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The Dubious Constitutional Origins of Treaty Overrides: A Response to Rosenbloom and Shaheen

by

*Reuven S. Avi-Yonah**

Abstract

In 1888, the Supreme Court decided a case called Whitney v. Robertson, *which is generally considered to be the source of the proposition that, under the Constitution, later-in-time statutes can override earlier treaties (the Rule). The Rule is highly controversial because it violates articles 26 and 27 of the Vienna Convention on the Law of Treaties (VCLT), which the United States has accepted as binding on it as customary international law (CIL). Despite that, the United States has since* Whitney *routinely engaged in treaty overrides, and the Court has repeatedly endorsed the Rule even while narrowing its application to cases where Congress has clearly expressed its intent to override.*

Despite the common consensus, the statement of the Rule in Whitney *was dicta since the Court held that the later statute did not conflict with the earlier treaty. So, when did the Court state the Rule as a holding that can be relied upon when Congress enacts legislation that purports to override treaties? The answer is that the Rule is based not on the Constitution (since the Supremacy Clause says nothing about the relationship between treaties and statutes) but on two old cases from 1870 and 1884, both of which related to disfavored groups:* Cherokee Tobacco *(Indians) and* Head Money *(Jews).*

This Article argues that the Rule is not needed as a constitutional matter. Outside the tax area, the courts will interpret later statutes as overriding earlier treaties only if Congress makes its desire to

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do so explicit, but when it does, then the courts will defer to it regardless of the VCLT because CIL in the United States is limited to situations where Congress has not spoken, and because courts respect the explicitly expressed will of Congress and follow the later-in-time principle as a matter of statutory interpretation. There is no need to rely on the Constitution for this outcome, nor for avoiding treaty overrides where Congress has not been clear because that result follows from an application of the lex specialis *canon (i.e., that a more specific law (the treaty) overcomes the more general one (the generally applicable statute) even when the statute is later in time). In the tax area, Congress codified the Rule in 1988 as section 7852(d) of the Code, and in that context made it clear that later-in-time tax statutes can override earlier tax treaties even when there is no clear statement of congressional intent. This exception has implications involving hundreds of billions in tax revenue.*

Given this outcome and the dubious historical origins and doubtful Constitutional basis for the Rule, the Court should overrule Cherokee Tobacco *and* Head Money *and leave the issue of overrides to Congress.*

Introduction 289
I. The Origins of the Rule: 1829–1888 293
II. The Development of the Rule, 1888–1984 307
III. The Application of the Rule in Tax Cases, 1980–2017 311
IV. Why the Rule Should Be Repealed 319
A. The Quality of the Precedent's Reasoning. 320
B. The Precedent's Consistency and Coherence with Previous or Subsequent Decisions. 322
C. Changed Law Since the Prior Decision. 322
D. Changed Facts Since the Prior Decision. 323
E. The Workability of the Precedent. 324
F. The Reliance Interests of Those who have Relied on the Precedent 324
G. The Age of the Precedent. 325
V. Conclusion 325

Introduction

In 1888, the Supreme Court decided a case called *Whitney v. Robertson*.[1] The case involved an 1875 agreement (included in a tariff statute) with the Kingdom of Hawaii for the duty-free importation of sugar products and an 1861 treaty with the Dominican Republic that promised most favored nation treatment and therefore after 1875 seemed to require similar duty-free treatment for Dominican products. The Court, however, rejected this contention, holding that the statute did not conflict with the provisions of the earlier treaty. It then stated the following oft-quoted rule (the "Rule"):

> By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two 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, provided always the stipulation of the treaty on the subject is self-executing.[2]

This Rule that later-in-time statutes can override earlier treaties is highly controversial because it violates articles 26 and 27 of the Vienna Convention on the Law of Treaties (VCLT), which the United States has accepted as binding on it as customary international law (CIL).[3] Despite

1. Whitney v. Robertson, 124 U.S. 190 (1888).
2. *Id.* at 194.
3. For the controversy about treaty overrides, especially in the tax area, see, for example, OECD Committee on Fiscal Affairs, *Report on Tax Treaty Overrides*, 2 Tax Notes Int'l 25 (Jan. 1, 1990) [hereinafter *OECD Report*]; Comms. on U.S. Activities of Foreign Taxpayers and Foreign Activities of U.S. Taxpayers, *Legislative Overrides of Tax Treaties*, 37 Tax Notes 931 (Nov. 30, 1987); Reuven S. Avi-Yonah, *Tax Treaty Overrides: A Qualified Defense of U.S. Practice*, *in* Tax Treaties and Domestic Law 65 (Guglielmo Maisto ed. 2006); Richard L. Doernberg, *Overriding Tax Treaties: The U.S. Perspective*, 9 Emory Int'l L. Rev. 71 (1995); Richard L. Doernberg, *Treaty*

that, the United States has since *Whitney* routinely engaged in treaty overrides, and the Court has repeatedly endorsed the Rule even while the Court narrowed its application to cases where Congress has clearly expressed its intent to override. For example, to focus just on one area, the United States explicitly or implicitly overrode its tax treaties in 1980, 1986, 1989, 1993 and 1997, and arguably also in 2010 and 2017.[4]

The Rule is usually attributed to *Whitney*. But in fact, the statement of the rule in *Whitney* was dicta, since the Court held that the agreement with Hawaii did not conflict with the earlier treaty with the Dominican Republic. Similarly, a later statement of the Rule in *Reid v. Covert* (1957) was dicta, and two other cases that arguably limited the Rule to explicit congressional statements of an intent to override (*Cook* in 1933 and *Trans World Airlines* (*TWA*) in 1984) had very unusual

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Override by Administrative Regulation: The Multiparty Financing Regulations, 2 FLA. TAX REV. 521 (1995); Richard L. Doernberg, *Legislative Overrides of Income Tax Treaties: The Branch Profits Tax and Congressional Arrogation of Authority*, 42 TAX LAW. 173 (1989); Craig Elliffe, *Preventing Unacceptable Tax Treaty Overrides*, 2022 BRIT. TAX REV. 38, https://ssrn.com/abstract=4125713 [https://perma.cc/VD35-VL6X]; Craig Elliffe, *The Lesser of Two Evils: Double Tax Treaty Override or Treaty Abuse?*, 2016 BRIT. TAX REV. 62, https://ssrn.com/abstract=2745612 [https://perma.cc/BB68-A8EY]; Craig Elliffe & John Prebble, *Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions*, 95a CAHIERS DE DROIT FISCAL INT'L 575 (2010), https://ssrn.com/abstract=1811268 [https://perma.cc/J9VG-9EQD]; Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677 (2001); Georg Kofler, *Legislative Tax Treaty Overrides in Austrian, German, and EU Law*, 2022 BRIT. TAX REV. 64, https://ssrn.com/abstract=4146955 [https://perma.cc/T4X6-N3FX]; Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1 (2013); Jinyan Li & Daniel Sandler, *The Relationship Between Domestic Anti-Avoidance Provisions and Tax Treaties*, 45 CAN. TAX. J. 891 (1997); David Sachs, *Is the 19th Century Doctrine of Treaty Override Good Law for Modern Day Tax Treaties?*, 47 TAX LAW. 867 (1994); Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313 (2001); Matthias Valta & Robert Stendel, *Dynamik des Völkervertragsrechts und treaty override— Perspektiven des offenen Verfassungsstaats* [*The Dynamics of Treaty Law and the Treaty Override— Perspectives on Open Constitutionalism*] (Max Planck Inst. for Compar. Pub. L. & Int'l L. Rsch. Paper No. 2019-18, 2019), https://ssrn.com/abstract=3463170 [https://perma.cc/NAE4-55NJ].

4. *See* discussion *infra* Part II.

facts and can easily be distinguished from the general application of the Rule on that basis.[5]

When did the Court state the Rule as a holding that can be relied upon when Congress enacts legislation that purports to override treaties? The answer is that the Rule is based not on the Constitution (since as explained below, the Supremacy Clause says nothing about the relationship between treaties and statutes) but on two old cases from 1870 and 1884, both of which related to disfavored groups: *Cherokee Tobacco* (Indians) and *Head Money* (Jews).[6]

Moreover, this Article argues that the Rule is not needed as a constitutional matter. Outside the tax area, the courts will interpret later statutes as overriding earlier treaties only if Congress makes its desire to do so explicit, but when it does, then the courts will defer to it regardless of the VCLT because CIL in the United States is limited to situations where Congress has not spoken and because courts respect the explicitly expressed will of Congress and follow the later-in-time principle as a matter of statutory interpretation. There is no need to rely on the Constitution for this outcome, nor for avoiding treaty overrides where Congress has not been clear because that result follows from an application of the *lex specialis* canon.[7] In the tax area, Congress codified the Rule in 1988 as section 7852(d) of the Code, and in that context made it clear that later-in-time tax statutes can override earlier tax treaties even when there is no clear statement of congressional intent.[8]

Given this outcome and the dubious historical origins and doubtful Constitutional basis for the Rule, the Court should overrule *Cherokee Tobacco* and *Head Money*, limit *Cook* and *TWA* to their facts, and leave the issue of overrides to Congress.

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5. Reid v. Covert, 354 U.S. 1 (1956); Cook v. United States, 288 U.S. 102 (1933); Trans World Airlines, Inc. v. Franklin Mint Co., 466 U.S. 243 (1984); *see* discussion *infra* Part II.

6. The Cherokee Tobacco, 78 U.S. 616 (1870); Edye v. Robertson (*Head Money Cases*), 112 U.S. 580 (1884).

7. The canon states that a more specific law (the treaty, which is limited to one country) overcomes the more general one (the generally applicable statute) even when the statute is later in time. *See Cook*, 288 U.S. at 118–19; *Trans World Airlines, Inc.*, 466 U.S. at 252–53.

8. *See* discussion *infra* Part III.

What difference would that outcome make? A lot, it turns out, and billions of dollars in tax revenue are dependent on this issue.[9] If the Rule is a matter of constitutional interpretation, then the Court gets the last word, and it can require for example that Congress make its intent to override explicit in the statute. That is the implication of its holdings in *Cook* and *TWA*, although, as noted above, these cases had unusual facts and it is not clear that a general modification of the Rule to require explicit statements was intended. But if the Rule is just a matter of statutory interpretation, then Congress gets the last word, and it can legislate (as it did for tax law in 1988) that a later statute can override an earlier tax treaty without any explicit statement to that effect. This outcome is important because in the twenty-first century Congress has been enacting tax legislation by using the budget reconciliation process in the Senate to avoid a filibuster, and under the budget reconciliation rules as interpreted by the Senate parliamentarian, it is likely that no explicit legislative statement of an intent to override can be included in the legislation.[10] This is why the two leading examples of tax treaty overrides in recent years, the enactment of the "net investment income tax" (NIIT) as part of the Affordable Care Act in 2010, which arguably overrides article 23 of the tax treaties, and of the "base erosion anti abuse tax" (BEAT) as part of the Tax Cuts and Jobs Act of 2017 (TCJA), which arguably overrides article 24 of the tax treaties, both do not

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9. The main problem involves the Base Erosion Anti Abuse Tax (BEAT) enacted in 2017, and the issue is whether the BEAT applies when it conflicts with a treaty in the absence of an explicit congressional statement to that effect, since if it does not then there are few cases in which the BEAT would apply. The BEAT was estimated to raise $150 billion when enacted and is likely to raise more as the rate increases. For this debate, *see* H. David Rosenbloom & Fadi Shaheen, *The BEAT and the Treaties*, 92 TAX NOTES INT'L 53 (Oct. 1, 2018); *see also* H. David Rosenbloom & Fadi Shaheen, *Treaty Override: The False Conflict Between* Whitney *and* Cook, 24 FLA. TAX REV. 375 (2021); H. David Rosenbloom & Fadi Shaheen, *The TCJA and the Treaties*, 95 TAX NOTES INT'L (TA) 1057 (Sept. 9, 2019). *But see* Reuven S. Avi-Yonah & Bret Wells, *The BEAT and Treaty Overrides: A Brief Response to Rosenbloom and Shaheen*, 92 TAX NOTES INT'L 383 (Oct. 22, 2018).

10. Adam Girts, Yossarian's Treaty: A Proposal to Solve the Treaty Override v. Byrd Rule Catch-22 When Implementing Multilateral Treaties, (May 21, 2022) (unpublished working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203605 [https://perma.cc/7EG9-C47L].

contain statements of congressional intent to override.[11] Therefore, some commentators have argued that they do not apply in cases where there is a treaty in place, which is clearly contrary to congressional intent but arguably follows from the Court's statements in *Cook* and *TWA* that an explicit statement is required.[12] This result would not be possible if the 1988 codification applies, and that requires the Court to state that the Rule is not based on the Constitution.

The rest of the Article proceeds as follows. Part I discusses the origins and development of the Rule from *Foster v. Eilam and Nelson* (1829) to *Whitney v. Robertson* (1888). Part II follows the development of the Rule from 1888 until its modern restatement in *TWA* in 1984 and also explores some more recent applications in lower court cases in both tax and non-tax contexts. Part III shows how the Rule has been applied in tax cases and the impact of codification in 1988. Part IV explains why the Supreme Court should overrule *Cherokee Tobacco* and *Head Money* and make the application of the Rule a matter of statutory rather than constitutional interpretation, which in turn would leave Congress free to alter the Rule as it attempted to do for tax cases in 1988. Part V concludes.

I. The Origins of the Rule: 1829–1888

The Supremacy Clause of the U.S. Constitution (Art. VI, cl. 2) provides—

> 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.[13]

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11. Reuven S. Avi-Yonah, *Sunt Pacta Servanda? The Problem of Tax Treaty Overrides* (U. Mich. Pub. L., Research Paper No. 22-022, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4098235 [https://perma.cc/JJS2-WH2W].

12. *See* Rosenbloom & Shaheen, *The BEAT and the Treaties*, *supra* note 9; Rosenbloom & Shaheen, *Treaty Override*, *supra* note 9; Rosenbloom & Shaheen, *The TCJA and the Treaties*, *supra* note 9.

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

The purpose of this Clause was to ensure that federal laws and U.S. treaties be superior over state laws, as is made clear by the addition of the requirement that state judges follow federal laws and treaties "anything in the Constitution or laws of any State to the contrary notwithstanding." This was one of the major innovations of the Constitution over the Articles of Confederation. Justice Oliver Wendell Holmes stated that no harm will come to the United States if judicial review of federal laws were overturned, but that the country would fall apart if federal judges could not rule that state laws were unconstitutional.[14]

Importantly, the Supremacy Clause says nothing about the relationship between federal laws and federal treaties. The Vienna Convention on the Law of Treaties (VCLT), which the United States has not ratified but generally regards as binding customary international law (CIL), states that treaties are superior to domestic laws.[15] The United States does not follow this international law rule (and is therefore violating CIL, as it is allowed to do under *Paquete Habana*)[16] because it has adopted the Rule. But supposing the United States followed the VCLT, no harm would come to the Supremacy Clause: This would merely mean that treaties are superior to domestic laws, but both will remain safely superior to state laws.

In the famous case of *Foster v. Elam and Neilson* (1829), Chief Justice Marshall created the distinction between self-executing treaties (that operate without legislation) and non-self-executing treaties (that require legislation to operate). He then said in dicta:

> In the United States, a different principle is established. Our Constitution declares a treaty to be the law

14. "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." Oliver Wendell Holmes, Collected Legal Papers 295–96 (New York: Harcourt, Brace and Howe ed., The Lawbook Exchange, Ltd. 2006) (1920).

15. Vienna Convention on the Law of Treaties, arts. 26–27, May 23, 1969, 1155 U.N.T.S. 331.

16. The Paquete Habana, 175 U.S. 677 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, *where there is no treaty and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations. . . ." (Emphasis added.)).

> of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.[17]

He was distinguishing the U.S. practice (which he seems to have invented) of distinguishing self-executing from non-self-executing treaties from the UK practice, under which every treaty must be implemented by legislation (i.e., every treaty is non-self-executing).[18] The

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17. Foster v. Neilson, 27 U.S. 253, 254 (1829).

18. In Commissioners of Inland Revenue v. Collco Dealings, Ltd., the UK High Court of Justice (Chancery Division) held:

> The Company has no rights under any agreement. Its rights arise from the Act of Parliament which confirms the agreement and gives it the force of law. . . . "But if the statute is unambiguous, its provisions must be followed, even if they are contrary to international law." It would not, I think, be possible to state in clearer language and with less ambiguity the determination of the Legislature to put an end, in all and every case, to a practice which was a gross misuse of a concession. What, after all, is involved? It is nothing else than that, when Parliament said "under any enactment," it meant any enactment except. . . ." But it was not found easy to state precisely the terms of the exception. The best that I could get was "except an enactment which is part of a reciprocal arrangement with a sovereign foreign State." It is said that the plain words of the Statute are to be disregarded and these words arbitrarily inserted in order to observe the comity of nations and the established rules of international law. I am not sure upon which of these high-sounding phrases the Appellant Company chiefly relies. But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign State from taking what steps it thinks fit to protect its own revenue laws from gross abuse or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the Statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear. I am well aware that there are cases—many were cited to your Lordships—in which the principle stated

UK is a "dualist" jurisdiction while the United States is a "monist" jurisdiction for self-executing treaties and CIL.[19]

Marshall could have ruled that all treaties are non-self-executing, in which case the Rule automatically applies because later legislation can overcome earlier legislation. But he did not, perhaps because self-executing treaties bypass Congress and therefore are more subject to direct judicial control (he was after all the Chief Justice who invented judicial review of federal laws). But is it not clear that he thought about the Rule because he does not mention it (i.e., he does not state that under the Supremacy Clause later in time governs for self-executing treaties). In any case, this was dicta because the holding involved a non-self-executing treaty.

The next Supreme Court case to invoke the Rule was *Cherokee Tobacco* (1870).[20] In that case, the question arose whether a later federal statute taxing tobacco overrode an earlier treaty with the Cherokee that promised them immunity from federal taxation on their reservation. The case was heard before only six justices. The majority held as follows:

> in Maxwell has been applied, though less often, I think, upon an appeal to comity of nations than to rules of international law. But each case must be judged in its own context, and I know of no case in which at the same time the words of a Statute were unambiguously clear and it was sought to vary them upon grounds which could not be justified by broad considerations of justice or expediency nor could be supposed to commend themselves to that sovereign power whose citizens relied on them.

[1961] 39 TC 509 at 527–28 (UK).

19. *See generally* Sachin Sachdeva, *Tax Treaty Overrides: A Comparative Study of the Monist and the Dualist Approaches*, 41 INTERTAX 180 (2013). Monist European countries include Belgium, France, Greece, Luxembourg, the Netherlands, Russia and Spain. In France, under Article 52 of the Constitution of France, the power to negotiate and ratify treaties rests with the President of the Republic and tax treaties take automatic effect with the French legal system. *Id.* at 184–85. In Spain, Article 97 of the Spanish Constitution authorises the Government to conduct domestic and foreign policy. *Id.* at 192. A tax treaty, ratified in accordance with the procedure prescribed by the Spanish Constitution, is published in the Official Gazette and the treaty attains full legal force. *Id.*

20. 78 U.S. 616 (1870).

But conceding these views to be correct, it is insisted that the section cannot apply to the Cherokee nation because it is in conflict with the treaty. Undoubtedly one or the other must yield. The repugnancy is clear, and they cannot stand together.

The second section of the fourth article of the Constitution of the United States declares that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land."

It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. *The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution*. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful and good faith may be inobligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.[21]

21. *Id.* at 621 (emphasis added) (citations omitted).

Two points stand out. First, the majority conceded that the Rule did not follow from the Supremacy Clause. Second, the cases relied upon do not dictate the outcome: *Foster* was dicta (and did not state the Rule), and the other cases were lower court cases that were not binding on the Supreme Court. These lower court cases relied on the legal canon that the specific overcomes the general, since treaties are more specific than statutes, and the dissent relied on that canon and the lack of an explicit congressional statement of an intent to override the treaty to argue that the treaty should survive. But they were in the minority.

It is striking that the first case in the Supreme Court to adopt the Rule involved an Indian treaty because it leads to the suspicion that the most important reason to adopt the Rule was to enable Congress to violate Indian treaties by mere legislation. Fundamentally, *Cherokee Tobacco* characterized the issue as a political question rather than a judicial one. That doctrine is behind the "plenary power" doctrine announced in *United States v. Kagama* (1886) and *Lone Wolf v. Hitchcock* (1903) and *Tee-Hit-Ton Indians v. United States* (1955), which characterize acts of Congress regarding Indians as not subject to judicial review.[22] Eventually, that approach was limited in *United States v. Creek Nation* (1935) and *United States v. Sioux Nation* (1985), which held that Congress must compensate tribes for takings of property "recognized" by treaty or statute, and by the *Morton v. Mancari* (1974) doctrine that laws treating Indians differently from non-Indians do not violate the Equal Protection Clause if they can be "rationally tied" to Congress's unique obligations toward Indians and Indian nations.[23]

Cherokee Tobacco was limited to its facts in 1883 because only six justices were involved.[24] But it was relied on by the Court in 1884, in the first case to hold that the Rule applied to foreign treaties.[25]

The *Head Money* case involved a head tax on immigrants which was repugnant to an earlier treaty with Russia (the source of

22. *See* United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

23. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Creek Nation, 295 U.S. 103 (1935); *see also* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

24. United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491 (1883).

25. Edye v. Robertson (*Head Money Cases*), 112 U.S. 580 (1884).

many immigrants, mostly Jewish, in the 1880s).[26] The unanimous Court held as follows:

> We are of opinion that, so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they must prevail in all the judicial courts of this country. We had supposed that the question here raised was set at rest in this court by the decision in the case of *The Cherokee Tobacco*. It is true, as suggested by counsel, that three judges of the court did not sit in the case, and two others dissented. But six judges took part in the decision, and the two who dissented placed that dissent upon the ground that [C]ongress did not *intend* that the tax on tobacco should extend to the Cherokee tribe. They referred to the existence of the treaty which would be violated if the statute was so construed as persuasive against such a construction, but they nowhere intimated that, if the statute was correctly construed by the court, it was void because it conflicted with the treaty, which they would have done if they had held that view. On the point now in controversy, it was therefore the opinion of all the judges who heard the case.
>
> The precise question involved here, namely, a supposed conflict between an act of [C]ongress imposing a customs duty and a treaty with Russia on that subject, in force when the act was passed, came before the [C]ircuit [C]ourt for the [D]istrict of Massachusetts in 1855. It received the consideration of that eminent

26. On antisemitism and the Supreme Court, see, for example, the virulent opposition to Louis Brandeis' nomination in 1916: "[Nevertheless] it would take generations to slough off age-old prejudices. Whenever Brandeis spoke in judicial conference, for example, Wilson's first appointee, Justice McReynolds, was known simply to rise and leave the room. He went so far as to avoid official Court pictures because he did not want to be photographed with a Jew. And when Brandeis retired in 1939—leaving a distinguished legacy of liberal decisions behind him—he received the customary panegyric letter, signed by his colleagues . . . all except one." A. SCOTT BERG, WILSON 402 (G.P. Putnam's Sons 2013).

jurist, Mr. Justice Curtis of this court, who, in a very learned opinion, exhausted the sources of argument on the subject, holding that, if there were such conflict, the act of Congress must prevail in a judicial forum. And Mr. Justice Field, in a very recent case in the Ninth [C]ircuit, that of *In re Ah Lung*, on a writ of *habeas corpus*, has delivered an opinion sustaining the same doctrine in reference to a statute regulating the immigration of Chinamen into this country. In the *Clinton Bridge Case*, the writer of this opinion expressed the same views as did Judge Woodruff, on full consideration, in *Ropes v. Clinch*, and Judge Wallace, in the same circuit, in *Bartram v. Robertson*.

It is very difficult to understand how any different doctrine can be sustained. A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may, in the end, be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. *The constitution of the United States places such provisions as these in the same category as other laws of [C]ongress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land."*

> A treaty, then, is a law of the land, as an act of [C]ongress is whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.
>
> But, even in this aspect of the case, there is nothing in this law which makes it irrepealable or unchangeable. *The constitution gives it no superiority over an act of congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.*
>
> A treaty is made by the president and the [S]enate. Statutes are made by the president, the [S]enate, and the [H]ouse of [R]epresentatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by [C]ongress and which, when made, usually suspends or destroys existing treaties between the nations thus at war.
>
> In short, we are of opinion that, *so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.*[27]

This is a clear statement of the Rule, and it is a holding for a unanimous Court. But on the very same day (December 8, 1884) the Court also issued its opinion in *Chew Heong v. United States*, a case involving a

27. *Head Money Cases*, 112 U.S. at 597–99 (emphases added) (citations omitted).

Chinese citizen who left the United States for Hawaii and wanted to come back after the Chinese Exclusion Act came into effect, and this decision suggested a higher status for treaties.[28] The Court held 7-2 that:

> If, as claimed by plaintiff in error, the treaty of 1880, fairly interpreted, secured to him at the time of his departure for Honolulu, the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting the substance of that right, the court should be slow to assume that [C]ongress intended to violate the stipulations of a treaty, so recently made with the government of another country. "There would no longer be any security," says Vattel, "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 as sovereign nations, acknowledging no superior, cannot be compelled to accept any interpretation, however just and reasonable, "the faith of treaties constitutes in this respect all the security of contracting powers." "Treaties of every kind," says Kent, "are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith." A treaty that operates of itself without the aid of legislation is equivalent to an act of Congress, and while in force constitutes a part of the supreme law of the land. Aside from the duty imposed by the constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a coordinate department of the government were it to doubt, for a moment, that these considerations were present in the

28. 112 U.S. 536 (1884).

minds of its members when the legislation in question was enacted.

. . . .

But even in the case of statutes, whose repeal or modification involves no question of good faith with the government or people of other countries, the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act. In *Wood v. United States*, Mr. Justice Story, speaking for the Court upon a question of the repeal of a statute by implication, said: "That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say, by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy." In *State v. Stoll*, the language of the court was that "it must appear that the latter provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be."

When the act of 1882 was passed, [C]ongress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative

> answer. The presumption must be indulged that the broad language of these sections was intended to apply to those Chinese laborers whose coming to this country might, consistently with the treaty, be reasonably regulated, limited, or suspended, and not to those who, by the express words of the same treaty, were entitled to go and come of their own free will, and enjoy such privileges and immunities as were accorded to the citizens and subjects of the most favored nation.[29]

Chew Heong is an example of the Court harmonizing a statute with an earlier treaty, so it is therefore not inconsistent with the *Head Money* cases decided on the same day. The case even accepts the possibility of override by implication (i.e., without a statement of congressional intent to override) by citing Justice Story as saying that harmonization is to be preferred, "[b]ut there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed *by implication* only *pro tanto,* to the extent of the repugnancy."[30]

Nevertheless, the respect for treaties evidenced in *Chew Heong* is somewhat inconsistent with the disregard for treaties evidenced in *Head Money*, especially since both involved the same subject of immigration.

The next case invoking the Rule (which since *Head Money* has been a holding) was *Whitney* in 1888, which is usually erroneously cited as establishing the Rule (which was in fact adopted for foreign treaties in *Head Money* four years earlier, following *Cherokee Tobacco* which adopted it for treaties with Indian tribes). In *Whitney*, the Court stated in dicta as follows:

> The act of [C]ongress under which the duties were collected, authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican [R]epublic, and, *if there be any conflict between*

29. *Id.* at 539–42 (citations omitted).

30. *Id.* at 549 (emphasis added). The Court also cited *State v. Stoll*, providing that "[i]f harmony is impossible, and only in that event, *the former law is repealed* in part or wholly, as the case may be." *Id.* at 550 (emphasis added) (citations omitted). There is no reference to intent here.

the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by [C]ongress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions so far as they bind the United States, or supersede them altogether. *By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two 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: provided, always, the stipulation of the treaty on the subject is self-executing.* If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance. In *Taylor v. Morton*, this subject was very elaborately considered at the circuit by Mr. Justice Curtis, of this [C]ourt, and he held that whether a treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation of the treaty had been voluntarily

withdrawn by one party, so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he justly observed, as a necessary consequence of these views, that, if the power to determine these matters is vested in [C]ongress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad.

In these views we fully concur. It follows, therefore, that *when a law is clear in its provisions*, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head Money Cases,* it was objected to an act of [C]ongress that it violated provisions contained in treaties with foreign nations, but the [C]ourt replied that, so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration of the subject, it held that "so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as [C]ongress may pass for its enforcement, modification, or repeal."[31]

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31. Whitney v. Robertson, 124 U.S. 190, 193–95 (1888) (emphases added) (citations omitted).

This is also a clear statement of the Rule, although it is modified by "when a law is clear in its provisions,"[32] which enabled later decisions to argue that a statement of congressional intent is required for the Rule to apply (even though this is inconsistent with the Court's reference to overrides "by accident"). But it was dicta (the Court holding the statute and the treaty could be harmonized).

II. The Development of the Rule, 1888–1984

The next Supreme Court case to invoke the Rule, and arguably to limit it, was *Cook v. United States* (1933). In that case, there was a statute enacted in 1922, a treaty limiting the statute deliberately in 1924, and then a word-by-word reenactment of the statute in 1930. The government argued that the re-enacted statute overrode the treaty, but the Court rejected this argument, holding as follows:

> The Treaty was not abrogated by re-enacting section 581 in the Tariff Act of 1930 in the identical terms of the [A]ct of 1922. *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.* Here, the contrary appears. The committee reports and the debates upon the [A]ct of 1930, like the re-enacted section itself, make no reference to the Treaty of 1924. Any doubt as to the construction of the section should be deemed resolved by the consistent departmental practice existing before its re-enactment.[33]

I do not think that *Cook* modified the Rule, because the reference to *Chew Heong* and *Payne*, which were both harmonizing cases, makes it clear that the Court thought it was harmonizing the later statute and the earlier treaty. The desire to do that in this case can easily be explained by the facts: the treaty was expressly negotiated to limit the statute, the relevant department continued to observe the treaty, and

32. *Id.* at 195.

33. Cook v. United States, 288 U.S. 102, 119–20 (1933) (emphasis added) (citations omitted).

there was no hint in the legislation or in the legislative history that Congress considered the treaty when it re-enacted the statute (which unlike the treaty applied universally, not just to the UK). This is far from a general statement that every statute that is repugnant with an earlier treaty must yield unless Congress explicitly stated otherwise. Such a rule cannot be found in the earlier Supreme Court cases on this subject, and by referring to *Chew Heong* and *Payne*, the Court showed that it was harmonizing in this context, not announcing a new general rule that departed from *Head Money* and *Whitney*, which it does not mention. But other commentators read *Cook* as modifying (or clarifying) the Rule to require an explicit statement of congressional intent to permit a later statute to override an earlier treaty.[34]

In *Reid v. Covert* (1956), the Court stated in dicta:

> This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.[35]

This is a clear statement of the Rule, but it is dicta, since the case involved a conflict between a treaty and the Constitution, not with a statute.

Finally, in *TWA v. Franklin* (1984), the Court held as follows:

> There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. "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." Legislative silence

34. *See* Rosenbloom & Shaheen, *Treaty Override*, *supra* note 9; *see also* Rosenbloom & Shaheen, *The BEAT and the Treaties*, *supra* note 9; Rosenbloom & Shaheen, *The TCJA and the Treaties*, *supra* note 9. *But see* Avi-Yonah & Wells, *The Beat and Treaty Overrides*, *supra* note 9; Reuven S. Avi-Yonah, *Is the Net Investment Income Tax a Treaty Override? Reflections on* Toulouse, 104 Tax Notes Int'l 41 (Oct. 4, 2021); Avi-Yonah, *supra* note 11.

35. 354 U.S. 1, 18 (1956).

> is not sufficient to abrogate a treaty. Neither the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention. The repeal was unrelated to the Convention; it was intended to give formal effect to a new international monetary system that had in fact evolved almost a decade earlier.
>
> Second, the Convention is a self-executing treaty. Though the Convention permits individual signatories to convert liability limits into national currencies by legislation or otherwise, no domestic legislation is required to give the Convention the force of law in the United States. The repeal of a purely domestic piece of legislation should accordingly not be read as an implicit abrogation of any part of it.
>
> Third, Article 39 of the Convention requires a signatory that wishes to withdraw from the Convention to provide other signatories with six months' notice, formally communicated through the Government of Poland. The repeal of the Par Value Modification Act had a sufficient lead time, but Congress and the Executive Branch took no steps to notify other signatories that the United States planned to abrogate the Convention. To the contrary, the Executive Branch continues to maintain that the Convention's liability limit remains enforceable in the United States. In these circumstances we are unwilling to impute to the political branches an intent to abrogate a treaty without following appropriate procedures set out in the Convention itself.[36]

This case as well should be read as an affirmation of the Rule, not as a modification. The treaty in question was an important multilateral convention, and the statute a purely domestic piece of legislation

36. 466 U.S. 243, 252–53 (1984) (footnote and citations omitted). The reference to "ambiguous Congressional action" has led some lower courts to demand only that the overriding statute be textually clear, but the context shows that the Court was referring to ambiguity in congressional intent. *Id.*

with no relationship to the treaty. The Executive Branch continued to observe the treaty. Under these circumstances it is not surprising that the Court wanted more from Congress to indicate it meant to override the treaty. This too is more a case of harmonization than a pronouncement of a general rule requiring an explicit statement of congressional intent for all overrides.[37]

Lower court cases in non-tax contexts generally follow the Rule by requiring that a later-in-time statute include a clear statement of congressional intent to override an earlier treaty unless that would render the statute a nullity. Rosenbloom and Shaheen summarize these cases as follows:

> Several D.C. Circuit and Tax Court cases are sometimes cited for the proposition that lower courts do not follow *Cook*. Those cases belong to two groups. One deals with a later-in-time statute accompanied by a clearly expressed congressional intent to override repugnant treaty provisions, thus meeting the *Cook* standard for applying the later-in-time rule. The other group deals with later-in-time treaty provisions that by their terms subjected the treaty obligation to preexisting domestic law limitations, thus producing no repugnancies and allowing the courts to harmonize the two instruments by giving full effect to both without violating the language of either. There is nothing in either group of cases that is inconsistent with *Cook*.[38]

37. In 1988, The Senate, in the legislative history of a statutory provision adopting the Rule for tax treaties, § 7852(d), stated explicitly that the Rule does not require a statement of congressional intent, distinguishing *Cook*. *See* S. Rep. No. 100-445, at 316, 325 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 4515, 4836 [hereinafter Senate Report].

38. Rosenbloom & Shaheen, *False Conflict*, *supra* note 9, at 402 (footnotes omitted). The non-tax cases they discuss are *South African Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987); *Fund for Animals v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003); *Roeder v. Islamic Republic of Iran*, 646 F.3d 56 (D.C. Cir. 2011); and *Owner-Operator Independent Drivers Association v. U.S. Department of Transportation*, 724 F.3d 230 (D.C. Cir. 2013). *Id.* at 402–03. They also mention but do not discuss tax cases, but there is at least one tax case (*Kappus v. Commissioner*, 337 F.3d 1053 (D.C. Cir. 2003)) that found an

III. The Application of the Rule in Tax Cases, 1980–2017

The situation is somewhat different in tax cases because Congress codified the Rule as section 7852(d) in 1988, which states as follows:

> 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.[39]

The legislative history of this provision is contained in the Senate Report, which states explicitly that, in the tax context, implicit overrides are permitted:

> Notwithstanding Congress' intent that the [1986 Tax Reform] Act and income tax treaties be construed harmoniously to the extent possible, conflicts other than those addressed in this bill or in the Act ultimately may be found or alleged to exist. Similarly, conflicts between treaties and other acts of Congress affecting revenue are likely to be found or alleged to exist in the future, either with respect to existing or future treaties and statutes. The bill provides that for purpose 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 a law. In adopting this rule, the committee intends to permanently codify (with respect to tax-related provisions) present law to the effect that canons of construction applied by the courts to the interaction of two statutes enacted at different times apply also in construing the interactions of revenue statutes and treaties enacted

override when the statute (the Tax Reform Act of 1986) did not explicitly mention an intent to override at the time it was enacted. (A later statute, the Technical Corrections and Miscellaneous Revenue Act of 1988, did explicitly mention it. Pub. Law No. 100-647, § 6139(a), 102 Stat. 3724 (1988).)

39. § 7852(d) (emphasis added).

and entered into at different times. The committee does not intend this codification to alter the initial presumption of harmony between, for example, earlier treaties and later statutes. Thus, for example, the bill continues to allow an earlier ratified treaty provision to continue in effect where there is not an actual conflict between that treaty provision and a subsequent revenue statute (i.e., where it is consistent with the intent of each provision to interpret them in a way that gives effect to both). Nor does the committee intend that this codification blunt in any way the superiority of the latest expression of the sovereign will in cases involving actual conflicts, whether that expression appears in a treaty or a statute.

. . . .

Although the committee believes that the bill's provision regarding the equal status of treaties and statutes merely codifies present law, the committee believes that this provision, and the bill's disclosure provision, are necessary technical corrections to the Act for several reasons. The committee is concerned that the relationship of the tax laws and treaties is misunderstood. The internal tax laws of most countries provide some sort of regime for taxing either the foreign income of domestic persons, the domestic income of foreign persons, or both. Either type of income, then, is potentially subject to two autonomous tax systems each of which is at best designed to mesh with other tax systems only in broad general terms. Double taxation of the same income, or taxation of certain income by neither system, can potentially result. Income tax treaties, in the committee's view, are agreements that provide the mechanism for coordinating two identified tax systems by reference to their particular provisions and the particular tax policies they reflect, and which have as their primary objectives the elimination of double taxation and the prevention of fiscal evasion. Ultimately, in the committee's view, meeting these objectives is a desirable goal that serves to improve the long term environment for commercial and financial dealings between residents of the treaty partners.

The committee believes that when a treaty partner's internal tax laws and policies change, treaty provisions designed and bargained to coordinate the predecessor laws and policies must be reviewed for purposes of determining how those provisions apply under the changed circumstances. The committee recognizes that there are cases where giving continued effect to a particular treaty provision does not conflict with the policy of a particular statutory change. In certain other cases, however, a mismatch between an existing treaty provision and a newly-enacted law may exist, in which case the continued effect of the treaty provision may frustrate the policy of the new internal law. In some cases the continued effect of the existing treaty provision would be to give an unbargained-for benefit to taxpayers or one of the treaty partners. At that point, the treaty provision in question may no longer eliminate double taxation or prevent fiscal evasion; if not, its intended purpose would no longer be served.

The committee recognizes that some would prefer that existing treaties be conformed to changing U.S. tax policy solely by treaty renegotiation. However, the committee notes that in recent years, U.S. tax laws have been constantly changing. Moreover, once U.S. tax policy has changed, the existence of an unbargained-for benefit created by the change would have the effect of making renegotiation to reflect current U.S. tax policy extremely difficult, because the other country may have little or no incentive to remove an unbargained-for benefit whose cost is borne by the United States.

The committee recognizes that the parties to the treaty can differ as to whether the continued effect of a treaty provision in light of a particular statutory change provides such an unbargained-for benefit or otherwise frustrates the basic objectives of tax treaties. Remedies may be available in the case of what one party views as a breach of international law. However, the committee believes that under the constitutional system of government of the United States, where tax laws must be passed by both Houses of Congress and signed by the President, and where it is the role of the

courts to decide the constitutionality of the laws and what the laws mean, it is not the role of taxpayers, the Judicial branch, or the Executive branch to determine that constitutionally valid statutes that actually conflict with earlier treaties ought not to be given effect either because of views of international law or for any other reason.

The committee is concerned that there are some who assert that treaties receive preferential treatment in their interaction with statutes. The committee is further concerned that whatever support is found for this view is based on misinterpretations of authoritative pronouncements on the subject. For example, before original introduction of this technical corrections legislation, the Internal Revenue Service announced that new Code section 367(e)(2), discussed above, which imposes corporate-level tax in certain liquidations, would not apply where it "would violate a treaty nondiscrimination provision" (Notice 87–5, 1987–1 C.B. 416). Eventually, the Internal Revenue Service withdrew its notice on a prospective basis, and concluded that no treaty conflict existed (Notice 87–66, 1987–2 C.B. 376). The committee is concerned that the language used in the original notice may have suggested an erroneous inference that, had section 367(e)(2) actually created a conflict in a particular case, it would have been given no effect under the terms of the original Notice. Normal application of the later-in-time rule would not permit this result.

. . . .

The committee believes that a basic problem that gives rise to the need for a clarification of the equality of statutes and treaties is the complexity arising from the interaction of the Code, treaties, and foreign laws taken as a whole. The committee notes that the United States has over 35 income tax treaties, some of extreme complexity, plus additional treaties bearing on income tax issues. In addition, the application of United States tax law to complex business transactions exacerbates these complexities. The committee does not believe that Congress can either actually or theoretically know in

> advance all of the implications for each treaty, or the treaty system, of changes in domestic law, and therefore Congress cannot at the time it passes each tax bill address all potential treaty conflict issues raised by that bill. This complexity, and the resulting necessary gaps in Congressional foreknowledge about treaty conflicts, make it difficult for the committee to be assured that its tax legislative policies are given effect unless it is confident that where they conflict with existing treaties, they will nevertheless prevail.
>
> The committee further believes that codification of this rule, together with the disclosure requirements in the bill, will lead to the early discovery of now-unknown treaty conflicts and to their appropriate resolution. If any case actually arises in which proper application of the canons of construction ultimately reveals an actual conflict, the committee expects that full legislative consideration of that conflict will take place to determine whether application of the general later-in-time rule is consistent with the spirit of the treaty (namely, to prevent double taxation by an agreed division of taxing jurisdiction, and to prevent fiscal evasion) and the proper expectations of the treaty partners.[40]

Rosenbloom and Shaheen dismiss the Senate Report as irrelevant because they view *Cook* as controlling and *Cook* is based on the Court's interpretation of the Constitution. I do not agree for the reasons stated above, but that is precisely why the Court needs to either reverse the Rule from a constitutional perspective or at least clarify that *Cook* and *TWA* do not require a clear congressional statement in all override cases.

It is worthwhile to survey the recent history of overrides in the tax area to show what is at stake in this debate. The first author has previously argued that most of these overrides were justified (except for the AMT foreign tax credit limitation, which was eliminated in 2004), because they all prevent double non-taxation.[41]

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40. SENATE REPORT, *supra* note 37, 4832–37 (emphasis added) (footnotes omitted).

41. Avi-Yonah & Wells, *The BEAT and Treaty Overrides*, *supra* note 9, at 390–91.

The FIRPTA override was enacted in the context of widespread political concern that foreign investors were taking advantage of depressed real estate prices in the United States during the "stagflation" period of the late 1970s to purchase prime U.S. real property like the Rockefeller Center for low prices, and that they would later sell for a large gain that would be tax-exempt under U.S. domestic law and U.S. tax treaties, both of which exempted capital gains of non-residents. This concern proved misguided because most of the late 1970s foreign acquisitions of U.S. real property resulted in significant losses, not gains.[42] (Rockefeller Center underwent bankruptcy in the early 1990s, and its Japanese owner lost its investment).[43] Once the decision was made to tax foreigners on capital gains from the alienation of U.S. real property interests, it was considered essential to block the obvious loophole of selling stock in a U.S. corporation most of whose assets consisted of U.S. real property. This required overriding Article 13 of the treaties, and given the underlying concern, the override was arguably justified. Interestingly, not just the United States but also the OECD now include this provision in their model tax treaties.[44]

In 1986, the United States was concerned that foreign parent corporations could avoid the withholding tax on dividends from U.S. subsidiaries by operating through a branch and added a branch profit tax (BPT) to the Code to impose withholding tax (subject to treaty reductions) on deemed distributions of "dividend equivalent amounts" from U.S. branches. The BPT was explicitly not a treaty override, and the United States renegotiated its treaties to allow it. But because U.S. treaties in 1986 did not yet contain a limitation on benefits (LOB) article, the United States was understandably concerned that it would be easy to avoid the BPT by routing the investment in the United States

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42. On this, *see* Reuven S. Avi-Yonah & Kaijie Wu, *Behavioral Biases and Political Actors: Three Examples from US International Taxation*, *in* Behavioural Public Finance: Individuals, Society, and the State 80 (M. Mustafa Erdoğdu et. al. eds., Routledge) (2021).

43. *Id.* at 83.

44. United States Model Income Tax Convention, art. 13 (U.S. Dept. Treas. 2016), https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf [https://perma.cc/HKE6-9SCL]; Articles of the Model Convention with Respect to Taxes on Income and on Capital, art. 13 (Org. Econ. Coop. & Dev. 2017), https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf [https://perma.cc/BR3G-7SWB].

through a treaty partner, and it therefore enacted an LOB provision in the BPT as an override of Article 4 (residence).[45] Again, given the purpose, the override was justified.

Also in 1986, the United States adopted a corporate alternative minimum tax (AMT) and as part of it limited the foreign tax credit to 90% of foreign taxes paid. This was not an explicit override but was treated as such by U.S. courts.[46] If it was an override, it was inconsistent with the purpose of the treaties because it created double taxation (the provision was repealed in 2004). However, Rosenbloom and Shaheen have argued that the similar "haircut" of the foreign tax credit in the global intangible low-taxed income (GILTI) provision of the TCJA is not an override because article 23 of the treaties subjects the U.S. requirement to allow foreign tax credits to the limitations of U.S. domestic law.[47]

In 1989, the United States enacted the earnings stripping limitation, which applied limits on the deductibility of interest paid to "tax exempt related parties."[48] This was widely understood at the time to be an attempt to avoid overriding the non-discrimination article (Art. 24) of U.S. tax treaties, but arguably it was ineffective because no domestic U.S. tax exempt organization holds a majority of the shares of a taxable corporation because of the unrelated business income tax, so that the provision de facto only applied to foreign related parties. Still, the override (if there was one) was justified because otherwise it would be possible to strip out the entire U.S. corporate tax base through interest paid to a foreign related party, and this type of thin capitalization rule is widely accepted as an exception to non-discrimination.[49]

In 1993, the United States adopted the conduit financing rule, designed to prevent earnings stripping through a related foreign party in a treaty jurisdiction that is a mere conduit to pass the interest to a

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45. § 884.

46. Kappus v. Commissioner, 337 F.3d 1053 (D.C. Cir. 2003). In this case, the 1986 legislation was not an explicit override.

47. §§ 250, 951A (GILTI); Rosenbloom & Shaheen, *The TCJA and the Treaties*, *supra* note 9.

48. § 163(j). Today, this provision has been subsumed by the general interest limitation, which is not discriminatory.

49. *See* Craig Elliffe, *Unfinished Business: Domestic Thin Capitalization Rules and the Non-Discrimination Article in the OECD Model*, 67 BULL. FOR INT'L TAX 26 (2013).

non-treaty jurisdiction. This rule was interpreted by the IRS in regulation to override treaties. It is not clear that treaty override by regulation is possible, but the rule was not challenged because there was ample case law permitting the IRS to look through mere conduits.[50]

In 1997, the United States enacted the reverse hybrid rule to block the application of the new "check the box" regulation to a U.S. LLC owned by a Canadian parent which pays the parent amounts treated as interest by the United States but as dividends by Canada. Because Canada exempts dividends from controlled foreign corporations and the LLC was treated as a branch by the United States but as a subsidiary by Canada, this situation created double non-taxation because in the United States there was an interest deduction subject to reduced withholding tax under the treaty, but in Canada there was no corresponding tax on the dividend. The reverse hybrid rule overrides the application of article 11 (interest) in this situation, and Canada accepted the legitimacy of the override.[51]

Importantly, this was the last explicit treaty override by the United States; since 1997, any overrides have been implicit (i.e., without a congressional statement that they are intended as overrides). However, there have arguably been two more recent overrides, the NIIT (2010) and BEAT (2017), which were not accompanied by congressional statements that an override was intended. This was because they were both enacted via budget reconciliation and Senate parliamentary procedures, likely preventing such an explicit statement from being included.[52]

The NIIT is a 3.8% surtax on rich investors on investment income. It was drafted in such a way as to not be offset by foreign tax credits, which arguably overrides article 23 of all U.S. tax treaties which requires such a credit. In my opinion this was a treaty override; Rosenbloom and Shaheen disagree.[53]

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50. § 7701(*l*); *see* Aiken Indus., Inc. v. Commissioner, 56 T.C. 925 (1971). *But see* Commissioner v. Indianapolis Power & Light Co., 493 U.S. 203 (1990). The same rationale underlies the BEAT. *See infra* text accompanying notes 52–55.

51. § 894(c).

52. Girts, *supra* note 10.

53. Avi-Yonah, *Is the Net Investment Income Tax a Treaty Override? Reflections on* Toulouse, *supra* note 34; H. David Rosenbloom & Fadi Shaheen, Toulouse*: No Treaty-Based Credit?*, 104 Tax Notes Int'l 417 (Oct. 25, 2021).

The BEAT was enacted as part of the TCJA. It imposes a 10% tax on an alternative tax base of U.S. corporations that disregards payments like interest and royalties to related foreign parties. There is no foreign tax credit allowed against the BEAT. The BEAT violates article 24 (non-discrimination) of all U.S. tax treaties which requires deductibility of payments to foreign parties if such payments to domestic parties are deductible. Rosenbloom and Shaheen argue that because there was no explicit congressional statement of an intent to override, the BEAT does not apply in treaty cases, which are potentially all the cases because taxpayers subject to the BEAT can then use affiliates in treaty jurisdictions to avoid it.[54] Bret Wells and I disagree.[55] About $150 billion in revenue depend on a resolution of this issue. If it is a matter of constitutional interpretation Rosenbloom and Shaheen have a case, although I still think they are wrong under the cases surveyed above. But the uncertainty is precisely why the Court should take up this issue.

IV. Why the Rule Should Be Repealed

If the Court had a case that required it to reconsider the Rule, I believe the Court should repeal it.[56] This would require overruling the two cases that adopted the Rule as a holding (*Cherokee Tobacco* and *Head Money*) and limiting *Cook* and *TWA* to their unusual facts. The other cases cited above that mention the Rule (*Foster, Whitney, Reid*) were dicta and do not need overruling or distinguishing.

The reason this outcome is plausible is that both originalists and living constitutionalists have reasons to reject the Rule. For originalists, the Supremacy Clause on which the rule depends says nothing about the relationship between treaties and statutes; it just states that

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54. Rosenbloom & Shaheen, *The BEAT and the Treaties*, *supra* note 9.

55. Avi-Yonah & Wells, *The BEAT and the Treaty Overrides*, *supra* note 9.

56. It is conceivable that the Court will take up a case involving the repugnancy between the BEAT (§ 59A) and the non-discrimination article (Art. 24) found in U.S. tax treaties because of either a circuit split or the sheer amount of revenue that would be lost if the BEAT were not an override ($150 billion). See *PPL Corp. v. Commissioner*, 569 U.S. 329 (2013), the last substantive case in which the Court took up a federal tax issue primarily on revenue grounds. On the issue, *see* Rosenbloom & Shaheen, *The BEAT and the Treaties*, *supra* note 9.

both are superior to state laws, and that can happen even if self-executing treaties were always superior to statutes, as the VCLT demands. For living constitutionalists, overruling the Rule would leave the issue up to Congress, which can then decide as a policy matter whether to apply the Rule in any given case.

In his recent concurrence in *Ramos* (2020), Justice Kavanaugh set forth the following factors for overruling precedent rather than abiding by stare decisis, as identified by the Court in previous cases:

1. the quality of the precedent's reasoning;
2. the precedent's consistency and coherence with revious or subsequent decisions;
3. changed law since the prior decision;
4. changed facts since the prior decision;
5. the workability of the precedent;
6. the reliance interests of those who have relied on the precedent; and
7. the age of the precedent.[57]

All of these factors suggest that *Cherokee Tobacco* and *Head Money* should be overruled.

A. The Quality of the Precedent's Reasoning.

As explained above, *Cherokee Tobacco* does not hold that the Rule follows from the Supremacy Clause. The Court explicitly said that "[t]he effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution."[58] Instead, the Court derived the Rule from general considerations about the nature of treaties, and these considerations would remain unaffected if the Court would now declare that the Rule

57. Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring).

58. The Cherokee Tobacco, 78 U.S. 616, 621 (1870).

is not a matter of constitutional interpretation. *Head Money*, however, does hold that the Rule derives from the Supremacy Clause:

> *The Constitution of the United States places such provisions as these in the same category as other laws of [C]ongress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land."*
>
> A treaty, then, is a law of the land, as an act of [C]ongress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.
>
> But, even in this aspect of the case, there is nothing in this law which makes it irrepealable or unchangeable. *The [C]onstitution gives it no superiority over an act of [C]ongress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.*
>
> A treaty is made by the president and the [S]enate. Statutes are made by the president, the [S]enate, and the [H]ouse of [R]epresentatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by [C]ongress and which, when made, usually suspends or destroys existing treaties between the nations thus at war.
>
> In short, we are of opinion that, *so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts*

> *as [C]ongress may pass for its enforcement, modification, or repeal.*[59]

It is this holding, and this holding alone, that the Court should overrule, although to ensure the result, it would be better to overrule *Cherokee Tobacco* as well (since later statements of the Rule in *Whitney* and *Reid* were dicta, while *Cook* and *TWA* can easily be distinguished from the normal override case). And this holding is clearly wrong as a matter of constitutional interpretation because the Supremacy Clause determines the relationship between both federal statutes and treaties and state laws, not the relationship between federal laws and treaties. The Clause is entirely consistent with the view that treaties are superior to statutes as long as they are both superior to state laws. Therefore, *Head Money* was wrongly decided, and should be overruled on that basis.

B. The Precedent's Consistency and Coherence with Previous or Subsequent Decisions.

There were no decisions before *Cherokee Tobacco* and *Head Money* establishing the Rule since *Foster* did not mention the Rule and was dicta. As far as later cases are concerned, *Whitney* and *Reid* were dicta, and *Cook* and *TWA* are distinguishable. Moreover, as Rosenbloom and Shaheen have argued, all of these cases could have reached the same result by merely relying on the *lex specialis* canon of statutory interpretation (that a more specific law overrides a more general one, since treaties are more specific than statutes of general applicability), and there was no need to invoke the Constitution for this purpose.[60] Therefore, *Head Money* can be separated from all these later decisions without affecting their outcome.

C. Changed Law Since the Prior Decision.

There were two changes in the law since *Head Money* established the Rule as a matter of constitutional interpretation. First, *Cook* and *TWA*

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59. Edye v. Robertson (*Head Money Cases*), 112 U.S. 580, 598–99 (1884) (emphases added).

60. Rosenbloom & Shaheen, *The BEAT and the Treaties*, *supra* note 9; Rosenbloom & Shaheen, *Treaty Override: The False Conflict Between* Whitney *and* Cook, *supra* note 9.

arguably changed the Rule by requiring a clear statement of congressional intent. However, this was more a clarification of the Rule than a modification, since these cases were about harmonizing the treaty and the later statute and therefore finding no repugnancy that required an override.

The enactment of section 7852(d) changed the law for tax cases by eliminating the explicit statement requirement for these cases. If *Cook* and *TWA* are binding as a matter of constitutional interpretation, then Congress acted in vain because it cannot change the Constitution. But *Cook* and *TWA* have unusual facts, and therefore can be distinguished, while *Head Money* itself as well as *Whitney* (in dicta) indicate that overrides are possible without an explicit statement to that effect.[61] The Court should be reluctant to hold that a statute enacted by Congress is unconstitutional unless it has to, and this is not the case here.

D. Changed Facts Since the Prior Decision.

The main fact that has changed since *Cherokee Tobacco* and *Head Money* is that the racism and antisemitism that underlay these decisions have been repudiated by the Court. The Court has upheld several Indian treaties against challenges based on later statutes on the ground that the statutes were ambiguous.[62] And in *Cook*, the name of the British vessel whose owners won the case was the *Mazel Tov*, which gives away their religious identity.

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61. *See* Whitney v. Robertson, 124 U.S. 190, 195 (1888) (providing that "if the power to determine these matters is vested in [C]ongress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, *or whether such departure was by accident or design*, and if the latter, whether the reasons were good or bad") (emphasis added); *see also* Chew Heong v. United States, 112 U.S. 536, 549 (1884) ("But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed *by implication* only *pro tanto,* to the extent of the repugnancy.") (first emphasis added).

62. *See, e.g.*, Washington v. Washington Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 (1934).

E. The Workability of the Precedent.

The Rule itself is perfectly workable and has been applied in numerous cases, but it does not need to be based on the Constitution for this purpose, because outside the tax area it is a normal application of the *lex specialis* canon. In tax, however, as Congress explicitly stated in 1988, the Rule as arguably modified by *Cook* and *TWA* (requiring an explicit statement) is not workable because it was not possible for Congress to predict all the ways in which a complex tax statute differs from the Code.[63]

The lack of workability of the clear statement version of the Rule is even admitted by Rosenbloom and Shaheen because they concede that the clear statement requirement would not apply if it would render the later statute a nullity. Moreover, since a clear statement is not possible in reconciliation, such a requirement means that major recent tax provisions like the NIIT and the BEAT have very limited application because in many cases they conflict with earlier treaties. This is particularly true of the BEAT because if the BEAT does not apply in a treaty context then it becomes very easy to avoid by routing the payments through a treaty country, and this result was clearly not intended by Congress because otherwise the BEAT would not have been estimated to raise anywhere near $150 billion.

F. The Reliance Interests of Those Who Have Relied on the Precedent

The Rule does not have to be based on the Constitution, and in the majority of cases it can be applied without such a constitutional basis, so reliance is not an issue. In the tax context, there have been no cases that relied on the clear statement version of the Rule to argue that it should not apply when Congress is silent (contrary to the 1988 legislation, which warned taxpayers against relying on such an interpretation of *Cook*). The argument that *Cook* requires a clear statement as a constitutional matter can only be found in Rosenbloom and Shaheen's very recent article, so there could have been no reliance on it.

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63. Senate Report, *supra* note 37, at 4836–37.

G. The Age of the Precedent

Both *Cherokee Tobacco* and *Head Money* are very old (151 years and 137 years respectively) and are based on attitudes toward disfavored groups that American society and American law have long since cast aside.

V. Conclusion

This Article has attempted to elucidate the origins and development of the Rule. It shows that the Rule has no basis in the Constitution, that the first Supreme Court cases adopting it were dubious applications to disfavored groups (Indians and Jews), and that later cases are either dicta or can be limited to unusual facts. Moreover, the Rule is unnecessary as a constitutional matter for tax cases because Congress has enacted it by statute, which would apply if the Court declared that the Rule is not based on the Constitution, and in other cases it would apply as a matter of statutory interpretation. The Court should overrule *Cherokee Tobacco* and *Head Money* and leave the question to Congress, which is much better position to assess the proper relationship between a statute it enacts and an earlier treaty that half of it has ratified.