

# “CUI BONO FUISSET”<sup>1</sup>: COORDINATING U.S. TAX STATUTES WITH U.S. TAX TREATIES

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*When attempting to resolve a potential conflict between a U.S. tax statute and a U.S. tax treaty provision, how much should it matter whether the statute was enacted before or after the ratification of the treaty? Examining the history of the “later-in-time” rule and related principles used in coordinating treaties and statutes suggests that the development of these interpretive principles reflects evolving views of U.S. sovereignty. The tension between defining U.S. sovereignty as the power to tax, versus understanding U.S. sovereignty as the power to give up a right to tax in exchange for a treaty partner’s commitment, continues to shape the application of the later-in-time rule. Exercising the later-in-time rule to override statutory or treaty provisions mechanically, based on a constricted or less contextual view of U.S. sovereignty, risks harming short-term and long-term national interests.*

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<sup>1</sup> See Marcus Tullius Cicero, *Pro Roscio Amerino* § 84, PRO QUINTIO; PRO ROSCIO AMERINO; PRO ROSCIO COMOEDO; ON THE AGRARIAN LAW, 240 Loeb Classical Library 122, 196–97 (J. H. Freese trans. 1930) (“L. Cassius ille, quem populus Romanus verissimum et sapientissimum iudicem putabat, identidem in causis quaerere solebat, ‘cui bono’ fuisset,” translated as “The illustrious Lucius Cassius, whom the Roman people considered the wisest and most conscientious of judges, was in the habit of asking repeatedly in trials, ‘who had profited by it?’” (emphases added)).

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## I. INTRODUCTION

Although United States courts, legislators, government officials, allies, and legal scholars have examined relationships among various U.S. tax statutes and tax treaties for over one hundred and fifty years,<sup>2</sup> discerning an underlying framework for coordinating these sometimes conflicting sources of law is challenging. Approaches used in integrating particular provisions of U.S. tax law and U.S. tax treaties include the “later-in-time” or “last-in-time” rule and its network of related principles, such as the presumption of harmony canon, the explicit override requirement, originalism, textualism, discerning the intent of drafters or negotiators, and determining the purposes of a statute or a treaty.<sup>3</sup> The perceived usefulness of these overlapping and contrasting approaches waxes and wanes, often in confusing ways. “*Cui bono?*” — who profited by it?<sup>4</sup> — is thus both a rhetorical and practical question when deciding whether or how to apply these principles for coordinating United States tax statutes and tax treaties.

However, examining the evolution of these different interpretive principles suggests that the tensions among them may be a reflection of evolving views of U.S. sovereignty. Attempts at coordinating tax statutes and tax

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<sup>2</sup> See David Sachs, *Is the 19th Century Doctrine of Treaty Override Good Law for Modern Day Tax Treaties?*, 47 TAX LAWYER 867, 868 (1994) (noting that *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), was “the first Supreme Court case to hold that a federal statute overrode a prior treaty” and that the case “involved taxes on liquor and tobacco”).

<sup>3</sup> See, e.g., Rebecca M. Kysar, *Interpreting Tax Treaties*, 101 IOWA L. REV. 1387, 1390–91 & nn.7 & 8, 1396–1404, 1443–45 (2016) (noting that “the American literature specific to tax treaties is particularly sparse,” discussing several tax treaty interpretation methods, and advocating for “a fluid interpretive methodology that encompasses many actors and sources” as a “pragmatic approach to treaty interpretation”).

<sup>4</sup> See Cicero, *supra* note 1; see also *Cui bono?* [Latin] (17c), BLACK’S LAW DICTIONARY (11th ed. 2019) (“For whose advantage?; Who benefits?. The exclamation may be used to ask who benefited from the results of a crime, usu. to cast suspicion without offering evidence of guilt. Despite the literal meaning, the term is more often used to mean ‘what’s the good of it?’ or ‘what benefits are there?’”).

treaties often involve competing considerations about constraining or protecting taxpayers, non-citizens, branches of government, and other nations. Because in the United States taxation is sometimes considered equivalent to sovereignty,<sup>5</sup> analyzing how ideas about sovereignty influence methods of coordinating tax statutes with tax treaties can be especially useful. In addition to helping to identify or resolve apparent conflicts between tax treaties and domestic tax statutes, noticing how sovereignty beliefs influence tax law coordination suggests what types of tax law coordination questions may continue to arise. The reverse is also true: recognizing how different conceptions of sovereignty can lead to different consequences in coordinating U.S. tax statutes and tax treaties may help shape choices about what sovereignty could or should mean.

## II. TREATIES ARE “THE BASIS OF PEACE, WELFARE, AND SAFETY OF THE HUMAN RACE”<sup>6</sup>

Taxation, legislation, and treaty-making were acknowledged as functions of sovereignty at least as early as 1648, in the treaties ending the Thirty Years’ War in Europe under the Peace of Westphalia.<sup>7</sup> Many influential

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<sup>5</sup> See *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819) (“But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States.”).

<sup>6</sup> See Anthony C. Infanti, *Curtailed Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677, 711 & n. 210 (2001) (quoting Emmerich de Vattel) (citing EMMERICH DE VATEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE AUX AFFAIRES DES NATIONS ET DES SOUVERAINS bk. 2, ch. 12, § 163 (1758), translated in *The Classics Of International Law*, 3 Le Droit des Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite aux Affaires des Nations et des Souverains 162 (James Brown Scott ed., 1916)).

<sup>7</sup> See Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies, art. LXV, LXVII, Münster, Oct. 24, 1648 (Peace of Westphalia):

LXV. ...Above all, it shall be free perpetually to each of the States of the Empire, to make *Alliances with Strangers for their Preservation and Safety*....

LXVII. That as well as general as particular Diets, the free Towns, and other States of the Empire, shall have decisive Votes; they shall, without molestation, keep their Regales, Customs, *annual Revenues*, Libertys, Privileges to confiscate, to *raise Taxes*, and other Rights, lawfully obtain’d from the Emperor and Empire, or enjoy’d long before these Commotions, with a full Jurisdiction within the inclosure of their Walls, and their Territories....As for the rest, all laudable Customs of the sacred Roman Empire, the fundamental Constitutions and Laws, shall for the future be strictly observ’d, all the Confusions which time of War have, or could introduce, being remov’d and laid aside.

(emphases added), available at [https://avalon.law.yale.edu/17th\\_century/westphal.asp](https://avalon.law.yale.edu/17th_century/westphal.asp); see also Allison Christians, INTRODUCTION TO TAX POLICY THEORY, 4–5 n.14 (2018) (“In general,

European scholars in the eighteenth and early nineteenth centuries, such as Emmerich de Vattel, viewed treaties as “sacred and inviolable”<sup>8</sup> and treaty rights as “[t]he basis of peace, welfare, and safety of the human race”;<sup>9</sup> several of these scholars never even “contemplated the unilateral, unprovoked modification, amendment, or dissolution of a treaty obligation.”<sup>10</sup> The works of these scholars “influenced the thinking” of the framers of the U.S. Constitution.<sup>11</sup> Pragmatism also may have shaped early American views of the importance of international law, such as treaties, versus domestic law.<sup>12</sup> For instance, Benjamin Franklin in 1775 had noted that “circumstances of a rising state make it necessary frequently to consult the law of nations,”<sup>13</sup> possibly implying that reliance on international law may not be as necessary for stronger or more established nations.

Due to their competing ideas about sovereignty and government structure, “the early leaders of the Republic were not in complete agreement” about the relationship between legislation and treaties during, or after, the Constitutional Convention in Philadelphia in 1787.<sup>14</sup> This unresolved relationship between treaties and domestic law is embodied in the Supremacy Clause of the U.S. Constitution, which requires that treaties and federal laws supersede state laws,<sup>15</sup> but which does not specify the relationship among the Constitution, treaties, and federal law.<sup>16</sup> The Constitution does provide that,

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the division of the world into nation-states, and with it the emergence of modern international relations, is traced to the 1648 Treaty of Westphalia, and it is customary to view today’s division of sovereign states as the post-Westphalian order.”), <https://ssrn.com/abstract=3186791>.

<sup>8</sup> See Infanti, *supra* note 6, at 709–711 & n.213 (quoting Emmerich de Vattel).

<sup>9</sup> See *id.* at 711 & n.210 (quoting Emmerich de Vattel).

<sup>10</sup> See *id.* at 713.

<sup>11</sup> See *id.* at 709–710 & n.202 (citing BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22–54 (1967) and GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 355 (1969)).

<sup>12</sup> See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1107, 1095–96 & n.130 (1985) (“The leaders of a weak and newly independent nation recognized the need to rely heavily on international law to guide foreign policy.”) (footnotes omitted).

<sup>13</sup> See *id.* (quoting Letter of B. Franklin to Dumas, Dec. 19, 1775).

<sup>14</sup> See *id.* at 1100.

<sup>15</sup> See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>16</sup> See Sachs, *supra* note 2, at 881 (“The Supremacy Clause language merely posits the problem of the relative status of treaties and statutes; it does not resolve it.”); see also Infanti, *supra* note 6, at 684 n.40 (“Commentators have questioned the logical underpinning of the later-in-time rule, which, if carried to its natural conclusion, would also put statutes and the Constitution on equal footing under the Supremacy Clause”); Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT’L L. 406, 425 (1989) (“Our jurisprudence giving treaty and statute equal status so that the later in time will prevail was developed a hundred years ago by constitutional construction based, I believe, on misconstruction of Article VI.

unlike the process for enacting a federal statute, adopting a treaty requires a two-thirds majority vote of the Senators present for the vote.<sup>17</sup>

However, despite continuing debates after the Constitutional Convention about the lack of a role for the House of Representatives in the treaty-making process,<sup>18</sup> “strong support existed among the founding fathers for the superiority of treaties over either preexisting or subsequent federal statutes.”<sup>19</sup> For example, John Jay, a negotiator of the 1783 Treaty of Paris ending the Revolutionary War, noted in *The Federalist Papers* just after the convention that the idea that treaties are like statutes and so are “repealable at pleasure” was an idea that “seems to be new and peculiar to this country.”<sup>20</sup> He argued instead that “a treaty is only another name for a bargain” and is “made not by only one of the contracting parties, but by both,” cautioning that “it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it.”<sup>21</sup> Similarly, and specifically in the area of taxation, Alexander Hamilton contended several years later that “[t]hough Congress, by the Constitution, have power to lay taxes, yet a treaty may restrain the exercise of it in particular cases,” because “the power of treaty is the power of making exceptions, in particular cases, to the power of legislation,” with treaties being “in good faith, restraints upon the exercise of” domestic legislative power.<sup>22</sup>

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There is no evidence that, in that article [VI], the Framers also addressed the equality of treaties and United States statutes.”)

<sup>17</sup> See U.S. CONST. art. II, § 2, cl. 2 (“[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.”); see also Sachs, *supra* note 2, at 881 (questioning “whether this unique feature might make treaties invulnerable to statutory override (in the absence of a two-thirds vote of the Senate)”).

<sup>18</sup> Current forms of this debate note that the “absence of a formal role for the tax-writing committees in both the House and the Senate may be viewed as a threat to the Committee members’ power.” See Richard L. Doernberg, *Overriding Tax Treaties: The U.S. Perspective*, 9 EMORY INT’L L. REV. 71, 78 (1995) (“In the treaty ratification process, the House of Representatives has no official role. Consequently, some House members may resent the exclusive authority of the Senate in that area. In addition, the Senate Foreign Relations Committee—not the tax-writing Senate Finance Committee—is involved in the treaty process.”); see also Reuven S. Avi-Yonah, *Tax Treaty Overrides: A Qualified Defence of U.S. Practice*, in TAX TREATIES AND DOMESTIC LAW, ¶ 4.3 (Guglielmo Maisto ed., 2006) (“Treasury and the IRS, as well as the courts, may be inclined to minimize treaty overrides by interpreting away potential conflicts, and by stressing the need for Congress to be explicit. The Ways and Means, and Finance Committees, on the other hand, want to retain their full authority over tax laws, and thus prefer to emphasize treaty overrides.”).

<sup>19</sup> See Lobel, *supra* note 12, at 1096–97.

<sup>20</sup> See THE FEDERALIST No. 64 (John Jay); see also Lobel, *supra* note 12, at 1096–97 n.132.

<sup>21</sup> See THE FEDERALIST No. 64 (John Jay).

<sup>22</sup> See Alexander Hamilton, THE DEFENCE NO. XXXVII(1796), available at <https://founders.archives.gov/documents/Hamilton/01-20-02-0006>; see also Lobel, *supra* note 12, at 1099 n.139.

### III. TREATIES “DEEPLY AFFECT[] [A NATION’S] INDEPENDENCE”<sup>23</sup>

Early justices of the Supreme Court promoted the principle that treaties must be respected. For example, in holding in 1796 in *Ware v. Hylton* that treaties supersede state laws under the U.S. Constitution, the Court also noted that “[t]reaties must be construed in such manner, as to effectuate the intention of the parties,” based on “the letter and spirit of the instrument.”<sup>24</sup> Three of the five seriatim opinions in the case cited the work of European legal scholar Emmerich de Vattel.<sup>25</sup> In addition, the Supreme Court formulated the “*Charming Betsy* canon” of construction in 1802, stating that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>26</sup> In *Charming Betsy*, the Court held that an 1800 act of Congress temporarily prohibiting trade between residents of U.S. and French territories did not allow the U.S. to capture the owner of the ship *Charming Betsy*, because such capture would violate international neutrality norms.<sup>27</sup> Similarly, in 1823, the Court reasoned in *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven* that treaties between the United States and another nation should be assumed to survive even if Congress later declares war on the other nation, or vice versa.<sup>28</sup> Otherwise, the Court explained, even the 1783 Treaty of Paris that

<sup>23</sup> See *Taylor v. Morton*, 23 F. Cas. 784, 788 (C.C.D. Mass. 1855).

<sup>24</sup> See *Ware v. Hylton*, 3 U.S. 199, 249 (1796) (Paterson, J.).

<sup>25</sup> See *id.* at 230 (“Vattel lib. 4. sect. 21 p. 121. says, ‘[t]he state of things at the instant of the treaty, is held to be legitimate, and any change to be made in it requires an express specification in the treaty’”) (Chase, J.); *id.* at 253 (“The fourth article appears to me to come within the first general maxim of interpretation laid down by Vattel. ‘It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents....’ Vatt. B. 2 ch. 17. s. 263.”) (Paterson, J.); *id.* at 258 (“That if a treaty be broken by one of the contracting parties it becomes (in the expressive language of the law) not absolutely void, but voidable... The authorities, I think, are full and decisive to that effect. Grotius, b. 2 c. 15. s. 15. ib. b. 3. c. 20. s. 35, 36, 37, 38. 2 Burl. p. 355. part. 4. c. 14. in s. 8. Vattel, b. 4. c. 4. s. 54.”) (Iredell, J.).

<sup>26</sup> See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>27</sup> See *id.*; see also Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1217 (2008).

<sup>28</sup> See *Soc’y for the Propagation of the Gospel in Foreign Parts v. New Haven*, 21 U.S. 464, 494 (1823) (“[W]e are not inclined to admit the doctrine urged at the bar that treaties become extinguished, ipso facto, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace.... There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war.”); see also Lobel, *supra* note 12, at 1112 n.218 (discussing that even a war does not automatically terminate a treaty) (citing Pitman B. Potter, *Relative Authority of International Law and National Law in the United States*, 19 AM. J. INT’L L. 315, 319–20 (1925)).

“acknowledged our independence, would be gone,” a “construction...so monstrous as to supersede all reasoning.”<sup>29</sup>

However, in the mid-nineteenth century, the idea that domestic federal law instead might supersede treaties began to serve as the basis of U.S. judicial decisions. In 1846, the Iowa Supreme Court in *Webster v. Reid* resolved title to land once granted by treaty to the Sac and Fox tribes, in part by noting that “a treaty is by the constitution declared to be a supreme law of the land, but so is an act of Congress,” and then concluding, without citing any other authority, that “the latter may repeal the former in the same manner that one statute may repeal another.”<sup>30</sup> Despite reciting that the “Government is certainly under the strongest moral obligation to preserve inviolate the faith of all treaties,” the court assumed that the judiciary could not prevent “the legislative power, which in such matters is sovereign,” from “violat[ing]” a treaty.<sup>31</sup> The court expressed concern that if, instead, the legislature could not enact a statute superseding a treaty, then a treaty might hobble the legislature’s power. For example, the court suggested that if the legislature could not override a treaty, then a treaty might prevent Congress from declaring war (despite the Supreme Court’s opinion in *Society for the Propagation of the Gospel* twenty-three years earlier reasoning that even a declaration of war might not terminate a treaty). Specifically, the court concluded that it must allow the later-enacted statute at issue in the case to override the earlier treaty because otherwise the treaty might allow the land at issue in the case to be “exempt... forever from taxation.”<sup>32</sup>

A few years later, a nearly identical argument that a later statute should be able to override an earlier treaty was put forward by U.S. Supreme Court justice Benjamin Curtis, serving as a circuit judge, in his 1855 trial court opinion in *Taylor v. Morton*.<sup>33</sup> In that case, despite an 1832 treaty with Russia providing that U.S. duties on imported Russian goods would not exceed the duties imposed on similar goods imported from other countries, Justice Curtis held that the higher duties on Russian goods imposed by Congress’s 1842 Tariff Act overrode the 1832 treaty.<sup>34</sup> Justice Curtis viewed the power to “refuse to execute a treaty” as a matter of sovereignty, describing such power as the “prerogative, of which no nation can be deprived, without deeply

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<sup>29</sup> See *Soc’y for the Propagation of the Gospel*, 21 U.S. at 494.

<sup>30</sup> See *Webster v. Reid*, 1 Morris 467, 477 (Iowa 1846), *rev’d*, 52 U.S. 437 (1850) (reversing on evidentiary grounds); see also Lobel, *supra* note 12, at 1104 n.164.

<sup>31</sup> See *Webster*, 1 Morris at 477.

<sup>32</sup> See *id.* at 477–78 (“[A legislative act] is an act of sovereignty, which, if the judiciary could arrest, they might paralyze all the energies of law itself, on the ground that the declaration of war was a violation of treaties.”).

<sup>33</sup> See *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855).

<sup>34</sup> See *id.* at 788 (“inasmuch as the duty paid in this case was duly assessed and levied pursuant to the act of congress, there is no further or other question to be tried, and the plaintiffs cannot recover”).

affecting its independence.”<sup>35</sup> Justice Curtis expressed concern that if Congress did not have the power to override a treaty, then a treaty could make the United States “helpless” to act and also could restrict the ability of Congress to declare war.<sup>36</sup> Reasoning that “power to legislate...includes power to modify and repeal existing laws,” and that “a treaty is a law,” Justice Curtis concluded that Congress could repeal a treaty provision.<sup>37</sup>

Although commentators have noted several flaws in its reasoning,<sup>38</sup> Justice Curtis’s 1855 opinion in *Taylor v. Morton* eventually developed into the “later-in-time” method for coordinating U.S. tax statutes and U.S. tax treaty provisions. This interpretive method attempts to resolve issues arising when a treaty provision appears to conflict with a statutory provision, by privileging whichever provision is most recent. Beginning in 1871,<sup>39</sup> the Supreme Court amplified the later-in-time method by citing and discussing Justice Curtis’s *Taylor v. Morton* opinion in several tax, immigration, and treaty cases. As discussed below, the expansion and contraction of the later-in-time rule reflects the competition between, on the one hand, the principle that U.S. sovereignty is enhanced<sup>40</sup> by respecting commitments to other nations, and on the other hand, the principle that U.S. sovereignty is diminished by agreements with other nations.

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<sup>35</sup> See *id.* at 786.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 785.

<sup>38</sup> See Lobel, *supra* note 12, at 1105–06 (“The law of treaties does not now, nor did it in the 1850’s, limit the repeal of a treaty to consent of the parties or the outbreak of war. Material breaches or fundamental changes in circumstances may absolve a party of its treaty obligations...Because international law already provided escape from ruinous treaties, Justice Curtis’ sovereignty rationale overstates the powers necessary for national survival.” (footnotes omitted)); see also Sachs, *supra* note 2, at 869 & n.14 (noting that although Justice Curtis “rejected the possibility of unilateral executive denunciation or modification of treaties (even with Senate ratification),” “[t]he President alone has, in fact, renounced treaties”); Infanti, *supra* note 6, at 684 & n.41 (noting that Justice Curtis’s option was based on “the dubious notion that treaties and statutes are on equal footing”).

<sup>39</sup> See Lobel, *supra* note 12, at 1110–1111 (“The doctrine that later statutes supersede prior treaties is weakly reasoned; it is best understood as an expression of the particular concerns of its times...Absolute sovereignty established itself firmly in American jurisprudence in the late 1800’s, when nationalist sentiments ran high.”); see *id.* at 1104 (“The doctrine that Congress can supersede prior treaties and customary international law was not firmly established in American jurisprudence until the late nineteenth to the early twentieth century. As international relations changed and American military and economic power grew, the status of international law also changed.”).

<sup>40</sup> See, e.g., Sachs, *supra* note 2, at 879–880 (“[T]he sovereignty and independence of the United States is hardly a burning issue today. Rather, the far more pressing matter in the international sphere now is respect for the rule of law, of which compliance with international agreements is a vital part.”).



IV. WITHOUT HONORING TREATIES, “THERE WOULD NO LONGER BE ANY SECURITY”<sup>41</sup>

The tension between respecting treaties and overriding them shaped the emergence of the later-in-time rule. The first case in which the Supreme Court held that a later federal statute superseded an earlier treaty was the 1871 tax case *United States v. Cherokee Tobacco*.<sup>42</sup> Citing only Justice Curtis’s trial court opinion in *Taylor v. Morton*, the Supreme Court announced in *Cherokee Tobacco* that “an act of Congress may supersede a prior treaty.”<sup>43</sup> Applying this later-in-time principle, the Court held that an 1868 statute imposing a tax on tobacco sales extended to tobacco farmed on land within the Cherokee nation, despite an 1866 treaty between the Cherokee and the United States prohibiting U.S. taxes on crops grown on Cherokee land.<sup>44</sup> Despite two justices dissenting, three justices not participating, and only four justices joining the majority opinion, the Court concluded that although “the effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution,” nevertheless the “question is not involved in any doubt as to its proper solution.”<sup>45</sup>

However, even in *Cherokee Tobacco* itself, the “later-in-time” principle was criticized. The two dissenting justices in *Cherokee Tobacco* preferred to limit the “later-in-time” method by focusing on the intent of Congress in enacting a statute that might conflict with an already-existing treaty. They noted that a “general law” should not override the “special rights and privileges” created by a previous law “unless the language be such as clearly to indicate the intention of the legislature to effect such repeal.”<sup>46</sup> Therefore, because Congress did not state that the tobacco tax statute at issue was intended to include Cherokee territory, the dissenting justices believed that “the presumption is that Congress did not intend to include it.”<sup>47</sup>

Several years later, in the 1883 case *United States v. Forty-Three Gallons of Whiskey*, the Supreme Court attempted to limit *Cherokee Tobacco* to its facts, holding that in a conflict between an 1864 law enacted by Congress and provisions of the 1863 treaty between the United States and the Red Lake and Pembina bands of the Chippewa, the treaty prevailed.<sup>48</sup> Writing for a

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<sup>41</sup> See *Chew Heong v. United States*, 112 U.S. 536, 539–540 (1884) (citations omitted) (quoting Emmerich de Vattel).

<sup>42</sup> See *United States v. Cherokee Tobacco*, 78 U.S. 616 (1871).

<sup>43</sup> See *id.* at 621 & n.9.

<sup>44</sup> See *id.* at 621.

<sup>45</sup> See *id.*; see also Sachs, *supra* note 2, at 868.

<sup>46</sup> See *Cherokee Tobacco*, 78 U.S. at 622 (Bradley, J., dissenting).

<sup>47</sup> *Id.* at 623.

<sup>48</sup> See *United States v. Forty-Three Gallons of Whiskey*, 108 U.S. 491, 496–97 (1883) (“The case of the *Cherokee Tobacco Tax*, 11 Wall. 616, cannot be treated as authority against the conclusion we have reached.”).

unanimous Court, Justice Field noted that “laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language[,]” especially “where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States.”<sup>49</sup> Echoing the dissenting justices in *Cherokee Tobacco*, Justice Field wrote that “Congress never intended to interfere with the operation of the treaty,” in part because “[i]t would require very clear expressions in any general legislation to authorize the inference” that Congress intended to depart from a long-established policy or “an express stipulation” in a treaty.<sup>50</sup>

In the following year, however, the Supreme Court continued to develop the later-in-time rule in the 1884 case *Edye v. Robertson* (also known as the *Head Money Cases*).<sup>51</sup> The statute in question in the case levied a tax on ship owners for each immigrant that a ship transported to the United States, despite any contrary treaties between the U.S. and the country from which the individual was emigrating.<sup>52</sup> Although the Court noted that “[w]e are not satisfied that this act of Congress violates any of these treaties, on any just construction of them,”<sup>53</sup> the Court instead applied a later-in-time analysis. Again relying on *Taylor v. Morton* and *Cherokee Tobacco*, the Supreme Court ruled that the later-enacted federal statute superseded any previous treaty with which the statute might conflict. In discussing the later-in-time doctrine, the Court emphasized that “[a] treaty...is a law of the land as an act of congress is” and that “[t]he Constitution gives it no superiority over an act of Congress[.]”<sup>54</sup> The Court also concluded that, despite the Constitution’s different procedures for making treaties and enacting legislation, there is nothing “in its essential character, or in the branches of the government by which the treaty is made[.]” which would give a treaty “superior sanctity.”<sup>55</sup>

Yet on the same day the Supreme Court decided that a later statute superseded earlier treaties in *Edye v. Robertson*, the Supreme Court reached nearly the opposite conclusion in *Chew Heong v. United States*, holding that later-enacted statutes did not override a series of earlier treaties.<sup>56</sup> The treaties at issue in *Chew Heong* were the 1858, 1868, and 1880 treaties between the United States and China permitting limited “migration and emigration” of people between the two countries.<sup>57</sup> The statutes at issue were the 1882

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<sup>49</sup> See *id.* at 496.

<sup>50</sup> See *id.*

<sup>51</sup> See *Edye v. Robertson*, 112 U.S. 580 (1884) (also known as the *Head Money Cases*).

<sup>52</sup> See *id.* at 586, 597.

<sup>53</sup> See *id.* at 597.

<sup>54</sup> See *id.* at 598–99.

<sup>55</sup> See *id.* at 599.

<sup>56</sup> See *Chew Heong v. United States*, 112 U.S. 536 (1884).

<sup>57</sup> See *id.* at 541–43.

Chinese Exclusion Act and its 1884 revision, which suspended permission for certain Chinese laborers to enter the United States.<sup>58</sup> Mr. Chew Heong had arrived in the U.S. in 1880, left the U.S. for the Hawaiian Kingdom in 1881, and attempted to return to the U.S. in 1884.<sup>59</sup> In the meantime, the revised Chinese Exclusion Act had barred his re-entry into the U.S. unless he had obtained a certificate from a U.S. customs collector when he left — an impossibility in his case, because such certificates were not being issued at that time.<sup>60</sup> Although Justice Field had served as a circuit judge in the trial court for the case, he also heard the case on appeal to the Supreme Court. His trial court opinion construing the statutes to bar Mr. Chew Heong’s re-entry into the United States,<sup>61</sup> however, was overturned by the Supreme Court majority. Justice Field’s lengthy Supreme Court dissent in *Chew Heong*, unlike his trial court opinion in the same case, elaborated on the later-in-time rule and relied on *Taylor v. Morton* and *Cherokee Tobacco* to support his view that the later statutes overrode the earlier treaties.<sup>62</sup> He asserted that Congress’s power “can neither be taken away nor impaired by any treaty[.]” and so “Congress may, as with an ordinary statute, modify [treaty] provisions, or supersede them altogether.”<sup>63</sup>

The seven-justice *Chew Heong* majority was not persuaded. Instead, the Court limited the application of the later-in-time rule to conflicts between statute and treaty provisions that are so “certainly and clearly in hostility” that there is a “positive repugnancy between the provisions[.]”<sup>64</sup> The majority noted that, as with conflicting statutes, “[i]f, by any reasonable construction,” the conflicting provisions “can stand together, they must so stand.”<sup>65</sup> By harmonizing the statutes with the treaty, the majority allowed Mr. Chew Heong to remain in the United States.<sup>66</sup> The majority derived its emphasis on harmonization from “the duty imposed by the Constitution to respect treaty stipulations[.]” “the fact[.] that the honor of the government and people of the United States is involved in every inquiry whether rights secured by [treaty]

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<sup>58</sup> See *id.* at 543–44.

<sup>59</sup> See *id.* at 538.

<sup>60</sup> See *id.* at 538–39; see also *id.* at 560 (“[H]e was clearly entitled, under the express words of the treaty, to go from and return to the United States of his own free will—a privilege that would be destroyed, if its enjoyment depended upon a condition impossible to be performed.”).

<sup>61</sup> See *Case of Former Residence by a Chinese Laborer*, 21 F. 791, 793–94 (C.C.D. Cal. 1884) (“The act, interpreted according to its direct language, necessarily excludes in its operation those who left the country before the act took effect. If this construction works any hardship, it is for congress to change the act.”).

<sup>62</sup> See *Chew Heong*, 112 U.S. at 562–65 (Field, J., dissenting).

<sup>63</sup> See *id.* at 563.

<sup>64</sup> See *id.* at 549–550 (majority opinion) (citations omitted).

<sup>65</sup> See *id.* at 550 (citations omitted).

<sup>66</sup> See *id.* at 560 (“Thus, the legislation of Congress and the stipulations of the treaty may stand together....In accordance with these views, it is adjudged that the plaintiff in error is entitled to enter and remain in the United States.”).

stipulations shall be recognized and protected[,]” and the Court’s concern that it “would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.”<sup>67</sup> Quoting the eighteenth century legal scholar Emmerich de Vattel, the majority cautioned that “[t]here would no longer be any security...no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises[,]” and that “the faith of treaties constitutes in this respect all the security of contracting powers.”<sup>68</sup>

V. THE CONSENT OF THE UNITED STATES “WAS IN TERMS GIVEN BY THE TREATY REFERRED TO”<sup>69</sup>

The further development of the later-in-time rule continued to reflect tensions among different ideals of U.S. sovereignty, including whether the judiciary, the executive, or Congress was the appropriate arbiter of those ideals. Just four years after the *Chew Heong* majority in 1884 appeared to limit the later-in-time rule by deciding that later-enacted statutes had not completely overridden earlier treaties, Justice Field in 1888 wrote for a unanimous Supreme Court in *Whitney v. Robertson* and used the later-in-time rule to override a treaty.<sup>70</sup> In *Whitney*, the Court examined whether a U.S. treaty with Hawaii lowering duties on sugar imported into the U.S. affected the duties owed on sugar imported from the Dominican Republic, and upheld the duties imposed on Dominican Republic sugar imports.<sup>71</sup> Justice Field noted that the outcome was controlled by a Supreme Court case decided during the previous term with very similar facts, *Bartram v. Robertson*,<sup>72</sup> whose unanimous opinion was also authored by Justice Field. In his earlier opinion in *Bartram*, Justice Field had discussed the two treaties at issue and had made no mention of the later-in-time rule.<sup>73</sup>

However, in his opinion in *Whitney*, after disposing of the case using the same reasoning as he used in *Bartram*, Justice Field provided “another and complete” basis for his decision “independently of” the reasoning used in

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<sup>67</sup> See *id.* at 540.

<sup>68</sup> See *id.* at 539–540 (citations omitted).

<sup>69</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (Field, J., dissenting) (“The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent—and such consent will always be implied when not expressly withheld, and in the case of the Chinese laborers before us was in terms given by the treaty referred to—he becomes subject to all their laws, is amenable to their punishment and entitled to their protection.”).

<sup>70</sup> See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

<sup>71</sup> See *id.* at 191, 193–194.

<sup>72</sup> See *Bartram v. Robertson*, 122 U.S. 116 (1887).

<sup>73</sup> See *id.*

*Bartram*: namely, the later-in-time rule.<sup>74</sup> He reasoned that because the sugar import duties were enacted by Congress after the treaty with the Dominican Republic was adopted, the duties statute overrode any contrary provision in the treaty.<sup>75</sup> Discussing *Taylor v. Morton* and *Edye v. Robertson* and other arguments he used in his dissent in *Chew Heong*, Justice Field contended that “if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.”<sup>76</sup> He asserted that when a statute and treaty “relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other[.]”<sup>77</sup> Although Justice Field’s discussion of the later-in-time rule appears to have been dicta, it is instead often relied on and cited<sup>78</sup> as the holding of *Whitney v. Robertson*.

The struggle between constricting and widening the later-in-time rule reached a new extreme the following year in *Chae Chan Ping v. United States*, also known as *The Chinese Exclusion Case*.<sup>79</sup> The case involved an 1888 statute further revising the Chinese Exclusion Act to bar the re-entry of any Chinese immigrant who had left the United States, even if the immigrant had obtained a re-entry certificate. Writing for a unanimous Court in 1889, Justice Field held that although the 1888 statute was “in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880[.]” between the United States and China, the statute nevertheless “is not on that account invalid or to be restricted in its enforcement.”<sup>80</sup> Again discussing *Taylor v. Morton* and *Edye v. Robertson*, as well as relying on his dicta in *Whitney v. Robertson*, Justice Field concluded that a treaty is “only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress.”<sup>81</sup> Justice Field distinguished the Court’s respect for treaties in the 1823 case *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven* as concerning treaty-granted property rights, which are “not affected by the termination or abrogation of a treaty”; he characterized the treaties at issue in *Chae Chan Ping*, on the other hand, as equivalent to “expectations of benefits from the continuance of existing legislation[.]”<sup>82</sup>

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<sup>74</sup> See *Whitney*, 124 U.S. at 193.

<sup>75</sup> See *id.* at 193–94.

<sup>76</sup> See *id.* at 194.

<sup>77</sup> See *id.*

<sup>78</sup> See discussion of later-in-time rule cases, *infra* Part IV & V. In addition, two of the three Westlaw headnotes provided for the Supreme Court’s opinion *Whitney v. Robertson*, and four of the five Lexis headnotes, relate to the later-in-time rule.

<sup>79</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (also known as *The Chinese Exclusion Case*).

<sup>80</sup> See *id.* at 600.

<sup>81</sup> See *id.* at 600, 602–03.

<sup>82</sup> See *id.* at 610.

Other than for property rights as in *Society for the Propagation of the Gospel*, he held, regardless of whether a provision is in a treaty or a statute, “the last expression of the sovereign will must control.”<sup>83</sup>

A few years after his 1889 *Chae Chan Ping* opinion, however, an apparently horrified Justice Field believed a majority of the Supreme Court stretched the later-in-time rule too far in the 1893 case *Fong Yue Ting v. United States*.<sup>84</sup> In *Fong Yue Ting*, the Supreme Court evaluated an 1892 federal statute that required all Chinese immigrants within the U.S. “to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence,” or else face deportation. The Court majority upheld the statute, despite the statute’s arguable conflicts with provisions of earlier treaties between the United States and China.<sup>85</sup> Relying on *Edye v. Robertson*, on Justice Field’s opinion in *Whitney v. Robertson*, and extensively on Justice Field’s opinion *Chae Chan Ping*, the majority concluded that “it appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of Congress, any right, as a denizen or otherwise, to be and remain in this country, except by the license, permission and sufferance of Congress, to be withdrawn whenever, in its opinion, the public welfare might require it.”<sup>86</sup>

Justice Field’s forceful dissent *Fong Yue Ting* instead asserted that under the treaties at issue between China and the United States, Chinese immigrants “domiciled within our country by its consent[.]” had in fact gained rights that could not be taken away by Congress: Constitutional rights.<sup>87</sup> He asserted that “[t]he moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent” (with “their” referring to “the United States”) — and, he noted, U.S. consent to immigration from China “was in terms given by the treaty referred to” — then that immigrant is “protected by all the guaranties of the Constitution[.]” and he disagreed that a Congressional statute could take those treaty-awarded protections away.<sup>88</sup> Justice Field’s view of sovereignty appeared to have shifted

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<sup>83</sup> See *id.* at 600.

<sup>84</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698, 744, 755–56 (1893) (Field, J., dissenting) (“I also wish to say a few words upon these cases and upon the extraordinary doctrines announced in support of the orders of the court below.... I utterly dissent from and reject the doctrine expressed in the opinion of the majority.... I utterly repudiate all such notions, and reply that brutality, inhumanity, and cruelty cannot be made elements in any procedure for the enforcement of the laws of the United States.”).

<sup>85</sup> See *id.* at 723–24 (majority opinion).

<sup>86</sup> See *id.* at 720–24.

<sup>87</sup> See *id.* at 754 (Field, J., dissenting) (“Arbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and property of native-born citizens.... As men having our common humanity, they are protected by all the guaranties of the Constitution. To hold that they are subject to any different law or are less protected in any particular than other persons, is in my judgment to ignore the teachings of our history, the practice of our government, and the language of our Constitution.”).

<sup>88</sup> See *id.*

away from his opinion in *Chae Chan Ping*, in which he had written that “[t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, . . . the right to its exercise at any time . . . cannot be granted away or restrained on behalf of any one[,]” or thus by any treaty.<sup>89</sup> In contrast, in his dissent in *Fong Yue Ting*, he wrote that “[t]he government of the United States is one of limited and delegated powers[.]” and that by ignoring the provisions of a treaty, “[t]he decision of the court and the sanction it would give to legislation depriving resident aliens of the guaranties of the Constitution fills me with apprehensions.”<sup>90</sup>

After *Fong Yue Ting*, the later-in-time rule appeared to reach a point of equipoise. For example, in 1902 the Supreme Court held in *United States v. Lee Yen Tai* that an 1894 treaty between China and the United States was “in absolute harmony” with the earlier Chinese Exclusion statutes, and so the statutes could continue to be enforced.<sup>91</sup> Citing *Cherokee Tobacco*, *Edye*, *Whitney*, and *Chew Heong*, the Court recited the later-in-time rule but appeared to favor statutes over treaties: “[a] statute enacted by Congress expresses the will of the people of the United States in the most solemn form . . . and should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced.”<sup>92</sup> The Court also observed, “[n]evertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty[,]” and resolution of an alleged inconsistency between a treaty and a statute should “serve to advance the purpose of the two countries . . . as avowed in the treaty[.]”<sup>93</sup>

The Court’s 1902 opinion in *Lee Yen Tai* demonstrates that during the approximately twenty years between the 1871 *Cherokee Tobacco* tax statute and the 1893 *Fong Yue Ting* internal revenue residency certificate statute, ideas about taxation and sovereignty sharpened the later-in-time rule into a potent way for Congress to override treaty provisions. This establishment of the later-in-time rule paralleled “[i]ncreasingly accepted views of absolute sovereignty, nationalism, positivism, and congressional supremacy” in the United States.<sup>94</sup> However, these views soon were challenged by two events which made U.S. taxes and treaties more international and more salient: first, the 1913 ratification of the Sixteenth Amendment that made federal income

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<sup>89</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

<sup>90</sup> See *Fong Yue Ting*, 149 U.S. at 757–60 (Field, J., dissenting).

<sup>91</sup> See *United States v. Lee Yen Tai*, 185 U.S. 213, 222 (1902).

<sup>92</sup> See *id.* at 221–22.

<sup>93</sup> See *id.*

<sup>94</sup> See Lobel, *supra* note 12, at 1104.

tax levies constitutional,<sup>95</sup> and second, U.S. participation in World War I. The increasing tax rates and increasing international interests resulting from these events led to U.S. tax treaties, both for reducing instances of international double taxation and for improving international cooperation.<sup>96</sup>

VI. “OUR INTEREST, HOWEVER, IS PRECISELY THAT OF STRENGTHENING OUR ALLIES”<sup>97</sup>

The later-in-time rule continued to develop as U.S. domestic and international interests evolved. Just over thirty years after the Supreme Court’s apparent finalization of the later-in-time doctrine in *Lee Yen Tai*, the Court applied the doctrine in *Cook v. United States* to hold that a later statute did not override an earlier treaty.<sup>98</sup> The treaty at issue in the case was a 1924 U.S. treaty with Great Britain; complicating the application of the later-in-time rule, the statute at issue was originally enacted before the treaty in 1922 and then re-enacted after the treaty in 1930.<sup>99</sup> The 1924 U.S. treaty with Great Britain was a Prohibition-era treaty “designed to remove the friction between the two Governments” that arose when the United States banned “the carrying of intoxicating liquors” by ships in its territorial waters and ports and then enforced the ban by boarding British ships and seizing such cargo, causing “embarrassment to British vessels and trade.”<sup>100</sup> The Court first cited *Whitney v. Robertson* in holding that the 1924 treaty conflicted with and superseded the 1922 statute.<sup>101</sup> Then the Court, citing *Chew Heong*, cautioned that “[a]

<sup>95</sup> See U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

<sup>96</sup> See H. David Rosenbloom and Stanley Langbein, *United States Tax Treaty Policy: An Overview*, 19 COLUM. J. TRANSNAT’L L. 359, 361 (1981) (“During and shortly after World War I, double taxation became a matter of worldwide significance. Rates of direct taxation, particularly income taxation, were increasing, as was the volume of international business.”); see also *id.* at 374 (“The first general U.S. tax treaty - after certain limited purpose treaties, chiefly governing the taxation of shipping profits was with France, signed in 1932.”); Symposium, *The Future of the New International Tax Regime*, 24 FORDHAM J. CORP. & FIN. L. 219, 317 (2019) (Steven Dean, Closing Remarks) (“[T]here was broad consensus among experts that tax treaties were a good idea. There was agreement that double taxation posed a threat to cross border ties, and in the wake of World War I, such a threat was not to be taken lightly.”).

<sup>97</sup> See Sunita Jogarajan, *Prelude to the International Tax Treaty Network: 1815–1914 Early Tax Treaties and the Conditions for Action*, 31 OXFORD J. OF LEGAL STUD. 679, 690–91, 691 n.71 (2011) (quoting late nineteenth century German Chancellor Caprivi regarding trade treaties: “When I impose an economic war on someone, I want to weaken him; our interest, however, is precisely that of strengthening our allies.” (footnote omitted)).

<sup>98</sup> *Cook v. United States*, 288 U.S. 102 (1933).

<sup>99</sup> See *id.* at 107–108.

<sup>100</sup> See *id.* at 116–17.

<sup>101</sup> See *id.* at 118–19 (“The Treaty, being later in date than the Act of 1922, superseded, so far as inconsistent with the terms of the Act, the authority which had been conferred by § 581 upon officers of the Coast Guard to board, search and seize beyond our territorial waters.”); see also *N.W. Life Assurance Co. of Can. v. Commissioner*, 107 T.C. 363 (1996)



treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed,” and noted that Congressional “committee reports and the debates upon the Act of 1930...make no reference to the Treaty of 1924.”<sup>102</sup> The Court therefore held that “the provisions of the Treaty” superseded both the 1922 and 1930 enactments of the statute, except that the statute was not limited when applied to countries “with which we had no relevant treaties.”<sup>103</sup> Although the Court’s respect for the treaty caused at least one commentator to view the majority opinion as result-oriented rather than consistent with the later-in-time doctrine,<sup>104</sup> the Court’s reasoning also could be understood as balancing the tensions inherent in the later-in-time approach: the power of Congress versus the power of the executive branch in negotiating the treaty, as well as the sovereignty involved in the U.S. enforcing its domestic laws versus the sovereignty involved in U.S. international relations and commitments.

The need to balance these different forms of U.S. sovereignty reflects some of the differences between statutes and treaties. For example, “whereas a municipal legal order is erected on the command ‘You shall,’ the international legal system rests on the undertaking ‘We shall.’”<sup>105</sup> Ever since “the earliest double taxation treaty between Prussia and Saxony in 1869” and “[t]he first international treaty expressly concerned with the prevention of double taxation in relation to income tax” in 1899 between Prussia and the Austro-Hungarian Empire, such treaties have “play[ed] an important role in international relations,” by “enabling the movement of people between states without the burden of double taxation” and “facilitating economic integration.”<sup>106</sup> Moreover, such treaties help “maintain economic peace” — as

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(concluding that a later treaty overrode an earlier statute); see also Roger Alford, *When Treaties Supersede Statutes*, OPINIO JURIS (May 19, 2014), <http://opiniojuris.org/2014/09/05/treaties-supersede-statutes/> (listing cases in which later U.S. mutual legal assistance treaties overrode an earlier federal statute regarding discovery requests, 28 U.S.C. § 1782).

<sup>102</sup> See *Cook*, 288 U.S. at 120.

<sup>103</sup> See *id.*

<sup>104</sup> See C. Gordon Post, *A Note on Cook v. United States*, 16 SW. SOC. SCI. Q. 65, 70 (1936) (“The Court favored the Treaty of 1924 in order to avoid what it deemed to be undesirable consequences. It does not seem unreasonable, therefore, to aver that *if the Court favors a treaty*, that treaty may not be overridden by a subsequent statute even though the two are inconsistent.”).

<sup>105</sup> See Infanti, *supra* note 6, at 687–88 n.56 (quoting J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 244 (1968)).

<sup>106</sup> See Jogarajan, *supra* note 97, at 690 & n.71 (discussing how trade treaties led to “[t]he first international treaty expressly concerned with the prevention of double taxation in relation to income tax” in 1899 “between the Austro-Hungarian Empire and Prussia (Germany),” noting that “[w]hile the purpose of the Alliance [among the German Empire, Austro-Hungary, and Italy] was to maintain peace, this included economic peace”); see also Christians, *supra* note 7, at 8 (“In brief, the idea is that in an international society of states in which lawmaking is state-based (controlled by governments) but economic activity is globalized, each state’s tax regime choices necessarily stand in relation to those of others. As a result, governments use

German Chancellor Caprivi explained in the late nineteenth century, “[w]hen I impose an economic war on someone, I want to weaken him; our interest, however, is precisely that of strengthening our allies.”<sup>107</sup>

Beginning in 1932, the United States gradually increased its international commitments through a series of tax treaties.<sup>108</sup> Following a 1932 treaty with France covering certain income that had been being taxed by both France and the United States, the United States entered into tax treaties with Sweden, Canada, the United Kingdom, and several other countries, with a network of approximately twenty tax treaties adopted before 1950.<sup>109</sup>

Congress at first appeared to respect such tax treaties. When enacting the Internal Revenue Code of 1954, Congress explicitly provided in 26 U.S.C. § 7252(d) that the new tax statutes would not override the tax treaties then in effect.<sup>110</sup> When Congress instead provided that the Revenue Act of 1962 would override tax treaties, however, the Treasury Department had already advised Congress that any conflicts were small.<sup>111</sup> And when enacting the Foreign Investors Tax Act of 1966, Congress again stated that the statute’s new tax provisions would not override any U.S. treaties.<sup>112</sup> Furthermore, in 1969 the United States signed, but did not ratify, the Vienna Convention on the Law of Treaties,<sup>113</sup> which many commentators nevertheless view as binding on the United States and which requires nations to honor their treaties and not change them unilaterally.<sup>114</sup>

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taxation strategically to achieve goals that only materialize as a result of economic interdependence among states.”).

<sup>107</sup> See Jogarajan, *supra* note 97, at 691 n.71.

<sup>108</sup> See Rosenbloom and Langbein, *supra* note 96, at 374 (“The first general U.S. tax treaty... was with France, signed in 1932.”).

<sup>109</sup> See *id.* at 374–79.

<sup>110</sup> See I.R.C. § 7852(d) (1954) (“No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title.”).

<sup>111</sup> See H.R. Rep. No. 87-834, pt. 2 at 960 (1962) (“Section 7852(d) of the Internal Revenue Code of 1954 (relating to treaty obligations) shall not apply in respect of any amendment made by this [Revenue] Act [of 1962.]”); see also Doernberg, *supra* note 18, at 83 (“In the Revenue Act of 1962, Congress specifically provided that the Act took precedence over all prior treaty obligations. The Treasury had advised Congress that only one conflict existed.”).

<sup>112</sup> See Foreign Investors Tax Act of 1966, Pub. L. No. 89-1707, § 110, 80 Stat. 1539, 1575 (“No amendment made by this title shall apply in any case where its application would be contrary to any treaty obligation of the United States. For purposes of the preceding sentence, the extension of a benefit provided by any amendment made by this title shall not be deemed to be contrary to a treaty obligation of the United States.”).

<sup>113</sup> See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Article 26 of the Vienna Convention provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith” (also known as *pacta sunt servanda*, or “agreements must be kept”), and Article 39 provides that “[a] treaty may be amended by agreement between the parties.”

<sup>114</sup> See Infanti, *supra* note 6, at 687 & n.55 (arguing that “those provisions of the convention that constitute the codification of customary international law,” including Articles 26 and 39, “are binding on the United States”).

However, in the 1980s Congress began explicitly or arguably overriding provisions of U.S. tax treaties through a series of new tax statutes.<sup>115</sup> In addition, as part of the Technical and Miscellaneous Revenue Act of 1988,<sup>116</sup> Congress appeared to be attempting to limit the authority of tax treaties. For example, Congress revised 26 U.S.C. § 7252(d) by deleting the former provision, which prohibited overrides of treaties in force in 1954, and replacing it with a restatement of the premise that statutes and treaties are equivalent.<sup>117</sup> Similarly, Congress enacted a requirement for taxpayers to disclose any tax position taken that is based on the idea “that a treaty of the United States overrules (or otherwise modifies) an internal revenue law of the United States,” regardless of whether the statute or the treaty was later in time.<sup>118</sup> The 1988 Senate Finance Committee report relating to these new provisions cited *Whitney v. Robertson* as requiring courts to “carry out the process of harmonization” for tax treaties and tax statutes, “that is, to construe earlier and later provisions in a way that is consistent with the intent of each and that results in an absence of conflict between the two.”<sup>119</sup> The report also quoted

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<sup>115</sup> These statutes included the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) (introducing taxes on sales by nonresidents of U.S. real property and of shares of certain U.S. corporations holding real property) and the Tax Reform of Act 1986 (introducing the branch profits tax and branch interest tax). See Doernberg, *supra* note 18, at 83–92 (discussing these and other legislative overrides of tax treaties); see also Avi-Yonah, *supra* note 18, at 1 (“However, in some countries (primarily the US, but also to some extent the UK and Australia) treaties can be changed unilaterally by subsequent domestic legislation. This result clearly violates international law as embodied by the Vienna Convention on the Law of Treaties (“VCLT”), which is recognized as customary international law even by countries (such as the US) that have not formally ratified it.”).

<sup>116</sup> See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1012(a), 102 Stat. 3342, 3531, 3532 (1988).

<sup>117</sup> Compare I.R.C. § 7852(d) (1954) (“No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title.”) with I.R.C. § 7852(d)(1) (1988) (“For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law.”); also compare I.R.C. § 894 (1954) (“Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle.”) with I.R.C. § 894(a)(1) (1988) (“The provisions of this title shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer.”); see also Kysar, *supra* note 3, at 1396 n.33 (suggesting that the 1988 revision “of sections 894(a) and 7852(d) was a compromise between the House’s position that later enacted statutes would always take precedence over treaties, regardless of intent[,] and Treasury’s position that Congress must explicitly override a treaty in order for the statute to trump” (citations omitted)).

<sup>118</sup> See I.R.C. § 6114(a) (1988) (“Each taxpayer who, with respect to any tax imposed by this title, takes the position that a treaty of the United States overrules (or otherwise modifies) an internal revenue law of the United States shall disclose (in such manner as the Secretary may prescribe) such position...”); see also Doernberg, *supra* note 18, at 92 (“Certainly, this provision is a ‘shot across the bow’ for any taxpayer contemplating an aggressive return provision in reliance on a treaty.”).

<sup>119</sup> See S. Rep. No. 100-445, 100th Cong., 2d Sess. 316–17 (1988).

a Supreme Court restatement of the later-in-time rule.<sup>120</sup> However, despite quoting *Cook v. United States* for the proposition that “[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed,”<sup>121</sup> the report asserted that any Congressional override of a treaty should not need to be explicit, preferring to limit *Cook v. United States* to its facts.<sup>122</sup> The report argued that Congress should not need to be explicit about overriding a tax treaty due in part to the “complexity” of U.S. tax law, which makes it “not possible” for Congress to determine some potential conflicts between tax treaties and new tax legislation.<sup>123</sup>

Although some commentators justify Congressional overrides of U.S. tax treaties either as “consistent with the underlying purpose of the treaties” to reduce both double taxation and tax avoidance,<sup>124</sup> or as necessary to prevent “domestic policy” from becoming “stymied” by tax treaties,<sup>125</sup> U.S. treaty partners often are less sanguine. As six U.S. allies protested in 1987, “[t]he violation of a double tax treaty by unilateral action of one contracting party undermines the basis of trust existing between the two countries involved, erodes the certainty and security intended by international agreements,” and makes the other parties wonder if a tax treaty “serves any purpose at all.”<sup>126</sup> Such overrides make tax treaties more difficult for the United

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<sup>120</sup> See *id.* at 316 (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (“An Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and...when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”)). However, *Reid v. Covert* was not a case about the later-in-time rule. Instead, it was a case about limiting Congressional power. In *Reid v. Covert*, the Supreme Court reasoned that an unconstitutional statute was void even if a treaty purported to give Congress the ability to pass the statute. The next sentence in *Reid v. Covert* after the sentence quoted in the Senate Report reads, “It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.” See 354 U.S. at 18. Specifically, the Court held that a family member accused of murdering a soldier overseas could not be tried by a military court, even if a U.S. treaty with the country in which the soldier was serving permitted such courts martial and Congress enacted statutes governing such courts martial. See *id.* at 15–19.

<sup>121</sup> See S. Rep. No. 100-445, *supra* n. 119, at 316–17 (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)).

<sup>122</sup> See S. Rep. No. 100-445, *supra* n. 119, at 324–26.

<sup>123</sup> See *id.* at 324–26.

<sup>124</sup> See Avi-Yonah, *supra* note 18, at 17–18.

<sup>125</sup> See Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 MINN. L. REV. 1755, 1807 & n.293 (2020) (“[U]nless countries are willing and able to override tax treaties, domestic policy is stymied.”; “Unlike the United States, not all countries can override international agreements through domestic legislation.”).

<sup>126</sup> See Doernberg, *supra* note 18, at 115 & n.149 (quoting memorandum signed by “Ambassadors to the United States of the European Community’s Group of Six (France, Belgium, the Federal Republic of Germany, Great Britain, Luxembourg, and the Netherlands),” as reported in *EEC Group of Six Addresses 1986 Act’s Treaty Override Provisions*, 36 TAX NOTES 437 (1987)).

States to negotiate;<sup>127</sup> they also enforce a one-size-fits-all approach rather than allowing the United States to interact differently with different countries' tax systems.<sup>128</sup> Thus, "[s]tatutory override of treaty bargains has a disruptive effect on our entire treaty program, if not on our foreign relations generally."<sup>129</sup>

#### VII. "FACING THE WORLD ALONE IS NOT SOMETHING WE WANT TO DO"<sup>130</sup>

The later-in-time rule continues to be shaped by the tension between defining U.S. sovereignty as the power to tax, versus understanding U.S. sovereignty as the power to give up a right to tax in exchange for a treaty partner's commitment. This tension is sometimes a question of how much context is appropriate to consider — only domestic tax policy, or also U.S. international commitments? Similarly, applying the later-in-time rule is sometimes a question of how much context to consider — only the dates of the treaties and statutes at issue, to see which was "later in time," or also the text of the provisions, the purpose of the provisions,<sup>131</sup> whether the provisions can be harmonized, whether there was an explicit intent for one to override the other,<sup>132</sup> the legislative or negotiating histories of the provisions, the commentaries on model treaty provisions provided by the Treasury Department or by the Organisation for Economic Cooperation and Development,<sup>133</sup> the intent of the drafters or negotiators, or the intent of the other treaty partner?

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<sup>127</sup> See, e.g., *Infanti*, *supra* note 6, at 1 ("Legislative overrides damage the reputation of the United States as a member of the international community, undermine the trust of our treaty partners, and harm U.S. citizens and residents by hindering the Department of the Treasury in its efforts to obtain favorable concessions from foreign governments when negotiating and renegotiating tax treaties.").

<sup>128</sup> See Symposium, *supra* note 96, at 270 (Fadi Shaheen: "I view the substantive purpose of treaties as more of an instrument that facilitates the inoffensive, non-uniform allocation of taxing rights. You can just tax different items of income of different residents or residents of different countries differently without offending anyone....[T]reaties provide some framework that is based on negotiation that takes into account the tax systems of both countries...").

<sup>129</sup> See Rosenbloom and Langbein, *supra* note 96, at 397.

<sup>130</sup> See Symposium, *supra* note 96, at 277 (David Rosenbloom: "But, we need treaties—we have no means of resolving international tax disputes otherwise. What are we going to do? Face the world alone? That is beginning to sound awfully familiar to me. Facing the world alone is not something we want to do in the tax area...").

<sup>131</sup> See *United Techs. Corp. v. United States*, 315 F.3d 1320, 1322 (Fed. Cir. 2003) ("The terms of a treaty are to be given their ordinary meaning in the context of the treaty, and are to be interpreted to best fulfill the purpose of the treaty.") (citing *Xerox Corp. v. United States*, 41 F.3d 647, 652 (Fed. Cir. 1994)).

<sup>132</sup> See *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237–38 (D.C. Cir. 2003) (concluding that "[t]he kind of legislative history offered here cannot repeal an executive agreement when the legislation itself is silent" and reasoning that "Courts have insisted on clear statements from Congress in other contexts" because "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" (citations and quotation marks omitted)).

<sup>133</sup> See, e.g., *N.W. Life Assurance Co. of Can. v. Commissioner* 107 T.C. 363, 378–79, 383–84, 388–95 (1996) (concluding that a later tax treaty overrode an earlier statute, in part

Ignoring context in tax law risks unintended consequences. For example, a narrow focus on the text of a tax statute or treaty provision could fail to prevent the tax avoidance that the statute or treaty intended.<sup>134</sup> In order to consider the broader context in which tax law operates, the U.S. judiciary has developed approaches such as the economic substance doctrine. This doctrine “has required disregarding, for tax purposes, transactions that comply with the literal terms of the tax code but lack economic reality,” in order to “prevent taxpayers from subverting the legislative purpose of the tax code by engaging in transactions that are fictitious or lack economic reality simply to reap a tax benefit.”<sup>135</sup> Similarly, because “treaties exist to establish differences from domestic law,”<sup>136</sup> a “facile later-in-time analysis to resolve ‘conflicts’” between statutes and treaties risks undermining their purposes by “fail[ing] to address the hard questions of what exactly a conflict is and when it calls for a resolution.”<sup>137</sup>

Applying the later-in-time rule based on a constricted or less contextual view of U.S. sovereignty, in order to override statutory or treaty provisions mechanically, risks harming short-term and long-term national interests. For instance, if Congress were to override fundamental provisions of U.S. tax treaties, “the rest of the world” likely will not “sit still while the United States systemically repudiates its treaty commitments.”<sup>138</sup> Instead, “the price to be paid for that kind of action is going to be paid by our multinationals,” such as through unilateral actions by other countries to tax the income of American multinational corporations.<sup>139</sup> Thus “[f]acing the world alone is not something we want to do in the tax area,” because other countries “will retaliate

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by relying on the U.S. Model Technical Explanation as well as the OECD model treaty and related commentaries).

<sup>134</sup> See Kysar, *supra* note 3, at 1422–23 n.220 (“[T]he departure from a strictly textualist approach to combat abusive tax shelters has been largely accepted by American academic literature and the judiciary as necessary to defend the Code against tax avoidance.”; “[T]he failure of British and Canadian courts to look beyond a statute’s text except in limited circumstances has resulted in an inability to develop robust judicial anti-avoidance doctrines and has arguably contributed to the growth of such shelters within those systems.”).

<sup>135</sup> See *Coltec Indus. v. United States*, 454 F.3d 1340, 1353–54 (2006) (holding that a transaction “must be disregarded for tax purposes,” and noting that “the economic substance doctrine is not unlike other canons of construction that are employed in circumstances where the literal terms of a statute can undermine the ultimate purpose of the statute”).

<sup>136</sup> See H. David Rosenbloom and Fadi Shaheen, *The BEAT and the Treaties*, 92 TAX NOTES INT’L 53, 59 (Oct. 1, 2018).

<sup>137</sup> See H. David Rosenbloom and Fadi Shaheen, *The TCJA and the Treaties*, 95 TAX NOTES INT’L 1057, 1070 (Sept. 9, 2019) (emphasizing “[t]he need to reconcile or harmonize self-executing treaties (such as tax treaties) and acts of Congress (such as the IRC), given that those two sources of law are equal in their constitutional status as the supreme law of the land”).

<sup>138</sup> See Symposium, *supra* note 96, at 277 (David Rosenbloom (footnote omitted)).

<sup>139</sup> See *id.*

against U.S. companies.”<sup>140</sup> Using a narrow formulation of the later-in-time rule to disregard U.S. tax treaties thus could be seen as a kind of expensive isolationism: just as the United States learned one hundred years ago that a narrow view of national sovereignty would not ensure safety from either World War I or the influenza pandemic, the United States is unlikely to be able to afford to view its tax sovereignty as unrelated to that of its treaty partners.<sup>141</sup>

### VIII. CONCLUSION

Because the later-in-time rule reflects the history of its development, examining this history suggests how the later-in-time rule could and should be applied in the future. Determining which view of U.S. sovereignty is most beneficial — and thus which conception of the later-in-time rule is most useful — is especially important for coordinating U.S. tax treaties with the provisions of the 2017 amendments to the Internal Revenue Code, because the 2017 amendments provided little guidance for such coordination.<sup>142</sup> The more context is involved in applying the later-in-time rule, and thus the more U.S. tax sovereignty is considered to include responsibilities to treaty partners, the more useful the results of applying the later-in-time rule are likely to be. Using these principles to coordinate U.S. tax statutes and tax treaties would show more care for balancing U.S. obligations to taxpayers, non-citizens, government branches, and other nations than the unpredictability of an automatic later-in-time override. For coordinating tax statutes and tax treaties, the answer to *cui bono?* should be as close as possible to “everyone.”

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<sup>140</sup> *See id.* (“Facing the world alone is not something we want to do in the tax area because there are other countries out there that have serious interests. They will retaliate, and not against the U.S. government. Instead, they will retaliate against U.S. companies, and, I believe, notwithstanding all the influx of investment in the United States, in the multinational world there are a lot more of us than there are of them, and we will pay a price, a big price.”).

<sup>141</sup> *Cf.* Adam Gopnik, *The War on Coffee*, THE NEW YORKER, at 63, 66 (Apr. 27, 2020) (discussing the international history of coffee, describing the origin of the term “spite store” as a rival coffee shop opened only to “avenge an insult” suffered at the original shop, and concluding, “Whatever else the current [coronavirus] crisis may be teaching us, the one certain thing is that self-sufficiency is a non-solution to our suffering. None of us are sufficient, since none of us are complete selves, and what is true of each of us is true of every nation.... On our tightly connected planet, it is impossible to sustain the policy of spite stores and their isolating spiral of envy. What happens here happens there.”).

<sup>142</sup> *See* An act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018 (also known as the Tax Cuts and Jobs Act or the TCJA), Pub. L. No. 115–97, 131 Stat. 2054 (2017); *see also* Rosenbloom and Shaheen, *supra* note 135, at 59 (“As noted, in the TCJA, Congress expressed no explicit intent to override treaties, whether in the statute or in the legislative history.”).