make appointments, Congress would have as much authority to delegate this power to, say, the President or the heads of departments, as to retain the power in itself. Its Article I powers, then, would engulf the proviso, rendering it surplusage. As above, of course, this reading of the text would also stand the principle of the separation of powers on its head.

150 The Federalist No. 32, supra note 94, at 199 (referring to clause in Article I, Section 10 barring states without consent of Congress from laying any imposts or duties specifically on imports or exports, and arguing that it would not have been included had affirmative Article I, Section 8 power of Congress to lay and collect taxes, duties, and imposts implicitly prohibited states from imposing taxes on any articles whatsoever). This answers Professor Tribe's concern about Congress vesting the appointment of a Trade and Commerce Secretary, a principal officer, in the Supreme Court. See Tribe, Taking Text, supra note 3, at 1274-75. Such a power is excluded because of the clear implications of the proviso. The Framers would not have expressly granted Congress the power to vest the appointment of inferior officers in, *inter alia*, the courts, if Congress had in any case retained general Article I authority to vest appointments of both principal and inferior officers in the courts. For further discussion, see infra note 319.

151 272 U.S. 52 (1926).

152 Id. at 127, 129.

As to inferior officers, moreover, there are equally compelling textual reasons to limit Congress's supervisory powers strictly to the three vesting options specified in the proviso. To concede Congress any broader role would render the specific grants in the proviso surplusage. Why specify Congress's authority to vest inferior appointments in these three ways if Congress retained plenary authority to vest them anywhere it pleased?[153]

In light of these textual considerations, it is hard to understand why Professor Tribe believes the language of the Appointments Clause lends weight to the argument for an exclusive reading of the Treaty Clause. The peculiar textual features that lead to an exclusive reading of the former clause do not apply to the latter. It contains no "proviso" or other comparable language which would have clarified the Framers' intent, no express conferral upon Congress of authority over some types of agreements which would be surplusage were Congress to retain Article I, Section 8 authority over all other agreements. The text simply grants the President the power, by and with the advice and consent of the Senate, to make treaties. The contrast with the Appointments Clause could not be more striking.

In an effort to avoid the obvious implications of the proviso, Professor Tribe resorts to high formalism. Reversing the intuitive inference, he argues that it is the proviso itself which supports the exclusivity of the Treaty Clause, because it demonstrates that the Framers would have been explicit had they intended the treaty power to be nonexclusive. The argument proceeds in two steps. First, rather than considering how the provisions for the appointment of principal and inferior officers are substantively intertwined, he treats them as two distinct powers and focuses on their formal linguistic properties.[154] Thus, he ignores the central point that a nonexclusive reading of the procedure for confirming principal officers would render the proviso substantively superfluous, instead emphasizing that the proviso explicitly authorizes alternative means of appointing inferior officers. He then extrapolates from this express nonexclusivity as to inferior officers to the conclusion that the Framers would have been explicit about the nonexclusivity of the principal officers procedure

153 See Freytag v. Commissioner, 501 U.S. 868, 883-84 (1991) (holding that Congress may only vest appointments of inferior officers in three ways specified in Appointments Clause); cf. Buckley v. Valeo, 424 U.S. 1, 127 (1976) (noting that "[w]hile the Clause expressly authorizes Congress to vest the appointment of certain officers in the 'Courts of Law,' the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language 'Heads of Departments' in this part of cl. 2").

154 See Tribe, Taking Text, supra note 3, at 1272-75.

had they so intended.[155] Taking it one step further, he then extrapolates to the Treaty Clause: Its failure to be expressly nonexclusive likewise argues in favor of its exclusivity.[156] Thus, for Professor Tribe, the critical textual feature is the use in one instance of language of nonexclusivity and the failure to use the same or comparable language in others.

This focus on form over substance is a notable characteristic of Professor Tribe's argumentation throughout. While a staple of the lawyerly trade, however, it is at best exceedingly incomplete as an interpretive methodology for constitutional law. "It is," after all, "*a constitution* we are expounding."[157] By presuming consistency on the highest levels of linguistic abstraction, such rigid interpretive rules demand more of the text than it can possibly offer. As a result, Professor Tribe's approach also renders the text hopelessly self-defeating: From the Constitution's express language of exclusivity in its grant to the Senate of the "*sole* Power to try *all* Impeachments,"[158] for example, can we argue persuasively in favor of the nonexclusivity of other constitutional grants of power that lack its explicitness? If not all other grants, what about grants of power, like the Treaty Clause, which are given to the Senate? Professor Tribe does not tell us why this implication is any less textually persuasive than his effort to draw an exclusive reading of the Treaty Clause from the multiple procedures provided for making inferior appointments.[159] More impor-

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155 See id. at 1273 (noting that "Clause 2's affirmative authorization for Congress to alter the procedures for appointing inferior officers suggests that the Constitution would be explicit if the prescribed methods of confirming principal officers were not exclusive").

156 See id. at 1272 (arguing that "there is a telling difference between the Treaty Clause and the immediately adjacent Appointments Clause: *only the Appointments Clause provides for alternative consent procedures*").

157 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.).

158 U.S. Const. art. I, § 3, cl. 6 (emphasis added). Consider as well Article I, Section 2, Clause 5 which declares that the House "shall have the *sole* Power of Impeachment." Id. art. I, § 2, cl. 5 (emphasis added).

159 Similarly, the Exclusive Legislation Clause, id. art. I, § 8, cl. 17, empowers Congress to "exercise *exclusive* Legislation" over the district ceded by states for the seat of the government and likewise over places purchased from states for the purpose of erecting forts, government buildings, and the like. Id. (emphasis added). Presumably, this was meant to emphasize that the states which ceded the district or sold the places would have no continuing legislative authority over them. See generally Tribe, Constitutional Law, supra note 11, § 5-11, at 327-29 (discussing interpretation of Exclusive Legislation Clause). Would Professor Tribe conclude, then, that all of the other grants in Article I, Section 8 are nonexclusive, permitting concurrent state regulation of their subject matter in the absence of congressional preemption? After all, none contain similarly explicit language of exclusivity. For further discussion, see infra note 209.

Ironically, despite the explicit language of exclusivity in the Exclusive Legislation Clause, the Supreme Court has permitted states to exercise concurrent legislative authority in certain respects. See, e.g., United States v. State Tax Comm'n, 412 U.S. 363, 369-71

tantly, it is common ground, I assume, that some constitutional grants of power are exclusive while others are not.[160] In most cases, however, there is no explicit language one way or the other, and we are left to construe the sounds of silence. Ordinarily, it will not advance the effort to invoke the presence or absence of linguistic formulas taken from the few instances in which the Framers adopted explicit language of exclusivity or nonexclusivity. If we are to take our interpretive responsibilities seriously, we will have to consider each provision in context and examine its logical interrelationships with other possibly overlapping provisions.[161]

(1973) (holding that previously enacted state law continues to govern state property acquired by federal government with state's consent unless inconsistent with federal policy or preempted by Congress); Pacific Coast Dairy, Inc. v. Department of Agric., 318 U.S. 285, 294 (1943) (same); Tribe, Constitutional Law, supra note 11, § 5-11, at 328-29 (discussing cases). These holdings only suggest again how far Professor Tribe's current approach is out-of-step with our tradition of constitutional interpretation.

It is notable as well that Article III, Section 3, Clause 1 provides that treason against the United States "shall consist *only* in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const. art. III, § 3, cl. 1 (emphasis added). Does this mean that when the Framers wished to make an exclusive list they used the word "only"? Professor Tribe's approach certainly makes constitutional interpretation simpler. Yet, it is hard to believe that even he would defend the results. See infra note 403 for further discussion of Professor Tribe's concerns about missing "only[s]."

160 See supra notes 117-23, 131-34, and accompanying text (discussing numerous examples of both exclusive and overlapping powers); infra notes 194-209, 398-403, and accompanying text (same).

161 There is an additional irony here. As we shall see, Professor Tribe goes to some lengths to defend the unilateral executive agreement even as he attacks the congressional-executive agreement. He claims that the President may make less important agreements on his own authority but that important agreements must receive senatorial advice and consent. See infra Part III.D.2. If a linguistic analysis of the Appointments Clause teaches us anything about the Treaty Clause, however, it is that we ought to be skeptical about the President's claimed unilateral agreement-making powers—and likewise about any effort to restrict Congress to approving only less important agreements. Recall that the Treaty Clause says nothing about the power to conclude undertakings other than through the Senate supermajority method, whereas the Appointments Clause carefully distinguishes between principal (read, "important") and inferior (read, "less important") officers and explicitly allows inferior officers to be appointed through alternative less burdensome procedures, viz., by the President alone. The absence of a comparable distinction in the Treaty Clause argues against finding that the President has the power to conclude agreements on his own authority, so long as they are, in effect, "inferior" rather than "principal" agreements, and it likewise argues against limiting Congress to approving such "inferior" agreements. Under Professor Tribe's approach, the proviso to the Appointments Clause strongly suggests that the Framers would have been express about authorizing the President to make inferior agreements on his own. Likewise, they would have been express had they wished either, depending upon one's view of congressional Article I power, to limit Congress to approving only inferior agreements or, conversely, to authorize it to approve only inferior agreements.

Despite these textual implications, however, when the WTO Agreement was pending before Congress, Professor Tribe, even while relying upon the Appointments Clause, made precisely the argument that it seems to rule out—that the President and the Congress may

Of course, courts never rely solely upon purely textual considerations in resolving great constitutional questions, not even the more nuanced inquiry that looks to context and substance rather than simply linguistic forms. The Appointments Clause is no exception. It is no small irony that Professor Tribe begins his article on the Treaty Clause by elaborating a multidimensional interpretive model that emphatically stresses the importance not only of text but of structure and architecture.[162] Yet, inexplicably, in his discussion of the Appointments Clause, he ignores the pressing structural and architectural considerations that give substance to the Court's decisions and which sharply distinguish the appointments and treaty powers.[163] Chief Justice Taft in *Myers v. United States*,[164] with firm support in historical

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make less important agreements but not important treaties. See GATT Hearings, supra note 41, at 301 (suggesting that only most important agreements need be submitted to Senate rather than Congress); Tribe Letter to Sen. Byrd of July 19, 1994, supra note 41, at 2 (same); Tribe Memo of Oct. 5, 1994, supra note 41, at 8 (same). In response, Professor Ackerman and I pointed out the textual inconsistency. See Ackerman & Golove, supra note 5, at 923 n.517. Although Professor Tribe now derides our argument as "downright silly," Tribe, Taking Text, supra note 3, at 1274 n.182, he has in the meantime changed his view about congressional power to meet our point: Professor Tribe now concedes that Congress can either approve all agreements falling within its substantive powers or none; it is the middle ground that is untenable. He has simply chosen none where we chose interchangeability. With respect to unilateral presidential agreements, moreover, he charges us with silliness only because he persists in thinking that the Treaty Clause implicitly incorporates a distinction between "treaties" and "agreements," and that the clause applies only to the former. The President, he says, cannot make unimportant "treaties," only "agreements," although the latter are just unimportant treaties. As we will see, this premise is entirely untenable, see infra Part III.D.2, and is even contradicted by Professor Tribe himself, see infra note 366 and accompanying text.

Professor Tribe's unwillingness to accept the obvious linguistic implications of the Appointments Clause from the point of view of his own interpretive methodology is, of course, a consequence of the imperative to uphold the unilateral executive agreement. That imperative teaches another lesson that he seems to miss: We ought to be skeptical about the strength of any inferences drawn on the basis of the kinds of purely linguistic considerations that he purports to find definitive. At this level of abstraction, the text simply refuses to cooperate. In my view, whether the President has unilateral powers to make some kinds of agreements cannot be intelligently resolved by a close parsing of the Appointments Clause. Nor—and this is the crucial point—can Congress's powers to approve international agreements.

162 See Tribe, Taking Text, supra note 3, at 1235-49.

163 As Justice Scalia put it: "[T]he basic separation-of-powers principles . . . are what give life and content to our jurisprudence concerning the President's power to appoint and remove officers." Morrison v. Olsen, 487 U.S. 654, 715 (1988) (Scalia, J., dissenting). It is not the case, of course, that Professor Tribe is unaware of these structural and architectural considerations. He has insightfully discussed them on numerous past occasions. See, e.g., Tribe, Constitutional Law, supra note 11, at 213-18, 244-54 (discussing separation of powers concerns underlying appointment and removal powers).

164 272 U.S. 52 (1926).

understandings,[165] recognized appointments as a core executive function.[166] Indeed, it was the Convention's decision to include the Senate—inserting a branch of the legislature into an executive procedure—that stood in need of justification. As Madison said during the famous House debate in 1789 over the removal power, this legislative encroachment on the executive sphere had to be narrowly construed.[167] At stake, of course, is the ability of the executive to control the character of the officers who are to carry out his constitutional responsibility to faithfully execute the laws. The need to assure the independence of the executive against legislative aggrandizement and the need to avoid a concentration of power that might threaten the liberties of the people were, famously, central preoccupations of the Framers.[168] In any case, Madison's principle of strict construction

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165 See, e.g., 1 Annals of Cong. 496-97, 581-82 (Joseph Gales ed., 1789) [hereinafter Annals] (remarks of Rep. Madison) (indicating that appointments and removals are executive functions); 1 id. at 557 (remarks of Rep. Baldwin) (same); 1 id. at 561 (remarks of Rep. Sylvester) (same); see also *Myers,* 272 U.S. at 115-32 (reviewing removal debate in First Congress); id. at 136-57 (reviewing subsequent practice and judicial decisions).

166 See *Myers*, 272 U.S. at 115-29 (holding that removal is an executive function).

167 As Madison put it:

> Perhaps there was no argument urged with more success, or more plausibly grounded against the Constitution, under which we are now deliberating, than that founded on the mingling of the Executive and Legislative branches of the Government in one body. It has been objected, that the Senate have too much of the Executive power even, by having control over the President in the appointment to office. Now shall we extend this connexion between the Legislative and Executive departments, which will strengthen the objection, and diminish the responsibility we have in the head of the Executive?
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> . . . [The legislature] ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded.

1 Annals, supra note 165, at 380, 582 (remarks of Rep. Madison); see also *Myers*, 272 U.S. at 120-21, 128-29 (endorsing Madison's argument); 1 Annals, supra note 165, at 557 (remarks of Rep. Baldwin) (concurring with Madison).

168 These separation of powers concerns have underwritten the Court's several decisions in this area, which develop the separation of powers theme at great length. See Weiss v. United States, 510 U.S. 163, 183-89 (1994) (Souter, J., concurring) (upholding procedure for appointing military judges); Freytag v. Commissioner, 501 U.S. 868, 882-92 (1991) (upholding procedure for appointing special Tax Court trial judges); id. at 901-08 (Scalia, J., concurring); *Morrison*, 487 U.S. at 685-96 (upholding independent counsel law); Bowsher v. Synar, 478 U.S. 714, 721-27 (1986) (striking down certain provisions of Gramm-Rudman-Hollings Act on ground that congressional control over removal of Comptroller General violated separation of powers); Buckley v. Valeo, 424 U.S. 1, 120-29 (1976) (per curiam) (striking down Federal Election Campaign Act procedure for appointing commissioners to Federal Election Commission); *Myers*, 272 U.S. at 116-32 (striking down provision that President could remove certain postmasters only upon senatorial consent); see also Tribe, Constitutional Law, supra note 11, §§ 4-9 to 4-10 (affirming centrality of separation of

led the *Myers* Court to rule out altogether the participation of the Senate in removing officers, despite the absence of any explicit textual guidance and despite the rule, accepted by the Court, that the power to remove is incident to the power to appoint.[169] Indeed, even as to inferior officers, over whom Congress has express supervisory authority, the Court held that Congress could not

> draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause, and to infringe the constitutional principle of the separation of governmental powers.[170]

It should be obvious that application of this rule of strict construction virtually compels the conclusion that the Appointments Clause is exclusive: Notwithstanding Congress's powers under Article I, the legislative branch has no role in appointments beyond that explicitly specified in the language of the proviso, narrowly construed.[171]

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powers concerns in this area). Even in his article, Professor Tribe notices the separation of powers underpinnings to the Appointments Clause but only when he is not actually discussing his Appointments Clause argument. See Tribe, Taking Text, supra note 3, at 1238 (noting separation of powers concerns embodied in Appointments Clause in context of discussion of legislative veto as example of distortion of constitutional topology).

169 See *Myers*, 272 U.S. at 119-22, 163-64. Indeed, the Court was willing to abide congressional supervision only over removals of inferior officers whose appointments Congress, in accordance with the proviso, had vested outside the normal senatorial procedure. Here, the power to vest the appointment yielded the power to control removals as well. See id. at 160-61. Even within this narrow category, however, the Court doubted strongly whether Congress could exercise removal power over appointments it had vested in the President alone. Instead, Congress's power applied only to appointments the proviso permitted Congress to vest in the heads of departments, and, the Court insisted, the power applied only in cases where Congress had in fact vested the appointment in the head of a department. It was not enough that Congress could have vested the appointment but had chosen not to do so. See id. at 161-62, 164. Even in these cases, moreover, the Court implied what later cases confirmed—that Congress itself can play no direct role in removals. While in these cases it may vest the removal power elsewhere than in the President and restrict its exercise to specified causes, Congress may not itself participate in the removal process. See id. at 161; see also *Morrison*, 487 U.S. at 685-86 (noting that Congress has historically been denied the right to remove officers directly); *Bowsher*, 478 U.S. at 722-26 (declaring that "[a] direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with separation of powers").

170 *Myers*, 272 U.S. at 161; see also *Morrison*, 487 U.S. at 685-86 (affirming same); *Bowsher*, 478 U.S. at 722-26 (same); *Buckley*, 424 U.S. at 129, 134-36 (same).

171 Note that subsequent decisions have retreated somewhat from the *Myers* highwater mark of exclusive executive powers. In Humphrey's Executor v. United States, 295 U.S. 602 (1935), the Court disapproved *Myers* in this respect and recognized that Congress could restrict the grounds upon which the President can remove even certain principal officers, provided their functions are quasilegislative or quasijudicial, rather than purely executive, in character. See id. at 629-31. More recently, the Court has abandoned the effort to draw bright line distinctions and has permitted Congress to impose limits on removals so long as these do not interfere with the President's ability to accomplish his executive responsibilities. See *Morrison*, 487 U.S. at 690-91. Implicitly, then, the Court has

Indeed, wholly independently of textual considerations, these structural concerns have proven powerful enough to justify a quarantine against any legislative involvement in the appointments process. The need to resolve this question of fundamental principle was provoked by the constituent instrument Congress promulgated for the Philippine Islands during the period of our colonial rule.[172] Unsurprisingly, it looked quite a bit like our own Constitution, but for our purposes it differed in one critical respect: The Governor General had no general power to appoint officers by and with the consent of the Philippine Senate but only when the legislature so decided.[173] Rushing to test the limits, the legislature appointed the President of its Senate and the Speaker of its House, along with the Governor General, to

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recognized that Congress has a reserve of Article I authority over removals that permits it some supervisory role where the separation of powers does not compel otherwise.

On the other hand, in deference to the core separation of powers issues at stake, the Court has continued to insist that Congress itself never play any direct role in removals. See id. at 685-86; *Bowsher*, 478 U.S. at 722-26. The Court's concerns are not limited to ensuring that the President has sufficient control over executive officers to carry out his executive duties effectively. In accordance with the Madisonian theory of separated powers, it has also worried about the dangers posed by congressional power over the execution of the laws. Much like the legislative veto struck down in I.N.S. v. Chadha, 462 U.S. 919 (1983), Congress's holding of the removal power, the Court has feared, would give it effective control over executive officers and thereby over the execution of the laws. See *Bowsher*, 478 U.S. at 726. Such control would enable Congress to usurp the executive function and would pose the dangers of unitary, parliamentary government the Framers so carefully sought to avoid. See Tribe, Constitutional Law, supra note 11, § 4-10, at 253-54; Tribe, Choices, supra note 39, at 74-76. No doubt, these concerns, combined with the textual points noted above, would continue to rule out any congressional role over appointments beyond that specified in the proviso.

172 See Springer v. Philippine Islands, 277 U.S. 189 (1928) (construing Phillipine Organic Act).

173 Section 21 of the Organic Act provided: "He shall, unless otherwise herein provided, appoint, by and with the consent of the Philippine Senate, such officers as may now be appointed by the Governor General, or such as he is authorized by this Act to appoint, or *whom he may hereafter be authorized by law to appoint*." Act of Aug. 29, 1916, ch. 416, § 21, 39 Stat. 545, 552 (emphasis added), made obsolete by Proclamation No. 2695, 3 C.F.R. 64 (Supp. 1946) (recognizing Philippine independence), reprinted in 22 U.S.C. § 1394 (1994). This provision contrasts with the language of Article II, Section 2 of the Constitution, which provides that the President shall appoint, by and with the advice and consent of the Senate, "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2, cl. 2. Thus, under the U.S. Constitution, Congress's power is clearly limited to creating the office, at which point the President's appointment power automatically kicks in, whereas in the Organic Act, the legislature seemed to have the power both to create the office and to decide whether to vest the appointment in the Governor General. Note further that the Organic Act also vested the supreme executive power in the Governor General, granted him general supervision and control over all departments and bureaus of the Philippine government, charged him with faithfully executing the laws, and provided that all executive functions must be directly under the Governor General or within one of the executive departments under his supervision and control. See *Springer*, 277 U.S. at 200-01.

vote the shares of certain publicly held corporations.[174] This legislative usurpation of a core executive function, the United States Supreme Court held in *Springer v. Philippine Islands*,[175] violated a basic principle of the separation of powers: "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."[176] This was sufficient to condemn the legislative appointments even apart from "whether the duties devolved upon these members are vested by the Organic Act in the Governor-General."[177] Since *Springer*, the Court has consistently enforced this basic separation of powers principle, refusing to permit Congress to insert itself into the appointments or removal processes, whether by vesting an appointment or removal in itself or in one of its officers or by requiring its approval of a presidential appointment or removal.[178]

These fundamental separation of powers considerations, which underwrite the Court's narrow construction of congressional power over appointments, are entirely inapt when applied to the treaty power. There is persuasive evidence that a number of key Framers viewed the power to approve treaties as properly a legislative, not an executive function, and there is strong textual support for this view.[179] In contrast to the appointments power, international agreement-making was not conceived of as a core executive function. Consequently, no emanation from the Treaty Clause can underwrite a *Myers*-like strict rule of construction, ruling out a priori any congressional participation in agreement-making as an infringement on the

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174 See *Springer*, 277 U.S. at 197-99.

175 277 U.S. 189 (1928).

176 Id. at 202.

177 Id. The Court nevertheless went on to hold that the Organic Act, particularly the section requiring all executive functions to be under the Governor General or within one of the executive departments under his supervision and control, prohibited legislative appointments. In the process, the Court expressly rejected the application of *expressio unius* to the listing of the Governor General's appointment powers in Section 21—despite the fact that its interpretation seemed to render that listing mere surplusage and thus presented a particularly compelling linguistic case for application of the canon. See id. at 206.

178 See *Bowsher*, 478 U.S. at 722-26 (striking down certain provisions of Gramm-Rudman-Hollings Act because of Congress's retention of power to remove Comptroller General, who was responsible for executing Act); Buckley v. Valeo, 424 U.S. 1, 126-28, 134-37 (1976) (per curiam) (striking down act creating Federal Election Commission because Congress vested appointment of some commissioners in its own officers and subjected all appointments to congressional approval); see also *Morrison*, 487 U.S. at 685-86 (affirming restrictions on congressional involvement).

179 See infra notes 244-58 and accompanying text.

essential powers of the executive.[180] As Madison put it, in rejecting

[180] This does not mean that the two clauses ought invariably to be interpreted in parallel but opposite fashion. Formal symmetries and oppositions rarely recommend themselves in constitutional interpretation. Consider the cognate issues of the removal of executive officers and the termination of treaties. *Myers* and its progeny, as we have seen, strictly limit congressional participation in removals of executive officers. See supra notes 169-71 and accompanying text. Somewhat similarly, although the issue is still unsettled, see Goldwater v. Carter, 444 U.S. 996, 996 (1979) (Powell, J., concurring) (dismissing on justiciability grounds challenge to a unilateral presidential treaty termination); id. at 1002 (Rehnquist, J., concurring) (same), the leading though still highly controversial modern view is that the power to terminate treaties belongs solely to the President. See Restatement, supra note 9, § 339 (affirming President's unilateral power); id. § 339 cmt. a & reporters' note 1 (elaborating on same); Henkin, supra note 9, at 211-14 (same); Louis Henkin, Litigating the President's Power to Terminate Treaties, 73 Am. J. Int'l L. 647, 651-54 (1979) (same); see also Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.) (en banc) (per curiam) (ruling in favor of President on narrow grounds in hodgepodge opinion rehearsing wide range of pro-Executive arguments), vacated, 444 U.S. 996 (1979) (mem.). But see *Goldwater*, 444 U.S. at 1004 n.1 (Rehnquist, J., concurring) (noting various procedures, including congressional authorization or direction, that have been used to terminate treaties); Van der Weyde v. Ocean Transp. Co., 297 U.S. 114, 117-18 (1936) (upholding termination pursuant to congressional direction and appearing to approve practice). Presidents and their boosters, unsurprisingly, have from time to time been unable to resist the temptation to cite *Myers* in support of unilateral presidential authority. See, e.g., Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (No. 78-2412), reprinted in 2 United States Foreign Relations Law 532, 551-52 (Michael J. Glennon & Thomas M. Franck eds., 1980). However, the more authoritative commentators reach this conclusion concededly not on the basis of the text's original meaning but on "the nature of his office as it has become," Henkin, supra, at 652, and "as it has developed over almost two centuries," Restatement, supra note 9, § 339 reporters' note 1 (citing, *inter alia*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

Indeed, the original understandings, which far better reflect the original meaning of the text, were quite to the contrary and strongly confirm the vast gulf between the appointments and treaty powers. The decision of 1789, as *Myers* referred to the famous debate in the First Congress, confirmed the view that appointments and removals are core executive functions in which Congress may not participate. See Myers v. United States, 272 U.S. 52, 163 (1926). In sharp contrast, Congress quickly claimed for itself the power to terminate treaties when, in 1798, it unilaterally abrogated our alliance with France formalized in the Treaties of 1778. See Act of July 7, 1798, ch. 67, 1 Stat. 578 (declaring "the United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France"). While that precedent has, strictly speaking, never been repeated, the predominant practice until at least President Wilson and perhaps until the New Deal was either for Congress, or less commonly for two-thirds of the Senate, to authorize or direct the President to terminate treaties. For historical accounts, compare *Goldwater*, 617 F.2d at 716, 723-32 (MacKinnon, J., dissenting in part, concurring in part) (concluding that "Congressional participation in termination has been the overwhelming historical practice"), vacated, 444 U.S. 996 (1979) (mem.), with David Gray Adler, The Constitution and the Termination of Treaties 149-90 (1986) (concluding there has been "no predominant method of termination, or even a discernible trend," and that there is "no support" for contention that unilateral executive termination has dominated since 1920s), and Memorandum from Herbert J. Hansel, Legal Adviser, Dep't of State, to Secretary of State (Dec. 15, 1978) (concluding that while early precedent is mixed, practice since 1920 confirms President's unilateral power to terminate treaties), reprinted in 2 United States Foreign Relations Law, supra, at 377, 382-404. For

the claim that the strict rule of construction he had argued for in the appointments context in the first Congress applied as well to legislative involvement in the treaty and war powers:

> To justify any favourable inference from [the removal] case, it must be shown, that the powers of war and treaties are of a kindred nature to the power of removal, or at least are equally within a grant of executive power. Nothing of this sort has been attempted, nor probably will be attempted. Nothing can in truth be clearer, than that no analogy, or shade of analogy, can be traced between a

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contrasting views of leading historical figures, compare Jefferson, supra note 47, § 52, at 300 (asserting that "an act of the legislature alone can declare [treaties] infringed and rescinded"), and Ware v. Hylton, 3 U.S. (3 Dall.) 199, 256, 261 (1796) (Iredell, J.) (reprinting Justice Iredell's opinion for lower court) (stating that Congress alone has authority to terminate treaties), with The Federalist No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961) (indicating that "they [the President and the Senate] who make treaties may alter or cancel them"), and Techt v. Hughes, 128 N.E. 185, 192 (N.Y. 1920) (Cardozo, J.) (explaining that "President and Senate may denounce treaty, and thus terminate its life"), and The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 75 (1821) (Story, J.) (stating that "the obligations of the treaty could not be changed or varied, but by the same formalities with which they were introduced, or, at least, by some act of as high an import, and of as unequivocal an authority," thus arguably suggesting that Congress, as well as President and Senate, may terminate treaties). Corwin's early view, which reflected the practice up to that time, placed the power in the Congress alone. See Corwin, President's Control, supra note 119, at 111-16 (reasoning that this exclusive congressional prerogative "flows naturally, if not inevitably, from the power of Congress over treaty provisions in their quality as 'law of the land'"). The text itself is radically indeterminate on the subject. See generally Adler, supra, at 89-111 (canvassing views of Framers and Supreme Court precedents on location of treaty termination power).

In any case, even the modern view favoring unilateral presidential authority is far more tolerant of congressional supervision of treaty terminations than the Court has ever been of a comparable congressional role in removals. Thus, for example, contrary to the clear implication of *Myers* with regard to appointments, both the *Restatement* and Professor Henkin recognize the power of the Senate to consent to a treaty on the condition that the President not terminate it without the approval of either the Senate or Congress. See Restatement, supra note 9, § 339 cmt. a & reporters' note 3; Henkin, supra note 9, at 212; see also Tribe, Taking Text, supra note 3, at 1253 n.108 (noting that "[s]erious questions might be raised by such unilateral termination if a treaty provided for termination exclusively by other means"). Furthermore, both likewise accept that the President may not exercise a unilateral power to terminate a treaty when doing so would create a serious danger of war "in view of the authority of Congress to decide for war or peace." Restatement, supra note 9, § 339 cmt. a; see also id. § 339 reporters' note 1 (similar). This latter exception, of course, provides fertile grounds for growth. Why not apply the same logic to the termination of a treaty that would seriously affect congressional policy on foreign commerce or any other matter within its plenary foreign affairs powers?

Finally, the functional differences between the appointments and treaty powers also account for the different rules concerning "reservations." The Senate's right to condition its consent to treaties on reservations is virtually unlimited. In contrast, the Senate may not place conditions on its consent to a presidential appointment. See 3 Op. Att'y Gen. 188 (1837) (opining that Senate could not place conditions on its consent to naval commission); Corwin, The President, supra note 119, at 92-93 (noting that while Senate may condition approval of treaties, its role in relation to appointments is limited to affirming or rejecting nominations without condition); Henkin, supra note 9, at 122, 180-81 (same).

> power in the supreme officer responsible for the faithful execution of the laws, to displace a subaltern officer employed in the execution of the laws; and a power to make treaties and to declare war, such as these have been found to be in their nature, their operation, and their consequences.[181]

Indeed, the whole notion of congressional usurpation of an executive function is out of place in this context. The interchangeability doctrine in no way restricts the President's functions; it simply gives him another option he can invoke when he deems it appropriate.[182] If there is usurpation afoot, it is not, as in the appointments context, the President's prerogatives that are at risk, but the Senate's. Yet, whether we conceive the potential encroachment as coming from the House or the President, the result is the same: The overwhelming dis-

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[181] Helvidius No. 1, supra note 69, at 149-50. Corwin appears to have shared Madison's view on this point. See Corwin, President's Control, supra note 119, at 29-30 (acknowledging force of Madison's argument on this point). Washington also distinguished between the nature of the appointments and treaty powers, stating in a communication to the Senate: "In the appointment to offices, the agency of the Senate is purely executive, and they may be summoned to the President. In treaties, the agency is perhaps as much of a legislative nature and the business may possibly be referred to their deliberations in their legislative chamber." George Washington, Sentiments Expressed to the Senate Committee at a Second Conference on the Mode of Communication Between the President and the Senate on Treaties and Nominations (Aug. 10, 1789), in 30 The Writings of George Washington 377, 378 (John C. Fitzpatrick ed., 1931).

[182] Although interchangeability expands rather than contracts executive power, Congress might well provoke conflict were it to go a step further and attempt to restrict the President's authority to enter into agreements falling within his independent constitutional powers. Indeed, Congress and the Executive fought a heated war of words over this issue in the 1970s during the heroic period of congressional efforts to rein in executive unilateralism in foreign affairs. Congress claimed expansive authority for restrictive framework legislation under its Necessary and Proper Clause power to carry into execution the powers of the other departments of government. Compare H.R. 4438, 94th Cong. (1975) (requiring President to submit executive agreements to Congress for review and possible rejection), S. 3830, 93d Cong. (1974) (similar), and S. Rep. No. 93-1286, at 4, 7 (1974) (articulating congressional position), with Congressional Review of International Agreements: Hearings on H.R. 4438 Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong. 163-200 (1976) (testimony of Monroe Leigh, Legal Advisor, Dep't of State, and Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Dep't of Justice) (opposing congressional position). Ultimately, not with a bang but a whimper, Congress's resolve fizzled, and it failed to adopt proposed legislation which would have required congressional approval of all executive agreements, even those falling within the President's sole powers. The important point here is that the interchangeability doctrine in no way implies a resolution of this conflict in favor of one or the other of the contending branches. Interchangeability asserts only that Congress may authorize the President to enter into agreements, not that it may limit him in the exercise of his independent constitutional authority. On the other hand, whether Professor Tribe's view would undermine congressional efforts to limit presidential unilateralism in this way is unclear, though his emphatic insistence that Congress has no power to approve international agreements certainly seems to suggest a pro-Executive position.

analogies undermine the relevance of any argument from the Appointments Clause.

Consider first the intrabranch struggle between the two houses of Congress. The fundamental separation of powers concerns that justify a strict rule of construction to avoid legislative infringements on the executive's very capacity for independence are entirely absent in this context. To the extent the separation of powers principle applies at all, it concerns the propriety of House participation in the treaty process given its institutional characteristics. The Senate, when acting separately from the House, however, is an extraordinary body in our constitutional system, derogating from the carefully structured bicameral legislative procedure the Framers deemed necessary for the protection of the people.[183] We ought to assume that the Framers excluded the House only for compelling reasons in particular contexts and ought carefully to avoid extending the Senate's exclusive powers beyond the strict necessities of the case. If anything, then, there are persuasive grounds for construing the Senate's powers strictly to avoid any further distortion of the normal legislative process.[184]

Now, consider the interbranch struggle between the Senate as one component of the legislative body and the Executive—or, more precisely, consider the prerogative of one-third plus one of the Senate to veto treaties approved by the majority.[185] This conflict presents the converse of the Appointments Clause problem—an executive usurpation, aided by the House, of a legislative power, the power of a minority to block the approval of treaties. Here again, however, as in the House/Senate dispute and precisely contrary to the appointments power, we have compelling reasons to confine the Senate minority's veto as narrowly as possible. Indeed, the argument for a strict rule of construction has even greater force in this context because the two-thirds supermajority requirement is a derogation from the usual

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183 See United States v. Munoz-Flores, 495 U.S. 385, 394-95 (1990) (discussing importance of bicameralism in protecting liberties of people from legislative overreaching and tyranny); I.N.S. v. Chadha, 462 U.S. 919, 948-50 (1983) (same); The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (same); The Federalist No. 62, at 378-79 (probably James Madison) (Clinton Rossiter ed., 1961) (same); The Federalist No. 63, at 385-90 (probably James Madison) (Clinton Rossiter ed., 1961) (same).

184 See *Chadha*, 462 U.S. at 955-56 (noting that exceptional cases in which one house may act independently of other house are "narrow, explicit, and separately justified"); Henkin, supra note 180, at 652-53 (arguing that no unenumerated powers should be inferred for Senate acting alone); cf. The Head Money Cases, 112 U.S. 580, 598-99 (1884) (suggesting that if Supremacy Clause were absent from Constitution, lack of participation of House in treatymaking would militate in favor of according superior status to laws).

185 What is really at stake is not the prerogative of the Senate itself, since a majority of the Senate must still approve any congressional-executive agreement.

majoritarian principles of the Constitution[186] and runs the ever-present risk of subjecting the wishes of the majority to the will of the minority.[187] We ought to be particularly skeptical of any reading that

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186 Of course, bicameralism is itself a modification of a purely majoritarian system. In any case, there are four other instances in which the Constitution requires supermajority votes, all of which involve the absence of one or more of the three usual lawmaking institutions. See supra notes 69-73 and accompanying text. In addition, in each case there are specialized considerations that seem to underlie the Framers' adoption of an extraordinary voting requirement.

The first is the adoption and amendment of the Constitution itself. See U.S. Const. art. VII (requiring ratification by nine states); id. art. V (requiring, alternatively, congressional amendment proposals to be adopted by two-thirds of both houses and approved by three-quarters of states or calling of a convention by Congress upon application of two-thirds of state legislatures and approval of proposed amendments by three-quarters of states, and prohibiting any amendment depriving a state of its equal suffrage in Senate without its consent). Without entering into the amendments debate, it seems evident that the Framers held the view, widely shared even today, that there is something unique in the nature of a constitution such that its adoption and/or amendment should be supported by a strong majority of the population.

The second case is the power to try impeachments, which, in the absence of the House and President, requires a two-thirds vote in the Senate for conviction. See id. art. I, § 3, cl. 6. Since impeachment is in the nature of a criminal charge, it seems unremarkable that the Framers required a qualified majority of the triers of fact to be persuaded. Additionally, there is the need to prevent those holding a majority of seats from abusing the minority through political uses of the impeachment power.

Third, each House may expel a member only upon a two-thirds vote. See id. art. I, § 5, cl. 2. Here, again, there is not only the criminal analogy but the need to prevent obvious abuses of majoritarian democracy. Cf. Powell v. McCormack, 395 U.S. 486, 547-48 (1969) (considering two-thirds requirement for expulsion).

Finally, the fourth case is the veto override provision, which allows two-thirds of both houses of Congress to pass a law over the objections of the President. See U.S. Const. art. I, § 7, cls. 2, 3. In part, the President's veto power enables him to guard his own institutional position against an overreaching legislature and to protect the minority against majoritarian excesses. In this context, the President's role is comparable to that of the Supreme Court in exercising the power of judicial review, except that the Framers allowed the President to be overruled by two-thirds of both houses (whereas the Court must be overruled not only by two-thirds of both houses, but three-quarters of the states as well). In part, when the President vetoes a bill, he throws in doubt not only the constitutionality and/or the wisdom of the measure, but the assumption that Congress has faithfully executed the will of the majority. As the Court in *Myers* put it:

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . .

Myers v. United States, 272 U.S. 52, 123 (1926). Hence, requiring two-thirds of both houses for an override helps to ensure that the law passed actually represents the majority's considered views. See *Chadha*, 462 U.S. at 948.

187 See 2 Records of the Federal Convention of 1787, at 540 (Max Farrand ed., 1911) [hereinafter Records of the Convention] (remarks of James Wilson) (objecting to two-thirds rule because it "puts it in the power of a minority to controul the will of a majority"); The Federalist No. 75, at 453 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that "all provisions which require more than the majority of any body to its resolutions

would expand the reach of this extraordinary requirement beyond what is compelled by the language of the text or is necessary to preserve it from being rendered nugatory.

Regardless of how one thinks these separation of powers conflicts should be resolved,[188] what should be clear beyond dispute is that the Appointments Clause deals with an entirely separate problem and can offer no real guidance in this radically different context. The textual, structural, and architectural reasons for an exclusive reading of the Appointments Clause simply have no bearing on the proper interpretation of the Treaty Clause. As a consequence, we cannot sensibly look to this neighboring provision to help us with the difficult interpretive questions that the Treaty Clause presents.[189]

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have a direct tendency to embarrass the operations of the government and an indirect one to subject the sense of the majority to that of the minority").

[188] My larger point, of course, is that they cannot be resolved on the basis of text alone. Take the House/Senate conflict, for example. From a purely textual perspective, the question is whether the apparent (though necessarily speculative) institutional reasons for excluding the House—the large number of representatives and their short terms of office, see supra text accompanying notes 68-69—require their exclusion in all cases, or whether it is sufficient to allow the President the option of avoiding the House in those instances when he believes that these institutional characteristics might prejudice his foreign policy initiatives, say, because of the need for secrecy and dispatch. See supra notes 68-74 and accompanying text. The text alone does not aid in resolving the ambiguity, although, as I argue above, there are persuasive grounds for narrowly construing exceptions to the usual bicameral legislative procedure. Similarly, consider the President/Senate minority conflict. From a textual perspective, the question is whether the Framers empowered the Senate minority in order to provide a sectional veto over treaties or as an added protection in those cases where the President concludes that the House cannot safely participate. Again, the constitutional text does not resolve the issue, but, as the text above suggests, there are persuasive grounds here as well for strictly construing the scope of extraordinary supermajority voting requirements, such as the two-thirds rule.

[189] Another closely-related structural difference that undermines the effort to import the exclusivity of the Appointments Clause to the Treaty Clause is the contrast between the simple majority rule for appointments and the supermajority requirement for treaties. In both cases, the reasons for the choice of the Senate, at least insofar as one can infer from the text alone, appear similar. The Senate, among other things, would ensure a more equitable geographical distribution of appointments, see *Myers*, 272 U.S. at 119-20, and likewise would ensure that the interests of all states be considered equally in undertaking international commitments. However, the Framers' reasons for excluding the House appear quite different in the two contexts. In the case of appointments, at least one persuasive textual inference is that they wished to avoid placing any further obstacles in the President's path. Having already introduced the legislature into a core executive function, the Framers sought to avoid compounding the problem by requiring the President to run the gauntlet not just of the Senate but of the differently configured House as well. This, in turn, provides a strong structural argument for reading the Appointments Clause to prohibit any congressional involvement beyond that expressly granted to the Senate. In contrast, the two-thirds supermajority requirement for treaties suggests a different basis for the House's exclusion. Given the extraordinary burden placed upon the President in seeking the Senate's consent (as well as the Framers' view that approving agreements is a legislative function, see infra notes 246-58 and accompanying text), there is little basis for inferring that they excluded the House to avoid placing an additional obstacle on the

This brings us, then, to Professor Tribe's proximity argument, his claim that the two clauses should be read in parallel because they appear in the same clause and even sentence of the Constitution. Professor Tribe appears to find this logic particularly compelling. Reinvoking his mathematical theme, he likens the argument to a virtual axiomatic proof. Suppose someone makes the argument that the age eligibility clause for Senators should be read in base eight.[190] "It would," he then points out, "be a fatal objection to the base eight view if the numeral '9' were used where the very same sentence adds that a Senator must have been a United States citizen for at least nine years."[191] QED. Apparently, in his view, a similar "QED" follows directly from the exclusivity of the appointments power, refuting the interchangeability doctrine.[192] What are we to make of this argument for importing the physically adjacent Appointment Clause's exclusivity to the functionally distant Treaty Clause?

President. Limiting the burden on the President in the one case was apparently not the point in the second, and the reasons that underwrite a narrow, exclusive reading of the Appointments Clause simply do not apply to the Treaty Clause. See infra note 247 and accompanying text. For this reason as well, the interpretation of the Appointments Clause does not shed any light on the proper interpretation of the Treaty Clause.

190 That clause requires senators to be 30 years of age. See U.S. Const. art. I, § 3, cl. 3. To make the hypothetical work, Professor Tribe asks us to assume that the text uses numerals rather than spelling out, as it does, the words "nine" and "thirty." See Tribe, Taking Text, supra note 3, at 1274.

191 Id. at 1274 (citing U.S. Const. art. I, § 3, cl. 3).

192 In a footnote, Professor Tribe concedes that the Appointments Clause argument does not provide "a fail-safe proof of the exclusivity of the Treaty Clause procedure." Id. at 1274 n.181. Perhaps, then, his hypothetical is designed just to demonstrate the importance for constitutional interpretation of reading whole sentences rather than just fragments. After all, the latter part of a sentence might reflect on the proper interpretation of the first part. This point, however, is so obviously uncontroversial it seems unlikely he would have belabored it with an elaborate hypothetical illustration. On the other hand, he does charge Professor Ackerman and me with deriding his suggestion that the Appointments Clause "should be considered in deciding the issue of the Treaty Clause's exclusivity," id. at 1273-74, and uses this as an occasion to provide a lecture on the importance of reading sentences as a whole. Needless to say, Professor Ackerman and I have not criticized him for "considering" the Appointments Clause. Every provision in the Constitution that might shed light on the interpretation of the Treaty Clause, including the Appointments Clause, ought obviously to be consulted, and spreading the net as widely as possible is laudable. The Appointments Clause in particular is a good candidate for inclusion because of the linguistic and formal structural similarities to the Treaty Clause. We simply argued that having consulted and analyzed the Appointments Clause, it has no real bearing on interpreting the Treaty Clause. Everything should be consulted, but arguments should be based only on clauses that turn out, on examination, to be relevant. Indeed, a slight variation on Professor Tribe's base eight story illustrates our point: Suppose that Senators need be citizens only seven, not nine years. Then reading the sentence as a whole, in Professor Tribe's sense, would be unhelpful. The latter portion would not give us any further evidence as to whether base eight, nine, or ten were intended, and it would not be worth pointing to as an argument for the base ten view. That is exactly the status of the Appointments Clause in our view.

Surely Professor Tribe must agree that the Constitution's grants of power are too nuanced, too idiosyncratic to lend themselves to simple mechanical formulas of this kind. Why, then, abandon his own past subtle efforts at constitutional elucidation in favor of arid formalism on stilts? Consider the untenable implications of his interpretive theory. Recall that Article II, Section 2, Clause 2, the home of the Treaty and Appointments Clauses, contains only a portion of the powers granted to the President. Clauses 1 and 3 of that section, *inter alia*, contain additional grants. Does Professor Tribe's interpretive method apply to all grants contained within the same section? We would then have to conclude that each of these powers is exclusive because the appointments power in Clause 2 is exclusive.[193] Or perhaps the argument is limited to powers that are contained in the same clause, perhaps only to those, like the appointments and treaty powers, that appear in the same sentence. The grants in Clause 1, as in most other clauses in the Constitution, fit this same sentence rule. They include the President's power as Commander-in-Chief,[194] the power to require the written opinions of the principal officers in each department "upon any Subject relating to the Duties of their respective Offices,"[195] and the power to grant pardons and reprieves.[196] Even giving it the narrowest construction, then, Professor Tribe's methodology would require that they all be given a parallel construction—they are all either exclusive, nonexclusive, or mixed in the same degree, but not a dissimilar admixture of the three. If we take long-accepted views seriously, however, this cannot be right.

Consider the Commander-in-Chief power. Only the President can direct troop movements, form military strategies, order a battlefield attack, and so on.[197] Outside this robust core of exclusivity, pres-

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193 Alternatively, returning to Professor Tribe's textual argument, are we to conclude that these powers are all exclusive because none of them contains any language of nonexclusivity, as does the proviso? See supra notes 157-61 and accompanying text.

194 See U.S. Const. art. II, § 2, cl. 1.

195 Id.

196 See id.

197 See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) ("[The war] power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief."); see also Berdahl, supra note 118, at 116-30 (describing President's wide-ranging and exclusive power to conduct wartime military operations); Corwin, The President, supra note 119, at 262-63, 293-94 (same); cf. Fleming v. Page, 50 U.S. (9 How.) 603, 615-16 (1850) (holding that custom house in conquered territory was validly established under President's authority as Commander-in-Chief where duties imposed were part of military strategy to burden commerce with enemy); Tribe, Constitutional Law, supra note 11, § 4-4, at 220 & n.6 (acknowledging President's exclusive authority over military policy decisions, though locating source of authority in President's "inherent" power over foreign policy rather than Com-

idents have also successfully achieved a penumbra of additional authority that is shared with Congress. This penumbra, in turn, has expanded with each of the successive great internal and external, hot and cold wars of our history.[198] In contrast, the pardon power is apparently entirely nonexclusive.[199] Although Congress may not abridge or limit the President in the exercise of the power,[200] over a century ago the Supreme Court held that despite the pardon power, Congress's (implied) authority extends to granting amnesties and that any "distinction between amnesty and pardon is of no practical importance."[201] More complicated is the power to require written opinions. From the very outset, Congress has claimed the implied power to require written reports from the heads of departments on any subject pertinent to its legislative responsibilities.[202] Presidents have some-

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mander-in-Chief Clause). Henkin is less certain but says "[i]t would be unthinkable for Congress to attempt detailed, tactical decision, or supervision, and as to these the President's authority is effectively supreme." Henkin, supra note 9, at 103-04.

198 See Corwin, The President, supra note 119, at 263-93 (describing historical expansion of President's commander-in-chief power); Henkin, supra note 9, at 45-50, 97-112 (same).

199 Acting under its Article I, Section 8 powers, Congress may vest the pardon power in executive officers other than the President, see The Laura, 114 U.S. 411, 414-16 (1885) (upholding power of Congress to vest in Secretary of Treasury power to remit fines, penalties, and forfeitures for violations of laws of United States against claim that pardon power is exclusively President's), or it may grant amnesty for any offense against the United States. "Although the Constitution vests in the President 'power to grant reprieves and pardons for offences against the United States, except in cases of impeachment,' this power has never been held to take from Congress the power to pass acts of general amnesty . . . ." Brown v. Walker, 161 U.S. 591, 601 (1896) (quoting U.S. Const. art. II, § 2, cl. 1).

200 See United States v. Klein, 80 U.S. (13 Wall.) 128, 147-48 (1871) (striking down congressional attempt to limit scope of pardon power); Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (holding that "Congress can neither limit the effect of [the President's] pardon, nor exclude from its exercise any class of offenders").

201 *Brown v. Walker*, 161 U.S. at 601. The difference, the Court said, was "'one rather of philological interest than of legal importance.' 'Amnesty' is defined by the lexicographers to be an act of the sovereign power granting oblivion, or a general pardon for a past offence, and is rarely, if ever, exercised in favor of single individuals . . . ." Id. at 601-02 (quoting Knote v. United States, 95 U.S. 149, 152-53 (1877)); see also Burdick v. United States, 236 U.S. 79, 94-95 (1915) (describing further incidental differences between amnesties and pardons); Nix v. James, 7 F.2d 590, 593-94 (9th Cir. 1925) (holding that Probation Act does not encroach on President's pardon power). Despite the holdings of Brown v. Walker and The Laura, however, one might still doubt whether there really are no limits on Congress's powers to grant amnesty in individual cases or to vest a pardon power concurrently in other executive officers.

202 See Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 66 (establishing Treasury Department and requiring Secretary of Treasury "to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office"). For a very pro-Executive recounting of the early history, see Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary, 85th Cong., The Power of the President to Withhold Information from the Congress—Memorandums of the Attorney General pt. 1, at 2-42, 74-82 (Comm. Print 1958 & 1959) [hereinafter Attorney General's

times denied that power and, in any case, have on occasion asserted executive privilege to prevent the revelation of information they deemed confidential.[203] As a practical matter, though, presidents

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Memorandums]. But cf. H.R. Rep. No. 86-2207 (1960) (describing historical conflicts over executive privilege).

Although Congress's investigatory power, like its power to approve international agreements, is not mentioned in the text, it has long been recognized as an implied power incident to the power to legislate and includes the power to compel testimony through subpoena. See, e.g., McGrain v. Daugherty, 273 U.S. 135, 160-75 (1927) (upholding powers of House and Senate to compel testimony of witnesses when needed to enable them to perform their legislative functions); see also James M. Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926) (recounting early history of congressional exercises of its investigatory powers). The issues take on some added separation of powers complications when Congress wishes to compel the testimony of heads of the executive departments or to require them to make reports. See Tribe, Constitutional Law, supra note 11, § 4-16 (describing interplay between congressional investigatory power and executive privilege to withhold information). The Supreme Court has suggested that the power to require reports is incident to the legislative function. See Morrison v. Olsen, 487 U.S. 654, 694 (1988) (indicating that receiving reports from executive officers is "incidental to the legislative function"). The real issue is the existence and scope of executive privilege and its impact on Congress's implied investigatory power. Thus far, the Supreme Court has managed largely to stay out of the fray, although in United States v. Nixon, 418 U.S. 683 (1974), it did recognize the constitutional status of executive privilege but ruled that the courts could overrule the President's judgment at least in the context of a criminal prosecution. The Court left open whether executive privilege could be invoked in a legislative setting. See id. at 712 n.19. In any case, Congress has always required principal officers of the executive departments to provide written reports on subjects of congressional interest. Although there was some early confusion, see Thomas Jefferson, Diary Entries (Mar. 12 & Apr. 2, 1792), in 4 Memoir, Correspondence, and Miscellanies, from the Papers of Thomas Jefferson 463-65 (Thomas Jefferson Randolph ed., Charlottesville, F. Carr & Co. 1829) (revealing early misgivings of first cabinet); William Rawle, A View of the Constitution of the United States 171-72 (Philadelphia, Philip H. Nicklin 2d ed. 1829) (describing practice); 3 Joseph Story, Commentaries on the Constitution of the United States 371 n.1 (Boston, Hillard, Gray & Co. 1833) (describing early confusion but noting that practice is accepted), the practice is settled and has become even more widespread today than in the past. Indeed, it is impossible to glance through a volume of the United States Code without noticing some of the scores, even hundreds of statutes ordering executive branch officials to submit regular reports to Congress on every conceivable subject. For an example close to home, consider the elaborate report Congress requires the United States Trade Representative to submit annually on the subject of the World Trade Organization. See 19 U.S.C. §§ 3534, 3535 (1994). Perhaps the most widely known instance is the State Department's annual Country Reports on Human Rights Practices. See, e.g., U.S. Dep't of State, Country Reports on Human Rights Practices for 1995 (Comm. Print 1996). The State Department submits these elaborate reports in accordance with a number of different statutory mandates. See, e.g., 22 U.S.C. § 2304(b) (1994 & Supp. 1996) (prescribing content of reports); see also U.S. Dep't of State, supra, at ix (noting statutory compliance). There are countless other examples. By statute, Congress has charged the standing committees of both houses with evaluating the execution of the laws by the executive branch and authorized them to "require a Government agency to [carry out the necessary analysis, appraisal, and evaluation themselves] and furnish a report thereon to the Congress." 2 U.S.C. § 190d(a) (1994).

[203] See the comprehensive listing of precedents in Attorney General's Memorandums, supra note 202, pt. 1, at 30-32; id. pt. 2, at 120-21; see also Corwin, The President, supra

have generally allowed department heads to provide demanded reports, and controversy has swirled only over the relatively few instances when presidents have refused to cooperate.[204] What is most striking for our purposes is that presidents, attorneys general, and their academic boosters have not even thought the President's power to require opinions worth mentioning in arguing for the Executive's right to withhold information from Congress, resting instead on general principles.[205]

Even were it the case, however, that these three powers had been given a roughly parallel construction, it would be nothing more than sheer coincidence. Given their widely different purposes and functions, there is no persuasive reason why they ought to be construed together.[206] It makes no difference at all that the Framers, for whatever reasons, grouped these three powers in the same article, section, clause, and sentence of the Constitution. For these reasons, it is not surprising, though it is quite revealing, that courts and commentators have not thought to consider either of the two other powers when construing the third.[207] Indeed, Professor Tribe himself is no exception.[208] The same principle applies to the treaty and appointments

note 119, at 125-33, 212-13, 473-76 (discussing precedents); Henkin, supra note 9, at 115-16 (same).

[204] In fact, most of the controversy has been over presidential refusals to produce records, rather than refusals to make reports. It has not been unusual for one or the other house of Congress to decide that to assess the accuracy of executive branch reporting, it is necessary to have access to the underlying records and not just to formal reports and opinions. See Attorney General's Memorandums, supra note 202, pt. 1, at 4-30 (citing instances); id. pt. 2, at 91-121 (same); Corwin, The President, supra note 119, at 126-31 (same).

[205] At least so far as my admittedly less than complete historical research reveals. See, e.g., Attorney General's Memorandums, supra note 202, pt. 1, at 1-4, 69-72 (resting on separation of powers grounds rather than President's power to require opinions); 40 Op. Att'y Gen. 45 (1941) (resting on separation of powers and protection of public interest); Roman L. Hruska, Executive Records in Congressional Investigations—Duty to Disclose—Duty to Withhold, 35 Neb. L. Rev. 310 (1955) (resting on executive prerogative and need to protect public interest). Professor Tribe never mentions this power in his discussion of executive privilege. See Tribe, Constitutional Law, supra note 11, §§ 4-15 to 4-16.

[206] It is hardly plausible, for example, to suggest that we can substantially advance our thinking about conflicts between the political branches over the war powers by examining the pardon power. Nor does the status of the power to require written opinions seem to have any bearing on whether Congress may limit the President from the use in war, say, of certain kinds of weapons, or on whether a congressional amnesty for a named individual ought to be upheld.

[207] Compare Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (construing commander-in-chief power), Corwin, The President, supra note 119, at 262-63, 293-94 (same), and Henkin, supra note 9, at 45-50, 97-112 (same), with Brown v. Walker, 161 U.S. 591, 601-02 (1896) (construing pardon power).

[208] See Tribe, Constitutional Law, supra note 11, § 4-7 (construing Commander-in-Chief Clause); id. § 4-11 (construing pardon power); id. §§ 4-15 to 4-16 (construing scope of executive privilege).

powers—even though they inhabit the same constitutional sentence. Professor Tribe's same sentence rule would certainly make constitutional law easier, but constitutional interpretation, thankfully, is more subtle than that![209]

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[209] Nor would matters improve were we to apply Professor Tribe's methodology outside Article II, say, to Article I. The latter introduces a new worry—we have to determine not only whether the powers granted are exclusive of the executive but also whether they are exclusive of the legislative powers of the states. See supra note 115 (discussing exclusivity vis-a-vis states); infra notes 278-79 and accompanying text (same). To compound matters, all of the grants contained in Section 8 are contained within a single sentence! In the Constitution a la Tribe, this would appear to mean that all should be given the same construction in these two respects. Thus, for example, as to exclusivity vis-a-vis the states, compare Congress's power to borrow money on the credit of the United States, see U.S. Const. art. I, § 8, cl. 2, to establish post offices and post roads, see id. art. I, § 8, cl. 7, and to constitute tribunals inferior to the Supreme Court, see id. art. I, § 8, cl. 9, with its power to lay and collect taxes, duties, imposts, and excises, see id. art. I, § 8, cl. 1, to regulate commerce with foreign nations and among the several states, see id. art. I, § 8, cl. 3, and to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries, see id. art. I, § 8, cl. 8. While the former seem clearly exclusive, the latter, however different in detail, are nonexclusive to a significant extent (although congressional supremacy, in the event of conflict, is clear at least as to the latter two). See Goldstein v. California, 412 U.S. 546, 552-60 (1973) (holding that copyright power is concurrent but that federal legislation controls in event of conflict); Tribe, Constitutional Law, supra note 11, §§ 6-2 to 6-5 (describing Court's negative Commerce Clause jurisprudence); see also The Federalist No. 32, supra note 94, at 199 (arguing for nonexclusivity of taxation power as well as its nonhierarchical character). Similarly, the grants in Article I cannot be read as uniformly exclusive of executive power. In this context, compare Congress's power to lay and collect taxes, see U.S. Const. art. I, § 8, cl. 1, and to borrow money on the credit of the United States, see id. art. I, § 8, cl. 2, and to provide for the punishment of counterfeiting the securities and current coin of the United States, see id. art. I, § 8, cl. 6, with its power to make rules for the government and regulation of the land and naval forces, see id. art. I, § 8, cl. 14, and to provide for organizing, arming, and disciplining the militia, see id. art. I, § 8, cl. 16, and to regulate commerce with foreign nations, see id. art. I, § 8, cl. 3. Again, the former are clearly exclusive, while the latter present more complexities. As to presidential intrusions on Congress's power to make rules for the regulation of the land and naval forces, see supra note 120. As to invasions of the power to regulate foreign commerce, see supra note 120. As to presidential overlaps with a variety of congressional powers through the conclusion of treaties and unilateral executive agreements, see supra note 120 and accompanying text.

If we were more generous to Professor Tribe, we might assume that he would limit his presumption only to powers listed in a single clause—the same sentence rule being a necessary, but not a sufficient condition, to the operation of his presumption. But this too is of little help, as careful consideration of the relevant provisions reveals. The Framers were far more careful in Article I, Section 8 than in Article II to group together into single clauses powers that are similar in their nature and purposes. They were also more reluctant to group powers at all. Nevertheless, the single clause rule quickly runs into difficulties in this Article as well. Take the power to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies. See U.S. Const. art. I, § 8, cl. 4. The requirement of national uniformity in both cases might well have led the Court to conclude that both powers are exclusive of the states. In fact, however, the Court early held that the bankruptcy power was concurrent and that state laws on the subject would not be preempted unless Congress occupied the field (which, in fact, it did not for many decades).

3. *Having More Fun with Word Games: Congress's Less than Usual Legislative Powers and the Compact Clause*

Formalism is rarely far beneath the surface in Professor Tribe's interpretive methodology, and it resurfaces once again in his second crack at the argument from *expressio unius*. He points out that the Constitution grants Congress a number of powers in provisions not found in Article I, Section 8. Some of these, moreover, are not "normal lawmaking" powers.[210] "A serious textual analysis cannot simply

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See Stellwagen v. Clum, 245 U.S. 605, 615 (1918); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 196 (1819). The naturalization power proved more difficult to interpret. An early case seemed to suggest that the naturalization power was also nonexclusive, leaving the states free in the absence of contrary federal legislation to naturalize citizens. See Collet v. Collet, 6 F. Cas. 105, 106-07 (C.C.D. Pa. 1792) (per curiam). But later cases, understandably, criticized this view. See, e.g., The Passenger Cases, 48 U.S. (7 How.) 283, 556 (1849) (Woodbury, J., dissenting) (citing cases); The License Cases, 46 U.S. (5 How.) 504, 585 (1847) (opinion of Taney, C.J.), overruled on other grounds by Leisy v. Hardin, 135 U.S. 100 (1890); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817) (Marshall, C.J.). Even justices who argued for a strong presumption in favor of concurrent state jurisdiction believed the naturalization power exclusive. Chief Justice Taney thought it "hardly consistent" with the constitutional structure "to allow any one State, after the adoption of the constitution, to exercise a power, which, if it operated at all, must operate beyond the territory of the State, and compel other States to acknowledge as citizens those whom it might not be willing to receive." *The License Cases*, 46 U.S. (5 How.) at 585. Likewise, Chief Justice Marshall concluded: "That the power of naturalization is exclusively in congress does not seem to be, and certainly ought not to be, controverted . . . ." *Chirac*, 15 U.S. (2 Wheat.) at 269.

Consider as well the power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. See U.S. Const. art. I, § 8, cl. 11. Narrowly construed, the power to declare war is exclusively vested in Congress. No President has ever claimed the right to issue a formal declaration of war. See Henkin, supra note 9, at 97. In a more extended sense, however, the war powers of the two branches are substantially overlapping. As Henkin puts it, "[n]o one . . . can disentangle the war powers of the two branches." Id. at 94; see also id. at 96-112 (elaborating on overlap). In contrast, the now obsolete power to grant letters of marque and reprisal might well be limited to a formal power to issue documents having a special significance in international law circa 1787 (that is, to save privateers from punishment as pirates under the law of nations). But see Jules Lobel, "Little Wars" and the Constitution, 50 U. Miami L. Rev. 61, 66-70 (1995) (arguing that marque and reprisal power implicitly granted Congress exclusive authority over limited wars and hostilities short of formal war). If the more limited view is right (and perhaps even if the broader view is correct), the power is almost surely exclusively lodged in Congress. Finally, contrast the power to make rules concerning captures. In an early case, the Court, over Justice Story's strong dissent, held that the President had no power to order the confiscation of alien enemy property during war. That power was lodged in Congress. See Brown v. United States, 12 U.S. (8 Cranch) 110, 128-29 (1814). During the Civil War, the Court seemed to abandon this view. See The Prize Cases, 67 U.S. (2 Black) 635, 670-71 (1862) (holding that under law of war President may, without congressional authorization, order blockade and capture of vessels that violate blockade). And commentators have strongly doubted whether the Court would today interfere with presidential confiscations of enemy property during war, even in the absence of congressional legislation. See, e.g., Henkin, supra note 9, at 104. Perhaps, then, the power is concurrent.

210 Tribe, Taking Text, supra note 3, at 1269.

slide past the brute fact that international agreement-making on behalf of the United States is not among these enumerated powers."[211]

To be sure, Article I, Section 8 is not the sole repository of Congress's powers, and some of the powers found outside that section arguably fall outside some narrow conception of "normal" lawmaking.[212] But this is equally true of the powers enumerated in Section 8,[213] and it is difficult to see how pointing to these additional powers adds anything but emphasis to the argument. Why would the fact that some of those powers appear outside of Article I, Section 8 in any way strengthen the *expressio unius* inference?[214]

Furthermore, when we examine the particular powers to which Professor Tribe refers, his argument appears even less justified. Some are simply "normal" lawmaking powers or scarcely distinguishable from them.[215] The bulk of the others are found in Article I, Section 10, Clauses 2 and 3. These set forth a list of powers the states are forbidden from exercising except with the consent of Congress.[216] Professor Tribe seems to think it particularly significant that in these cases Congress is given an express power of "consent." In his view, this indicates that the Framers would have been explicit had they

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211 Id. at 1270. In Professor Tribe's view, of course, approving agreements is not a "normal lawmaking" function. For an extended reply to this assumption, implicit in the cited passage, but made explicit elsewhere, see infra notes 244-62 and accompanying text.

212 Professor Tribe cites Article I, Section 9, Clause 8 (prohibiting any person holding any office under United States from accepting any present, emolument, office, or title from foreign state without consent of Congress); Article I, Section 10, Clause 2 (prohibiting states from taxing imports or exports without consent of Congress); Article I, Section 10, Clause 3 (prohibiting states, without consent of Congress, from laying any duty of tonnage, keeping troops or ships of war in time of peace, entering into any agreement or compact with another state or with foreign power, or engaging in war unless actually invaded or in imminent danger); Article IV, Section 1 (granting Congress power to regulate public records); Article IV, Section 3, Clause 1 (granting power to admit new states or consent to formation of new states from other states or parts thereof); Article IV, Section 3, Clause 2 (granting power to make all needful rules and regulations respecting territory or property of United States); and Article V (granting Congress power to propose constitutional amendments by two-thirds vote in each house). See Tribe, Taking Text, supra note 3, at 1270 & n.170.

213 Consider, for example, Article I, Section 8, Clause 5 (granting Congress power to coin money), Clause 11 (granting power to declare war and to grant letters of marque and reprisal), and Clause 12 (granting power to raise and support armies).

214 The stronger *expressio unius* argument rests on the grant of the treaty power to the President and the Senate, not on the nature of the expressly enumerated powers granted to Congress. *McCulloch*'s expansive reading of the Necessary and Proper Clause undermines the force of the latter. See supra notes 49-56 and accompanying text; infra notes 228-31, 235-38, and accompanying text. Of course, I consider the former weak as well. See supra notes 93-100, 116-23, and accompanying text.

215 See, e.g., U.S. Const. art. IV, § 1 (granting power to regulate public records); id. art. IV, § 3, cl. 2 (granting power to make all needful rules and regulations for territory and property of United States).

216 See supra note 212.

wished Congress to have the power to "consent" to federal agreements.[217] It should be clear, of course, that this is just another highly formulaic version of the *expressio unius* argument—because the Framers granted Congress the power of "consent" in some cases, they must have meant to exclude the power of "consent" in all other cases. Not only is this approach overly mechanical, it becomes virtually indefensible once we view the relevant provisions in context.

The Framers expressly referred to congressional consent only because they wished to deny certain powers to the states but nevertheless to permit them to act under leave of Congress. It was thus necessary to dispel any inference arising from the denial of these powers that the bar was absolute, beyond even Congress's power to override. This need was particularly pressing, moreover, because of the structure of Section 10. The first clause contains a list of powers flatly denied the states, while the second and third, on which Professor Tribe myopically focuses, forbid the states from exercising a further list of powers except with congressional consent.[218] Had the Framers deleted the qualifying language, two possible inferences would have been compelling: Either all of the powers listed were absolutely denied to the states, or all could be exercised but only if Congress, acting under the Necessary and Proper Clause, were to give its consent. It is manifest, however, that neither of these inferences is consistent with what the Framers sought to achieve—an absolute prohibition on exercising the powers in the first clause and a qualified prohibition on those in the second and third.[219] This explains, then, why they included the language on which Professor Tribe relies and why its inclusion has no bearing on whether Congress has an implied power to approve international agreements. The text's reference to congressional consent in this special context has no tendency to suggest that

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217 See Tribe, Taking Text, supra note 3, at 1270.

218 Article I, Section 10, Clause 1 prohibits the states from entering into any treaty, alliance, or confederation; granting letters of marque and reprisal; coining money; emitting bills of credit; making any thing but gold and silver coin a legal tender; passing any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or granting any title of nobility. Professor Tribe has recognized these as absolute prohibitions. See Tribe, Constitutional Law, supra note 11, § 6-33, at 521, 527 n.42; see also infra note 362 (discussing implications and rationale for structure of Section 10). For the provisions of Clauses 2 and 3, see supra note 212.

219 See supra note 218; infra note 362. Perhaps, the Court would have determined on a case-by-case basis whether a particular power included in Article I, Section 10 required absolute prohibition in light of its peculiar nature or whether the prohibition could be overcome by congressional consent. This, too, however, would not necessarily have achieved what the Framers had in mind—the particular division they made among the powers included in Clauses 1, 2, and 3.

the Framers would have been express on all other occasions when they wished Congress to have a power of "consent."[220]

It is not surprising that Professor Tribe shifts quickly from the general to the specific, moving from Article I, Section 10 as a whole to one provision in particular, the Compact Clause. As we have seen, that clause empowers Congress to approve (give consent to) agreements negotiated by the states. This demonstrates, he thinks, that the Framers were explicit whenever they contemplated "congressional supervision of *any* category of agreements with foreign nations."[221] This "quite badly damage[s]" the case for the congressional-executive agreement, since, of course, the Constitution is silent on whether Congress has the power to approve federal agreements.[222]

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220 Indeed, as Professor Tribe has previously recognized, the Framers were not in fact express on other occasions when they did wish Congress to have a power of consent. Consider, for example, Congress's power to "consent" to state regulations of interstate commerce that would otherwise be beyond state authority because they unduly discriminate against out-of-state commerce. See Tribe, Constitutional Law, supra note 11, § 6-33, at 524-27 (discussing source and scope of power). More generally, although he has recognized that Congress may not override the absolute prohibitions on state regulation contained in the first clause of Article I, Section 10, Professor Tribe has affirmed that there are implied congressional consent powers over state action in two broad areas which go beyond the express consent powers specified in the second and third clauses of Section 10:

> [C]ongressional consent or ratification may suffice to validate otherwise unconstitutional state action in three different settings: *first*, where the Constitution expressly makes congressional consent a prerequisite of state action, as in the provisions of article I, § 10, with respect to import and export duties, interstate compacts, and certain other topics; *second*, where the existence of a constitutional ban on state action is inferred entirely from a grant of legislative power to Congress, as in the case of the commerce clause; and *third*, where the constitutional prohibition against state intrusion is thought to follow from concerns of federalism that may properly be entrusted to Congress, as in the case of federal immunity from state taxation.

Id. § 6-33, at 521. His current argument, then, appears to be wholly inconsistent with his previous views.

Furthermore, the analysis in the text above applies as well to the provision prohibiting any person holding office under the United States from accepting any present, office, or title from a foreign state without the consent of Congress. See U.S. Const. art. I, § 9, cl. 8. That provision likewise appears among a list of powers, in this case denied to the federal government, including those holding office under it. It would have been impossible to determine which activities were absolutely prohibited and which prohibited except with congressional consent had the Framers failed to include explicit language in those instances where they intended the latter.

Professor Tribe's reliance on Article V is likewise misplaced. The need to make Congress's power to propose amendments explicit arose from at least two considerations. It was at least doubtful whether a power to *amend* the constituent text could be inferred from Congress's implied *legislative* powers. The Framers, moreover, wished to limit Congress's role to proposing amendments rather than adopting them and to require a two-thirds vote in both houses rather than the usual simple majority with the concurrence of the President.

221 Tribe, Taking Text, supra note 3, at 1271.

222 Id.

As with many of his other arguments, there is an embarrassing array of reasons why this argument fails to persuade. Begin with the point we just noticed. The Framers had very specific reasons for including the reference to congressional consent in the Compact Clause. In the first clause of Section 10 they had prohibited states from entering into treaties, alliances, or confederations, and in the third clause they wished to prohibit them from entering into agreements or compacts. Only in the latter case, as opposed to the former, they wished to qualify the prohibition by permitting the states to make agreements or compacts with congressional consent. To make this distinction they had to include the language on which Professor Tribe relies. Otherwise, the states would most likely have been barred altogether from making international agreements of any kind or, less likely, have been permitted to do so across the board but only with the permission of Congress. Thus, unless we think the Framers were engaged in an elaborate exercise in linguistic forms, we have no reason to believe that they included the qualifying language because of a commitment to being explicit whenever they contemplated "congressional supervision of *any* category of agreements." Professor Tribe's inference is extremely frail at best.

Second, Professor Tribe himself seems to recognize its weakness. "Perhaps," he suggests, the Framers failed to grant Congress an explicit power to approve agreements "simply because the giving of such consent was understood, or tacitly assumed, to be included in Congress's section 8 powers."[223] This argument can be rejected, however, because "such consent was *not* thought to be so included for the first century-and-a-half of constitutional practice."[224] Quite so! That is precisely what Professor Ackerman and I have been at pains to argue: The text is indeterminate, but reference to practice during the first hundred and fifty years resolves the interpretive doubts. But if Professor Tribe is willing to resort to history to supplement his textual arguments, what exactly are we arguing about? And if resort to history is necessary to support his textual claims, then we seem to agree that the text itself is indeterminate. In other words, this concession seems to undermine his entire argument.

Third, Professor Tribe's peripheral vision again seems impaired, for in word games, turnabout is fair play. Thus, if the Compact Clause suggests that the Framers were explicit when they contemplated that Congress could approve agreements, then Article I, Section 10's explicit prohibition on state treaties equally suggests that they were ex-

[223] Id. at 1270.
[224] Id.

plicit whenever *they wished to deny the power to make treaties*. But there is no provision in the text expressly denying Congress the power to approve treaties. How are we to know which of these is the more compelling inference? I would suggest that the better approach is to foreswear both as unworthy of a serious effort at constitutional exegesis.

Finally, Professor Tribe's argument runs into further trouble when confronted with the unilateral executive agreement, which, as we will see, he is at pains to defend.[225] Even if we accept his reading of the Compact Clause, the inference he chooses to draw is oddly narrow. The lesson, it would seem, is that the Framers were explicit when they wished to provide for the making of agreements, not just when they wished to provide for congressional supervision of agreement-making. However, the only provision permitting the President to make agreements is the Treaty Clause; hence, the unilateral agreement should be ruled out. Indeed, even if we accept Professor Tribe's crimped version of the lesson of the Compact Clause, the same problem arises. The Compact Clause, after all, is not the only provision for the making of agreements. The Treaty Clause, it will be recalled, grants that power to the President with the advice and consent of the Senate. But if Congress's power to approve state agreements suggests that the Framers were explicit about its agreement-making powers, then the Treaty Clause, by a parity of reasoning, suggests that they were explicit about the President's authority to make agreements. Yet, search as we may, the text yields only silence on the unilateral executive agreement.[226]

There is considerable irony here. From the express and affirmative grant to Congress of the power to approve state agreements, Professor Tribe wishes to draw the implication that Congress is excluded from any further role in approving agreements. But from the absence of any reference to a presidential power to make agreements (outside the Treaty Clause), he finds an important unenumerated executive agreement-making power.[227] As a thought experiment, imagine that the Compact Clause had granted the approval power to the President rather than to the Congress. Would Professor Tribe have then said that the President's agreement-making powers (outside the Treaty

225 For further discussion, see infra Part III.D.2.

226 As soon as we begin finding explanations for their silence in the one case, moreover, we then have to consider what reasons they may have had for silence in the other. In other words, once we postulate reasons for not drawing the *expressio unius* inference as to the President's unilateral agreement-making powers, we can at least as persuasively posit reasons for not drawing the inference in Congress's case as well.

227 See infra Part III.D.2.

Clause) are limited to state agreements? Would he then have affirmed a congressional power to approve federal agreements? On the contrary, it seems evident that exhibit number one in his brief against congressional power would be the grant to the President rather than Congress of the power to approve state agreements. This would be cited as evidence that the Framers wished to exclude Congress altogether from the agreement-making process, and any negative implication regarding the President's unenumerated powers would have been waived away on grounds like those I have already articulated.

B. Negative Textual Arguments

Professor Tribe makes one principal textual argument against the case for the congressional-executive agreement: He seeks to undermine the availability of the Necessary and Proper Clause as a basis for Congress's power to approve international agreements. I address this argument below, as well as two brief points he adds as grace notes.

1. Approving Agreements as Necessary but Improper: Isn't There Some Way Around the Necessary and Proper Clause?

The affirmative textual case for the congressional-executive agreement rests fundamentally on Chief Justice Marshall's ringing affirmation in *McCulloch v. Maryland*[228] of the scope of Congress's implied powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[229] In one fell swoop, Marshall thus swept away the fierce objections of his Republican adversaries Jefferson and Madison[230] and established a foundational construction of the fundamental text ever since accepted by the courts and the political branches.[231] It is beyond dispute that when Congress authorizes the

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228 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.).

229 Id. at 421.

230 Jefferson had argued that Congress's implied powers under the Necessary and Proper Clause are limited to those "without which the [express] grant[s] of power would be nugatory," Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in 19 The Papers of Thomas Jefferson 275, 278 (Julian P. Boyd ed., 1974), and Madison had taken the view that they are limited to those "evidently and necessarily involved in an express power" and which are not inherently important powers in themselves, 2 Annals of Cong. 1899-1901 (1791) [hereinafter 2 Annals] (remarks of Rep. Madison). For further discussion of Madison's view, see infra note 268. For further commentary on the epochal dispute over the first Bank of the United States, see Paul Brest & Sanford Levinson, Processes of Constitutional Decisionmaking 9-17 (3d ed. 1992).

231 Professor Tribe does not purport to revisit *McCulloch*. Perhaps as a strict textualist he should. Some have argued, not unpersuasively, that Marshall was de facto amending

President to conclude an international agreement in order to implement its regulatory responsibilities under one of its broad foreign affairs powers, it has utilized a "means which [is] appropriate, which [is] plainly adapted" to a legitimate end "within the scope of the constitution." The only question, then, is whether this means is "prohibited"—whether, in other words, we ought to read the Treaty Clause as commanding that the senatorial advice and consent procedure is the exclusive method by which international agreements may be approved. Which brings us back to our initial question: Is the Treaty Clause exclusive? If not, then the Necessary and Proper Clause supplies clear textual grounds for the congressional-executive agreement.

Professor Tribe has two responses to the Necessary and Proper Clause. First, he points out that the mere fact that Congress adopts a law as a means to implement one of its enumerated powers is not sufficient to establish its constitutionality. Even though the law is "necessary and proper" to implementing Congress's express powers, it will still be unconstitutional if it contravenes other provisions of the Constitution, such as the Bill of Rights or the provisions creating structural constraints on Congress.[232] Professor Tribe is, of course, correct so far as it goes, but his argument begs the fundamental question. *McCulloch* recognizes that the Necessary and Proper Clause does not authorize Congress to adopt laws that are inconsistent with "the letter and spirit of the constitution." Moreover, as Professor Tribe points out, the more recent decisions of the Court in *I.N.S. v. Chadha*[233] and *New York v. United States*[234] reaffirm this constitutional commonplace. But the mere fact that the Necessary and Proper Clause does not automatically insulate a law from constitutional challenge does not establish, or even argue in favor of, the exclusivity of the Treaty Clause, nor does it undermine the Necessary and Proper Clause as a foundation for the congressional-executive agreement. Whether that clause will support the congressional-executive agreement will depend upon how the other arguments in favor of and

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the Constitution of 1787. See Sanford Levinson, How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change (citing James Boyd White, When Words Lose Their Meaning 263 (1984)), in Responding to Imperfection, supra note 17, at 13, 22-23.

232 See Tribe, Taking Text, supra note 3, at 1258-61.

233 462 U.S. 919 (1983) (striking down legislative veto on structural grounds even though a useful device for implementing Congress's legislative powers).

234 504 U.S. 144 (1992) (striking down on federalism grounds statute directing states to regulate interstate commerce in radioactive waste in accordance with congressional instructions). The even more recent decision in Printz v. United States, 117 S. Ct. 2365 (1997) (striking down on federalism grounds provisions of Brady Handgun Violence Prevention Act that required state police to conduct background checks of handgun purchasers), is to the same effect.

against the exclusivity of the Treaty Clause are resolved. If the nonexclusive view prevails, then the Necessary and Proper Clause will supply the essential constitutional predicate for the modern practice.

Professor Tribe's first argument is thus beside the point; his second is entirely unconvincing. He points out that the Necessary and Proper Clause only permits Congress to "make all Laws" that are necessary to executing its enumerated powers.[235] But, he argues, approving an international agreement is not making a *law*; it is an unspecified something else.[236] It should be immediately clear that Professor Tribe is really urging that we revisit *McCulloch*. For Marshall was abundantly clear that the implied powers doctrine, incorporated into but existing independently of the Necessary and Proper Clause, authorizes Congress to adopt all *means* that are adapted to executing its express powers.[237] Approving an agreement, like chartering a bank, is surely a useful "means" of implementing Congress's enumerated foreign affairs powers and is thus well within the *McCulloch* framework. So too are making paper money a legal tender, compelling testimony, punishing contempts, and chartering corporations.[238] None involve the passage of laws setting forth rules of general application, but all are surely within the scope of Congress's implied powers.

In any case, it is extremely difficult to see why Professor Tribe doubts that approving an agreement falls under the language of the Necessary and Proper Clause. Perhaps it is simply the result of the way he frames the problem. When Congress "approves" an agreement, it does not engage in some international ritual unconnected to the legislative process, any more than when Congress created the Bank of the United States, it laid the bricks and mortar for its building or printed the corporate seal. As with any other law, Congress approves an international agreement through the passage of a bill or

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235 U.S. Const. art. I, § 8, cl. 18.

236 See Tribe, Taking Text, supra note 3, at 1261-64.

237 Chief Justice Marshall uses the term "means" throughout the opinion. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 passim (1819) (Marshall, C.J.). He also treats the implied powers doctrine as independent of the Necessary and Proper Clause. See id. at 406-11 (finding implied congressional power to create corporations, and only subsequently discussing Necessary and Proper Clause in response to argument by counsel); Tribe, Constitutional Law, supra note 11, § 5-3, at 301 n.5 (stating that "Marshall, like Madison, did not regard the necessary and proper clause as the source of the implied congressional power recognized in McCulloch"). For Madison's concurring view, see The Federalist No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961).

238 See, e.g., McGrain v. Daugherty, 273 U.S. 135, 174-75 (1927) (upholding investigatory powers of each house, including their power to compel testimony by subpoena); The Pacific Railroad Removal Cases, 115 U.S. 1, 14-15 (1885) (upholding Congress's power to charter railroad corporations); The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 544, 553 (1870) (upholding Congress's power under Necessary and Proper Clause to make treasury notes legal tender in payment of all debts and obligations).

resolution that obtains bicameral approval and the signature of the President. The "law" adopted authorizes the President to conclude an agreement that he has already or will subsequently negotiate.[239] In this particular respect, Congress's approval of an international agreement is no different from its approval of any of the myriad agreements executive branch officials conclude in order to carry on the government's business.[240] Nor, despite Professor Tribe's heroic efforts to find a distinction, is it different from the long-settled congressional practice, sanctioned by the Supreme Court, of approving agreements negotiated by the President with Indian tribes.[241] Indeed, in *Antoine*

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239 For further discussion of the various forms congressional-executive agreements take, see Ackerman & Golove, supra note 5, at 804-05.

240 See, e.g., 10 U.S.C.A. §§ 2302-2331 (West 1998) (providing ex ante authorization for military procurement contracts under strict congressional guidelines); 41 U.S.C. §§ 5-58 (1994) (similar).

241 Professor Tribe creates confusion by his conflation of two separate issues. The first is whether the term "laws" in the Necessary and Proper Clause includes a resolution approving an international agreement. The second is whether, notwithstanding an affirmative answer to the first question, Congress is prohibited from approving international agreements under that clause because of an "invisible radiation," Missouri v. Holland, 252 U.S. 416, 434 (1920), from the Treaty Clause. At this juncture in his argument, Professor Tribe is challenging only the first, claiming that the linguistic terms of the Necessary and Proper Clause are not broad enough to encompass approving agreements. The accepted practice of Congress approving federal contracts and agreements with Indian tribes, however, conclusively resolves the point against his view. See supra note 240 and accompanying text; infra note 243 and accompanying text. Nevertheless, it is true that those same practices have no direct bearing on the second question, which, as I have repeatedly made clear, depends on other considerations. Thus, Professor Tribe's repeated emphasis on Congress's plenary power over Indian affairs is entirely beside the point. Congress likewise has plenary power over foreign affairs, but this fact is irrelevant to the question whether the term "laws" includes resolutions approving agreements. So too is the fact that international agreements are between sovereigns, whereas Indian agreements are between a sovereign (the United States) and its subjects (the Indian tribes).

However, the latter distinction is relevant to the second question, whether congressional approval of Indian treaties demonstrates the nonexclusivity of the Treaty Clause. Ironically, Professor Tribe chides Professor Ackerman and me for having failed in our article to address the longstanding practice, going back to the 1870s, of congressional approval of Indian agreements. In 1871, Congress passed a statute declaring that Indian tribes are not independent nations with whom the United States may contract by treaty. See Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (1994)). This statute put an end to the practice of treatymaking with the Indians, and in its place, Congress began to approve agreements negotiated by executive branch officials, much as it approves congressional-executive agreements. Professor Tribe hypothesizes that we did not address this practice because "it does not enhance [our] depiction of 1945 as a radical break with the past." Tribe, Taking Text, supra note 3, at 1262 n.138. This *ad hominem* is doubly ironic, first, because Professor Tribe himself, who accepts our view of the early history, see supra note 39, immediately proceeds to explain why this practice is entirely consistent with an exclusive reading of the Treaty Clause, and second, because our treatment of the subject ended up on the cutting room floor as a matter too obvious to require further elaboration. Alas.

v. Washington,[242] the Court explicitly held that congressional "ratification of an agreement between the Executive Branch and an Indian tribe is a '[Law] of the United States . . . made in Pursuance' of the Constitution."[243] There is, of course, an important difference: An international agreement creates obligations under international law. But that is relevant not to whether approving an agreement is a "law" but to whether the Treaty Clause implies that the international nexus

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In any case, the explanation is quite simple, although the history is complex and fascinating. As relations between the United States and the Indians developed, the early *sui generis* perception of the character of Indian sovereignty and of the relationship between the United States and the Indians came under increasing stress. The predominant view slowly shifted, culminating in a new conceptualization of the Indians as subjects and wards of the nation. At the same time, the House came increasingly to resent the regulation of Indian affairs through treaties, a process from which it was excluded, and began to protest against the application of a procedure designed principally for undertaking international obligations to domestic groups having, in their view, no international status. After a drawn out and bitter legislative struggle, the Senate capitulated and agreed to the 1871 statute. See generally Antoine v. Washington, 420 U.S. 194, 201-03 (1975) (discussing conflict between House and Senate that resulted in 1871 statute). For excellent surveys of the history, see Felix S. Cohen's Handbook of Federal Indian Law 62-70, 105-07 (Rennard Strickland ed., 1982); Francis Paul Prucha, American Indian Treaties 289-310 (1994). Thus, far from supporting the nonexclusivity of the treaty procedure, congressional approval of Indian agreements simply marks the sharp historical differentiation between "genuine" international agreements and all other forms of legislation. Indeed, the point of the 1871 statute was not to make the senatorial and congressional procedures interchangeable (i.e. nonexclusive), but to exclude the use of the senatorial procedure altogether, as inapplicable to Indian tribes. The statute thus raises an entirely different issue. No one in 1871 imagined that the statute would have any bearing on the exclusivity of the treaty procedure within the "proper" field of its application to binding international commitments under the law of nations. Surprisingly, Professor Tribe intimates that in his view the 1871 statute might be unconstitutional because Congress cannot strip the President and the Senate of a constitutional authority. See Tribe, Taking Text, supra note 3, at 1264 n.144. True, but if so, it would only be because the Framers in effect constitutionalized the status of Indian tribes in a way that makes application of the Treaty Clause to Indian agreements appropriate and renders impermissible a change in the conceptualization of the Indians to purely domestic subjects and wards of the state. Perhaps this is the better—though long unappreciated—view. But even if correct, this view says nothing about the constitutionality of the congressional-executive agreement.

242 420 U.S. 194 (1975).

243 Id. at 201 (quoting U.S. Const. art. VI, cl. 2).

Professor Tribe chides Professor Ackerman and me for treating the distinction between making laws and approving agreements "dismissively." Tribe, Taking Text, supra note 3, at 1261. However, in the pages of our article to which he cites, we simply made the point that his position at that time undermined the very distinction he was trying to draw. He was then claiming that Congress could approve most international agreements but that some very important agreements had to be processed exclusively as treaties. In response, we noted that this position was inconsistent with the distinction he had drawn between laws and approving agreements, for if congressional resolutions approving less important agreements are "laws" for purposes of the Necessary and Proper Clause, then resolutions approving even important agreements must be "laws" as well. See Ackerman & Golove, supra note 5, at 919-22. In response, of course, Professor Tribe radically shifted his view; he now holds that Congress cannot approve any agreements.

can be tied only by the President and the Senate. Thus, we return full circle to our initial question.

Professor Tribe's real objection, then, must not be as to form but substance. Even though congressional approval may take the form of a law, it is not, he thinks, a legislative act. But this reasoning too is obscure. *Chadha*, upon which he heavily relies, teaches that an act is legislative in character when it alters "the legal rights, duties, and relations of persons . . . outside the Legislative Branch."[244] These persons may include, moreover, "Executive Branch officials."[245] Clearly, authorizing the President to conclude an agreement alters his legal rights and, upon the contingency of his depositing an instrument of ratification, the legal rights and duties of those to whom the agreement, as supreme law of the land, will apply. It would seem, then, to pass the *Chadha* test with flying colors.

Professor Tribe relies principally on the Framers' intent, citing statements by Hamilton and Madison he construes as denying the legislative character of approving agreements. This is odd given his adherence to an original meaning interpretive methodology,[246] and unhelpful since he seriously misinterprets their remarks. Odder still, however, is his lack of attention to the textual evidence. One has to suspect that he is dissatisfied with the results of textual exegesis—and for good reason. If we consider text alone, while there are arguments going both ways, the weight of the evidence tips decidedly in favor of the legislative side. The Treaty Clause, of course, appears in Article II and is framed as a power granted to the President. Taken alone, this would certainly suggest that the Framers viewed approving agreements, like negotiating them, as executive acts. But this is assuredly not the only evidence the Constitution yields. Thus, while the text places the treaty power among those granted to the President, it subjects the President's power to strict legislative oversight, requiring a special majority of the Senate to approve his agreements. Had the Framers believed that approving agreements was an executive act, surely they would not have subjected it to a supermajority legislative veto. This suggests that while negotiating agreements is an executive task, approving agreements is legislative in character.[247] This view is

244 I.N.S. v. Chadha, 462 U.S. 919, 952 (1983).

245 Id.

246 Perhaps Professor Tribe believes recourse to historical evidence is appropriate in determining whether people at the Founding would have viewed approving an agreement as a legislative act. See supra notes 38-39 and accompanying text.

247 Madison emphasized this point in arguing that the treaty power is legislative: "One circumstance indicating this, is the constitutional regulation under which the senate give their consent in the case of treaties. In all other cases, the consent of the body is expressed by a majority of voices." Helvidius No. 1, supra note 69, at 147-48. Here, the contrast with

confirmed, moreover, by two other provisions. First, the Compact Clause subjects state agreements and compacts to congressional approval.[248] This both confirms that approving agreements is a legislative act and undermines any (already strained) inference from the Treaty Clause that it is somehow senatorial but not legislative in character. Second, the Supremacy Clause provides that the Constitution, the laws of the United States, and treaties made under its authority "shall be the supreme *Law* of the Land."[249] Since treaties are supreme law, it stands to reason that approving them is a legislative act.[250] Indeed, it would be extraordinary if such a sweeping power to create supreme law of the land were a purely executive function.

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the Appointments Clause is of significance. In that clause, the Framers subjected the President's appointments only to a bare majority senatorial veto. This departure from their usual requirement of a two-thirds vote when one of the regular lawmaking organs does not participate tends to suggest the executive character of appointments in contrast to the legislative character of approving agreements. See supra notes 69-74 and accompanying text. Madison held just this view. See supra notes 167-81 and accompanying text; infra notes 250, 253, 256, and accompanying text.

248 See U.S. Const. art. I, § 10, cl. 3.

249 Id. art. VI, cl. 2 (emphasis added).

250 Professor Tribe points to the Supremacy Clause as evidence that approving agreements is not legislative. He does so, however, only by lifting part of the clause out of context. Thus, he misleadingly quotes only the first part of the clause, which refers to "'the Laws of the United States which shall be made in Pursuance [of the Constitution]; and all Treaties made, or which shall be made, under the Authority of the United States,'" Tribe, Taking Text, supra note 3, at 1262 n.136 (quoting U.S. Const. art. VI, cl. 2), and argues that this language demonstrates that the Framers viewed lawmaking and treatymaking as different kinds of acts. He fails, however, to quote the critical portion of the clause that directly follows his quotation—both laws and treaties, it provides, "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Of course, the Framers distinguished between laws and treaties to provide a special procedure for approving the latter. That is why there is a Treaty Clause. But both laws and treaties, the Supremacy Clause tells us, are the "Law" of the land. As Madison put it in arguing for the legislative character of treatymaking:

> [T]reaties, when formed according to the constitutional mode, are confessedly to have force and operation of *laws*, and are to be a rule for the courts in controversies between man and man, as much as any *other laws*. They are even emphatically declared by the constitution to be "the supreme law of the land."

Helvidius No. 1, supra note 69, at 148.

Professor Tribe attempts one other thrust at textual argument. He notes that Article I, Section 1 provides that all "legislative Powers herein granted" shall be vested in Congress. U.S. Const. art. I, § 1. Since Article II vests the treaty power in the President and the Senate, ipso facto, he concludes, it must not be a legislative power. Of course, Articles II and III likewise "vest" the executive and judicial powers in the President and the courts, respectively. Professor Tribe's notion that the three types of powers neatly divide into hermetically sealed boxes, then, is entirely inconsistent with the many powers that are overlapping and concurrent. See supra notes 117-23, 131-34, 194-209, and accompanying text; infra notes 398-403 and accompanying text. Perhaps no mechanical formalist argument has more fully merited Justice Holmes's famous quip: "The great ordinances of the Constitution do not establish and divide fields of black and white." Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

When we turn to the historical materials, the evidence is equally strong that the Framers—or at least many among them—viewed approving agreements as legislative. It is true that a number of early theorists, including Locke and Montesquieu, had viewed it as an executive authority.[251] But they wrote during the period when the modern treaty power was still in formation, and their views were largely an artifact of earlier conceptions of sovereignty as a personal attribute of the monarch.[252] In any case, although there was a wide spectrum of views during the ratification period, key Framers clearly articulated the view that approving treaties is a legislative function. During the Convention, Madison, Wilson, and Mason all expressed this conviction,[253] and both Washington and Jefferson later pronounced the same position.[254] In *The Federalist*, Hamilton too said approving treaties

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251 Locke viewed all powers relating to external affairs, including the treaty power, as belonging to the "federative" power, which was distinct from the executive power. Nevertheless, both powers, he thought, ought to be united in one officer. See John Locke, Second Treatise of Civil Government § 146 (Crawford B. Macpherson ed., Hackett 1980) (1690). Montesquieu placed all external powers in the executive. See Charles de Seconat, Baron de Montesquieu, The Spirit of the Laws, bk. XI, ch. 6 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

252 See Peter Haggenmacher, Some Hints on the European Origins of Legislative Participation in the Treaty-making Function, in Parliamentary Participation in the Making and Operation of Treaties 19, 19-26 (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994). Professor Haggenmacher's excellent study of the early intellectual history explains that the use of treaties as a general instrument for conducting foreign affairs was still nascent at the time these authors wrote. Peace treaties were their almost exclusive form, and as such they were perceived as inextricably tied to the war power, which belonged to the sovereign (though here too the Framers departed from tradition). Also critical were changing conceptions of sovereignty, which evolved from a personal right inhering in certain persons to an attribute of nationhood residing in an absolute sovereign. Finally, as the implications of emerging notions of popular sovereignty became more clear, the attitudes of leading theorists underwent a corresponding shift. See infra notes 257-58 and accompanying text.

253 See 1 Records of the Convention, supra note 187, at 65-66, 73-74 (remarks of James Wilson) (declaring treaty power to be legislative and reflecting even in 1787 close historical association between treaty power and war power in referring to former as power to make peace); 1 id. at 70 (remarks of James Madison) (same); 2 id. at 522-23, 530 (remarks of James Wilson) (same); 2 id. at 537 (remarks of George Mason) (same). Madison expressed the same view on numerous other occasions as well. See supra notes 167, 181, 250, and accompanying text; infra note 256.

254 See Jefferson, supra note 47, § 52, at 298 ("Treaties are legislative acts. A treaty is the law of the land. It differs from other laws only as it must have the consent of a foreign nation, being but a contract with respect to that nation."); Washington, supra note 181, at 378 (contrasting, in remarks to Senate committee, executive character of Senate's participation in appointments with acknowledgment that "[i]n treaties, the agency is perhaps as much of a legislative nature"). Professor Yoo concludes that the Framers believed treatymaking "to be a legislative function." John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 Cal. L. Rev. 167, 249 (1996); see also id. at 249 & nn.399-400 (construing John Jay's view as in accord). For the best accounts of the Framers' deliberations, see Arthur Bestor, Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers

was more legislative than executive in nature,[255] and Justice Story confirmed this view in his *Commentaries*, when he recalled the debates at the Founding.[256] Perhaps in this respect the Framers were influenced by their reading of Vattel, who argued in 1758 that the treaty power belongs to those in whom the sovereignty of the state ultimately resides: If absolute sovereignty is vested in the monarch, then the treaty power belongs solely to him, but if sovereignty resides in the people, then it is up to the fundamental law to determine which authority is capable of exercising it.[257] As a consequence, in some states, he pointed out, the executive has "to take counsel of a senate or of the representative body of the Nation."[258]

Professor Tribe takes no note of any of this history. Instead, he relies principally on a statement of Hamilton's in *Federalist No. 75*. In this quotation, Hamilton asserts that making treaties is not strictly a legislative or an executive power. From this, Professor Tribe infers that the legislative power does not include the power to approve international agreements, claiming that "it was clear to Hamilton, at least, that the making of international agreements was not a task for Congress."[259] To reach this conclusion, however, he disregards Hamilton's express statements to the contrary and seriously mangles the quote.

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of the Constitution Historically Examined, 55 Wash. L. Rev. 1, 73-132 (1979); Jack N. Rakove, Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study, 1 Persp. Am. Hist. 233, 236-50 (1984). This is not to deny that some contemporaries may have believed that agreement-making was executive in character, though Professor Tribe has not mustered any such evidence. At a minimum, nothing in the historical evidence renders the Necessary and Proper Clause an implausible textual grounding for Congress's power to approve agreements falling within its legislative authority.

255 See The Federalist No. 75, supra note 187, at 450. In the heat of battle over Washington's unilateral declaration of neutrality between the British and the French, however, Hamilton, writing as Pacificus, switched views. See Pacificus No. 1, supra note 106, at 33, 39, 42. This provoked Madison's vigorous denial in his Helvidius letters. See Helvidius No. 1, supra note 69, at 143-50. Madison reaffirmed his earlier view and, in his concluding riposte, charged Hamilton with having borrowed his doctrine, not from the Constitution, but from the "*royal prerogatives* in the *British government*." Id. at 150. Inexplicably, Professor Tribe relies on Hamilton's initial view in *Federalist No. 75*, rather than his later turnabout. See infra notes 259-60 and accompanying text; infra note 261.

256 See 3 Story, supra note 202, § 1508, at 361 (discussing debates over character of treaty power); 3 id. § 1513, at 365-66 (concluding that it "partake[s] more of the legislative, than of the executive character").

257 See 3 Emmerich de Vattel, The Law of Nations or the Principles of Natural Law, bk. 2, ch. 12, § 154, at 160 (Charles G. Fenwick trans., Oceana Publications 1964) (1758).

258 Id. Vattel, with whom the Framers were apparently familiar, see United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n.12 (1978) (discussing Framers' familiarity with Vattel), was a populizer of the earlier work of Christian von Wolff. Some hints of Vattel's views can even be found in Grotius. For further discussion, see Haggenmacher, supra note 252, at 27-28.

259 Tribe, Taking Text, supra note 3, at 1262.

To correct Professor Tribe's error, it is necessary to quote Hamilton at some length:

> Though several writers on the subject of government place [the treaty] power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. . . . Its objects are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. . . . The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.[260]

The key points are first that Hamilton affirms the treaty power as more legislative than executive in character, although, ironically, Professor Tribe later goes on to ignore Hamilton altogether and claim agreement-making as a solely executive function.[261] Second, Hamilton is discussing the treaty power as a whole when he says that it does not fall strictly into either camp. This does not mean, as Professor Tribe would suppose, that no part of it belongs either to the legislative or the executive branch, but that it ought properly to be divided between them. Thus, Hamilton's view quite nicely explains why the negotiating of an agreement ought to be given to the executive but its approval be reserved to the legislative branch. Indeed, he goes on in the next sentence to explain as much:

> The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and *the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.*[262]

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[260] The Federalist No. 75, supra note 187, at 450-51. Professor Tribe conveniently omits the entire first sentence except for the last clause, thus beginning with "though it does not seem strictly to fall with the definition of either of them." See Tribe, Taking Text, supra note 3, at 1262.

[261] See Tribe, Taking Text, supra note 3, at 1265. As previously noted, Hamilton did in fact change his views subsequently, see supra note 256, but Professor Tribe relies on Hamilton's initial position in *The Federalist*, not his later turnabout.

[262] The Federalist No. 75, supra note 187, at 451 (emphasis added).

Hamilton then goes on to explain why requiring the President to obtain the approval of the House as well as the Senate would create special problems in light of the peculiar institutional characteristics of that part of the legislative branch. Thus, while Hamilton may have viewed "treatymaking" as not "strictly" a legislative task, approving agreements fell directly within the legislature's domain.

Professor Tribe's reliance on Madison is equally puzzling. He quotes from Madison's speech in the House during the famous debate over the first Bank of the United States. In the course of defending a narrow reading of Congress's implied powers, Madison said: "Had the power of making treaties . . . been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution."[263] This Professor Tribe takes to prove his claim that approving agreements is not a legislative act. Presumably, he thinks (inexplicably) that Madison would have affirmed an unenumerated congressional power to approve agreements had he believed it to be legislative in character. Again, however, Professor Tribe is lifting comments out of context and thereby missing their clear import. Not only did Madison affirm his view of treatymaking as legislative both before and after these remarks,[264] but there is nothing in the quoted statement to the contrary. Indeed, Madison's comment says nothing whatsoever about the character of agreement-making as legislative or otherwise or even about Congress's power under the Necessary and Proper Clause to approve agreements incident to its enumerated foreign affairs authority.

Immediately prior to the quoted remarks, Madison distinguished between two kinds of implied powers—those necessary and proper for executing an enumerated power and those necessary and proper for the Government or Union. The former were permissible under the Necessary and Proper Clause insofar as they were evidently and necessarily incident to an express power. The latter, however, were never permissible: "This constituted the peculiar nature of the Government; no power, therefore, not enumerated could be inferred *from the general nature of Government*."[265] He then offered the treaty power as an example. No matter how crucial it might be to the operation of the federal government, if it had not been expressly granted it could not be inferred from the general nature of the government. Although

263 2 Annals, supra note 230, at 1900-01 (remarks of Rep. Madison).

264 See supra notes 167, 181, 250, 253, 255, and accompanying text.

265 2 Annals, supra note 230, at 1900 (remarks of Rep. Madison) (emphasis added).

Madison's proposition is not categorically true,[266] it is still a sensible interpretation of the Constitution and one with which Chief Justice Marshall concurred in *McCulloch*. Marshall explicitly denied that a general congressional power to incorporate could be implied:

> Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.[267]

The same analysis, consistent with Madison's remarks, applies to the power to approve agreements. Had the Framers meant to grant Congress a general power to approve any and every agreement, whatever its subject matter, they would likely have included such a power among the others expressly given. But the congressional-executive agreement does not depend on any such general power in Congress. Congress has the power to approve an agreement only as a means to execute its foreign affairs powers. As a means, "there could be," in Chief Justice Marshall's words, "no motive for particularly mentioning it."[268]

C. *Affirmative Structural Arguments*

I turn now to the structural arguments. Here, again, I divide them into affirmative arguments for exclusivity and negative arguments against Congress's power to approve agreements. In this section, I deal only with the former. Professor Tribe makes only one

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266 In *Curtiss-Wright*, the Court found the whole of the external affairs powers to be implicit in the nature of the federal government. See supra notes 113-15 and accompanying text; infra note 347.

267 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421-22 (1819).

268 Id. at 422. To be sure, Madison's constricted interpretation of the Necessary and Proper Clause, rather than the explicit reference to the treaty power upon which Professor Tribe relies, might well be inconsistent with the congressional-executive agreement. Madison argued that only those powers that were evidently and necessarily incident to an enumerated power were to be implied. Even this category had to be narrowed to exclude any powers that were inherently important powers in themselves. In the latter category, he placed the naturalization power, which he argued would have been too important to be implied under the Necessary and Proper Clause had it been omitted from the text, even if it were necessarily incident to an express power. See 2 Annals, supra note 230, at 1899-1901 (remarks of Rep. Madison). These arguments, however, are irrelevant for us: *McCulloch* swept them into the dustbin of history where they have remained ever since. Moreover, even Madison's specific claim that the naturalization power was too important to be implied has long been discredited. Although the text in fact provides for naturalization, it says nothing about the immigration power—the power to admit, exclude, and expel aliens. Yet, the Court long ago had no trouble finding plenary power in Congress over this equally important and closely related subject. See supra note 115 and accompanying text.

affirmative structural argument. Although he never articulates the point clearly, he invokes the federalism argument that I identified at the outset as one of the two main arguments in favor of the exclusive view. But as in the case of his *expressio unius* argument, he seeks to endow it with far more weight than it can sustain.

1. Exclusivity, Basic Framework Provisions, and Federalism

Professor Tribe claims that certain kinds of constitutional provisions ought by their nature to be given an exclusive sense. He identifies these as "provisions that establish the basic framework of our system of governance"[269] and, in a slightly different formulation, "provisions that specify how elements of the supreme law of the land are to be adopted."[270] These apparently include the procedures for proposing and ratifying constitutional amendments, for adopting laws, and for making treaties. Of course, there is no axiomatic link connecting these sorts of provisions to the conclusion that they ought to be exclusive. What underwrites Professor Tribe's view is structural—"the overarching concern with state sovereignty" that animated the Framers' design.[271] Exclusivity is necessary to uphold "the careful efforts of the Framers to establish an elaborate scheme of checks and balances and a delicate division of lawmaking power."[272]

But why does this conclusion follow from the premise? To be sure, from an originalist perspective, care should be taken to avoid substantially undermining the Framers' delicate division of powers between the federal and state governments. However, construing a basic framework provision as nonexclusive will not necessarily create this evil. In some instances, that will be precisely what the Framers had in mind, in which case Professor Tribe's principle would obviously have no application. In others, their thinking may be less clear, but that is no reason to leap to an exclusive construction. Exclusivity will not necessarily best serve the interests of the states. Even when it does, moreover, state interests cannot be the only consideration that weighs in the constitutional balance, and the imperative to preserve federalism values may be outweighed by competing concerns. In each case, the answer will depend on the particular provision being construed.

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269 Tribe, Taking Text, supra note 3, at 1241.

270 Id. at 1244.

271 Id.

272 Id. at 1241. For discussion of this argument not as a federalism principle but as an interpretation of the *expressio unius* maxim, see supra notes 124-38 and accompanying text.

It is clear that Professor Tribe assumes that the Framers designed the Treaty Clause to provide special protection for state interests and that the interchangeability doctrine undermines their scheme. This is indeed one of the two principal arguments in favor of exclusivity, but Professor Tribe never goes beyond mere assertion.[273] As I pointed out at the outset, however, the text—in contrast to the historical evidence[274]—does not yield a single plausible inference, and there are persuasive textual and structural arguments to counter the states' rights interpretation of the Framers' intent.[275] Professor Tribe simply never confronts the crucial interpretive difficulties posed by these conflicting plausible inferences or tells us why his construction is any more persuasive than the alternative view. Indeed, it may well be his recognition of the equivocal nature of the textual evidence that leads him to prefer a sweeping presumption of exclusivity. He would simply require us to presume without analysis that basic framework provisions protect federalism interests that would necessarily be undermined by a nonexclusive reading. But he never says why we should undertake constitutional analysis on the basis of rigid presumptions—presumptions, indeed, which he spins entirely out of whole cloth.

Furthermore, his distinction between basic framework provisions specifying how elements of the law are to be adopted and all others is not well drawn and when removed threatens to engulf his argument in the same morass that mires his *expressio unius* argument.[276] All sorts of constitutional provisions potentially reflect a delicate division of authority between the federal and state governments. There seems to be no more reason to treat as categorically exclusive those on Professor Tribe's narrow list than any of the others granting constitutional powers. Yet, not all constitutional grants are exclusive. Thus, for example, when the Framers designed the electoral college system, they made important choices about how much to favor the interests of the whole over the interests of individual states in the office of the

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[273] An assertion he repeats on many occasions. See, e.g., Tribe, Taking Text, supra note 3, at 1228, 1241, 1248, 1282, 1292. In defense of his claim, he only points out that the Framers assigned the power of advice and consent to the Senate, in which the states are represented equally. See id. at 1241. But Professor Tribe fails to notice that the congressional-executive agreement also requires approval by the Senate; it just includes the House as well. What is crucially at stake, then, is not the involvement of the Senate, but the two-thirds voting requirement.

[274] See Ackerman & Golove, supra note 5, at 808-13 (concluding early understandings strongly support exclusivity).

[275] See supra notes 69-75, 186, and accompanying text; infra note 378. The two main competing conceptions are the states' rights view and the claim that the Treaty Clause just gives the President an extraordinary option to be used when he believes that considerations of secrecy, dispatch, or long-term perspective counsel exclusion of the House.

[276] See supra notes 106-38 and accompanying text.

President. This too represented a delicate division of power between the federal and state governments. As we have seen, the Court has nevertheless upheld the independent agencies, as it has countless other concurrent exercises of constitutional power.[277] Unless we wish to revisit these decisions, it simply cannot be the case that from the fact that a grant of constitutional power reflects a particular division of authority between the federal and state governments, it follows that it ought to be exclusive.

The Court's approach to problems of exclusivity vis-a-vis the states provides an important illustration of this point. The provisions of Article I, Section 10 explicitly deny the states certain powers that Article I, Section 8 vests in Congress.[278] These exclusions surely reflect a delicate division of lawmaking powers between the federal and state governments and hence have strong claim, a la Tribe, to be read as the exclusive limitations on state authority. All the more so, then, because of the *expressio unius* inference which Professor Tribe finds so compelling in other contexts and because the very frame of the Constitution is of a limited cession of authority from the sovereign states to the federal government. Nevertheless, from the beginning, the Court has held that some of Congress's powers are exclusive of the states even though not expressly denied to them in Article I, Section 10. Although the Court no doubt begins with a presumption of nonexclusivity, the ultimate decision will depend upon whether or not the best inference from context suggests that the Framers wished to assign the power exclusively to Congress.[279] Thus, contrary to Professor Tribe's claim, there is no a priori answer to these kinds of interpretive problems. The mere fact that a particular construction might alter the division of authority does not resolve the interpretive difficulties.

Professor Tribe's distinction between basic framework provisions and all others, moreover, is not well drawn in another sense. If the underlying concern is about protecting the interests of the states from federal encroachment, it is unclear why his principle ought to be narrowly limited to questions of exclusivity. Why not, for example, insist

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277 See supra note 117 and accompanying text. Similar remarks are apt for the courts. Still, in a wide range of fields, the Court has repeatedly upheld Congress's power to create alternative adjudicatory tribunals outside of Article III. See supra note 118 and accompanying text. Even the choice of which powers to grant to Congress in Article I and which to the President in Article II reflect choices relevant to the division of federal and state power. Nevertheless, as we have also seen, many of these have been deemed nonexclusive. See supra notes 117-23, 131-34, 194-209, and accompanying text; see also infra notes 398-403 and accompanying text (discussing nonexclusivity of Supreme Court Original Jurisdiction Clause).

278 See supra note 115.

279 See id.

upon a general rule requiring strict construction of any powers granted to the federal government, such as, say, the commerce power? That provision surely reflects a delicate division of authority between the state and federal governments and thus in Professor Tribe's constitutional universe—where the Framers' "overarching concern with state sovereignty"[280] is controlling—ought to be given a narrow construction in favor of the states. But as Professor Tribe's expansive reading of the Commerce Clause suggests, this is surely not a direction in which he would wish to go.[281]

Finally, even if we confine ourselves to Professor Tribe's narrow notion of basic lawmaking provisions, he moves too quickly to his strict rule of exclusivity. Even assuming arguendo the exclusivity of Article V's amendment procedures and of Article I's lawmaking provisions,[282] Professor Tribe neglects the text's special provisions for making maritime law. Recall that the admiralty power is granted explicitly to the courts.[283] Surely, this is a provision specifying "how elements of the supreme law of the land are to be adopted."[284] And certainly the design of the courts (whose appointment is vested in the President and the Senate) reflects a delicate division of power between the federal and state governments. According to Professor Tribe's principle, this suggests that Congress's (implied) plenary power over admiralty, long accepted by the Court and previously affirmed by Professor Tribe himself,[285] should be revised.

When we attend closely to Professor Tribe's proposed rule of construction, it becomes evident that it is as arbitrary as the strict *expressio unius* interpretive regime he urges and as inconsistent with our constitutional tradition. Constitutional interpretation is more

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280 Tribe, Taking Text, supra 3, at 1244.

281 See id. at 1295-96 (endorsing broad reading of Congress's powers under Commerce Clause). For further discussion, see infra notes 421-23 and accompanying text. Perhaps, though, this is where the Court is moving. See Printz v. United States, 117 S. Ct. 2365, 2379 (1997) (holding Commerce Clause does not authorize Congress to commandeer state executive officials to carry out congressional policy in the Brady Handgun Violence Prevention Act); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996) (holding Congress lacked authority under Indian Commerce Clause to abrogate state's Eleventh Amendment immunity in challenge to Indian Gaming Regulatory Act); United States v. Lopez, 514 U.S. 549, 561 (1995) (holding Gun-Free School Zones Act exceeded Congress's authority under Commerce Clause).

282 We have already considered the complications for his view of exclusive Article I lawmaking posed by agency rulemaking, the common law, and presidential legislating in foreign affairs. See supra notes 118, 129-30, and accompanying text. I leave to Professors Ackerman and Amar arguments justifying a nonexclusive reading of Article V. For relevant sources, see supra note 17.

283 See supra notes 131-34 and accompanying text.

284 Tribe, Taking Text, supra note 3, at 1244.

285 See supra notes 133-34 and accompanying text.

nuanced than such categorical rules allow. We cannot escape the necessity of giving careful attention to context and the full range of relevant considerations by opting for simple formalist interpretive solutions like those he now professes to accept.

D. Negative Structural Arguments

Professor Tribe presses two negative structural arguments to undermine the textual bases for the congressional-executive agreement. The first invokes the danger to the President's primacy over foreign affairs posed by the congressional-executive agreement. Here, Professor Tribe relies upon the Veto Override Clause to suggest fatal structural defects in the Necessary and Proper Clause argument. His second argument is an effort to shield the exclusivity of the Treaty Clause from the apparent dilemma posed by the unilateral executive agreement. I address each in turn.

1. Fears About the President's Primacy in Foreign Affairs: The Veto Override Clause and the Case of the Hyperactive Foreign Affairs Congress (Rarely Seen in These Parts)

We turn now to the argument that Professor Tribe appears to view as his ace-in-the-hole—the possibility that accepting the congressional-executive agreement somehow entails that an aggressive Congress could conclude an international agreement on its own, even over the fierce objections of a sitting President. Professor Tribe is understandably proud of this point, since in the many momentous Treaty Clause debates over the course of our history, no one has ever made it before. Yet, on reflection, he might have considered whether this oversight reflects not so much upon the intelligence of his forebears than on the implicit historical judgment that the argument is simply without merit.

Professor Tribe's argument is simple: Imagine a Congress bent on having its way in all matters and wishing to force a bill down the President's throat. Under the Veto Override Clause, all it need do, should he refuse to sign, is to repass the bill by a two-thirds vote in each house.[286] Now imagine the same Congress equally insistent

[286] There are really two veto override clauses, which are the same in all relevant respects except that the first applies to bills, while the second applies to orders, resolutions, and votes. See U.S. Const. art. I, § 7, cls. 2, 3. I refer to them collectively hereafter as "the Veto Override Clause." Congressional-executive agreements are ordinarily, but not exclusively, approved by joint resolution. See Ackerman & Golove, supra note 5, at 804-05 & 805 nn.9-10 (citing examples). The second veto override clause provides, "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President," but if vetoed by him, shall only

about its views in foreign affairs and wishing to force a particular international agreement, perhaps one it itself negotiated or received from some foreign quarter, down that same President's throat. What is to prevent it from approving a resolution directing the President to ratify the agreement, "presenting" him with the resolution, and, upon his veto, repassing it by a two-thirds vote in each house? If Congress has the power under the Necessary and Proper Clause to authorize the President to conclude an international agreement he has negotiated, then, in Professor Tribe's view, under "a coherent Article I-based view,"[287] it ought to have the power to direct him to ratify any agreement, regardless of his role in its promulgation. Either way, it might find concluding the agreement necessary and proper for carrying into execution its enumerated powers. And if it can muster the necessary votes, it ought, under the Veto Override Clause, to have the power to bypass the President entirely. "The Constitution's text is unequivocal," in Professor Tribe's view, in applying the override power to "'*[e]very* Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary.'"[288] Never mind the extreme remoteness of the hypothetical.[289] Because the theoretical possibility thus presented is "dramatically at odds with the well-accepted principle that the President is the primary representative of the nation in foreign affairs,"[290] Professor Tribe believes that the only viable solution is to rule out the congressional-executive agreement altogether. Case closed![291]

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take effect if "repassed by two thirds of the Senate and House." U.S. Const. art. I, § 7, cl. 3.

287 Tribe, Taking Text, supra note 3, at 1254.

288 Id. at 1252 (quoting U.S. Const. art. I, § 7, cl. 3).

289 So far as I am aware, Congress has never attempted anything of the sort. But see infra note 291 (describing more assertive congressional actions in recent years).

290 Tribe, Taking Text, supra note 3, at 1254.

291 Even though Congress has never sought to negotiate an agreement on its own, Professor Tribe may be unaware of how close it has come towards this line in recent years. According to Professor Henkin, the so-called independent agencies have increasingly acted unilaterally on the international level, even at times negotiating agreements pursuant to congressional authority "without the participation, scrutiny or even awareness of the President or the Department of State." Henkin, supra note 9, at 129-30. This observation prompts Professor Henkin to query whether "the President is entitled to insist that he . . . be fully informed, and participate in any negotiations *at least as an observer*." Id. at 130 (emphasis added). Surely, Professor Tribe would object to this practice, as he does to the congressional-executive agreement. Perhaps, it is unconstitutional on other grounds. However the issue is resolved, the simple fact that it describes the actual operation of our government tends strongly to undermine his claim that independent congressional agreement-making is entirely foreign to our practices. Cf. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 243, 76 Stat. 872, 878 (requiring President to include members of Congress on delegations negotiating international trade agreements and thus arguably intruding on President's control over negotiating process), repealed by Trade Act of 1974,

Despite Professor Tribe's certainties about the clarity of the text, the application of Article I, Section 7's presentment and veto override provisions to the congressional-executive agreement is complex, providing some intriguing material for a law school exam in advanced constitutional law. As we shall see, closely related questions about the war powers have been the subject of long historical speculation among scholars, but remain unresolved since they have never arisen in practice. On this point, the opposite of Chief Justice Marshall's remark about the power of judicial review holds: Although the question whether Congress can override the President's veto in this area is of trivial practical importance to the United States, unhappily it is of an intricacy precisely disproportionate to its interest.[292] Happily, however, we need not attempt a resolution here, for, as we shall see, Professor Tribe's argument fails on other grounds in any case.

Professor Tribe does heavily emphasize the veto override provisions. On close examination, however, it is clear that the core of his argument lies elsewhere and depends upon two entirely separate propositions. He believes that independent congressional agreement-making is fatally inconsistent with the President's primacy over foreign affairs.[293] But he also thinks that from a textual perspective one cannot plausibly embrace both the congressional-executive agreement and any limits on Congress's independent agreement-making powers. Hence, the unconstitutionality of the modern procedure.[294] Both of these claims are essential to his argument, but neither is convincing.

Pub. L. No. 93-618, §602(d), 88 Stat. 1978, 2072 (1975); Henkin, supra note 9, at 395 n.88 (describing same).

292 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest."). Professor Tribe considers and rejects an argument suggested, though not endorsed, by Professor Henkin, that would prohibit Congress from overriding a veto in those instances when its legislation is designed to implement a presidential power under the Necessary and Proper Clause, rather than a power of its own. See Tribe, Taking Text, supra note 3, at 1256 n.117 (citing Henkin, supra note 28, at 915 n.26). I would reject this argument as well and would also reject Professor Tribe's implication that agreement-making is, in this sense, an executive power. For a different argument for avoiding the override power, which Professor Tribe considers and rejects, see id. at 1254 n.112 (rejecting, correctly, hypothetical argument that because treaty procedure is always available as an alternative, use of congressional-executive agreement is not a vote to which concurrence of both houses is "necessary," as required by Veto Override Clause). For other arguably more persuasive limitations on the veto override power, see infra notes 304, 308, and accompanying text.

293 By "independent congressional agreement-making," I mean any effort by Congress to negotiate or ratify an international agreement either on its own or by directing the President to implement its policy.

294 The veto override power enters into this argument only indirectly. Because the President could veto any congressional resolution directing him to ratify a congressional-executive agreement, the constitutional problem Professor Tribe identifies would ordina-

The first proposition—the inconsistency of independent congressional agreement-making with presidential primacy—may well be defensible on historical grounds. But by his own methodological fiat, Professor Tribe is bound to eschew history in favor of text and structure. It is here that he runs into trouble, for they both strongly suggest the contrary view.[295] Begin with the text. It is not entirely clear why Professor Tribe believes that the idea that Congress can bind the United States to an agreement by overriding the President's objections poses an insurmountable textual problem.[296] In support of his claim, he rests only on a citation to Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*[297] As an adherent of the original meaning school, however, Professor Tribe would seem

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rily not arise. It can occur only if Congress overrides the President's veto. But, as we shall see, in objecting to such a resolution, the President would be most unlikely to point to the Veto Override Clause as the problem; his objection would be based on substantive constitutional law. When Congress approves a congressional-executive agreement, it simply passes a resolution authorizing the President to conclude the agreement on the international level. As a result, the President would be most unlikely to veto the resolution of approval. Not requiring him to do anything in particular, he would have little reason to oppose it. Were he nevertheless to exercise the veto—and were Congress even more inexplicably to override—there would still be no real constitutional issue. The override would presumably be valid, but the resolution would only amount to an authorization that the President could freely disregard. On the other hand, were Congress to pass a resolution *directing* him to ratify an agreement, the President would be most likely to veto it (unless he favored the agreement, in which case he might just register his objections). And if Congress overrode his veto, he would most likely be unwilling to abide by its command. This result, however, would have nothing whatever to do with the Veto Override Clause, but rather with the President's view that the resolution, by directing him to ratify an agreement, had unconstitutionally invaded his exclusive sphere. The override would not itself be unconstitutional; it would be the bill's substance that would provoke objection.

295 This may lead one to wonder why Professor Tribe has not broadened the focus of his textual attack to include not only the congressional-executive agreement but the President's non-textually-based sole organ power as well. While both practices find their historical roots in practice, the latter, as we shall see, provides a far more congenial context for a convincing textualist challenge. See infra notes 309-18 and accompanying text.

296 Although he does not make the argument, perhaps Professor Tribe's sense of symmetry is offended by the idea that Congress can make agreements on its own but that the Senate, under the Treaty Clause, cannot. Yet, this seems perfectly consistent with the Framers' larger design: Congress can make an agreement over the President's veto, because when two-thirds of both houses are in favor, there is a strong enough national consensus to override the President's objections. However, the Senate acting alone could never reliably represent such a strong national consensus.

297 299 U.S. 304 (1936). Justice Sutherland's opinion has been roundly criticized for, among other things, its expansive dicta on the President's role in foreign affairs. See, e.g., Harold Hongju Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair 93-94 (1990) (criticizing opinion's key language as historically inaccurate and ambiguous dicta); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment, 83 Yale L.J. 1 (1973) (concluding Justice Sutherland provided no constitutional or historical ground for his broad view of broad, presidential foreign affairs). In favor of his propresidential bias, Professor Tribe, like Justice Sutherland, points to the President's superior access to, and ability to protect, confidential information neces-

obliged to point to convincing language in the text to justify his sweeping pro-Executive bias. Yet, it is notoriously difficult to find the needed support in the few scrawny provisions of Article II. And it becomes downright confounding when we compare those provisions to the rather hefty foreign affairs powers assigned to Congress in Article I.[298] This is hardly fertile ground for an original meaning textualist argument. Indeed, the history of the constitutional law of foreign relations has been largely a search for nontextual justifications for the President's broad foreign affairs powers. Textualists have had to resort to highly attenuated extrapolations from modest textual provisions, and even then they have come up short.[299] Of course, this is true not only of the President's foreign affairs powers. As Professor

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sary to international agreement-making. See Tribe, Taking Text, supra note 3, at 1254-55 (quoting with approval *Curtiss-Wright*, 299 U.S. at 320, on this point).

298 Compare the President's power as Commander-in-Chief, see U.S. Const. art. II, § 2, cl. 1, to appoint and receive ambassadors and public ministers, see id. art. II, § 2, cl. 2, id. art. II, § 3, to make treaties, see id. art. II, § 2, cl. 2, and to take care that the laws are faithfully executed, see id. art. II, § 3, with Congress's power to declare war, see id. art. I, § 8, cl. 11, to grant letters of marque and reprisal, see id., to make rules for captures on land and water, see id., to regulate foreign commerce, see id. art. I, § 8, cl. 3, to provide for the common defense of the United States, id. art. I, § 8, cl. 11, to raise and support armies, see id. art. I, § 8, cl. 12, to provide and maintain a navy, see id. art. I, § 8, cl. 13, to make rules for the government and regulation of the land and naval forces, see id. art. I, § 8, cl. 14, to provide for organizing, arming, disciplining, and calling forth the militia, see id. art. I, § 8, cls. 15, 16, to define and punish offenses against the law of nations and on the high seas, see id. art. I, § 8, cl. 10, to establish a uniform rule of naturalization, see id. art. I, § 8, cl. 4, to establish offices (including those pertinent to foreign affairs), see id. art. II, § 2, cl. 2, and to make all laws necessary and proper for carrying into execution all of Congress's enumerated powers and the powers conferred on any other branch of the government, see id. art. I, § 8, cl. 18. In his Helvidius letters, Madison used this comparison to demonstrate that the conduct of foreign affairs is principally a legislative function given to the Congress. See Helvidius No. 1, supra note 69, at 145-48.

299 See Henkin, supra note 9, at 31-36 (noting limited textual support for breadth of foreign affairs powers exercised by President). As Professor Henkin puts it:

> A stranger reading the Constitution would get little inkling of such large Presidential authority, and the general reader might comb the Constitution yet find little to support the legitimacy of large Presidential claims. The powers explicitly vested in him are few and appear modest, far fewer and more modest than those bestowed upon Congress. What the Constitution says and does not say, then, can not have determined what the President can and can not do. The structure of the federal government, the facts of national life, the realities and exigencies of international relations . . ., and the practices of diplomacy, have afforded Presidents unique temptations and unique opportunities to acquire unique and ever larger powers.

Id. at 31. The desire to find a home in the text for the President's broad powers has also led some to repair to the Hamiltonian reading of the Executive Power Clause despite the linguistic leap of faith it demands and the ominous possibilities it opens. See id. at 40 (discussing debate over Hamiltonian reading); see also supra notes 106-09 and accompanying text (discussing difficulty with this argument); infra note 342 and accompanying text (same).

Tribe once eloquently put it: "To be reminded that it was not meant to be so—that the Framers envisioned a vastly more modest chief magistrate—is only to recall that, had the blueprint been incapable of expanding beyond the Framers' designs, the Nation could not have persisted through two centuries of turmoil."[300]

In any case, the President's predominant role notwithstanding, the conundrum Professor Tribe identifies is built into the structure of the Constitution, and the larger difficulties are little affected by the case of the congressional-executive agreement. Congress has very wide, some say plenary, authority over foreign affairs.[301] Consider its power to regulate foreign commerce, to raise and support armies, and to define offenses against the law of nations. Yet, no one doubts that in exercising these extremely important foreign policy powers it may regulate even over the objections of the President. That is a necessary implication of the Veto Override Clause. Congress can even mimic through legislation most, if not all, of the obligations the country has undertaken through treaties.[302] To be sure, there would still be a difference; we would not be bound under international law to retain that legislation in place. The point, however, remains the same: Congress would be taking the lead in devising our foreign policy and could override any presidential opposition. Similarly, Congress can, and has, passed legislation inconsistent with our existing treaty obligations and thereby provoked our treaty partners (or the President anticipatorily) to terminate an agreement.[303] Here, too, it can, though it rarely has, acted against the President's wishes.

Even waiving these points, the most damning textual rejoinder to Professor Tribe's view is found in Congress's most momentous foreign affairs prerogative—the power to declare war. Under a straightforward reading of Article I, Section 7, we are forced to concede that two-thirds of both houses can force the country into war even over the most vehement opposition of the President, notwithstanding his status as Commander-in-Chief. This certainly suggests that Professor Tribe's

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[300] Tribe, Constitutional Law, supra note 11, § 4-1, at 209. Professor Tribe then viewed the textual grants of foreign affairs powers in Article II as "textual manifestations of the inherent presidential power" to administer the foreign relations of the nation. Id. § 4-4, at 220.

[301] See Henkin, supra note 28, at 920-30 (arguing for plenary congressional power); see also Henkin, supra note 9, at 71-72 (same); supra notes 28, 48-52, 298, and accompanying text (discussing support for this view).

[302] See Henkin, supra note 9, at 71-72 ("[T]he Foreign Affairs Power would support legislation on any matter so related to foreign affairs that the United States might deal with it by treaty . . . ."); Henkin, supra note 28, at 920-30 (arguing same).

[303] For further discussion, see Corwin, The President, supra note 119, at 220-21 & 478 n.58; Jesse S. Reeves, The Jones Act and the Denunciation of Treaties, 15 Am. J. Int'l L. 33 (1921).

simplistic affirmation of the President's primacy in foreign affairs is out of step with the constitutional structure. It perhaps adds insult to injury to note that most of the historical speculation has been over whether Congress's control over war and peace is so complete that the President's veto power ought somehow to be deemed *inapplicable* to a declaration of war.[304] Presidents, in any case, have at times been careful to delay convening Congress or releasing inflammatory information in order to avoid inciting Congress and provoking it to war.[305] Still, even leaving this additional complication aside, Professor Tribe's architectural worries about Congress somehow binding the country to an agreement without the President's sanction pales in comparison to this vast and portentous authority in the Congress alone. If, despite the President's predominance in foreign affairs, Congress can make the awesome decision to thrust the country into war unilaterally, why should the President's supposed primacy rule out congressional agreement-making?

The answer seems all the more clear when one considers that the Framers explicitly allowed Congress just such a power. Under the

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[304] Some have claimed that a declaration of war ought not be subject to the veto, see, e.g., 28 Cong. Rec. 2107 (1896) (remarks of Sen. Morgan); most have disagreed, see, e.g., Berdahl, supra note 118, at 79-80, 95-96 (arguing that declaration of war is, like any other bill or resolution, subject to veto); Clinton Rossiter, The Supreme Court and the Commander in Chief 66 n.1 (Richard P. Longaker ed., rev. ed. 1976) (same); James Schouler, Constitutional Studies, State and Federal 137 (New York, Dodd, Mead & Co. 1897) (same); Simeon E. Baldwin, The Share of the President of the United States in a Declaration of War, 12 Am. J. Int'l L. 1 (1918) (same). Grover Cleveland was reportedly prepared to veto a possible declaration of war against Spain. See Rossiter, supra, at 66 n.1. More recently, the decision in I.N.S. v. Chadha, 462 U.S. 919 (1983), and its application to the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1994) (giving Congress legislative veto over use of troops in hostilities), stirred debate over the issue. Some have argued that Section 1545(c)'s legislative veto provision is not unconstitutional because the President has no authority to veto a declaration of war and thus Congress need not "present" a declaration for his consideration. See, e.g., Stephen L. Carter, The Constitutionality of the War Powers Resolution, 70 Va. L. Rev. 101, 129-32 (1984); Leonard G. Ratner, The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles, 44 S. Cal. L. Rev. 461, 478-80, 489 (1971); War Powers and the Responsibility of Congress, 82 Am. Soc'y Int'l L. 1, 3-5 (1990) (remarks of Sen. Brock Adams and Prof. Louis Henkin). Still more recently, a scholarly debate has opened on the issue. Professor William Treanor, an excellent legal historian, claims that the original intent of the Framers was that a declaration was not subject to the veto, although admittedly I find the sources upon which he relies less convincing than he. See William Michael Treanor, Fame, the Founding, and the Power to Declare War, 82 Cornell L. Rev. 695, 724-29 (1997). Compare Philip Bobbitt, War Powers: An Essay on John Hart Ely's *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 Mich. L. Rev. 1364, 1385 n.69 (1994) (reaching same conclusion on textual grounds), with John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath 231 n.21 (1993) (taking opposing view).

[305] For an account of President Jefferson's efforts to avoid war with Great Britain in 1807, President Grant's in 1869, and Presidents Cleveland and McKinley's with respect to Spain in the later years of the nineteenth century, see Berdahl, supra note 118, at 84-92.

Compact Clause, states may enter into agreements or compacts with foreign states *with Congress's consent*.[306] If we accept Professor Tribe's understanding of the veto override power (as we should), it is clear that Congress can approve a state negotiated agreement even over the President's veto. Apparently, then, the idea was not so foreign to the Framers' scheme as Professor Tribe supposes. The Framers explicitly provided for just such a congressional power.[307]

What emerges, then, is that concurrent authority among the President, the Senate, and Congress is simply a pervasive fact of constitutional life even (perhaps, especially) in foreign affairs and that the text provides manifold ways for Congress to bypass the President if it is so determined. Still, given the history of our constitutional practices, Professor Tribe is not obtuse in perceiving an awkwardness in the idea of independent congressional agreement-making.[308] What he

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306 See U.S. Const. art. I, § 10, cl. 3.

307 Professor Tribe seems to fall into confusion in arguing at a later point that Congress's power to override the President's veto of a state compact or agreement "renders all the more remarkable a constitutional interpretation that would allow Congress to make what amount to *treaties* over presidential veto." Tribe, Taking Text, supra note 3, at 1271 n.172. It is hard to understand this passage as anything but a *non sequitur*. The fact that Congress can override a presidential veto of a state agreement hardly makes it *more* surprising that it could do the same for a federal agreement. It should be noted, as well, that state agreements with foreign states would appear to be binding under international law on the United States. See Wright, Control, supra note 89, § 157, at 232-33 (indicating that state agreements that are binding under international law involve a "national responsibility").

308 Perhaps, limitations on Congress's power to override a presidential veto might be suggested by another parallel drawn from the war powers. While the historical debates have mostly questioned the applicability of the President's veto power to congressional declarations of war, the reverse might also be defended: Congress has no power to push the country into war over the objections of the President. Most commentators seem to have rejected this view, just as they have rejected the claim that declarations are not subject to the veto. See, e.g., Berdahl, supra note 118, at 95-96 (acknowledging both veto and veto override power); Schouler, supra note 304, at 137 (same). On the other hand, the Framers' apparent design to make war as difficult as possible to enter would provide some support for finding an exception to the veto override provisions. Perhaps, by analogy, a similar argument could be made in favor of an override exception in the agreement-making context. I will not, however, pursue this point further. Other objections to Professor Tribe's view make consideration of this point unnecessary.

Alternatively, assuming Congress may issue a declaration of war even over the President's veto, it is less clear from a textual perspective that it can also force him as Commander-in-Chief to bring the army into battle. President Cleveland threatened to refuse to mobilize the army if Congress forced an unwanted declaration of war against Spain upon him. See 2 Robert McElroy, Grover Cleveland: The Man and the Statesman 249-50 (1923). Without an army in the field, presumably, there is no fighting war, Congress's declaration notwithstanding. Here, again, by analogy, perhaps Congress can override a presidential veto of a resolution approving an international agreement, but the President nevertheless is under no obligation to ratify the agreement and thereby to make it binding on the United States internationally. In any case, as to both of the war powers arguments, my own view favoring congressional primacy in foreign affairs—most dramatically evident in the case of the war powers—would support Congress's ultimate authority to override

fails to notice, however, is how far this concern inevitably draws him away from the text. As we shall see, the pedigree for the President's monopoly over the conduct of diplomatic affairs is rooted principally in history and practice and, at best, can be derived only loosely from the text. Yet, history and practice are forbidden domains for a strict original meaning textualist. If Professor Tribe's textual assault on the congressional-executive agreement requires resort to such extratextual materials, his argument testifies more to the weakness of his own interpretive methodology than to the proper construction of the Treaty Clause.

Professor Tribe actually tells us little about his grounds for affirming the President's monopoly over negotiations, but his view is hardly unfamiliar. It is rooted in longstanding conceptions of the President's authority over the conduct of our foreign affairs. From the beginning, the President has been the "sole organ of the nation in its external relations, and its sole representative with foreign nations."[309] He thus has exclusive authority to communicate the official policy of the United States to foreign states and to receive official notice of their policy when communicated to the United States.[310] The sole organ power, however, does not appear in terms in the text—a point Professor Tribe just glides past—and this has forced advocates of presidential authority to affirm expansive constructions of some rather unassuming provisions in Article II.[311] The most widely accepted view looks to the President's "control of the foreign relations 'apparatus,'" which in turn derives principally from his express powers to appoint and to receive ambassadors and other public ministers.[312] Whichever attenuated argument one ultimately prefers, however, the President's

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the President's objections and the constitutional obligation of the President to fight any war Congress declared even over his veto. I do not claim that this affirmation of congressional supremacy, however, can be justified on the basis of a plain meaning construction of the text. In any case, I do pursue a related argument concerning the scope of the President's negotiating powers in the text below.

309 10 Annals of Cong. 613 (1800) (remarks of Rep. John Marshall). Marshall, then a representative in the House, made these famous remarks during the debate over President Adams's extradition of Jonathan Robbins to Great Britain. See generally Ruth Wedgwood, The Revolutionary Martyrdom of Jonathan Robbins, 100 Yale L.J. 229 (1990) (discussing Robbins affair and its effect on debate over executive power in foreign affairs).

310 See Corwin, The President, supra note 119, at 213-14 (discussing history of sole organ power); Henkin, supra note 9, at 41-42 (discussing sources of power).

311 Even Professor Tribe acknowledges that Article II has only a "nebulous connection to the subject of negotiation." Tribe, Taking Text, supra note 3, at 1257.

312 Henkin, supra note 9, at 41-42; see also Corwin, The President, supra note 119, at 214 & 476 n.46 (quoting justification on similar lines by President Grant). The sole organ power may also find additional support in the President's powers to make treaties, as Commander-in-Chief, and to faithfully execute the law. Perhaps, it is an implication of all of the powers granted in Article II.

complete monopoly over foreign communications finds its real justification in its acceptance from the outset and in presidents' almost invariable insistence upon it.[313] In one famous instance, President Grant even returned a congressional resolution expressing thanks to foreign governments which had sent congratulatory messages on the first Centennial of the nation and used his veto message as an occasion for a detailed lecture on the constitutional proprieties.[314] Only the most wayward Congress, then, would contemplate bypassing the President and appointing its own agent to negotiate or ratify an international agreement.

But if the sole organ power is firmly rooted in practice and precedent, its scope and extent remain more open to question. Would it, for example, rule out a congressional resolution *directing* the President to ratify an agreement?[315] Given the provenance of the President's powers, it is probably impossible to answer this question except by further reference to practice, but until Congress attempts such a maneuver, we will have little to go on.[316] The point, however, is not to attempt to undermine the expansive claims that have often

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313 For an early confirmation of this view, see Jefferson's letter to the controversial French Minister Genet:

> [B]eing the only channel of communication between this country and foreign nations, it is from [the President] alone that foreign nations or their agents are to learn what is or has been the will of the nation; and whatever he communicates as such, they have a right, and are bound to consider as the expression of the nation, and no foreign agent can be allowed to question it.

Letter from Thomas Jefferson to Edmond Charles Genet, Minister of France (Nov. 22, 1793), in 6 The Writings of Thomas Jefferson 451, 451 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1895). In 1799, Congress passed the Logan Act, ch. 1, 1 Stat. 613 (1799) (codified as amended at 18 U.S.C. § 953 (1994)), which makes it a crime for any person to correspond with a foreign nation with an intent to influence its conduct in relation to a dispute involving the United States. See generally Corwin, The President, supra note 119, at 213-14 & 476 nn.43-44 (discussing history of Logan Act and its use).

314 For an account of this and other equally extreme incidents, see Corwin, The President, supra note 119, at 214 & 476 nn.45-46.

315 In a reversal of the actual (and tragic) trend, imagine a Congress hell-bent on ratifying human rights treaties and a resistant President who rejects the handiwork of earlier occupants of his office. For commentary on actual congressional attitudes since the Bricker Amendment controversy, see Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int'l. L. 341 (1995).

316 Nevertheless, most foreign relations scholars have thought that the sole organ power extends even to the formulation of the policy the President is to communicate. The President, many have claimed, not only communicates but determines what, if anything, is to be communicated. See, e.g., Henkin, supra note 9, at 42, 119, 249 ("Attempts by Congress to instruct U.S. representatives are highly questionable as a matter of constitutional separation of powers, and are usually only hortatory or are likely to be treated as such by the President."). Under this view, Congress would have no power to oblige the President to communicate an instrument of ratification to foreign states. As a consequence, even if Congress had the temerity, or the moxie, to override a veto of a resolution directing the President to ratify a particular agreement, the President would almost certainly disregard

been made on behalf of the sole organ power.[317] It is to underscore just how far removed the text itself is from these doctrinal debates and how it becomes even more removed as the connection to negotiations becomes more remote. In the longstanding constitutional debates, textual considerations have played only a minor role, and those arguing for expansive presidential powers have relied heavily on our whole history—on what the office of the President has become, not on what can be gleaned from the text or even from the early conflicts and crises.[318]

But if Professor Tribe's first claim is problematic, his second argument stands on even weaker ground. He believes that by embracing

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its pretensions. On the other hand, there is some practice arguably suggesting the contrary view. See supra note 291.

The President's exclusive authority to communicate with foreign states may also provide an argument against a congressional power to place the nation in a state of war over presidential objection. Perhaps a declaration of war does not become effective as an *international* act until it is communicated to the opponent, and this power belongs solely to the President. See supra notes 304-05 and accompanying text (discussing veto power and declarations of war).

317 My own position even in this area favors shared powers in foreign affairs with congressional preeminence in the event of conflict, a view with strong roots, as I have sought to demonstrate, in the text. In this respect, however, my approach has not always been fully accepted. Certainly, it was not what Justice Sutherland had in mind in his expansive dicta in the *Curtiss-Wright* case. See infra note 338 and accompanying text.

318 See, e.g., Restatement, supra note 9, § 339 reporters' note 1 (resting President's unilateral power to terminate treaties on what sole organ power has become "as it has developed over almost two centuries"); Henkin, supra note 9, at 41-45 (describing historical development of sole organ power).

Were Professor Tribe to rely on the historical materials, there would be no need for his exhaustive mining of the text to resolve the ambiguities inherent in the Treaty Clause. The point of the painstaking historical exegesis in which Professor Ackerman and I engaged was precisely to demonstrate that the practice during the first 150 years supports only the exclusive reading. In this respect, Professor Tribe's argument against independent congressional agreement-making faces precisely the same dilemma as his argument against the congressional-executive agreement. Neither of these practices are, as Professor Tribe would have it, inconsistent with plausible readings of the text. The principal argument against both is that they are inconsistent with historical understandings and practice. But the *textual* case for the congressional-executive agreement cannot be undermined by its purported inconsistency with the historically-based injunction against independent congressional agreement-making. This is especially so because the two histories are intimately intertwined. At least one obvious reason for the absence of any practice during the first 150 years supporting an independent congressional agreement-making power is that the Treaty Clause itself was understood to be exclusive. If the Treaty Clause makes senatorial consent the exclusive procedure for concluding international agreements, then, a fortiori, Congress cannot make agreements on its own authority, either by appointing its own agent to conduct negotiations or by directing the President to negotiate or ratify an agreement to which he objects. Thus, the same practice that supports the exclusivity of the Treaty Clause likewise supports the case against independent congressional agreement-making. It makes no sense to eschew reliance on this history when arguing the main point in contention but then to resort to the very same history to establish a related point which can then be used as an argument in favor of the exclusive view.

the congressional-executive agreement, one is somehow logically estopped from rejecting any limitations on Congress's independent agreement-making powers. In his view, the arguments against Congress's independent powers become unavailable once one accepts a congressional power to approve presidentially negotiated agreements. Indeed, he seems to think that affirming Congress's power to approve agreements under Article I somehow precludes one from finding limits anywhere in Article II on any of Congress's Article I powers. Why this should be so is quite unclear—except that he (wrongly) attributes this view to Professor Ackerman and me, thinking he has, as it were, hoisted us upon our own petard.[319] Be that as it may, defeating a bad argument does not make an affirmative case, and so Professor Tribe would seem obliged to offer something else in support of his position. The best I can discern, however, is that he simply thinks it implausible to find independent authority in Article I for approving agreements despite the Treaty Clause without at the same time ruling out any other Article II limits on congressional powers.

With all due respect, the reason why Professor Tribe perceives this as implausible escapes me entirely. First, once we recognize that the sole organ power itself arises principally from historical practice, not text, then Professor Tribe's objection becomes obtuse. Congress may approve agreements but for historical reasons it is enjoined from

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[319] For Professor Tribe's argument, see Tribe, Taking Text, supra note 3, at 1251, 1253-54, 1256-58. He repeatedly invokes a brief line in our article in which we stated that Articles I and II are "'great and *independent* grants of power,'" id. at 1253 (quoting Ackerman & Golove, supra note 5, at 920 (emphasis added by Professor Tribe)), and he insists that this means, in our view, that Congress's and the President's powers are to be construed wholly independently of each other. Of course, we meant nothing of the kind, and he only reaches this conclusion by lifting the quotation out of context. What we said was that Articles I and II are "great and independent grants of power, *each of which suffices to justify the creation of international obligations*." Ackerman & Golove, supra note 5, at 920 (emphasis added). No claim of global independence was stated or implied, and any such position would, in my view, be wholly unpersuasive. Our only claim—and the claim I defend here—is that there is a plausible textual case for the view that Congress has an Article I power to approve international agreements that is independent of the Article II power of the President and the Senate to make treaties. In other areas, the President's Article II powers may well be best read to limit Congress's Article I authority, and vice versa. Such questions can only be resolved on a case-by-case basis. That Professor Tribe nevertheless seriously believes that his construction of our position is essential to the argument for the congressional-executive agreement is strongly suggested by his later argument that construing the Treaty Clause as nonexclusive requires one to construe the Appointments Clause as nonexclusive as well, hence allowing Congress to vest the appointment of a new Trade and Commerce Secretary in the Supreme Court. See Tribe, Taking Text, supra note 3, at 1273-75. Why this should be the case is mysterious. Presumably, moreover, he thinks acceptance of the congressional-executive agreement necessarily wipes out the "sole" in the sole organ power—if Congress wishes to conduct our foreign affairs, it may do so without intruding on the President's exclusive authority. Indeed, unless the Treaty Clause is exclusive, there is no exclusively executive authority.

acting independently in the realm of foreign negotiations. Where is the inconsistency? Moreover, even were we to accept the claim, arguendo, that the text somehow grounds the sole organ power, Professor Tribe concedes that it derives principally from the President's control of the foreign relations apparatus through the Appointments Clause.[320] He is thus reduced to claiming that there is something untenable about some Article II powers being held (wholly or partially) concurrently with Congress and others entirely by the President alone. But why would this be untenable? It certainly describes our actual constitutional practices.[321] And it seems consistent with common sense: Depending upon the nature of the power in issue, the possibly overlapping grants to Congress, and the context, some provisions will be exclusive, some nonexclusive, and others a complex mix.[322] There is, then, nothing bizarre or incomprehensible about some provisions in Article II being deemed exclusive while others are deemed nonexclusive. That is commonly the case because of the complex ways different constitutional provisions interact with one another.

A moment's reflection on the two kinds of exclusivity in issue here, moreover, reveals that they pose radically different questions. Whether the Treaty Clause excludes a congressional power to approve international agreements depends largely, as Professor Tribe acknowledges, on federalism considerations—to what degree does the two-thirds rule reflect a design to protect minority state interests.[323] In contrast, whether the President's control over the appointment and reception of diplomatic agents—the source of the sole organ power—implies an exclusive presidential power to negotiate and ratify international agreements does not implicate federalism except in the most remote sense. The sole organ power raises classical problems of the separation of powers in foreign affairs. We should neither be surprised nor anxious, then, about the prospect of the two questions being decided in entirely dissimilar ways. Indeed, one could only miss this point by failing to apply a key teaching of Professor Tribe's own constitutional methodology—when we interpret the Constitution, we must take both text and *structure* seriously. Hence, when we consider whether the Treaty Clause is exclusive of a congressional power to approve agreements, we ask, *inter alia*, whether federalism so requires; when we consider whether the Article II sole organ power ex-

320 See Tribe, Taking Text, supra note 3, at 1256 (citing Henkin, supra note 9, at 45-46).

321 See supra notes 117-23, 131-34, 194-209, and accompanying text.

322 See supra note 119. Especially revealing are the decisions in which the Court has held that Congress's implied powers over immigration are (partially) concurrent with the President's implied powers over the same subject. See supra note 120.

323 See supra notes 68-75, 186, 273, and accompanying text; infra note 378.

clusively grants the President the power to negotiate agreements, we ask, *inter alia*, about the proper roles of the President and Congress in conducting our foreign affairs.[324]

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[324] Professor Tribe hypothesizes and then rejects a possible response to his veto override argument. See Tribe, Taking Text, supra note 3, at 1253 n.108. Someone, he imagines, might point out that the President could always unilaterally terminate a congressional-executive agreement approved by Congress over his veto. It would thus be in his power to put an end to the agreement at any time, including at the moment it becomes effective. According to Professor Tribe, however, this argument is wrong because, although the President may unilaterally terminate a treaty, he may terminate a congressional-executive agreement only with Congress's consent. This conclusion follows, he thinks, from the general principle that the President may not repeal an act of Congress. See id. While I fully agree that the hypothetical rejoinder he postulates is wrong, there is no reason to rest its refutation on any limitations on the President's unilateral termination powers, a subject which is far more complicated than Professor Tribe acknowledges. See supra note 180. Perhaps his concern about the President repealing an act of Congress simply reveals a misconception of what terminating an international agreement involves. When the President terminates a treaty, he is taking an act on the international level—abrogating the treaty for purposes of international law. The treaty ceases to have effect as domestic law not because the President has the power to repeal domestic law, but because the domestic effect of the treaty depends upon its status under international law. Similarly, when the President terminates a congressional-executive agreement, he is acting solely on the international level—upon termination, the agreement will no longer bind the United States under international law. But the President has no power to "repeal" the domestic effect of the congressional legislation implementing the agreement. Whether that legislation will still be binding as domestic law will depend on whether Congress explicitly or implicitly provided that it would survive the abrogation of the international obligation the legislation was designed to implement. Ordinarily, we presume that Congress intends to make such legislation dependent upon the reciprocally binding international obligation. Of course, the same applies to non-self-executing treaties that Congress implements through legislation. When the President terminates such a treaty, we ordinarily presume that Congress did not intend for the implementing legislation to continue in force notwithstanding the termination of the international obligation.

In any case, there are two conclusive objections to Professor Tribe's hypothetical response even assuming, contrary to his claim, that the President may unilaterally terminate a congressional-executive agreement. First, Congress will already have bound the nation's good faith. The fact that the President could willy-nilly place us in violation of our international obligations hardly cures the supposed constitutional defect. Although some treaties may be terminable at will, most have termination clauses restricting the rights of the parties to denounce or withdraw from the agreement. See Restatement, supra note 9, § 332 (describing international law of treaty termination); id. § 332 cmt. a (elaborating on same). Second, as explained above, Congress could limit the President's termination power simply by writing restrictions into the resolution approving the agreement, just as the Senate may when giving its consent to a treaty. See id. § 339 cmt. a (affirming Senate's power to restrict unilateral treaty terminations); id. § 339 reporters' note 3 (elaborating on same); Tribe, Taking Text, supra note 3, at 1253 n.108 (suggesting same). Consequently, even if the President could otherwise unilaterally terminate the agreement, Congress can remove that power. Of course, even though Professor Tribe's hypothetical rejoinder is unpersuasive, we have already seen that his veto override argument is meritless on other grounds.

2. *Fitting Square Pegs into Round Holes: The President's Power to Conclude Unilateral Executive Agreements and the Compact Clause*

One might have expected that Professor Tribe would be particularly concerned to protect the Treaty Clause from incursions no matter what their source. Yet, although he denounces the congressional-executive agreement, he is surprisingly restrained when it comes to another apparent assault on the Treaty Clause—the President's power to conclude agreements solely on his own constitutional authority. Rather than boldly pursuing a slash and burn expedition against all alternatives to the treaty form, Professor Tribe accepts the validity of the unilateral executive agreement heedless of the serious problems this creates for his own position.[325]

There are two fundamental respects in which acceptance of the President's unilateral powers tends to affirm the congressional-executive agreement. First, and most obviously, the unilateral agreement directly defeats the claim that the Treaty Clause is exclusive, leaving Professor Tribe's *expressio unius* argument up in the air. Recall that it was precisely the Treaty Clause's failure to include language providing for alternative methods of approving agreements that allegedly justified an inference of exclusivity. If the force of the *expressio unius* inference is not sufficient to rule out presidential agreements, however, then it ought not preclude congressionally approved agreements either, especially because the strength of the inference is so much greater in the former case. To the extent that presidents may conclude agreements on their own steam, the Treaty Clause is correspondingly rendered a virtual nullity.[326] In contrast, as we have seen, the same cannot be said for congressional-executive agreements, which can be harmonized with senatorial advice and consent by understanding the latter as an extraordinary option accorded the President. Furthermore, acceptance of presidential agreements substantially undermines the federalism argument for the exclusive read-

[325] For the distinctly negative bearing of the Appointments Clause on the textual case for the unilateral executive agreement, especially under Professor Tribe's formalistic interpretive approach, see supra note 161. This difficulty seems not to trouble him, even while he argues that the Appointments Clause rules out the congressional-executive agreement. See supra Part III.A.2.

[326] In theory, the Framers might still have had a reason for the Treaty Clause—treaties supersede prior conflicting law, whereas unilateral executive agreements probably do not. See infra note 357 and accompanying text. However, this difference is hardly adequate to explain the special precautions the Framers wrote into the text. Had their concern been solely with the domestic legal status of agreements, surely they would have left implementation to the whole Congress, as they in fact did for the power to pass legislation implementing treaties and superseding them for domestic law purposes.

ing. That argument rests on the Senate's participation in approving treaties. Of course, the Senate also participates in the approval of congressional-executive agreements. In contrast, when the President unilaterally concludes an agreement, the states are left entirely in the lurch.[327]

The second argument requires a closer look at the underlying textual justification for the unilateral agreement. The most obvious and compelling point of departure is the implied powers doctrine. In Article I, that doctrine is written directly into the text in the Necessary and Proper Clause. But as we have seen, both Madison and Marshall viewed it as a necessary correlate of any constitutional grant of power and affirmed that it would apply independently of the text.[328] Although they were considering Congress's powers, the principle applies with equal force to the substantive powers of the President. Among others things, he is the sole organ and chief diplomatic representative of the nation and its Commander-in-Chief. Incident to these powers, then, he may conclude unilateral agreements as necessary to carry out his constitutional responsibilities. The extent of his agreement-making powers, in turn, depends upon the scope of his substantive powers. This reading not only has the merit of providing a strong basis in the text for the practice, it is how the President's powers have been widely understood from the beginning.[329] But once we

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[327] To be sure, it is possible that, notwithstanding these arguments, the Framers might have accepted the President's unilateral powers as a necessary incident of his supervision of the conduct of foreign affairs but have rejected the same for Congress. Perhaps, the total exclusion of the states from unilateral presidential agreements did not concern them overly because they assumed that unilateral agreements would be quite modest in scope. Perhaps, in contrast, they thought that a parallel power in Congress to approve agreements incident to its enumerated powers would be more worrisome because of its potentially greater scope, despite the participation of the Senate by majority vote in the approval process. The problem for Professor Tribe, however, is that the Framers failed to write this distinction into the text and, for present purposes, that is the only point that matters given his insistence that the rarefied textual case—divorced from history—is all that is in issue. For further discussion of this argument, see infra note 380.

[328] See supra notes 235-37 and accompanying text.

[329] See Corwin, President's Control, supra note 119, at 116-25 (treating various examples of unilateral executive agreements as exercises of President's diplomatic and commander-in-chief powers); Samuel B. Crandall, Treaties: Their Making and Enforcement §§ 56-61 (2d ed. 1916) (same); 2 Charles Cheney Hyde, International Law: Chiefly as Interpreted and Applied by the United States §§ 507-09 (1922) (providing examples of various classes of unilateral executive agreements); Treaties, 2 Wharton Digest § 131, at 12 ("Matters exclusively of Executive discretion . . . may be settled by protocols which . . . need not be submitted to the Senate."); Wright, Control, supra note 89, §§ 161-172 (relating various classes of executive agreements to particular foreign affairs powers of President); Moore, supra note 20, at 389-92 (treating President's authority to conclude agreements as incident to his diplomatic powers). For further discussion and the citation of numerous additional early authorities, see Ackerman & Golove, supra note 5, at 815-20. Thus, in the early period, the President could settle private claims against foreign powers

and enter *modi vivendi* as incidents of his diplomatic powers, and he could conclude armistices, agreements for exchanges of prisoners of war, and arrangements allowing foreign troops to cross the border, all as incidents of his powers as Commander-in-Chief. See id. His powers, however, were narrowly construed. His diplomatic powers, for example, did not allow him to enter political agreements that were binding on the country; they were thought to bind only the President that made them. See id. at 819-20. The Supreme Court reflected these early understandings in Tucker v. Alexandroff, 183 U.S. 424 (1902), in which, after reviewing the past precedents in which the President had entered agreements permitting foreign troops to enter the United States, it noted that while no act of Congress authorized this practice, "the power to give such permission . . . was probably assumed to exist from the authority of the President as commander-in-chief." Id. at 435.

With the emergence of the United States on the world stage in the wake of the Spanish-American War, the President's unilateral foreign affairs powers experienced a corresponding expansion which was reflected in the increased use of the unilateral agreement. This development provoked considerable constitutional controversy. See Ackerman & Golove, supra note 5, at 817-18 & 818 n.64. In an effort to cabin this practice, which could no longer be easily contained by the implied powers doctrine, some commentators looked to the Compact Clause's distinction between treaties and agreements or compacts as a suggestive analogy, revealing that the Framers were at least aware that international agreements assumed different forms. This suggested to some that the President's unilateral powers might be limited to lesser forms of international undertakings. See, e.g., Simeon E. Baldwin, The Exchange of Notes in 1908 between Japan and the United States, 3 Zeitschrift fur Volkerrecht und Bundesstaatsrecht 456, 457-61, 464-65 (1909) (arguing that President may unilaterally conclude only agreements that do not rise to level of treaties); James F. Barnett, International Agreements Without the Advice and Consent of the Senate, 15 Yale L.J. 18, 63, 82 (1905) (same); see also 2 Hyde, supra, § 505, at 27 (opening discussion of unilateral executive agreements with observations that Framers were familiar "with the habit of statesmen to contract international engagements of lesser importance than treaties"). Even for these scholars, however, the point was to find an additional limitation on the President's authority, not to argue against the implied powers doctrine, which was accepted uniformly. See, e.g., Barnett, supra, at 70-73 (invoking Commander-in-Chief Clause to justify President's authority to conclude armistices, peace protocols, and joint military occupation agreements). The lack of any persuasive standards by which to define the difference between treaties and agreements, moreover, bedeviled the argument from the outset. See, e.g., Baldwin, supra, at 457-59 (resting on Vattel for distinction); see also infra note 361 (discussing problematic character of Vattel's distinction for purposes of limiting President's unilateral authority). In any case, the Compact Clause played only a minor role in the debates, see, e.g., 2 Butler, supra note 47, § 463, at 367 n.2 (failing to mention Compact Clause in discussion of scope of President's unilateral power to make agreements); Corwin, President's Control, supra note 119, at 116-25 & 121 n.48 (mentioning Compact Clause only in passing in brief footnote and making nothing of distinction); Crandall, supra, §§ 56-61 (failing to mention Compact Clause in discussing limits on President's implied powers to make agreements); Wright, Control, supra note 89, §§ 161-172 (same); and it failed to appear at all when the Supreme Court considered the constitutionality of the practice in a series of later cases. In each, the Court, not mentioning the Compact Clause, upheld the agreements as properly incident to the President's foreign affairs powers. See United States v. Belmont, 301 U.S. 324, 330-31 (1937) (upholding Litvinov Assignment, concluded by President Roosevelt as part of series of measures leading to recognition of U.S.S.R, as incident to President's sole organ and recognition powers, deriving latter power from his power to receive ambassadors); United States v. Pink, 315 U.S. 203, 228-30 (1942) (same); Dames & Moore v. Regan, 453 U.S. 654, 682-83 (1981) (following *Pink* and upholding Iranian Hostages Accord, which settled claims with Iran and referred them for resolution to Iran-U.S. Claims Tribunal, as incident to President's sole organ and recognition powers). Although the Compact Clause has never dropped

accept agreement-making as an implied power of the President, we have taken a giant leap towards acceptance of the congressional-executive agreement, since nothing in the Treaty Clause provides a textual foothold for distinguishing between the implied powers of the President and the Congress in this regard.

Professor Tribe thus faces a perplexing predicament—having committed himself to the unilateral presidential agreement, how can he avoid breathing new life into the congressional-executive agreement, its close constitutional relation? This is surely a difficult challenge, but he offers a three-part argument. Although designed to underwrite his plain meaning construction of the text, however, his claims begin with the controversial, proceed to the doubtful, and end in the highly dubious.

Professor Tribe begins with the apparent discovery of a genuine hole in constitutional space. He notes that although the Treaty Clause may appear on its face to be a comprehensive grant of the agreement-making power to the President and the Senate, in fact the Framers used the word "treaties" as a term of art.[330] The power to make "treaties" does not include the power to make all international agreements, only important agreements that substantially impinge on state or national sovereignty.[331] To demonstrate why, he points to Article I, Section 10. The Framers prohibited states from entering into treaties, alliances, or confederations, but allowed them, with Congress's consent, to enter into agreements or compacts (agreements, in his view, that less substantially impinge on state or national sovereignty).[332] Since he believes that the term "treaty" has the same meaning throughout the text, it is clear that the power to make treaties does not comprehend the power to make agreements or compacts.[333] We thus face a potential gap in constitutional space—the Framers were silent on how less important agreements and compacts would be made

entirely from view, this approach is now widely accepted. The *Restatement*, for example, provides: "[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution." Restatement, supra note 9, § 303(4); see also Congressional Research Serv., Library of Congress, 103d Cong., Treaties and Other International Agreements: The Role of the United States Senate, 60-65 (Comm. Print 1993) [hereinafter Congressional Research Serv., Treaties] (authoritative study prepared for Senate Foreign Relations Committee) (basing President's authority on various Article II powers); Restatement, supra note 9, § 303 cmt. g & reporters' note 11 (same). For further discussion, see supra notes 64-64 and accompanying text; infra note 376.

330 See Tribe, Taking Text, supra note 3, at 1265.

331 See id.

332 See id. at 1265-66.

333 See id. at 1266.

on behalf of the United States (although oddly they provided explicitly for how they might be concluded by states).

Fortunately, Professor Tribe has a solution to the problem he has uncovered. As *Curtiss-Wright* explained, the foreign affairs powers of the national government are plenary, and so the power to make less important agreements must necessarily reside in some part of the federal government.[334] According to Professor Tribe, this power clearly falls to the President for two reasons. First, following Hamilton, the Executive Power Clause can be read as a grab-bag grant of any and all powers that are "executive" in character.[335] Thus, in contrast to Congress, the President is not limited to his enumerated powers. Second, *pace* Hamilton in *The Federalist*, the making of agreements is executive in character. It therefore belongs to the President, not to Congress.[336]

To see the many difficulties in this argument, we must examine each of its parts separately. Begin with his explicit reliance on the claim that agreement-making is an executive function. We confronted this assertion in a previous section, and I pointed out then that the text of the Constitution, as well as the evidence of the Framers' contemporary understandings, better supports a more nuanced conclusion: While the negotiating of treaties is an executive function, their approval is ordinarily a legislative function.[337] Professor Tribe cites no textual or historical authority in favor of his view. Indeed, the only evidence he cites is the *Curtiss-Wright* case. But Justice Sutherland's opinion, though a paean to executive leadership in foreign affairs, says nothing at all, even in its most notoriously expansive dicta, about the

334 See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-18 (1936) (claiming that foreign affairs powers are plenary and are vested in federal government as an incident of national sovereignty).

335 See supra notes 106-09 and accompanying text.

336 For Professor Tribe's argument on these points, see Tribe, Taking Text, supra note 3, at 1264-69.

337 See supra notes 247-62 and accompanying text.

specific character of the power to approve agreements.[338] Hence, one essential predicate of Professor Tribe's argument is doubtful at best.[339]

Second, Professor Tribe self-consciously rests on the Hamiltonian reading of the Executive Power Clause.[340] Although he recognizes the controversial character of that view, he is forced to this position for at least two reasons. On the one hand, as I have already pointed out, were he to concede that presidential authority can be implied from enumerated grants in Article II, he would have no persuasive response to the advocate of congressional power who seeks to make the same move under Article I. But were he then to concede that Congress can approve some agreements under the Necessary and Proper Clause, he would, at a minimum, have to abandon one of his central claims: that a resolution approving an agreement is categorically not a "law" for purposes of that clause.[341] Equally problematic, the implied powers doctrine cannot fully solve the dilemma he has created, for it is unable to fill entirely his postulated constitutional gap. Implied powers permit the conclusion of agreements that are incident to an enumerated power. But Professor Tribe needs a general undifferentiated power to make all agreements falling below a certain threshold of importance, irrespective of their relationship to an enumerated power. Especially if we consider the far more constricted conception of executive powers held by the Framers, implied powers may not be up to the task. Hence, Professor Tribe must unearth an unenumerated power to fill in the void. In this context, Hamilton's thesis is understandably alluring. But to say that Hamilton's position

338 Indeed, Justice Sutherland's only reference to the power to make agreements without the consent of the Senate cites the Court's earlier decision in B. Altman & Co. v. United States, 224 U.S. 583, 600-01 (1912). See *Curtiss-Wright*, 299 U.S. at 318. *Altman*, however, dealt with a precursor to the modern ex ante congressional-executive agreement. See Ackerman & Golove, supra note 5, at 831-32 (discussing *Altman*). If anything, then, *Curtiss-Wright* would appear to support the claim that approving agreements is at least sometimes a legislative function.

339 This is not to suggest that concluding some types of agreements might not be thought of as properly executive in character. Despite the lack of any specific evidence about the Framers' view, one might reasonably think that this characterization would apply to agreements "as to the rights of an individual, the treatment of a vessel, a matter of ceremonial, or any of the thousand and one things that daily occupy the attention of foreign offices without attracting public notice." Moore, supra note 20, at 389. But no one—and certainly not Professor Tribe—claims that the President's unilateral authority is limited to these routine administrative matters. See id. at 390-93 (providing examples of more substantive agreements concluded by President acting alone).

340 See supra notes 106-09, 299, and accompanying text.

341 For further discussion, see infra note 378. Furthermore, Professor Tribe would seriously weaken any argument for placing limits on the kinds of agreements Congress can approve incident to its foreign affairs powers, since nothing in Article I, Section 8 or the Necessary and Proper Clause suggests that the Framers wished to allow Congress to approve some agreements but not others. See infra note 378.

is controversial profoundly understates the longstanding historical controversy, and it remains one of the great open questions of constitutional law.[342] To the extent that the case for the exclusivity of the Treaty Clause rests on an expansive reading of the Executive Power Clause, this merely underscores the indeterminacy of the Constitution on the very point in issue. All the more so, then, when the text offers a reasonable, and relatively uncontroversial alternative: In accordance with the traditional understanding, the President makes unilateral agreements, not pursuant to some unenumerated power, but as an incident of his enumerated foreign affairs powers.[343]

Most problematic of all, however, is Professor Tribe's central claim that the Constitution creates two kinds of agreements, important treaties and less important agreements, and that the Treaty Clause is limited to the former. It is easy to see why he finds this argument appealing. By positing the existence of two separate kinds of agreements and a gap in the text, he can preserve his claim that the Treaty Clause is exclusive within the range of its application. To be sure, he would say, the President may conclude unilateral executive agreements, but that is a separate power not comprehended by the Treaty Clause. When he wishes to make a treaty, the President is obliged to follow the singular procedure specified in the text for important agreements: senatorial advice and consent. Thus, there is no inconsistency between the presidential agreement and the *expressio*

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[342] Hamilton initiated the controversy in his Pacificus letters which immediately prompted Madison's famous refutation (at Jefferson's urging) as Helvidius. See Henkin, supra note 9, at 39-40 & 338 n.13 (discussing historical controversy); supra notes 106-09 and accompanying text (discussing Hamiltonian view). For Hamilton's argument, see Pacificus No. 1, supra note 106, at 38-39. Webster and Calhoun later opposed Hamilton's view. See Henkin, supra note 9, at 338 nn.13 & 17. And while Chief Justice Taft seemed to adopt it in Myers v. United States, 272 U.S. 52, 118, 128 (1926), Justice Black, writing for the Court, pointedly refused even to consider the Executive Power Clause as a possible source of presidential power in the Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952). In his celebrated concurring opinion, moreover, Justice Jackson, President Roosevelt's former Attorney General, expressly denounced such a doctrine as dangerous, and the Court has not invoked it since. See id. at 640-41 (Jackson, J., concurring). Academic opinion is also skeptical. See, e.g., Henkin, supra note 9, at 39-40 (discussing argument that Executive Power Clause is source of foreign affairs powers); Edward S. Corwin, *The Steel Seizure Case:* A Judicial Brick Without Straw, 53 Colum. L. Rev. 53, 53-55 (1953) (warning that overextension of presidential power through Hamiltonian reading of Executive Power Clause threatens rule of law). Ironically, one the most powerful objections to Hamilton's position is its textual implausibility. Why would the Framers have enumerated trivial powers, like the power to require written opinions by the heads of executive departments, if the Executive Power Clause was a grant in bulk of all powers that are executive in character? See supra note 109 (discussing objections to Hamiltonian view).

[343] See supra notes 328-29 and accompanying text; infra note 376.

unius and federalism arguments for the exclusivity of the Treaty Clause.

No doubt this argument has a nice elegance. But something more than elegance is needed to sustain Professor Tribe's plain meaning argument. He must articulate a construction of the text that is at least compelling, if not singularly persuasive. Yet, the gap which he purports to uncover is really only a gap of his own creation, and his claim that the President and the Senate are limited to making important agreements is based on the creative importation of implicit limits on an otherwise unqualified grant of power. As we shall see, his view is also demonstrably in conflict with assumptions that have been widely held during our whole history: that the Treaty Clause is an unrestricted grant of authority to the President and the Senate to make any international agreement on any subject touching upon our foreign affairs. But if there is no gap—if the President and the Senate can make any and all agreements no matter how important or unimportant—then there is no reason to repair to the Executive Power Clause to find an unenumerated power to make unimportant agreements and no gainsaying the fact that accepting the unilateral executive agreement renders the Treaty Clause nonexclusive. In short, Professor Tribe's effort to preserve the consistency of his position falls apart.

Professor Tribe is not the first to have suggested limits on the scope of the treaty power. Many have feared the potentially awesome power accorded to the President and the Senate in textually unrestricted terms and so have sought to find implicit limits.[344] But in all the historical controversy, the sweeping scope of the power has only rarely been seriously denied, and even Professor Tribe is satisfied in this regard to let things rest. Instead, he takes an entirely different tack: Although the Senate may bind the country to the most momentous of commitments, there are some agreements, he believes, that *in their triviality* are simply beyond its power of advice and consent. This view, however, is confronted with an immediate difficulty, for it conflicts with the widely held assumption from the beginning that the

344 Henkin provides a particularly useful discussion. See Henkin, supra note 9, at 185-98; see also H.R. Rep. No. 48-2680, at 1-6 (1885) (arguing for limits on scope of treaty powers); 1 Butler, supra note 47, §§ 3-7 (discussing early controversies and taking expansive view of treaty power); 2 John Randolph Tucker, The Constitution of the United States §§ 354-356 (Chicago, Callaghan & Co. 1899) (same, but taking narrow view); 1 Westel Woodbury Willoughby, The Constitutional Law of the United States §§ 206-219 (1910) (same, taking expansive, but more moderate view). There have been arguments for restrictions derived variously from the nature of international undertakings, the specific prohibitions of the Constitution, the principle of federalism, and the separation of powers doctrine in its many different guises. Some of these have been accepted, but most have been rejected in time. See Henkin, supra note 9, at 185-98 (providing critical review).

Treaty Clause is a comprehensive grant of the agreement-making power. Justice Story's early dictum is typical: "The power 'to make treaties' is by the constitution general; and of course it embraces all sorts of treaties, for peace or war . . . and for any other purposes, which the policy or interests of independent sovereigns may dictate in their intercourse with each other."[345] This same judgment, repeated countless times by presidents, secretaries of state, members of congress, and scholars, finds authoritative expression in the *Restatement*: "[T]he President, with the advice and consent of the Senate, may make any international agreement of the United States in the form of a treaty."[346] Even the Supreme Court has abandoned its traditional

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345 3 Story, supra note 202, § 1502, at 355.

346 Restatement, supra note 9, § 303(1); see also id. § 303 cmt. b (elaborating on same). Hamilton reached the same conclusion, noting:

> It was impossible for words more comprehensive to be used than those which grant the power to make treaties. They are such as would naturally be employed to confer a *plenipotentiary* authority. . . . With regard to the objects of the Treaty, there being no specification, there is of course a *charte blanche*. The general proposition must therefore be that whatever is a proper subject of compact between Nation & Nation may be embraced by a Treaty . . . .

The Defence No. 36, supra note 47, at 6; see also Congressional Research Serv., Treaties, supra note 329, at xxxviii, 41-42 (noting that "treaty power is recognized by the courts as extending to any matter that is properly the subject of international negotiations"); 29 Annals of Cong. 531-32 (1816) (remarks of Sen. Calhoun) (noting that "[w]hatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty power"); 11 U.S. Dep't of State, Foreign Affairs Manual § 721.2(a) (rev. ed. Feb. 25, 1985) ("The President, with the advice and consent of two-thirds of the Senators present, may enter into an international agreement on any subject genuinely of concern in foreign relations . . . ."), reprinted in Congressional Research Serv., Treaties, supra note 329, at 301, 303; 1 Butler, supra note 47, § 3, at 5 (stating that treaty power "extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world"); 1 id. §§ 261, 264, 268 (discussing views of leading early commentators on Constitution, including William Rawle, George Ticknor Curtis, and John Norton Pomeroy, which were to same effect); Treaties, 5 Hackworth Digest § 462, at 5-11 (collecting various statements, including by Secretary of State Elihu Root, Charles Evans Hughes (later Secretary of State and Chief Justice), Quincy Wright, and Senator Kellogg (later Secretary of State)); Henkin, supra note 9, at 185-99 (affirming unrestricted character of treaty power); Treaties, 5 Moore Digest § 735, at 164 (reprinting note by Secretary of State Calhoun asserting that "treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent"); Wright, Control, supra note 89, §173, at 247-48 (noting that treaty power "extends to 'any matter which is properly the subject of negotiations with a foreign country'" (quoting Geofroy v. Riggs, 133 U.S. 258, 266 (1890))); Charles Cheney Hyde, Constitutional Procedures for International Agreement by the United States, 31 Am. Soc. Int'l L. 45, 53 (1937) (affirming same); Moore, supra note 20, at 388 (same). There is some isolated language in a few of the early twentieth century commentators that could be read to suggest otherwise, but in context it is apparent that they were seeking to explain the basis for and limits on the President's unilateral powers, not to suggest restrictions on the scope of the treaty power. See Barnett, supra note 329, at 18, 82; Moore, supra note 20, at 388. John Bassett Moore, for example, declared: "[I]t can easily be demonstrated that the word 'treaties,' as used in

reticence about foreign affairs and repeatedly joined the chorus.[347]

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the constitutional law of the United States, does not embrace any and every kind of international agreement." Id. But this statement is immediately followed by his explanation that the term "treaty" has a purely procedural meaning, referring to "agreements approved by the Senate," and his affirmation that any agreement approved by the Senate is automatically "in the strict sense a 'treaty,'" with the specific legal character mandated for treaties in the Supremacy Clause. Id.; see also infra note 359 and accompanying text (discussing Moore's view). Moore also specifically recognized that even when an agreement falls within the President's unilateral powers, the Senate is not without power over the same agreement. See Moore, supra note 20, at 393, 414 (recognizing that President may conclude claims settlements and postal conventions as executive agreements or may submit them for senatorial advice and consent); see also Barnett, supra note 329, at 68-70, 76-77 (recognizing that President may conclude claims settlements, postal conventions, and tariff agreements as executive agreements but that Senate may approve them as treaties as well).

347 See, e.g., Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (affirming unrestricted character of treaty power); Geofroy v. Riggs, 133 U.S. 258, 266-67 (1890) (same); Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872) (same); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840) (opinion of Taney, C.J.) (same). In *Geofroy*, the Court, per Justice Field, declared:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear.... [I]t is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

Geofroy, 133 U.S. at 266-67. The Court did recognize, however, that there might be limits on the treaty power of an entirely different order: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States." Id. at 267.

Against these clear and weighty authorities, it is arguable, although by no means clear, that Justice Sutherland expressed a contrary view in a passing dictum in his *Curtiss-Wright* opinion. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). *Curtiss-Wright*, of course, did not involve an international agreement of any kind, dealing only with the scope of the nondelegation doctrine in external, as opposed to domestic, affairs. Nonetheless, Justice Sutherland famously took the case as an opportunity to expound upon his controversial theory of the foreign affairs powers. See id. at 315-22. The external powers of the United States, he claimed, do not depend upon the affirmative grants in the Constitution but simply devolve upon the federal government as concomitants of the concept of sovereignty under international law. Hence, "[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." Id. at 318. But these powers were, in fact, expressly delegated to the United States, and so, to demonstrate his point, Justice Sutherland cited a number of other powers that are not expressly mentioned in the text but still, he claimed, had been found to exist "as inherently inseparable from the conception of nationality" and without which "the United States is not completely sovereign." Id. Among these, he said, was "the power to make such international agreements as do not constitute treaties in the constitutional sense." Id.; see also United States v. Belmont, 301 U.S. 324, 330-31 (1937) (arguably suggesting same in opinion by Justice Sutherland rendered one year after *Curtiss-Wright*).

If Justice Sutherland indeed meant to suggest that there are two kinds of international undertakings comprising exclusive sets, treaties and agreements, and that the Senate has no power to consent to agreements, only to treaties—and that an unenumerated agreement-making power was therefore required to enable the federal government to con-

This point, moreover, is not only expressed *ad infinitum* in statements of principle, it is also reflected in the practice of the nation from its earliest days. For example, although presidents have often settled private claims unilaterally,[348] they have also frequently submitted these agreements to the Senate for its consent. In 1905, the State Department's Solicitor concluded that either method was permissible: "Such an agreement the president no doubt may in any case submit to the Senate, if he sees fit to do so; and we find, especially in former times, that this course was often taken."[349] This same view has also been expressed on countless occasions, including by the Supreme Court in *Dames & Moore v. Regan*[350]: "Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the

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clude agreements—there are several reasons why his view is unpersuasive. First, it is evident that Justice Sutherland was driven to this position not for textual or historical reasons, but in order to find support for his remarkable claim that the foreign affairs powers are inherent and not dependent on enumeration. The only decision he cites for his claim about the agreement-making power is B. Altman & Co. v. United States, 224 U.S. 583, 600-01 (1912). See *Curtiss-Wright*, 299 U.S. at 318. *Altman*, however, involved a tariff reciprocity agreement authorized by act of Congress, and although the Court did not address the issue squarely, it clearly grounded the agreement's validity in Congress's foreign commerce powers and the President's duty to faithfully execute the law, not in the law of nations or sovereignty. See *Altman*, 224 U.S. at 601 (observing that agreement dealt with "important commercial relations between the two countries" "authorized by the Congress" and "proclaimed by the President"). Nor does anything in the opinion suggest that the tariff agreement could not have been submitted to the Senate—an outlandish proposition in light of the long national experience with tariff treaties. See, e.g., U.S. Tariff Comm'n, Reciprocity and Commercial Treaties 21-38 (1919) (describing history of tariff treaties and agreements); Barnett, supra note 329, at 64-65, 70 (referring to same and concluding "there are certain ends, which, under our Constitution, may be attained in two different ways"). Not only can Justice Sutherland find no support in *Altman*, the one decision on which he relies, he also fails even to acknowledge the long line of decisions and the weighty history of opinions among leading political figures and commentators that are directly to the contrary. See supra notes 345-46 and accompanying text. No doubt for these reasons his dictum either has not been so interpreted or has simply been disregarded in subsequent authoritative sources. See supra notes 345-46 and accompanying text.

348 See generally Ackerman & Golove, supra note 5, at 815-20 (reviewing history and scope of unilateral executive agreement-making, including claims settlements). Perhaps the first unilateral executive agreement under the Constitution was John Adams's settlement in 1799 of the private claims of American citizens in the Wilmington Packet affair. See Wallace McClure, International Executive Agreements: Democratic Procedure Under the Constitution of the United States 43-44 (1941) (providing history).

349 Moore, supra note 20, at 399. Indeed, in our first century, the preferred method appears to have been the treaty. See Richard B. Lillich, The Gravel Amendment to the Trade Reform Act of 1974, 69 Am. J. Int'l L. 837, 844-45 (1975) (noting that treaties were predominant form for making claims settlements in nineteenth century). In 1905, Moore counted 20 instances in which claims settlements had been processed as treaties; Presidents had settled many unilaterally as well. See Moore, supra note 20, at 402-03, 408 (compiling examples).

350 453 U.S. 654 (1981).

advice and consent of the Senate."[351] On Professor Tribe's view, of course, *Dames & Moore* was wrong: If the President has unilateral authority to conclude these agreements, then they were ipso facto beyond the Senate's power of advice and consent. Indeed, on his view, the Litvinov Assignment[352] approved in *United States v. Belmont*[353] and *United States v. Pink*,[354] as well as the Iranian Hostages Accord affirmed in *Dames & Moore*, both unilateral agreements, were by definition too trivial to fall within the ambit of the Senate's treaty powers![355]

One might nevertheless respond by pointing out that although recourse to the Senate is unnecessary for less important agreements, its advice and consent in no way undermines the validity of a presidential agreement; it is just that the agreement remains a unilateral executive agreement since the Senate's consent is unable to transform it into a treaty.[356] Hence, the lack of concern about this problem in the authorities I have cited.

This response, however, is unconvincing for at least two reasons. First, it simply waives away the many unambiguous statements to the contrary that span the course of our history. Nothing in those authorities betrays that they somehow *sub silentio* accepted Professor Tribe's view. Furthermore, there are important differences in the legal status of treaties and unilateral presidential agreements that would have required attention had Professor Tribe's limited reading of the treaty power been accepted. Most salient, in contrast to treaties, it is widely thought that unilateral agreements do not supersede earlier inconsis-

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351 Id. at 679. For repeated affirmations of the availability of both procedures, see, e.g., Crandall, supra note 329, at 86; Treaties, 5 Hackworth Digest § 515, at 404; Agreements Not Submitted to the Senate, 5 Moore Digest § 752, at 211 (reprinting statement of Secretary of State Cass); Wright, Control, supra note 89, § 171; Barnett, supra note 329, at 76-77; John W. Foster, The Treaty-Making Power Under the Constitution, 11 Yale L.J. 69, 77 (1901); Lillich, supra note 349, at 844-45.

352 See supra note 329.

353 301 U.S. 324 (1937).

354 315 U.S. 203 (1942).

355 Claims settlements are not the only kinds of agreements that were alternately concluded as executive agreements and treaties during the first century of the country. Among others, postal conventions, tariff agreements, and even *modi vivendi* all took on both forms. See, e.g., 2 Butler, supra note 47, § 463, at 367 n.2 (describing alternative use of both forms for *modi vivendi*); John Mabry Mathews, American Foreign Relations 436 (1928) (describing same for agreements for United States superintendence of foreign country's debt payments to other foreign creditors); Barnett, supra note 329, at 68-70 (describing same for postal conventions and reciprocal tariff agreements); Moore, supra note 20, at 393 (describing alternative use of both forms for postal conventions).

356 One might so argue, but as we shall see, Professor Tribe does not. See infra note 366 and accompanying text.

tent laws or treaties.[357] As a result, it will not be sufficient for the President simply to submit an agreement falling into the gray area between "treaty" and "agreement" to the Senate, for if the agreement is really not important enough to merit the "treaty" appellation, the Senate's approval cannot give it this increased dignity. Prior inconsistent laws will still apply even in the face of the Senate's efforts.[358] But these and other similar issues have not troubled presidents, senates, and congresses when they have considered agreements approved by the Senate. They have simply assumed that any agreement is "by reason of its approval by the Senate, in the strict sense a 'treaty,' and possesses, as the product of the treaty-making process, a specific legal character . . . overriding any inconsistent provisions not only in the constitutions and laws of the various states, but also in prior national statutes."[359]

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357 The Fourth Circuit so held in United States v. Guy W. Capps, Inc., 204 F.2d 655, 660 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955). See Congressional Research Serv., Treaties, supra note 329, at 65-68 (affirming this view); Tribe, Constitutional Law, supra note 11, § 4-5, at 229 (noting that "[a]t a minimum, it seems clear that [a unilateral] executive agreement, unlike a treaty, cannot override a prior act of Congress"). The *Restatement* concurs, although with nuances. See Restatement, supra note 9, § 115 cmt. c & reporters' note 5 (affirming same but noting possible exceptions). Professor Henkin, however, is less certain. See Henkin, supra note 9, at 228 (suggesting that same arguments as to why treaties supersede earlier statutes also apply to executive agreements).

358 Consider also the perverse result of this view: When the Senate approves an important agreement, it can override any prior law even without the participation of the House. But when it gives its advice and consent to an unimportant agreement, its powers run out, and the President will have to obtain the House's consent to repeal any conflicting laws. This obviously reverses the intuitive notion. Nor is it an answer to suggest that any agreement inconsistent with prior law is automatically a "treaty" under Article II. Defining the difference between "treaties" and "agreements" in this way finds no support in the eighteenth century international practice from which, in Professor Tribe's view, the Framers were drawing. Professor Tribe himself interprets the point of difference as resting on the significance and extent of an agreement's impact on the nation's sovereignty. See supra text accompanying notes 334-36; supra note 161; infra note 376. Others have looked to an entirely different distinction found in Vattel, of which the Framers might have been aware. See supra note 329; infra note 361 and accompanying text. Either way, the crucial point has nothing to do with the agreement's relationship to preexisting law. This is not to suggest that a different view might not be plausible if one assumes—as I do—that the source of the President's unilateral authority resides in the implied powers doctrine. But if one is committed to the claim that the President has an unenumerated power to make all of those international undertakings that in the eighteenth century international practice familiar to the Framers were deemed "agreements" rather than "treaties," then there is no basis for limiting the President to agreements consistent with preexisting law. This is not to say, however, that a unilateral executive agreement, even under this view, would necessarily supersede a prior inconsistent statute. Were the President to enter into a unilateral agreement inconsistent with a prior statute, he would, perhaps, have to obtain repealing legislation before his agreement could be given effect in domestic law.

359 Moore, supra note 20, at 388. Nor can this be explained by the invariably important nature of the agreements presidents have referred to the Senate Foreign Relations Committee. Notoriously, presidents have sometimes opted for the arguably insulting practice

Even if we overlook this history and the views of our forebears, Professor Tribe's position is equally problematic as a matter of pure textual exegesis. The plausibility of his position rests entirely on his assertion that the term "treaty" must have the same meaning in Articles I and II. It is far from clear, however, that this premise supports his interpretive conclusion. In any case, while this same meaning rule may provide a reasonable starting point for interpretation, it loses all force when applied woodenly without reference to context,[360] and context gives us powerful reasons for giving the term "treaty" a different construction in Articles I and II.

Recall that Professor Tribe's contention is that the term "treaty" in Article I, Section 10 cannot include all international agreements because the Framers prohibited the states from making treaties but allowed them to make agreements or compacts. Thus, he concludes, treaties and agreements describe two exclusive sets. But it is at least equally plausible to read the permissive reference to agreements and

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of sending extremely trivial "treaties" to the Senate, while purporting to conclude rather hefty "agreements" on their own authority. See, e.g., S. Rep. No. 91-129, at 28 (1969) (noting that in some instances "we have come close to reversing the traditional distinction between the treaty as the instrument of a major commitment and the executive agreement as the instrument of a minor one"). Indeed, Senator Robert Taft complained over 50 years ago: "As a matter of fact, no treaties of any importance have been submitted to the Senate since I have been a Member of the body." 88 Cong. Rec. 9276 (1942) (remarks of Sen. Taft); see also 115 Cong. Rec. 16750 (1969) (remarks of Sen. Church) (echoing Sen. Taft's comment).

There are a number of other legal differences between treaties and unilateral agreements that would also have been relevant. For example, although it is generally assumed that the President can modify a treaty only by obtaining the consent of the Senate, the same would not apply to a unilateral agreement. See Congressional Research Serv., Treaties, supra note 329, at 140-46 (concluding that modifications of unilateral executive agreements are solely matter of presidential discretion). Thus, were the response suggested in the text correct, the President would be free to modify unilaterally agreements approved by the Senate if he could demonstrate that they did not in fact rise to the level of a genuine treaty. Likewise, the Senate may make reservations to treaties which are binding on the President if he ratifies the agreement. See id. at 96-100 (describing practice). Presumably, under the postulated response, the President could disregard the Senate's reservations even after he had ratified an agreement if the agreement had not in fact reached the treaty threshold. There are similar concerns over the vexed problem of treaty interpretation. The President may be limited in the extent to which he can reinterpret a treaty in a manner inconsistent with the understanding of the Senate when it gave its consent. See id. at 93-96 (discussing treaty interpretation controversies). Would this limitation apply to an agreement consented to by the Senate but which did not really warrant the appellation "treaty"? Apparently not, on the postulated view. Yet, all of these are important matters which would have surely drawn attention had anyone doubted that Senate approval ipso facto made an agreement an Article II treaty.

360 Chief Justice Marshall noted that in construing the Constitution "the same words have not necessarily the same meaning attached to them, when found in different parts of the same instrument; their meaning is controlled by the context." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 19 (1831).

compacts as an exception to the general prohibition on treaties, so that "treaties" represent the general category and "agreements" and "compacts" are a subset of the former. To make the point more perspicuously, it would be as if Section 10 provided: "No state shall enter into any treaty, alliance, or confederation; except they may, with the consent of Congress, enter into agreements or compacts."[361] In context, moreover, it is apparent that the Framers had compelling drafting reasons to adopt the existing formulation that are in no way incompatible with the view I have suggested.[362]

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361 Some have thought that the Framers borrowed the distinction between treaties and agreements or compacts from Vattel. See, e.g., United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n.12 (1978) (discussing Vattel's views in decision on Compact Clause); Abraham C. Weinfeld, What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?, 3 U. Chi. L. Rev. 453, 457-60 (1936) (arguing that Framers had Vattel in mind in drafting Compact Clause). Vattel distinguished between "treaties" and "agreements, conventions, and arrangements": The former are perpetual or of considerable duration and call for "a continuous performance of acts," whereas the latter are perfected in a single act "once for all." 3 Vattel, supra note 257, bk. 2, ch. 12, §§ 152-153. But Vattel himself recognized that "agreements, conventions, and arrangements" (which Weinfeld identified with the Constitution's "agreements and compacts," see Weinfeld, supra, at 460) were simply forms of the general category "treaties." Thus, in a later section, he stated:

> Treaties which do not call for continuous acts, but are fulfilled by a single act, and are thus executed once for all, those treaties, unless indeed we prefer to give them another name (see § 153) [defining agreements, conventions, and arrangements], those conventions, those compacts, which are executed by an act done once for all . . . are, when once carried out, fully and definitely consummated.

Id. bk. 2, ch. 12, § 192, at 172. It is worth noting that Vattel's distinction, even were it the source for the Framers' text, proved unworkable immediately and has never been reflected in actual practice. See 3 Story, supra note 202, § 1396 (rejecting George Tucker's earlier endorsement of (significantly) modified version of Vattel's distinction as "at best a very loose, and unsatisfactory exposition"). Those who have relied on it to distinguish between important and unimportant agreements have always been embarrassed by Vattel's failure to draw that as the point of difference. See Congressional Oversight of Executive Agreements, 1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong. 392 (1975) (reprinting memorandum by Monroe Leigh, Legal Adviser, Dep't of State, which noted that "Vattel's distinction has nothing to do with 'important' or 'unimportant'").

362 The Framers had important structural reasons to adopt their formulation. Section 10 actually includes three paragraphs. See U.S. Const. art. I, § 10, cls. 1, 2, 3. The prohibition on treaty-making appears in the first along with a list of other powers denied the states; the permissive rule for agreements and compacts, in contrast, appears in the third along with other powers that can be exercised only with congressional consent. This grouping served to clarify and emphasize that certain powers (those listed in the first paragraph) were absolutely prohibited to the states but that others (those listed in the second and third) could be exercised with leave of Congress. See Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 571 (1840) (opinion of Taney, C.J.) (affirming distinction); 3 Story, supra note 202, § 1396, at 270 (same); supra notes 218-19 and accompanying text (discussing same). Hence, the Framers were impelled to separate the treatment of state treaties and agreements by drafting imperatives that ruled out the more simple language I have suggested, but their drafting choice

In any case, even if we accept Professor Tribe's view that the term "treaty" in Section 10 does not comprehend "agreements or compacts," there are forceful textual reasons not to carry this limited construction over to the Treaty Clause. The term "treaty" in Section 10 is grouped together with the terms "alliance" and "confederation," and these are contrasted with "agreements" and "compacts." As Justice Story urged in his *Commentaries*, this grouping provides strong grounds for giving the term "treaty" a more limited sense in this context. Applying the maxim *noscitur a sociis* (the sense of each is best known by its association), he argued that the term treaty in Article I was limited to "treaties of a political character."[363] Compacts and agreements, in contrast, were best understood as applying to agreements dealing with "mere private rights of sovereignty."[364] It is hardly necessary to emphasize the difference in language between Articles I and II, the latter of which grants the treaty power to the President and the Senate in unrestricted terms and without making reference to agreements, compacts, alliances, or confederations. Context, then, strongly suggests that the limited meaning arguably appropriate in Article I has no application in Article II.[365]

This is particularly so when one considers the consequences—for the whole point of Professor Tribe's argument is that his construction opens up a hole in the Constitution's grant of the foreign affairs powers to the national government. It is hardly sensible to have recourse

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provides no compelling reason for doubting that my construction accurately corresponds with their intent.

[363] 3 Story, supra note 202, § 1397, at 271.

[364] 3 id. § 1397, at 272. These dealt with "questions of boundary; interests in land, situate in the territory of each other; and other internal regulations for the mutual comfort, and convenience of states, bordering on each other." Id. Indeed, because of his sense that the term "treaty" was properly a general category, Justice Story was tempted to conjecture that "the original reading was 'treaties of alliance, or confederation.'" Id. at 271 n.2. He quite properly recognized, however, that this specific explanation was ruled out by the drafting history. See id. (concluding that corresponding provision of articles of confederation undermines this conjecture).

[365] Nor is Chief Justice Taney's opinion in *Holmes* to the contrary; indeed, it supports the traditional view. Taney emphasized the parallel between the use of the term "treaty" in Articles I and II, not to demonstrate that the term had a limited meaning in Article II, but to emphasize the comprehensiveness with which states were denied independent agreement-making powers. See *Holmes*, 39 U.S. (14 Pet.) at 571-72 (opinion of Taney, C.J.). Indeed, he repeatedly stressed the sweeping scope of the treaty power in Article II, noting that it "is given by the Constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty." Id. at 569. He also repeatedly emphasized that the power to make extradition agreements was both within the treaty power and could properly be the subject of a state agreement or compact if approved by Congress under the Compact Clause. See id. at 568-69, 573-76. He must, then, have rejected Professor Tribe's view.

to extraordinary theories of unenumerated powers to fill in a gap in constitutional space when there are perfectly plausible, even compelling interpretive alternatives that obviate the problem. It is hardly sensible, that is, unless one is a priori committed to upholding the exclusivity of the Treaty Clause and is willing to bend, stretch, and perhaps even tear the text in order to reach a preordained result. Perhaps, then, a case of bad conscience explains Professor Tribe's otherwise bizarre concession, hidden in a footnote in an unrelated section of his argument: "Of course, the Treaty Clause of Article II would also seem to make a 'treaty' out of any agreement approved in accordance with the Treaty Clause's terms, even if the President would not have actually needed Senate supermajority approval of the agreement."[366] "Of course." But then what happened to the troublesome gap that supposedly motivates the whole argument?

But let us put aside this devastating footnote concession, and proceed as if Professor Tribe simply had not contradicted his own position—because the textual difficulties with his view do not end here. His peripheral vision, it seems, is badly impaired. Thus, for example, if we take his formalistic interpretive approach seriously, the difficulties he purports to uncover run far deeper than he imagines. Recall that Article I, Section 10 distinguishes not only between "treaties" and "agreements or compacts," but between "treaties," "alliances," and "confederations" as well. Presumably, the Framers did not just throw in these additional terms to lengthen the document; in their usage, if we follow Professor Tribe, "treaties" must not include "alliances" or "confederations." Yet, any careful reader ought immediately to notice that the Framers conspicuously failed to include the latter terms in Article II. Are we then to conclude that the President and the Senate can make "treaties" but not "alliances" and "confederations"? But if the exclusion of "agreements" from the treaty power opened up a hole in constitutional space, the exclusion of "alliances" and "confederations" would seem to open a giant chasm. And if the power does not belong to the President and the Senate, and if the Congress as a whole is excluded, are we to conclude that the power falls within the President's unilateral authority as chief executive? Is our participation in the NATO "alliance," for example, within the President's unilateral powers? Is NAFTA a "confederation"? The implications would be undeniably mind-boggling, if they were not so obviously silly.

Professor Tribe's peripheral vision fails in another crucial respect as well. He somehow misses the fact that the term "treaties" appears

366 Tribe, Taking Text, supra note 3, at 1272 n.175.

not only in Articles I and II but in Articles III and VI as well. Recall that the judicial power extends to all cases arising under the Constitution, laws, and "treaties" of the United States[367] and that the Supremacy Clause likewise declares that the Constitution, the laws, and "treaties" are the supreme law of the land.[368] To be sure, these clauses appear at first glance to be simple cognate provisions to Article II's Treaty Clause—any "treaty" to which the Senate gives its consent under Article II falls within the judicial power of the national courts and is supreme law of the land. Yet, they have nevertheless been given a more expansive construction. In *B. Altman & Co. v. United States*,[369] the Supreme Court held that the term "treaty" in the Judiciary Act of 1891 included not only treaties approved by the Senate but executive agreements concluded by the President as well.[370] Since then most have assumed that Article III's reference to "treaties" includes all international agreements to which the United States is a party, regardless of the method through which they were processed.[371] Likewise, it has often been assumed that executive agreements are supreme law of the land because they are "treaties" for purposes of Article VI.[372] The reason is straightforward: A broad construction is necessary in order to avoid just what Professor Tribe seeks to exploit, a hole in constitutional space. Cases arising under executive agreements would otherwise be relegated to the state courts, and state laws could thwart the foreign policies of the President. These are precisely the kinds of gaps a good faith interpreter ought to avoid whenever possible. If, then, the term "treaty" in Articles III and VI includes all agreements the United States enters no matter how approved—in direct contrast to the more limited construction Professor Tribe gives it in Article I—then surely its use in Article II is expansive enough to

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367 See U.S. Const. art. III, § 2, cl. 1.

368 See id. art. VI, cl. 2.

369 224 U.S. 583 (1912).

370 Id. at 600-01.

371 See Restatement, supra note 9, § 111 cmt. e & reporters' note 4 (adopting this view); cf. Weinberger v. Rossi, 456 U.S. 25, 28-31 (1982) (construing term "treaty" in statute prohibiting discrimination unless permitted by treaty to include congressional-executive agreements).

372 See Restatement, supra note 9, § 111 cmt. d & reporters' note 2 (suggesting this view). In United States v. Belmont, 301 U.S. 324, 331 (1937), Justice Sutherland held that sole executive agreements are supreme over state law but did not expressly rest on language in the Supremacy Clause. But, as the *Restatement* recognizes, "[t]he same result might be reached under the Supremacy Clause by giving the same broad interpretation to the words 'treaties' and 'laws' that has been adopted for purposes of judicial power and jurisdiction." Restatement, supra note 9, § 111 reporters' note 2.

include any international agreement actually given the Senate's advice and consent.[373]

Finally, Professor Tribe's position suffers from still another serious structural defect. By finding presidential authority implicit in the Compact Clause, he is forced to the anomalous view that the unilateral powers of the President are closely parallel to the power of the states to enter into agreements or compacts. He seems to think that hard-nosed textual interpretation requires that they be limited by a common metric.[374] This position, however, is utterly implausible. Although we have very little precedent on which to base an authoritative judgment, it has been widely assumed from early on that the Compact Clause could have been meant to open only a narrow space for the states to deal with local matters through foreign negotiations.[375] In contrast, the President is concerned principally with matters of national and international importance. He makes armistices,

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373 If, alternatively, one were to take the view that executive agreements are within the judicial power and are supreme law of the land not because they are "treaties," but because they are "laws," it would do more harm than benefit to Professor Tribe's position. This view would remove one unnecessary argument against his interpretation of the term "treaty" but would simultaneously seriously undermine his Necessary and Proper Clause argument. If executive agreements are "laws" under the Supremacy Clause, then surely a resolution approving an executive agreement would be a "law" under the Necessary and Proper Clause. See supra Part III.B.1; supra note 243. This is not to suggest that Professor Tribe's Necessary and Proper Clause argument is, in any case, plausible. On the other hand, one might join with Justice Sutherland and suppose that the foreign affairs powers are extratextual and that unilateral agreements are supreme law of the land and within the federal judicial power simply because of the nation's status as a sovereign under international law. However, it is difficult to imagine that Professor Tribe would wish to opt for this path, while simultaneously defending his strictly textualist approach to the Treaty Clause. If the text can be radically supplemented in this way, there would be little reason—or justification—for standing on textual formalities in opposing Congress's powers to approve agreements.

374 See Tribe, Taking Text, supra note 3, at 1266 & n.154.

375 See, e.g., Henkin, supra note 9, at 152-53 (affirming this view); 3 Story, supra note 202, § 1397 (same). In fact, there have been very few actual state agreements with foreign nations, and these have been confined to matters of local interest, mostly necessitated by common borders. See Henkin, supra note 9, at 153 (describing some of agreements approved by Congress). Chief Justice Taney's opinion in Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840), is emphatic in suggesting the limited role of the states in foreign negotiations. See id. at 572-75 (opinion of Taney, C.J.) (declaring that state involvement would be "totally contradictory and repugnant" to constitutional plan). Some have thought, however, that the validity of state agreements is controlled by purely political considerations within the discretion of Congress and that the courts are to stand aloof. See, e.g., Henkin, supra note 9, at 153 (noting that "[i]t would be difficult to believe . . . the courts would invalidate . . . [a state] agreement to which Congress consented"). The classic argument to this effect, although focusing on interstate compacts, rather than compacts with foreign states, is in Felix Frankfurter & James M. Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L.J. 685, 707-08 (1925) ("[M]ost questions of interstate concern are beyond the jurisdiction of the Supreme Court; they are beyond all court relief. Legislation is the answer. . . .").

concludes agreements incident to the recognition of foreign states, settles claims, and enters agreements repairing relations with adversaries through a myriad of mechanisms. The subjects appropriate for treatment by the states and the President could not be more different. Thus, the notion that the two powers derive from the same source and are roughly comparable in scope is unsustainable.[376]

It is worth noting that despite the Compact Clause's unconditional requirement of congressional consent for state agreements and compacts, the Supreme Court has permitted states to enter agreements without congressional approval so long as these do not tend "to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." Virginia v. Tennessee, 148 U.S. 503, 519 (1893); see also United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468-71 (1978) (reaffirming this view). This should be another warning against rigid interpretive presumptions of the kind on which Professor Tribe relies.

376 *Holmes* at least implicitly supports this conclusion, though in a way that underscores the narrowness of the early understandings of the President's unilateral authority. Thus, in his opinion, Chief Justice Taney repeatedly affirmed the traditional understanding that the President has *no* power to extradite a person to a foreign nation in the absence of a treaty or an act of Congress. See *Holmes*, 39 U.S. (14 Pet.) at 574 (opinion of Taney, C.J.). But he equally affirmed the power of the states to do so by compact if they obtain the consent of Congress. See id. at 578-79. He thus saw no parallel.

Still another objection to Professor Tribe's view is implicit in what has already been said: His effort to locate the President's unilateral authority in an unenumerated power to make agreements simply fails the tests of history and of text. The President enters into unilateral agreements, it has been widely understood, not from a general agreement-making authority, but as an incident of his substantive powers. See supra note 329 and accompanying text. Thus, contrary to Professor Tribe's assertion, we cannot determine the validity of a presidential agreement solely by reference to the level of its impact on state or national sovereignty (on the supposition that this reflects the difference between "agreements" and "treaties"). We must first determine whether the agreement is sufficiently related to an aim within the President's substantive powers. During the first 150 years of our history, those powers were understood far more narrowly than today; as a consequence, the scope of the President's unilateral powers was extremely modest. *Curtiss-Wright*, *Belmont*, and *Pink*, however, mark the beginnings of an enormous expansion in the conception of independent presidential authority in foreign affairs. See United States v. Pink, 315 U.S. 203, 228-30 (1942) (upholding Litvinov Assignment); United States v. Belmont, 301 U.S. 324, 330-31 (1937) (same); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-21 (1936) (reciting expansive dicta on President's foreign affairs powers). The resulting dilemma is stark: Unless we are prepared to render the Treaty Clause a virtual nullity, there must be limits on the President's sole authority, but, given his plenary powers, how to derive those limits is not clear. See Henkin, supra note 9, at 222 (observing plaintively that "[o]ne is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland nor any one else has told us which are which" (footnotes omitted)). Ironically, then, in order to preserve the core value expressed in the Treaty Clause, we may have no choice but to fall back on a Tribe-like notion that there are some agreements that are simply too important to be concluded by the President alone. (This is not to suggest, though, that Professor Tribe is the first commentator to suggest the idea. See, e.g., Edwin Borchard, Shall the Executive Agreement Replace the Treaty?, 53 Yale L.J. 664, 669-70 (1944) (arguing that executive agreements are appropriate only for routine or unimportant matters).) Our interpretive options would

We thus have an impressive array of reasons to put aside Professor Tribe's approach. Perhaps, however, there are other arguments, which Professor Tribe has simply missed or foregone, that might more successfully distinguish between the unilateral and the congressional-executive agreement. At least one other, also based on the Compact Clause, ought to be considered, since it has sometimes been put forward in explanation of the unilateral agreement and could potentially aid Professor Tribe's position.[377] It has the additional merit of not being based on the false premise which mars his own approach.

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be much broader, of course, were we to reject Professor Tribe's textualism and look to history for appropriate limits on the President's unilateral powers.

Finally, although I do not have space to consider it here, Professor Tribe's effort to define the dividing line between agreements and treaties is unsatisfactory. See Tribe, Taking Text, supra note 3, at 1266-68 & 1267 n.156 (suggesting that treaty status is ultimately determined by agreement's impact on state or national sovereignty, and arguing that burden WTO Agreement's dispute resolution mechanism imposes on state sovereignty renders it a treaty). Most importantly, his focus on dispute resolution procedures is misguided. Not only were these often included in unilateral agreements, even in the nineteenth century, see Moore, supra note 20, at 408-17 (describing nineteenth century claims settlements including arbitration provisions), there is nothing inherent in the inclusion of such a provision that renders an agreement ipso facto beyond the President's unilateral authority. That view overlooks the entire corpus of the international law of treaties and of state responsibility, which not only makes treaties binding but provides remedies for their breach. See, e.g., Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, arts. 60, 65-66, 1155 U.N.T.S. 331, 346-48 (providing, inter alia, for suspension or termination of treaties in response to material breach); Draft Articles on State Responsibility, arts. 41-46, Report of International Law Commission, U.N. GAOR, 51st Sess., Supp. No. 10, at 125, 141-43, U.N. Doc. A/51/10 (1996) (defining rights of states which are victims of internationally wrongful act), reprinted in 37 I.L.M. 440, 454-56 (1998). Dispute resolution procedures are not necessarily a greater restriction on domestic sovereignty; they simply provide a fair and impartial method for resolving conflicts that might otherwise be resolved by the force of power rather than the force of the better argument. In any case, just as we have the power to violate a treaty stipulation, we also have the power to disregard the rulings of an international tribunal and, unfortunately, have not always been shy about exercising that power. For an extended consideration of the United States's withdrawal from Nicaragua's suit against it in the International Court of Justice, see the articles collected in The International Court of Justice at a Crossroads (Lori Fisler Damrosch ed., 1987).

Professor Tribe complains that Professor Ackerman and I have disparaged as ad hoc the effort to draw lines between treaties and executive agreements. See Tribe, Taking Text, supra note 3, at 1266. In fact, what we "disparaged" was his effort to validate most congressional-executive agreements but deny the constitutionality of those dealing with particularly important matters. See Ackerman & Golove, supra note 5, at 921-22. He apparently now agrees, having reversed views and written off all congressional-executive agreements. It is of course true that drawing a line between agreements that may be concluded on the President's sole authority and those which can only be concluded as treaties or congressional-executive agreements is extremely difficult, but that difficulty does not excuse a failure to do our best.

377 See, e.g., Borchard, supra note 376, at 667-70 (articulating argument based on Compact Clause); Richard Cohen, Self-Executing Executive Agreements: A Separation of Powers Problem, 24 Buff. L. Rev. 137, 139-40 (1974) (same).

The argument runs as follows: By permitting states to make agreements or compacts with congressional consent, the Framers revealed that they did not deem the full protection of Senate supermajority consent vital for this lesser category of international undertakings. It is admittedly odd that they did not expressly provide an alternative procedure for federal agreements and compacts. Nevertheless, the inference is strong, or so it is claimed, that they did not believe that these lesser undertakings, whether made by the states or the federal government, require the heightened scrutiny of senatorial consent. Why would they have allowed the states this option but have denied it to the national government? There are grounds, then, for interpreting the Treaty Clause to permit the approval of "agreements" through a less burdensome procedure, and the power thus revealed belongs to the President.

With the exception of the hole in constitutional space argument, it should be clear that this view, which is really only a modified version of Professor Tribe's position, is subject to all of the same objections applicable to his original argument.[378] But there is a further

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[378] This version presumes, for example, that the Executive Power Clause is a general grant of all powers that are executive in character, that there is an undifferentiated presidential agreement-making power, that the powers of the states and the President derive from the same source and are roughly parallel, and that agreement-making is an executive function. The flaws in these arguments have already been demonstrated. As to the last, it may be added that it is extremely difficult to see why we should disregard the Framers' express preference for congressional supervision over agreement-making in the state context when moving into the non-text-based, parallel federal agreement-making power. This, of course, seriously undermines the argument for executive unilateralism. Even were we to avoid this problem by recognizing a congressional rather than presidential power to approve "agreements," however, this would simply introduce a new difficulty. It would necessarily mean that approving some agreements falls within the Necessary and Proper Clause. In that case, Professor Tribe's claim that the term "laws" does not include resolutions approving international agreements, whatever force it would otherwise have had, could not be sustained. See supra Part III.B.1; supra note 243. Moreover, if the Compact Clause suggests that the Framers must have assumed that Congress could approve presidential "agreements," then their failure to specify such a power in Article I, Section 8 suggests, in turn, that they assumed it was already within the Necessary and Proper Clause. That clause, however, does not distinguish between "agreements" and "treaties" and thereby creates a strong inference that the distinction does not apply to Congress's implied powers to approve federal commitments. It would be an interpretive leap of faith to find implicit limits on Congress's implied powers in a provision affirmatively giving Congress supervisory authority over state agreement-making. Thus, the more persuasive version of the argument from the Compact Clause leads right back to the modern congressional-executive agreement.

Professor Tribe professes to find this argument "astonishing." Tribe, Taking Text, supra note 3, at 1272. In particular, he takes us to task for concluding that "we do not see how the words of the Compact Clause—designed for a very different problem—are relevant in determining the *scope* of congressional power under Article I[, Section 8]." Ackerman & Golove, supra note 5, at 921 n.514 (emphasis added), quoted in Tribe, Taking Text, supra note 3, at 1271. Once again, of course, we made this point in response to

objection to this specific form of the argument that is of greater importance for our purposes. By eschewing reliance on the false underpinnings of Professor Tribe's view, this version is forced to concede the incorrectness of his basic premise about the exclusivity of the Treaty Clause. Since there is no gap, the President may admittedly conclude unilaterally what he and the Senate are empowered to conclude through the advice and consent procedure. Yet, if the arguments for the Treaty Clause's exclusivity give way in the face of the rather remote string of inferences from the Compact Clause, then it is exceedingly difficult to see why they do not collapse in the face of the much stronger and more direct arguments in favor of the power of the national legislature. The Compact Clause, after all, appears in a section devoted to limits on the powers of the states and does not even mention federal agreements, let alone unilateral presidential authority.[379] Congress, in contrast, is explicitly vested with supervisory authority not only over state agreements but over virtually the whole of our foreign affairs. The Compact Clause argument, in short, has no way of explaining why we should accept presidential but not congressional-executive agreements.[380]

Professor Tribe's then view that some agreements could be approved by Congress but others were beyond the scope of its authority. Although he finds the argument "astonishing," he seems to have drastically revised his view just to avoid its force. What else can explain the vigor with which he denies Congress any authority to approve presidential agreements, even those which it could approve if negotiated by the states—even though he concedes that under his reading the Framers' scheme presents "a puzzle." Tribe, Taking Text, supra note 3, at 1271 n.172. He never seems to contemplate the possibility that this puzzle provides a reason for further reflection on whether the interpretation he insists upon might require revision, or at least be less compelling than he had at first thought.

[379] Indeed, the most persuasive inference as to why the Framers assigned supervision of state agreements to the Congress rather than to two-thirds of the Senate is not that they wished to provide a less burdensome procedure for minor agreements. On the contrary, it is that they thought the House's participation in this class of essentially local agreements did not pose the same threat to the interests in secrecy, dispatch, and long-term perspective that might apply to agreements affecting the nation as a whole. When these considerations did not require otherwise, the Framers were content to let the national legislature play its ordinary role. This, in turn, suggests that they had no aversion to House participation in approving agreements so long as the threats about which they were concerned were not present. And this is precisely what the congressional-executive agreement permits: When the President does not believe that House participation threatens these important interests, he may seek the approval of Congress as a whole rather than the approval of one House by supermajority vote. For further discussion, see supra notes 68-75, 186, and accompanying text. Furthermore, the fact that the Framers assigned the supervisory role to Congress rather than the President is yet further evidence that they viewed approving agreements as a legislative not an executive task. See supra notes 247-62 and accompanying text.

[380] Professor Tribe might also have tried a functionalist line of argument. He might have conceded, for example, that the Treaty Clause cannot be exclusive and that the unilateral executive agreement is justifiable only as an implied power of the President incident to his executive authority. He might have further conceded that presidential agreements are a derogation from the protections afforded state interests by the Treaty Clause. Still, citing

E. A Closing Flourish: Competing for the Father's Approval—Who is Really Marshallian?

Professor Tribe takes one final crack at the *expressio unius* line of attack, although it is not entirely clear whether he means his argument to be rhetorical or substantive. Taking umbrage at Professor Ackerman and me for dubbing our interpretation of the Necessary and Proper Clause "Marshallian," he wishes to make clear that it is anything but and that "[t]he great Chief Justice would likely distance himself" from arguments like ours.[381] Indeed, he points out, "we need look no further than Chief Justice Marshall's opinion in *Marbury v. Madison*" to discover his attachment to the *expressio unius* principle.[382] Marshall's holding, after all, was that Article III's "architectural"[383] specification of cases within the Supreme Court's original jurisdiction is exclusive notwithstanding the absence of the word "only."

It is, of course, true that Chief Justice Marshall held that Congress could not add to the Court's original jurisdiction and, in doing so, implicitly invoked the *expressio unius* canon.[384] But it is instruc-

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the sole organ power, he could have claimed that they are justifiable because the Constitution vests control over the conduct of foreign affairs in the President. In the external realm, he might have argued, were the President not accorded some flexibility in concluding agreements unilaterally, our foreign relations would be hamstrung. The President is on the front-line, but Congress, as important as its foreign affairs powers are, has a mostly supervisory role. Thus, according to this view, its powers do not require the kind of flexibility essential to executive efforts, nor justify the significant infringement of federalism interests that recognizing the congressional-executive agreement would require.

To be sure, given the historical evidence about the Framers' actual purposes in adopting the Treaty Clause, this argument may give a reasonable account of what they might have had in mind. However, it is critical to recognize that its plausibility, if any, is almost entirely parasitic on history. As a matter of purely textual exegesis, it rests on extravagant inferences from the President's already textually problematic sole organ power. See supra notes 309-18 and accompanying text. Moreover, it overrides both the strong *expressio unius* inference and the federalism arguments against presidential unilateralism, see supra notes 326-29 and accompanying text, on the basis of speculative functionalist considerations that the Framers, for whatever reasons, did not incorporate into the text. In this respect, it is even weaker than the Compact Clause argument. Given the lack of textual support for this view, then, it does little to advance Professor Tribe's textualist agenda. This just drives home the main point: The compulsion to find a *textual* basis to explain the unilateral agreement while ruling out the congressional-executive agreement is just that—a drive that is motivated not by textual imperatives but by a prior commitment to reaching a certain result. In any case, even were this functionalist account more textually compelling than I believe, it still would not aid Professor Tribe. At best, it would only demonstrate that the text is, as I have said all along, indeterminate.

381 Tribe, Taking Text, supra note 3, at 1275.

382 Id.

383 Id.

384 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-75 (1803). The relevant clause of Article III provides:

tive to look more precisely at what he said. For rather than blunderbuss assertion of the maxim, he was at pains to show that anything but an exclusive construction would render the provision "mere surplusage, . . . entirely without meaning, . . . form without substance."[385] His discussion is thus consistent with Hamilton's in *Federalist No. 83* and with the traditional authorities I cited earlier. The *expressio* inference is most persuasive when necessary to avoid draining a provision of all meaning and purpose. When not necessary to that end, its force is greatly reduced.[386] As we have seen, accepting the congressional-executive agreement, far from rendering the Treaty Clause a nullity, leaves it substantial scope.[387]

However, the inapplicability of Marshall's reasoning is hardly the main point. Is there self-conscious irony in Professor Tribe's valorization of Marshall's performance in *Marbury* as an exemplar of original meaning jurisprudence? *Marbury* was certainly as political a decision as any in the history of the Court, its outcome preordained by the overwhelming political power of the Republican Congress and White House arrayed against the Federalist Court.[388] The Chief Justice's opinion is justly celebrated not for the rigor of its legal argumentation but for its remarkable political savvy. Under the most inauspicious circumstances, Marshall was able to lay the foundations for an expansive conception of the judiciary's role while strategically conceding the

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> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. art. III, § 2, cl. 2.

385 *Marbury*, 5 U.S. (1 Cranch) at 174.

386 See supra notes 83-87, 92-94, and accompanying text.

387 See supra notes 97-98 and accompanying text.

388 As the last Federalist stronghold after the Jeffersonian sweep in 1800, the Court was under intense political attack, and its institutional position was tenuous at best. By repealing the Judiciary Act of 1801, Congress had already unseated 16 sitting federal circuit court judges, and impeachment proceedings against another were under way. Congress had even delayed the Supreme Court's term for over a year in response to the Court's temerity in issuing an order to show cause to Secretary of State Madison. Under the circumstances, the Court had no choice but dismiss the suit or watch its order go unenforced and its institutional position crushed. For an engaging historical account emphasizing Marshall's role in the intense political controversies of the moment, see Bruce Ackerman, The Roots of Presidentialism 97-140 (1997) (unpublished manuscript, on file with the *New York University Law Review*); see also Dean Alfange, Jr., *Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom, 1993 Sup. Ct. Rev. 329, 349-72 (providing detailed historical account); James M. O'Fallon, *Marbury*, 44 Stan. L. Rev. 219 (1992) (same). The parallels to the Court's position at the height of the New Deal crisis should be clear.

case to Jefferson.[389] Brilliant though his effort might have been, however, the opinion's weaknesses as a "legal" text are barely submerged below the surface of his masterful rhetoric.

Begin with the fact that Marshall was himself a party to the dispute and an important witness. It was Marshall, after all, who as Secretary of State had negligently failed to deliver the sealed commission to Marbury before inauguration day; he was also a key witness to a crucial fact, that the commission had actually been signed and sealed.[390] One can hardly imagine a clearer case for recusal. Second, while Marshall famously dismissed Marbury's claim for want of jurisdiction, the bulk of the opinion is a lengthy disquisition on the merits self-evidently designed to embarrass the new chief executive and provide political hay for the Federalists.[391] By what right did the Chief Justice gratuitously consider and decide the merits, only to dismiss for lack of jurisdiction?

But it is not only that the opinion was obviously politically motivated. Marshall had to strain to find a constitutional issue and then strain again to find Section 13 of the Judiciary Act of 1789 unconstitutional. There is a virtual consensus that he could easily have avoided the constitutional conflict simply by construing Section 13 not to provide original jurisdiction over mandamus actions. Most have thought that this was the better interpretation in any event.[392] More to the point, the widely accepted historical verdict is that Marshall's reasoning on the constitutional question was defective. Indeed, *expressio unius* notwithstanding, most modern scholars think he got it wrong:

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389 These features of the decision have been frequently remarked upon. See, e.g., Robert G. McCloskey, The American Supreme Court 25-28 (Sanford Levinson ed., 2d ed. 1994); Alfange, supra note 388, at 366-72, 380-83; William W. Van Alstyne, A Critical Guide to *Marbury v. Madison*, 1969 Duke L.J. 1, 34-38.

390 See Alfange, supra note 388, at 392-93 (describing Marshall's role); Ackerman, supra note 388, at 74-75 (same); Van Alstyne, supra note 389, at 8 (same).

391 See Alfange, supra note 388, at 387-91 (discussing Marshall's agenda); Edward S. Corwin, *Marbury v. Madison* and the Doctrine of Judicial Review, 12 Mich. L. Rev. 538, 542-43 (1914) (same); Van Alstyne, supra note 389, at 6-8 (same). As Corwin characteristically put it:

> To speak quite frankly, this decision bears many of the earmarks of a deliberate partisan *coup*. The court was bent on reading the President a lecture on his legal and moral duty to recent Federalist appointees to judicial office . . . but at the same time hesitated to invite a snub by actually asserting jurisdiction of the matter.

Corwin, supra, at 542-43.

392 See, e.g., Corwin, supra note 391, at 541-43 (arguing on this ground that Marshall misinterpreted Section 13); David P. Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835, 49 U. Chi. L. Rev. 646, 653 (1982) (same); Van Alstyne, supra note 389, at 14-16 (same). Although Marshall read Section 13 to grant the Court original jurisdiction over mandamus actions, that section seems only to have authorized the Court to issue writs in cases otherwise properly within its jurisdiction.

Article III *should have been read to permit Congress to add to the Court's original jurisdiction.*[393] That was the contemporaneous view of the First Congress and the implicit view of the Supreme Court in earlier cases.[394] Most importantly, though, Marshall's claim that a nonexclusive reading would render the provision surplusage was extremely dubious.[395] This would seem to make *Marbury* an extremely unappealing precedent for Professor Tribe's original meaning argument.

The irony, however, goes deeper. Professor Tribe thinks "[i]t cannot escape notice" that Marshall read the Original Jurisdiction Clause as exclusive.[396] However, it also ought not escape notice that the Chief Justice himself later repudiated the heart of this argument.

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393 See, e.g., Alfange, supra note 388, at 397-405 (arguing for nonexclusive reading of Original Jurisdiction Clause); Corwin, supra note 391, at 539-41 (same); Currie, supra note 392, at 653-55 (same); Van Alstyne, supra note 389, at 30-33 (same). Even Beveridge, Marshall's partisan biographer, viewed his reasoning as "a pretext" for establishing the power of judicial review, 3 Albert J. Beveridge, The Life of John Marshall 133 (1916), and considered Marshall's constitutional argumentation, in the face of the contrary view of the First Congress, to be, charitably, the "only original idea" in the opinion, id. at 128. "Nobody," Beveridge claimed, "ever had questioned the validity of that section," which had been written by "[Oliver] Ellsworth, who preceded Marshall as Chief Justice" and who "was one of the greatest lawyers of his time and an influential member of the Constitutional Convention." Id. Notwithstanding, there have been dissenting voices. See, e.g., Robert Lowry Clinton, *Marbury v. Madison* and Judicial Review 96-97 (1989) (defending version of Marshall's rationale); Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 463-78 (1989) (declining to rest on Marshall's reasoning but affirming his result).

394 See Alfange, supra note 388, at 403-05 (discussing relevant history); Susan Low Bloch & Maeva Marcus, John Marshall's Selective Use of History in *Marbury v. Madison*, 1986 Wis. L. Rev. 301, 326-33 (same); O'Fallon, supra note 388, at 256 (same). Bloch and Marcus in particular demonstrate how shoddily Marshall dealt with inconsistent precedents.

395 See Alfange, supra note 388, at 399-400 (criticizing Marshall's argument); Corwin, supra note 391, at 540 (same); Currie, supra note 392, at 654-55 (same); Van Alstyne, supra note 389, at 31-32 (same). As these scholars have pointed out, contrary to Marshall's rhetoric, allowing Congress to add to the Court's original jurisdiction would not have left the Original Jurisdiction Clause without operation. It could be read to specify a minimum but not a maximum, so that Congress could add to but not subtract from the constitutionally assigned categories of cases. Alternatively, the division between original and appellate jurisdiction could have been a default assignment subject to congressional revision. The particular wording of the sentence that specifies the Court's appellate jurisdiction poses some difficulties. See U.S. Const. art. III, § 2, cl. 2. Marshall read the affirmative reference to appellate jurisdiction as an implicit negating of the power to add to original jurisdiction. Here, again, though, alternative readings were available. See Alfange, supra note 388, at 398-99 (arguing that affirmative reference to appellate jurisdiction was made to provide context for granting Congress power to make exceptions to Court's appellate jurisdiction); Corwin, supra note 391, at 540-41 (arguing that Marshall need not have construed affirmative reference as limited to appellate jurisdiction, i.e., that Court's jurisdiction in these cases could be both appellate and original).

396 Tribe, Taking Text, supra note 3, at 1275.

In *Marbury*, applying *expressio unius,* he had written: "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."[397] But in *Cohens v. Virginia*,[398] he reversed direction, deriding this language as mere dicta.[399] Although he stubbornly clung to the view that Congress could not add to the Court's original jurisdiction, he now disowned the implications of his own earlier argument. Congress could not give original jurisdiction where the Constitution gave appellate, but it could grant the Court appellate jurisdiction where the Constitution gave original.[400] Without acknowledging the tension this created with his earlier reasoning, he simply reiterated that in *Marbury* the provision had to be given an exclusive sense to avoid rendering it "totally inoperative."[401] But, he added:

> The effort now made is, to apply the conclusion to which the court was conducted by that reasoning, in the particular case, to one in which the words have their full operation, when understood affirmatively, and in which the negative or exclusive sense, is to be so used as to defeat some of the great objects of the article.[402]

In other words, Marshall disowned the very sort of rigid *expressio unius* argument Professor Tribe puts forward as decisive. According to the "great Chief Justice," where an exclusive reading is unnecessary to avoid rendering a provision nugatory, the maxim should not be applied in the face of more persuasive arguments to the contrary.[403]

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397 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803); see also id. at 175 (repeating same).

398 19 U.S. (6 Wheat.) 264 (1821).

399 See id. at 399-401. The need to disregard *Marbury* prompted Marshall to give a classic statement of the proper weight to be accorded dicta. See id. at 399-400.

400 See id. at 395-97.

401 Id. at 401.

402 Id. Scholars have noted the inconsistency. See, e.g., Alfange, supra note 388, at 400 (noting tension between *Marbury* and *Cohens*); Corwin, supra note 391, at 540-41 (arguing that *Cohens* "abandoned" reasoning of *Marbury* and left its "precise decision . . . hanging in mid-air"); Currie, supra note 392, at 654-55 (noting that "Marshall himself was to reject the implications of his *Marbury* reasoning in *Cohens v. Virginia*").

403 As with a number of other constitutional provisions discussed earlier, see supra notes 117-23, 131-34, 194-209, and accompanying text, it is instructive to note the various ways in which the Court has held that the Supreme Court Jurisdiction Clauses are nonexclusive. *Cohens* stands for the proposition that the Congress may confer on the Court appellate jurisdiction over cases falling within its original jurisdiction that may nevertheless have originated elsewhere. Thus, although assigned only original jurisdiction over certain cases, the Court is not exclusively limited to exercising that form of jurisdiction over them, and, despite the arguably contrary language in the Appellate Jurisdiction Clause, the cases described as within the Court's appellate jurisdiction are not an exclusive list. In Ames v.

Perhaps then it is appropriate to cede the Marshallian mantle to Professor Tribe, since, like the Chief Justice in *Marbury*, he too seems driven by purposes unconnected to a genuine construction of the text. Years hence, perhaps he too will reconsider, returning to his own earlier view affirming interchangeability. On the other hand, Professor Ackerman and I never meant to invoke the Marshall of *Marbury* in favor of the congressional-executive agreement. Because a broad construction of the Necessary and Proper Clause plays such a large role in the argument, we were invoking the Marshall of *McCulloch*. Now, we might fruitfully add the Marshall of *Cohens*. At this stage of the argument, and in the absence of any compromise solution in the offing,[404] I can only respectfully submit this dispute over the great Chief Justice's approbation to the reader's impartial judgment!

Kansas, 111 U.S. 449, 467-69 (1884), moreover, the Court extended this ruling to permit Congress to assign matters within the Court's original jurisdiction to the lower federal courts, and it was already understood that the states had concurrent jurisdiction in some cases. Thus, the assignment of original jurisdiction to the Court was not exclusive of other courts exercising original jurisdiction in the same cases.

It is instructive as well to consider where the Court has found and where it has refused to find missing "only"s. Thus, while *Marbury* in effect found a missing "only" in one part of the Original Jurisdiction Clause ("Only in all Cases . . ., the Supreme Court shall have original Jurisdiction"), see *Marbury*, 5 U.S. (1 Cranch) at 174, the *Ames* Court refused to find a missing "only" in another portion of that clause ("In all Cases . . ., only the Supreme Court shall have original jurisdiction over . . ."), see *Ames*, 111 U.S. at 466-69, and the *Cohens* Court refused to find the *Marbury* "only" in a comparable part of the Appellate Jurisdiction Clause ("Only in all the other cases before mentioned, the Supreme Court shall have . . .") or in still another part of the Original Jurisdiction Clause ("In all Cases . . ., the Supreme Court shall only have original Jurisdiction . . ."), see *Cohens*, 19 U.S. (6 Wheat.) at 397-99. I mention the Court's highly contextualized treatment of missing "only"s because Professor Tribe makes a great deal of rhetorical hay out of our reliance on missing "only's" in the Treaty Clause and Professors Ackerman's and Amar's reliance on the same in Article V. See Tribe, Taking Text, supra note 3, at 1244-45 & 1245 n.77 (ridiculing "the search for absent 'only'"). He seems to think that the interpretive difficulties can be surmounted simply by always reading missing "only"s into the text. See id. (arguing for default assumption of exclusivity). However, as the Court's original jurisdiction jurisprudence demonstrates, this formulaic solution is out of step with the subtleties of constitutional interpretation as reflected in our constitutional tradition. Whether a missing "only" should be assumed will depend on context and a host of other factors. In any case, as should be apparent by now, I have studiously avoided any reliance on missing "only"s in the Treaty Clause in making the textual case for the congressional-executive agreement.

[404] Perhaps, we can dub Professor Tribe's view "Marburyan," while Professor Ackerman and I retain the label "Marshallian." Admittedly, Professor Tribe's assent may not be forthcoming. Should first authorship not count for something?

IV
OF FREE-FORMISM, CONSTITUTIONAL MOMENTS, AND RULES OF RECOGNITION

I hope I have succeeded in demonstrating that Professor Tribe's interpretive methodologies cannot withstand critical scrutiny and that free-form interpretation is pervasively on display throughout his argument. This does not imply that the best construction of the text is nonexclusive. As I made clear at the outset, I claim only that the text is subject to two conflicting plausible interpretations. For myself, even were I to reconsider the persuasiveness of Professor Ackerman's larger theory, I would not think it sensible to try to resolve the question on purely textual grounds.[405] The point, however, is that Professor Tribe's elaborate arguments, despite the confidence with which he presses them and the scorn he heaps on opposing positions, come in the end to nothing more than what an astute reader would immediately infer from the text. Indeed, Professor Ackerman and I sought to exploit this first blush intuition by beginning our article with the question: "Whatever happened to the Treaty Clause?"[406]

But Professor Tribe pushes the free-form theme beyond mere textual arguments: He insists as well that loose interpretive methodologies penetrate every level of Professor Ackerman's theory of higher lawmaking and that our article provides an egregious case-in-point.[407] It is worth considering, then, whether his broader theoretical objections are more persuasive than the shaky textual points he was able to muster. As we shall see, a number of his scattershot arguments are simply not meritorious, while others apparently reflect a deep misunderstanding of Professor Ackerman's project. Indeed, one of the virtues of the latter's efforts at historical reinterpretation is precisely that it permits us to avoid the necessity of free-form methodologies in justifying the modern legal landscape, methodologies that Professor Tribe blithely reaffirms without seeming to notice the deep tensions this creates with his supposed interpretive commitments. In still other cases, Professor Tribe's arguments provide an occasion to attempt a deeper account of the nature of Professor Ackerman's claims. What exactly is Professor Ackerman proposing when he urges us to accept constitutional change outside the formal requirements of Article V?

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405 The methodological questions such an enterprise would raise, however, are beyond the scope of this Article.

406 Ackerman & Golove, supra note 5, at 801.

407 See, e.g., Tribe, Taking Text, supra note 3, at 1233, 1288 (alleging Professor Ackerman takes "a disturbingly loose approach to descriptive and normative matters alike" and that our NAFTA article makes manifest "a significant threat to the whole enterprise of constitutional dialogue" that is implicit in Professor Ackerman's work).

Does Professor Tribe provide a plausible alternative account? Finally, Professor Tribe's charges require some defense of our central interpretive claim about events in the wake of World War II.[408]

Professor Tribe presses a number of points that seem directed at some other article and some other theory of constitutional change. After attributing various arguments to us, he goes on to give refutations which he seems to count as winning debating points on some imagined scorecard. However, the arguments he (purports) to refute are nowhere to be found within the four corners of our article. Thus, he claims that we advocate searching the text for arguable ambiguities and view these "as license immediately to leap outside the discourse of text and structure;"[409] that we believe that past violations repeated frequently enough justify disregarding contrary textual commands because "once the Constitution's text and structure have been ignored long enough, we can rationalize away textual commands and the existence of a clash between settled practice and long-ignored principle;"[410] and that we contend that the acquiescence of a branch in the violation of structural provisions of the Constitution is sufficient in itself to justify the breach despite the fact that it "is not the prerogative of those who hold public office . . . to abdicate constitutional protections essential to the architecture of our government."[411] Of course, Professor Tribe's arguments, whether they are persuasive or not, are beside the point in this context since we did not make any of the arguments he chooses to deride.[412] To be sure, Professor

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408 Our claim is that the political events of 1943 through 1948 are best interpreted as a self-conscious movement to amend the Treaty Clause informally and validate the new congressional-executive agreement procedure. See Ackerman & Golove, supra note 5, at 861-96.

409 Tribe, Taking Text, supra note 3, at 1278; see also id. at 1279 (similar).

410 Id. at 1285; see also id. at 1280 (similar). For this point, Professor Tribe relies on a brief remark Professor Ackerman and I made in a letter to President Clinton regarding the WTO Agreement. See id. at 1280 (citing Letter from Bruce A. Ackerman, Professor, Yale Law School, and David M. Golove, Professor, University of Arizona College of Law, to President William J. Clinton 3 (Sept. 21, 1994) (on file with the *New York University Law Review*)). In context, however, it is clear that the argument was connected to our broader argument about the character of the political movement of 1945. In any case, no such argument appears in our article.

411 Tribe, Taking Text, supra note 3, at 1281.

412 I believe that the latter two of his arguments are not, in fact, persuasive. Longstanding practice is an important data point for constitutional interpretation, and the acquiescence of an affected branch, depending upon a number of contextual considerations, may in some cases be significant as well. Relevant in the latter case would be, *inter alia*, the degree of consensus among the members of the affected branch, the length of time that consensus holds, and whether the purpose of the constitutional provision is to assure political accountability precisely in the way the affected branch, by its acquiescence, is seeking to avoid. In these respects, among others, I reject Professor Tribe's strict textualism as well as other forms of originalism, but I cannot pursue these matters further here.

Ackerman's theory permits constitutional change outside of the formal amendment procedures of Article V but only when the strict requirements of a specially formulated set of criteria are met.[413] The existence of textual ambiguities, past violations, or institutional acquiescence are either not among the relevant criteria or are in themselves clearly insufficient. Thus, while arguments of the kind Professor Tribe pursues make for enjoyable reading, they hardly advance the debate.[414]

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413 See 1 Ackerman, supra note 4, at 266-90 (elaborating criteria that must be met, in his view, to validate an informal amendment).

414 Professor Tribe also repeatedly chastises us for affirming the constitutionality of NAFTA without bothering to analyze its specific terms in any detail. This "reflects precisely the free-form character of what Professors Ackerman and Golove put forth as constitutional interpretation." Tribe, Taking Text, supra note 3, at 1227; see also id. at 1251-52, 1277-78 (repeating sharp criticism on this point). Of course, we did not closely analyze NAFTA's terms because our argument is that Congress may approve *any* international agreement falling within its substantive powers. Given Congress's power to regulate foreign commerce, it is quite evident, and no one has disputed, that NAFTA falls squarely within its substantive authority. This should not be surprising. It is frequently unnecessary to engage in a searching analysis of the terms of congressional legislation when the only question is whether it falls within the scope of one of Congress's enumerated powers. Ironically, Professor Tribe's position is closely parallel, but opposite to our own. Despite his derisive comments, he, too, eschews analyzing NAFTA's terms. See id. at 1277 (conceding as much). Indeed, for him it is unnecessary to determine even whether NAFTA is a regulation of foreign commerce. The only relevant fact is that Congress is without power to approve international agreements, that is, *any* international agreement.

Professor Tribe also argues that our free-form arguments are merely a cover for our hostility to the states and that our real goal is to overturn "the Framers' vision of a Union of equal and sovereign states." Id. at 1230. I do not know Professor Ackerman's views on the continuing values of federalism and admit to some skepticism of my own about the value of the Framers' state-centered design in contemporary conditions. However, this is obviously entirely beside the point. Professor Ackerman's theory is, and must be, politically neutral in the sense that it states criteria for legitimate constitutional transformations that apply irrespective of the content of the proposed changes. Depending on events, then, we could move either further away from or back towards the Framers' initial vision, just as we could move back to an exclusivist view of the Senate's role in treaty-making. The policy arguments are irrelevant from this perspective. Professor Tribe displays an ignorance of the crucial history, moreover, when he claims that we think it was the "pig-headedness" of the states that obstructed the adoption of a formal amendment depriving the Senate of its special role. Id. at 1229. On the contrary, all accounts were that the states were more than prepared to approve the amendment proposed by the House. The problem was the Senate itself. See Ackerman & Golove, supra note 5, at 865 & n.297 (recounting Senate Judiciary Committee's determination to delay consideration of treaty amendment). Despite Professor Tribe's patriotic sentiments about the Senate's high-mindedness, observers at the time were extremely skeptical about whether it could be convinced to cooperate in the elimination of its own treasured prerogative. See id. (citing contemporary newspaper editorials). When in response to the House's amendment proposal the Senate Judiciary Committee cynically announced that it would not consider any amendments until after all the soldiers had returned home, the Washington Post declared: "[T]he Senate will have to be blasted out of its foxhole of entrenched power." Signal to the House, Wash. Post, Feb. 28, 1945, at 8.

Professor Tribe also repeatedly suggests that by claiming that Article V is nonexclusive, Professor Ackerman's project was inevitably doomed to free-formism. Having disregarded the clear meaning of Article V, he was bound to feel equally free to find other fundamental procedures nonexclusive as well.[415] This is borne out, he thinks, by our claims about the Treaty Clause.[416] I leave to Professor Ackerman the task of defending the textual argument in favor of a nonexclusive reading of Article V.[417] For reasons I discuss below, whatever one concludes about the success of that endeavor, one cannot defeat his larger project simply by rejecting his textual arguments.[418] For present purposes, the important point is that Professor Tribe badly mistakes what flows inevitably from Professor Ackerman's views about informal higher lawmaking. It should be obvious that whether Article V is exclusive or not has no bearing on the proper method of engaging in *textual* interpretation of other provisions of the Constitution and that nothing in Professor Ackerman's theory seeks to justify or encourage loose methods of textual exegesis. What does follow inevitably, in contrast, is that there may be times when textual exegesis is not the appropriate task for the constitutional interpreter. When an informal transformation of a constitutional provision has occurred, the interpreter must (at least partially) eschew the text in favor of new legal materials that have been validated through non-Article V processes. This inevitably requires resort to history but not to free-form interpretive methodologies. Hence, our basic thesis about the Treaty Clause: Events in 1945 transformed the constitutional status of treatymaking, validating a new congressional power to approve international agreements. The ultimate justification for this shift—whatever textual arguments can be made in its behalf—is based on an interpretation not of the original meaning of the text but of the meaning of 1945.[419]

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415 See, e.g., Tribe, Taking Text, supra note 3, at 1233, 1241 (charging that Professor Ackerman's acceptance of an extratextual amendment procedure "has led him to treat *all* constitutional text and structure as casually as he treats Article V").

416 See id. at 1233, 1241 (stating that our interpretation of Treaty Clause is "[u]nsurprising[ ], and perhaps even predictabl[e]" in light of Professor Ackerman's theory of higher lawmaking).

417 See 2 Ackerman, supra note 4, at 71-88 (analyzing Article V with reference to history of Convention).

418 See infra notes 426-33 and accompanying text.

419 We noted the indeterminacy of the text only to make it easier for some to accept the implications of Professor Ackerman's theory of informal amendment. Our implicit claim was that at least when the text is ambiguous, a constitutional movement like that of 1945 justifies abandoning a long-settled construction of the text for a new reading that is itself a plausible construction of the relevant provisions. We likewise thought it might be easier for some to accept Professor Ackerman's view in this case because of the peculiar difficulties of amending the Treaty Clause under Article V, in which two-thirds of the Senate is given a privileged role in validating amendment proposals. See U.S. Const. art. V. Could

There is, however, a deeper flaw in Professor Tribe's argument. By insistently focusing on questions of interpretive methodology, Professor Tribe misses the main point that Professor Ackerman's is not a theory of interpretation at all. His is a theory of exogenous constitutional transformation, which, of course, has interpretive aspects and consequences, but which leaves untouched many of the fundamental methodological questions which are the focal point of Professor Tribe's concerns. There is one interpretive consequence of Professor Ackerman's view, moreover, that is crucial from the point of view emphasized by Professor Tribe, only it works precisely in the opposite direction from what he supposes. Rather than encouraging objectionable free-formism, one of the central merits of the Ackermanian approach is its capacity to liberate us from such methods in justifying major parts of the constitutional practices of the modern era. Yet, Professor Tribe seems to miss this central point. Even as he reproaches us, he unselfconsciously persists in sustaining the constitutional transformations of 1937 as unproblematic acts of ordinary interpretation that require only cursory examination.[420] This is not surprising, for what he emphatically wishes to accomplish is only minor constitutional surgery—sacrificing the obscure congressional-executive agreement without calling into question the more sweeping changes of the New Deal.[421] But does anyone doubt that were he so inclined, Professor Tribe could mount an impressive original meaning assault on the modern Commerce Clause jurisprudence and that the textual and structural arguments would be at least as persuasive as those he musters against the congressional-executive agreement? When pressed to explain the difference, he says only that what was at stake in 1937 was just "the breadth of Congress's" commerce powers

two-thirds of that body ever be convinced to renounce through formal amendment the prerogative of one-third plus one of its members to veto treaties? See Ackerman & Golove, supra note 5, at 909 (noting dysfunctionality of Article V in this instance).

420 See Tribe, Taking Text, supra note 3, at 1296-99 (concluding that New Deal changes such as overturning of *Lochner* were just "the stuff of ordinary constitutional interpretation").

421 Professor Tribe does seem to recognize the possibly breathtaking implications of his view by suggesting that substantive due process, including not only the modern privacy doctrine, but the incorporation doctrine itself, might have to go! See id. at 1297 n.247 for one of the truly most remarkable footnotes in the history of legal scholarship. However, he comforts himself by thinking that much of what will be lost can be recovered through other means, such as reinterpretation of the Privileges and Immunities Clause and expansive readings of the prohibition on state bills of attainder. See id. At a minimum, this stunning turnabout seems to reflect a major concession to Professor Ackerman's main point—our traditional interpretive practices have justified the modern constitution only through "free-form" interpretive methods. Notwithstanding Professor Tribe's doubts, however, I take no position here on whether modern substantive due process jurisprudence can be justified using legitimate, non-Ackermanian interpretive techniques.

which "is a question of degree, not of basic architecture."[422] Yet, this seems nothing more than an assertion that so long as no architectural provision in Professor Tribe's obscure sense is at stake, the "free-formism" that he otherwise condemns is perfectly acceptable.[423] It is its ability to avoid the necessity of such interpretive moves that constitutes one of the great virtues of Professor Ackerman's theory, and this is especially so for formalists like Professor Tribe. Rather than asking us to stare at the text so long we can no longer focus on its words or the structures it creates, Professor Ackerman directs us to the relevant historical moment and urges that we interpret how the people wished to change their inherited constitutional practices.[424]

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[422] Id. at 1296. Professor Tribe does suggest in passing, but does not defend, the claim that the Court's modern jurisprudence is a return to the pre-1880s understanding of the Commerce Clause. See id. at 1295.

[423] The same can be said of his explanation of modern substantive due process jurisprudence: The overturning of Lochner v. New York, 198 U.S. 45 (1905), see West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398-400 (1937), did not require a constitutional amendment because it did not represent a rejection of substantive due process. See Tribe, Taking Text, supra note 3, at 1296-97 & 1296 n.246. The latter simply took another guise in Griswold v. Connecticut, 381 U.S. 479 (1965), where the Court replaced the discredited notion of economic liberty with the notion of privacy. See Tribe, Taking Text, supra note 3, at 1296-97 & 1296 n.246. Leaving aside the timing problems with this argument, it suggests that in Professor Tribe's interpretive world, if the Court limits itself to protecting new liberties and rejecting old ones, there will never be a need for an amendment. Here again, his striking formalism is self-evidently on display: Just as long as we retain the category of substantive due process, we are free to use free-form methods as we move from protecting the right to contract to the right to an abortion.

Professor Tribe also applies the same expansive approach to the term "treaty" in the Treaty Clause, although he does so only rather softly. See id. at 1247 n.89 (noting "'treaty' . . . might have some evolutionary potential"). To appreciate his point, it is necessary to recall his argument that the Treaty Clause only applies to "treaties" and not to lesser "agreements," and that the President may conclude unilateral executive agreements only insofar as these are not covered by the Treaty Clause. See supra Part III.D.2. His concern is that the scope of the President's authority to make unilateral executive agreements (like the scope of Congress's powers under the Commerce Clause) has expanded enormously from its very modest beginnings in the late eighteenth century and throughout the nineteenth. To justify this development, he holds that the meaning of the term "treaty" in the Treaty Clause, rather than expanding as time has passed (as in the case of the term "commerce" in the Commerce Clause), has instead taken on a narrower and narrower meaning: Whereas originally it included virtually all agreements, now it includes only the more important among them, since otherwise presidents would regularly be engaged in violations of the Treaty Clause. I can perhaps be pardoned for suggesting that this argument is, to be charitable, textually disingenuous.

[424] Many have made the point that Professor Ackerman's criteria for valid informal amendments may not be definite enough to provide a firm basis for determining when a constitutional movement has achieved its goal and that the advantages of textual amendments in this respect are of great significance. See, e.g., Michael W. McConnell, The Forgotten Constitutional Moment, 11 Const. Commentary 115, 122-40 (1994) (arguing that end of Reconstruction would qualify as constitutional moment legitimizing Jim Crow under Ackerman's criteria). This is an important objection and one which Professor Tribe seems to share. See Tribe, Taking Text, supra note 3, at 1286 & n.216 (endorsing

Professor Tribe also finds free-formism at work in Professor Ackerman's "disturbingly loose" conflation of the Founding, Reconstruction, and the New Deal, events which Professor Tribe believes have little in common.[425] The argument from the illegality of the Founding fails, he thinks, on self-reference grounds: Nothing in the procedures used for the adoption of the Constitution can tell us whether similar procedures are valid under the Constitution itself since they simply brought the Constitution, including Article V, into force.[426] The argument from the Fourteenth Amendment, in contrast, lacks a sense of constitutional proportion. The Civil War was a singular event, and even though Article V's requirements were overlooked in the adoption of the Fourteenth Amendment (and perhaps the Thirteenth as well), the decision to go forward in the face of the opposition of the states that had illegitimately made war upon the Union is not a precedent for less momentous occasions like the crisis of economic regulation of the New Deal or the post-War framing of the new international order.[427] These claims constitute a challenge to central aspects of the Ackermanian constitutional order and warrant fuller treatment than I can give them here. I attempt only the outlines of a response, for my purpose is less ambitious: to demonstrate that Pro-

McConnell's analysis). This is yet another way in which Professor Tribe believes that Professor Ackerman's theory promotes free-formism. The way Professor Tribe formulates the objection, however, is unconvincing. He thinks that only if amendments are strictly limited to those that are adopted in accordance with textual procedures can the Constitution meaningfully constrain governmental acts; otherwise, "the constraining power of text and structure is eroded almost to the vanishing point." Id. at 1280. On the contrary, however, there is nothing inherent in an extratextual procedure that undermines the Constitution's constraining power. Among other things, its constraining power depends upon the clarity of the accepted criteria for extratextual amendments, the scope of any ambiguities in the procedure for textual amendments, and the relative determinacy of the textual and nontextual amendments that are adopted. If the constitutional tradition in a polity permits extratextual amendments in accord with the one-time wishes of any person who can pull Excalibur out of a rock, it might have a perfectly determinate constitution, so long as its King Arthur rendered only relatively clear constitutional edicts. In contrast, if a polity that restricted amendments to those adopted in accordance with a clearly specified textual procedure adopted amendments incorporating broadly abstract commands such as "no person shall be deprived of liberty or property without due process of the law," the constitutional text might be quite indeterminate, and unless it could be made determinate through an agreed upon procedure, its constraining power might well be nil. Notwithstanding Professor Tribe's way of putting the point, however, it is true that the real question is whether the historical and normative resources from which Professor Ackerman draws are adequate to provide definite criteria that can meet the general objection. Otherwise, his particular theory of extratextual amendment will founder on the shoals of vagueness and may tell us only then that nothing succeeds like success. I cannot attempt here to address this larger problem.

425 See Tribe, Taking Text, supra note 3, at 1286-88.

426 See id. at 1290-92.

427 See id. at 1292-94.

fessor Tribe's charge of free-formism is as unwarranted in this case as it has been throughout.

In part, the difficulty in assessing objections like Professor Tribe's results from conceptual puzzles at the heart of Professor Ackerman's theory; in part, these ambiguities are the consequence of the style of his argument which presses different conceptual approaches simultaneously. But it will be helpful to sort out at least two fundamental questions: the level at which the theory purports to operate and the relationship between its descriptive and normative claims. To put the matter somewhat differently, to what extent does it rely upon interpretive materials that are *endogenous* or are *exogenous* to the Constitution in arguing for the nonexclusivity of the amendment procedure? And to what degree does the theory rest on the descriptive claim that it provides the most accurate account of our actual constitutional practices rather than the view that it provides the most attractive normative account while still fitting our actual practices?

Begin with two views of Professor Ackerman's claims that seem to offer the most plausible constructions of his project. The first takes the endogenous claims as the core of the argument. Under this view, the theory rests upon the thesis that the *Constitution itself* is best interpreted as providing for amendment procedures that are not explicitly identified in the text. This is the case, moreover, solely on the basis of interpretive materials that are *internal* to the Constitution according to some plausible theory of interpretation. In this version, the normative claims appear to be at least as important as the descriptive. They provide a reason why we should accept practice arguably in conflict with the text as controlling: because, in Dworkin's sense, that practice reflects the most attractive account of the Constitution and still fits our history.[428]

The second construction of Ackerman's theory views it as resting principally on an exogenous argument about the character of the ultimate rule of recognition in our society. The claim is that irrespective of the text, the rule of recognition establishes that our fundamental law—which we refer to broadly as the Constitution—can be altered outside Article V when the public adequately manifests its considered will. Rules of recognition are purely matters of social and political fact—the rule of recognition is just whatever the relevant officials ac-

428 See Dworkin, Freedom's Law, supra note 2, at 11 (arguing judges should seek morally best conception of constitutional principles that still fits historical record); Dworkin, Law's Empire, supra note 2, at 62 (arguing that we should seek interpretation that makes artistic work or social practice or structure "the best it can be" consistent with constraints of history).

cept as the source of validation for all binding law.[429] So in this version of the argument, the descriptive claim takes on far greater significance. The claim is that the relevant officials in this country have accepted in the past, and continue to accept, something like Professor Ackerman's criteria as the basis for alterations of the fundamental law. This does not entail that the normative features of the argument are irrelevant. But from this vantage point, Professor Ackerman's writings appear to be an effort to make the terms of our rule of recognition more perspicuous to ourselves and to urge only their refinement on political/normative grounds.[430] Thus, while it is critical that he not simply be making a normative plea for a new rule of recognition, nothing precludes him from urging a honing of the marginal features of our existing rule to make it more consistent with normative political theory.

To assess Professor Tribe's objections, we need to evaluate them in light of these two constructions of Professor Ackerman's project. Begin with the endogenous interpretation, which seems to be the view Professor Tribe has principally in mind.[431] Is there a plausible account

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429 See H.L.A. Hart, The Concept of Law 97-114 (1961) (articulating his famous positivist theory of law); see also Frederick Schauer, Amending the Presuppositions of a Constitution, in Responding to Imperfection, supra note 17, at 145, 149-52 (endorsing Hart's view).

430 Perhaps, too, his project is an effort to explain why those who may wish to undo important parts of the New Deal and post-War constitutional orders cannot base their arguments on fidelity to some long-accepted tradition. They are involved in a political effort either to amend the fundamental law or to alter our rule of recognition itself. Textual fidelity is not a politically neutral interpretive methodology inherent in our constitutional tradition.

431 See Tribe, Taking Text, supra note 3, at 1291-92 & 1291 n.227 (taking exception to claim "that the text of the Constitution is rightly seen as *itself* allowing alternative modes of amendment . . . *as a matter of constitutional law*"); see also Schauer, supra note 429, at 147 (reading Professor Ackerman as making only an endogenous argument for nonexclusivity of amendment process). Professor Tribe's narrow objections to Professor Ackerman's internal arguments seem implicitly to endorse the validity of his exogenous claims. But this would seem to undermine seriously Tribe's position. Whatever conceptual differences there may be between the endogenous and the exogenous views, they do not matter much from the perspective underlying Professor Tribe's objections. Thus, even were Professor Tribe right that Professor Ackerman can rely only on the exogenous argument, the implications of the latter's views would be the same: The Constitution can be and has been amended outside the formal requirements of Article V. It makes no difference in the final analysis whether these "amendments" are technically valid "*as a matter of constitutional law*" or only are treated as such by the relevant public officials in accordance with our ultimate rule of recognition. Either way, the Constitution has been informally amended and those amendments are as binding on the courts and the political branches as if they had been adopted in accordance with Article V. It is particularly odd, then, that Professor Tribe self-consciously aligns himself with Professor Schauer in this respect. See Tribe, Taking Text, supra note 3, at 1291 n.227 (endorsing Schauer). Professor Schauer is quite explicit in holding that the Constitution can be amended outside the requirements of Article V if our rule of recognition allows it to be, see Schauer, supra note 429, at 156-57, and that as a descriptive matter this is almost certainly the case, see id. at 156-58 (noting that exclu-

of how the "illegality" of the Constitution's adoption under the Articles of Confederation bears on the proper internal interpretation of Article V? Professor Tribe is of course right that the procedure used to validate the Constitution cannot conclusively demonstrate the proper interpretation of Article V. The Constitution was not, and could not, have been adopted pursuant to Article V which was not part of the Articles and did not itself become valid law until the Constitution went into force. But the fact that the Founding cannot be relevant in this respect does not entail that it provides no support for the endogenous interpretation in other respects. On the contrary, the argument is that the Framers' self-conscious end-run around the amendment provision of the Articles reflected their principled view that formal textual requirements cannot and should not be controlling in the face of deep and broad manifestations of popular will, a view apparently affirmed by the American people in their willingness to accept the Constitution's validity despite the evident violation of the Articles. Given this view, there is good reason to suppose that in adopting Article V the Framers were not attempting to contain future expressions of popular sovereignty through precisely the kind of formalist means they had just eschewed.

The conceptual issues under the endogenous view become somewhat stickier when we turn to the Fourteenth Amendment. On its face, Professor Tribe's principal argument seems to be that the constitutional disruption caused by the Civil War is simply on a different order of magnitude than the New Deal crisis or the conflicts of the second World War. Professor Tribe apparently believes that it was justified to leap out of the text only in the first, not in the latter cases. However, in the first place, it is unclear by what metric one would compare the varying levels of crises at these momentous historical junctures. And, in any case, since deep and abiding shifts in constitutional law occurred in each, it is unclear why the differences should be of significance in this context—unless Professor Tribe means to accept Professor Ackerman's claim validating the concept of informal amendments and wishes only to state a different normative judgment about where the line should be drawn.

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sive amendment procedure is "almost certainly not the American approach" and stating that descriptively his view "is that the American legal and constitutional culture treats the procedures of Article V as presumptively but not conclusively constraining"); see also Kent Greenawalt, The Rule of Recognition and the Constitution, 85 Mich. L. Rev. 621 (1987) (expressing view similar to Professor Schauer's). If the congressional-executive agreement is valid in accordance with our rule of recognition, then precisely what is Professor Tribe saying when he brands it unconstitutional? Is it unconstitutional but valid and binding on the courts and political branches? If so, it would certainly have been helpful had he said so.

Perhaps we can reformulate Professor Tribe's argument to bring out what may be his deeper objection, that the Fourteenth Amendment is somehow categorically different from the New Deal and World War II. The Fourteenth Amendment is valid "law," he may think, only because the trauma of the nation's sundering led to a change in our ultimate rule of recognition: Our post–Civil War rule of recognition, he might claim, directs officials to apply the Fourteenth Amendment as such, along with the provisions of the Constitution, as the fundamental law of the land. In contrast, the transformations of the New Deal and World War II were purely matters of interpretation under the existing Constitution and must stand or fall on the merits of what they purported to be—internal interpretations of the text. There are two replies to this version of the objection. First, Professor Tribe's point can be made in reverse. The Reconstruction Congress did not purport to change the rule of recognition, just to amend the existing Constitution. It chose, after all, to denominate the Fourteenth Amendment an "amendment." This choice suggests that the Reconstruction Congress did not believe Article V constituted the sole means of changing the Constitution and that there are times when the will of the nation as a whole outweighs the conflicting interests of the states as such. On this reading, the adoption of the Fourteenth Amendment provides substantial support for Professor Ackerman's claim that we have not as a nation understood Article V to state the exclusive internal means of amending the Constitution. Second, the New Deal and World War II effected tectonic shifts in our constitutional practices that have proved long-lasting and durable. Even though the changes wrought were based on at least highly arguable textual premises, our officials have shown virtually no serious interest in revisiting the fundamental questions resolved in those historical periods. Indeed, this deference has persisted even with the rise of radically new interpretive methodologies under which the earlier decisions are highly vulnerable.[432] Professor Tribe himself witnessed the resilience of these practices when the Senate cursorily disregarded his strenuous constitutional objections to the WTO Agreement, despite the fact that he was only pressing that body to defend its own jealously guarded prerogative of yesteryear.[433] So, while it is true that

[432] In this respect, United States v. Lopez, 514 U.S. 549 (1995), seems like a rather weak shift in direction, not a promise of a wholesale repudiation of the New Deal Commerce Clause jurisprudence. See id. (striking down statute that prohibited carrying firearms in areas near schools as beyond Congress's powers under Commerce Clause).

[433] See supra notes 42-44 and accompanying text. The Senate approved the WTO Agreement as a congressional-executive agreement despite Professor Tribe's ominous warning that doing so would effectively make it impossible for it to reassert its authority in

no formal amendments were adopted, our political practices suggest that we have given these highly problematic "interpretive" changes a similar stature and that they are, in this respect, far more comparable to the Fourteenth Amendment than Professor Tribe is willing to admit.

The relevance of the Founding and the Civil War to the exogenous view is, I think, even more readily apparent. The fact that the Framers did not feel bound to respect the textual requirements of the Articles when they could obtain widespread popular support for their new constitutional order suggests the deep roots of antiformalism in our political culture. The acceptance of the Constitution as valid and binding confirmed that our rule of recognition directs officials sometimes to validate as fundamental law provisions not adopted in accordance with the governing text. Furthermore, continuity with the Founding period in this respect was demonstrated during Reconstruction when the Fourteenth Amendment was immediately accepted as valid despite the evident inconsistencies with Article V. The tradition was carried forward yet again when officials accepted the core New Deal constitutional order and its rippling implications immediately after the 1937 switch. All of these instances, then, are evidence that our rule of recognition directs officials to accept some "amendments" to the fundamental law that are not adopted in accordance with textual strictures. It also suggests that these "amendments" are to be validated when a political crisis has mobilized large portions of the public decisively in favor of changes to the existing constitutional order. Certainly, this is not the only plausible construction of these historical events, but as I indicated at the outset, my purpose has not been to give a full defense to Professor Ackerman's views but only to acquit them of Professor Tribe's charge of free-formism.

Finally, Professor Tribe finds free-form methods at work in our interpretation of the events during the mid-1940s that are at the core of our argument. In his view, there was no "constitutional moment"; by acceding to the congressional-executive agreement, the Senate just made a strategic maneuver to avoid a constitutional amendment stripping it entirely of its unique treaty role.[434] The elites in Washington, moreover, were fully cognizant that they were violating the Constitution. That is why the House adopted an amendment proposal. In this respect, he thinks, 1945 was entirely different from events in 1787, the

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the future. See GATT Hearings, supra note 41, at 301-02, 311 (testimony of Laurence H. Tribe, Professor, Harvard Law School) (admonishing Senate that adoption of GATT "outside the strictures of the Treaty Clause could spell doom for the continued viability of the Treaty Clause itself").

[434] See Tribe, Taking Text, supra note 3, at 1284-85.

1860s, and 1937.[435] In any case, Professor Ackerman and I have gotten the constitutional moment all wrong; all the people did in 1945 was engage in a kind of extratextual popular approval of the United Nations Charter. Their principal concern was not with the Treaty Clause at all.[436]

Here, Professor Tribe is finally arguing on our territory, but his arguments are as unpersuasive in this context as elsewhere. First, it is unclear what to make of his claim that the collapse of the Senate's resistance was a strategic move. Of course it was; that is precisely the point of our argument. But it was not just a strategic move; it was taken with full cognizance of the depth and breadth of public opinion arrayed against the Senate's traditional position—the decisive shift towards internationalism and the widespread association of a discredited isolationism with the Senate and its historical treaty role—all as reflected in the outcome of the elections of 1944.[437] Furthermore, Professor Tribe seems not to appreciate the disturbing implications of his view. For he seems to be suggesting that there are no consequences to the Senate's deliberate derailment of the "regular" amendment processes through temporary acquiescence in an unconstitutional procedure. A thought experiment (not too far from historical reality) will bring out the objection: Imagine the position of the conservative members of the Supreme Court in 1937 under the following scenario. The country, they sense, is close to opting for formal amendments that would sweep aside the principles of limited national government and *laissez-faire* economics to which these justices are deeply committed. To avoid this unappealing result, they decide to "switch" in the short-run, yielding to New Deal legislation that in their view is unconstitutional. But their acquiescence is only strategic; they simply abide the right moment—when the economic crisis has lessened and the people are no longer mobilized. Then they will "switch" again, this time to reinstate the principles that they had apparently forsaken in their earlier decisions. Is Professor Tribe such a formalist that he would accept this constitutional fraud? Might even he see a way to uphold a practice that apparently would have made it into formal constitutional law but for the cynical course adopted by the Court? Yet, this is precisely what the Senate, in his view, did in 1945.[438] More generally, when Franklin Roosevelt made the decision to forego the formal amendment track in 1944-45 and opt for informal

435 See id. at 1285, 1301.

436 See id. at 1284 n.210.

437 See Ackerman & Golove, supra note 5, at 861-96 (detailing pertinent history).

438 For assessments of the popular support for an amendment, see id. at 862-64. For an account of the Senate's retreat, see id. at 889-96.

constitutional transformation, he was relying upon a particular jurisprudential background—the then-ascendant view that accepted common law methods in constitutional law, at least when combined with deep shifts in popular sentiment. After *United States v. Darby*,[439] *Wickard v. Filburn*,[440] and *United States v. Pink*,[441] to name but a few cases, Roosevelt could easily have concluded—indeed, he would have been a fool to think otherwise—that the Supreme Court would agree that the congressional-executive agreement was "constitutional." Why then force an amendment through the Senate, jeopardize bipartisan internationalism, and distract the country from the monumental substantive problems of the new post-War order, all to satisfy a formalist's sense of propriety? It is in this context that the deeply reactionary implications of Professor Tribe's methodologies become evident.

Second, Professor Tribe thinks the fact that the political leaders in Washington were aware that the congressional-executive agreement was inconsistent with the traditional understanding of the Treaty Clause somehow delegitimates their constitutional movement and sharply distinguishes it from the Founding, the Civil War Amendments, and the New Deal transformations of 1937. Professor Tribe, however, seems to have the point precisely in reverse. We have something to worry about when our elites are unaware that the movements they lead are actually for constitutional transformation. For then we do not have deliberate movements for constitutional change but political movements founded on mistaken premises. We would have good reason to fear that whatever changes were proposed had not received the kind of deliberative consideration that is an essential predicate for accepting a shift in our constitutional practices.[442] It is obscure, moreover, why Professor Tribe believes that this awareness distinguishes the earlier crises. On the contrary, the historical evidence is quite clear that the Framers were well aware that they were disregarding the

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439 312 U.S. 100 (1941) (upholding Fair Labor Standards Act as valid exercise of commerce power).

440 317 U.S. 111 (1942) (upholding Agricultural Adjustment Act as valid exercise of commerce power).

441 315 U.S. 203 (1942) (expanding scope of President's independent foreign affairs authority by upholding Litvinov Assignment). For a discussion of the impact of *Pink* and other decisions on the President's foreign affairs powers, see supra note 376.

442 See 1 Ackerman, supra note 4, at 285-88 (arguing that crucial requirement for validating informal amendment is deliberative character of support for change in constitutional practice). In fact, if there is a concern about 1945 it should be the degree to which the public might have been misled about the nature of the change they were being asked to endorse.

requirements of the Articles of Confederation,[443] that the Reconstruction Congress had no illusions (and little concern) about inconsistencies with the formal requirements of Article V,[444] and that the New Dealers were as aware of the constitutional infirmities of their efforts as the later New Internationalists were of their own.[445]

Third, Professor Tribe's interpretive claim that 1945 was really about popular ratification of the United Nations Charter is no more persuasive. He simply offers this as a contrasting hypothesis but provides no historical evidence to support his view. His claim is nevertheless important in another sense. I agree that 1945 is best read as an affirmation both of the congressional-executive agreement and of the principles enshrined in the Charter (and other foundational elements of the post-War era). The latter point, however, rather than having the narrow import Professor Tribe implicitly attributes to it, is in fact rich with constitutional significance. Although I cannot defend the point here, much of the legitimacy of the post-War constitutional order in foreign affairs rests upon changes that were achieved by the sweeping political movement behind the Charter. Not least in this respect are its implications for the modern division of authority over the war powers.[446]

CONCLUSION

I have been arguing in part against free-form formalism, but this is admittedly a rather easy target. My real efforts have had a deeper purpose—to illustrate the weaknesses of Professor Tribe's textualist interpretive methodology and the tendency of strict formalist approaches to self-defeating indeterminacy. From Professor Tribe's steadfast effort to draw the textual line against undisciplined interpreters, I have argued, comes fresh reason to doubt any methodology that focuses single-mindedly on the text.

Of course, constitutional theory has not been my only, or even necessarily my most pressing concern. I have also felt an urgent need—and responsibility—to reply to Professor Tribe's all-out textual assault on the congressional-executive agreement. Despite his protestations to the contrary, the modern practice has become as essential to the conduct of our foreign affairs as the Federal Reserve is to the reg-

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443 See 1 id. at 167-79 (reviewing *Federalist Papers* on point); 2 id. at 49-65 (reviewing history of Convention and contemporaneous events).

444 See 2 id. at 99-252 (reviewing history of Reconstruction).

445 See 2 id. at 255-382 (reviewing history of New Deal).

446 For an account of the constitutional controversy over the Charter and the war powers, see Jane E. Stromseth, Rethinking War Powers: Congress, the President, and the United Nations, 81 Geo. L.J. 597 (1993).

ulation of our banking and monetary systems. I have therefore sought to defend the claim that the text can plausibly and persuasively support either the original or the modern understanding. But this is necessarily only a limited defense of the congressional-executive agreement. Although compatibility with the text is important in virtually anyone's book, the text's indeterminacy is not sufficient on its own to ground the constitutionality of the modern procedure. Something more will be needed to convince those who find themselves unable to affirm the kind of constitutional theory that Professor Ackerman and I have proposed. So, I have contented myself here with a more modest goal—opening up at least some interpretive space from which defenders of the congressional-executive agreement can launch a more conventional constitutional counter-attack.

In our article, Professor Ackerman and I sought to pose a challenging dilemma to the community of constitutional lawyers and scholars: A basic and long-accepted constitutional practice in the field of foreign affairs turns out, on close inspection, to be extremely difficult to justify under the ordinary forms of constitutional argument. Contrary to common conceptions, its roots, we claimed, are found not in a long accretion of slowly expanding precedent, but in a revolutionary and self-conscious moment of constitutional transformation. Assuming that the practice itself is a fixed point in our shared constitutional universe, we invited others to consider whether this history suggested the need for rethinking some of the received conventions of our field.[447] Though provoked by our argument, Professor Tribe ultimately declined our invitation and instead sidestepped the dilemma we posed. Donning the mask of the constitutional purist and invoking a rhetoric charged with patriotic overtones, he simply denied that there is a dilemma—if the modern practice cannot be justified under conventional interpretive methods, then it is simply and ipso facto unconstitutional, the consequences notwithstanding. Worse, he berated us for having failed to pose the dilemma starkly enough! Despite our claim that the original intent and the first hundred and fifty years of practice were unequivocal, our concession that the text is indeterminate was blatantly wrong and revealed our true status as free-formists bent on undermining the rigorous legal science underlying the discipline of constitutional law.

In pragmatic human affairs, purism is rarely helpful or compelling, and Professor Tribe's above-the-fray approach to the

447 This is a kind of "reflective equilibrium" argument. See John Rawls, A Theory of Justice 19-21 (1971) (articulating role of reflective equilibrium in normative political-economic theory).

congressional-executive agreement is no exception. The imperatives of history and contemporary realities play an undeniable role in our constitutional debates, and no amount of purist posturing or affectation of superior moral rectitude can alter these basic facts of constitutional life. We will always have to struggle over the balance between pure principle and changing times; neither can achieve total dominance. Nor is constitutional law mathematics or the text a place to which we can retreat to escape the value conflicts that inevitably characterize the views of citizens in a pluralistic society. Constitutional interpretation is messier than that, more inclusive, less certain, and almost always legitimately open to struggle.

Professor Tribe is surely cognizant of these platitudes—indeed, he has made them himself on past occasions.[448] Perhaps then, his sudden turnabout reflects a perceived need to shore-up the solidity of both the New Deal Revolution and the Warren Court civil liberties jurisprudence. He may believe that by drawing the line at the (in his view) less centrally important congressional-executive agreement he can mollify the critics. If this is his underlying aim, however, it misses the mark. There is no denying the parallels between the congressional-executive agreement and, for example, the modern Commerce Clause jurisprudence. By calling into question the validity of the former, however, he will only have fueled the fires of those who have led the charge against the New Deal Revolution and the Warren Court precedents.[449] With all due respect, I suspect that few will be impressed by his efforts to support the textual case for the modern Commerce Clause while denigrating the textual argument for the congressional-executive agreement.[450] If promoting reconciliation underlies his view, then he has, in my view, missed the main reconciliatory virtue in the congressional-executive agreement, which is just a cautionary point: The modern post-1937 constitutional landscape has something of value for everyone, and it may prove impossible to aban-

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448 See Tribe, Choices, supra note 39, at 3-6:

> Even if we could settle on firm constitutional postulates, we would remain inescapably subjective in the application of those postulates to particular problems and issues. . . .
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> Anyone who insists, for instance, that "fidelity to text" must be the core commitment of a constitutionalist must confront the indeterminacy of text and must justify giving to one or another vision of language such binding force over our lives.

449 See, e.g., United States v. Lopez, 514 U.S. 549, 584, 601 (1995) (Thomas, J., concurring) (stating that Court should "temper" its Commerce Clause jurisprudence in future and return to "the original understanding of that Clause").

450 See supra notes 420-23 and accompanying text.

don those parts we revile, or to which we are indifferent, without throwing into doubt those we cherish.

I began this Article with a tribute to Professor Tribe's monumental achievements as a constitutional scholar, and nothing I have said is meant to cast doubt on his preeminent stature. But his latest work does present a puzzle: Why suddenly posture himself as a hard-nosed, rigorous textualist, unmoved by controversial value predilections and political ideals? Is it—and here I freely speculate—the persistent voice of his critics finally provoking him to show somehow that they have it all wrong? That would, in my view, be a mistake. They are not literally wrong in charging him, as they have, with the creative use of constitutional doctrine. Surely, he has been an enormously creative scholar—but creative in the best sense of the term. His creativity has produced an immensely valuable body of work that has been, and no doubt will continue to be, tremendously influential in shaping our constitutional law. So, there is no reason to accept their critiques or to bend his own methods to their demands—no reason to jump, even if only half-heartedly and only to a limited extent, on the illusory originalist bandwagon. Such a move, as I have sought to show, can only undermine, not advance, the legitimacy of his constitutional project.

Professor Tribe has thus failed to advance the discussion of the congressional-executive agreement past the point where Professor Ackerman and I left it in our earlier article, and that is where it remains today. Perhaps the debate will pick up again some time in the future. One thing, however, is certain. The rich historical and interpretive story of the Treaty Clause will continue to provide constitutional theorists with a remarkable range of materials for considering the controversial questions that continue to vex the field.