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The Death of Treaty Supremacy: An Invisible Constitutional Change

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Introduction

When the Framers of the U.S. Constitution met in Philadelphia in 1787, they drafted a Constitution designed to ensure that States would not violate the nation's treaty commitments. Before adoption of the Constitution, Alexander Hamilton noted, "the treaties of the United States . . . [were] liable to the infractions of thirteen different legislatures . . . The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."[1] The Framers sought to rectify the problem of State treaty violations by vesting power over treaty compliance in the federal government. The draft Constitution sparked vigorous debates in the period from 1787 to 1789. No issue was more hotly contested than the balance of power between the States and the federal government. However, there was virtual unanimity on one point: the Constitution prohibited state government officers from violating national treaty obligations. The power to violate treaties belonged to the federal government, not the States.

On August 5, 2008, the State of Texas executed José Ernesto Medellín. His execution violated the nation's legal obligations under the UN Charter, the treaty that created the United Nations. President George W. Bush—a former Texas Governor who supports the death penalty and believes strongly in states' rights—tried to block Medellín's execution, precisely because it violated U.S. treaty obligations. However, the Supreme Court ruled in a case called *Medellín v. Texas* that President Bush could not prevent Texas from putting Medellín to death, even though the execution violated international law.[2] The Supreme Court based its decision on an understanding of the Constitution that differed sharply from the Framers' understanding. How did we arrive at a shared understanding that the Constitution permits States to violate some treaties, even though the Framers purposefully adopted a Constitution that barred States from violating any treaties? That is the central question addressed in this book.

In addressing this question, I draw on a growing body of scholarship that explains constitutional change outside the courts, and outside the formal amendment process codified in Article V of the Constitution. Much of that literature celebrates constitutional change outside the courts as a democratic expression of popular sovereignty.[3] To cite just one example, the women's movement failed in its effort to promote adoption of the Equal Rights Amendment (ERA) through the formal Article V process, but succeeded in changing popular attitudes about gender discrimination. Those changed attitudes, in turn, gave rise to new federal legislation and key Supreme Court decisions that accomplished many of the goals of the women's movement. That process has come to be known as the "de facto ERA."[4]

The central story line in this book is similar to the ERA story in one respect, but quite different in other respects. The "treaty supremacy rule" is codified in Article VI of the Constitution, known as the Supremacy Clause. The rule, as traditionally understood, provided that treaties automatically supersede conflicting state laws. The traditional treaty supremacy rule

served an important purpose: it helped ensure that state governments would not violate U.S. treaty obligations unless the federal political branches authorized them to do so. The United States ratified the UN Charter in 1945. Articles 55 and 56 of the Charter obligate the United States to promote "human rights . . . for all *without distinction as to race*."[5] In the late 1940s and early 1950s, human rights activists in the United States invoked the Charter's human rights provisions, together with the Constitution's treaty supremacy rule, to challenge the validity of state laws that discriminated on the basis of race or nationality. In 1950, in a case called *Fujii v. California*, a California court ruled in favor of human rights claimants, striking down a California law that discriminated against Japanese nationals because it conflicted with the Charter's human rights provisions.[6] The potential implications of that decision were shocking. If the court was right, the United States had effectively abrogated Jim Crow laws throughout the South by ratifying the UN Charter. That result was unacceptable to many Americans at the time. Responding to *Fujii*, conservatives mobilized support for a constitutional amendment, known as the Bricker Amendment, whose aim was to abolish the treaty supremacy rule. Like the feminists who failed to obtain passage of the ERA, but achieved some of their goals in other ways, proponents of the Bricker Amendment achieved some of their goals without a formal constitutional amendment. I refer to that constitutional transformation as the "de facto Bricker Amendment."

In contrast to the de facto ERA, the history of the de facto Bricker Amendment is not a story about the triumph of democracy and popular sovereignty. Rather, it is a story about invisible constitutional transformation. The results of the de facto ERA were codified in federal statutes and Supreme Court opinions—sources that were readily accessible to all interested American citizens. One did not need a law degree to understand the significant expansion of women's rights that occurred in the 1970s. In contrast, most lawyers in the United States today are unaware that the Constitution's treaty supremacy rule was dramatically transformed in the 1950s. The substance of that transformation was initially expressed in American Bar Association (ABA) reports and Senate testimony by Eisenhower Administration officials in the early 1950s.[7] Later, the de facto Bricker Amendment was "codified" in the Restatement (Second) of Foreign Relations Law, a document published by the American Law Institute (ALI) in 1965.[8] None of those sources were readily accessible to the American public. Moreover, neither the ABA nor the ALI exercises formal governmental authority.

The de facto Bricker Amendment remained largely invisible because the results were expressed in technical legal jargon that obscured the magnitude of the constitutional change. Before 1950, the treaty supremacy rule was simple: all treaties prevail over conflicting state laws because the Supremacy Clause says so. By 1965, though, a new constitutional understanding had emerged—"self-executing" treaties prevail over conflicting state laws, but States are free to violate "non-self-executing" treaties. The distinction between self-executing (SE) and non-self-executing (NSE) treaties has been a feature of U.S. constitutional law since the 1790s. According to the oldest version of self-execution doctrine, federal executive officials have the authority to implement SE treaties, but congressional legislation is needed to authorize the President to

implement NSE treaties. For example, if treaty implementation requires an expenditure of money, legislation is needed to authorize federal officials to withdraw funds from the U.S. treasury. Hence, the treaty is "non-self-executing" in that respect. Before 1950, treaty supremacy doctrine and self-execution doctrine were independent, non-overlapping doctrines. Treaty supremacy governed the relationship between treaties and state law. Self-execution governed the division of power over treaty implementation between Congress and the President. (Actually, self-execution doctrine was somewhat more complicated, but I will address those complications later.) The de facto Bricker Amendment expanded the scope of self-execution doctrine to encompass the relationship between treaties and state law. In the process, lawyers created the "NSE exception to the treaty supremacy rule." The NSE exception allows state government officers to violate U.S. treaty obligations without authorization from the federal political branches.

In this respect, the NSE exception is starkly at odds with one of the primary goals of the Constitution's Framers. In the Federalist Papers, James Madison invited readers to consider the hypothetical case of a federal constitution that provided for the supremacy of state law over federal law. In that case, he said,

> [T]he world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.[9]

In certain cases, the NSE exception to the treaty supremacy rule places the head under the direction of the members. In *Medellín v. Texas*, the Supreme Court held that Article 94 of the UN Charter is not self-executing.[10] The Court's decision was based on the NSE exception to the treaty supremacy rule that arose from the de facto Bricker Amendment (although the Court claimed, incorrectly, that it was applying nineteenth century self-execution doctrine). As a practical matter, the Court's decision meant that Texas was allowed to violate U.S. treaty obligations. Moreover, Texas' actions meant that the federal political branches were forced to deal with the foreign policy consequences of a treaty violation that they did not authorize and that the President tried to prevent. This was precisely the type of situation that the Framers sought to avoid by codifying the treaty supremacy rule in Article VI of the Constitution.

The de facto Bricker Amendment gained acceptance because the NSE exception to the treaty supremacy rule was responsive to widely shared sentiments about American constitutional identity. Americans have long believed that we have the best constitution in the world. I refer to this view as American exceptionalism. The *Fujii* decision (referenced above) threatened the popular faith in American exceptionalism. In *Fujii*, not only did the court hold that California law violated the UN Charter's human rights provisions; it also held that the law *did not* violate the Fourteenth Amendment Equal Protection Clause. The juxtaposition of those two holdings was impossible to reconcile with the widely shared faith in American exceptionalism. Most Americans in the early 1950s were not prepared to accept the notion that international human

rights law provided more robust protection against racial discrimination than did our own Fourteenth Amendment. Thus, at a time when the Fourteenth Amendment was generally understood to permit racial segregation, the NSE exception to the treaty supremacy rule served a useful purpose. Like other doctrines that are well known to lawyers, but that are generally unfamiliar to non-lawyers, the new NSE exception provided judges a convenient rationale for refusing to decide questions that they preferred to dodge. Specifically, it provided courts a rationale for refusing to answer the question whether the UN Charter prohibited forms of racial discrimination that the Fourteenth Amendment permitted.[11] Thus, the NSE exception to the treaty supremacy rule helped preserve the public faith in American exceptionalism by enabling courts to dodge the uncomfortable question whether the UN Charter prohibited racially discriminatory laws and practices that were still pervasive in the United States in the 1950s.

The legacy of the de facto Bricker Amendment continues today. The NSE exception to the treaty supremacy rule is still an entrenched feature of modern legal doctrine, although the precise contours of that exception are contested.[12] Perhaps more importantly, the Bricker debate generated an atmosphere in which human rights treaties are seen as political poison. Consequently, the United States refuses to ratify most human rights treaties, and the treaties we do ratify include unilateral reservations and declarations designed to ensure that ratification does not affect human rights protection in the United States.[13] The net result is that we cling to our faith in the superiority of the U.S. constitutional system, but domestic protection for human rights falls short of international standards.[14] International human rights law provides a mirror that tells us who is "the fairest of them all." Like the queen in Snow White, we do not like the answer, so we refuse to look in the mirror. NSE doctrine helps us avert our gaze from the unflattering answer that the mirror provides.

The Substance of Transformation

The substance of the constitutional transformation that occurred between 1945 and 1965 can be summarized briefly in two sentences. Before 1945, the treaty supremacy rule was a mandatory rule. After 1965, though, the treaty supremacy rule was generally understood to be an optional rule.

Article II of the Constitution grants the President the power to make treaties "by and with the advice and consent of the Senate."[15] I use the term "treaty makers" to refer collectively to the President and the Senate when they act together under Article II to make treaties. Article VI, Clause 2, of the Constitution, known as the Supremacy Clause, states in full:

> 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.[16]

The treaty supremacy rule, as traditionally understood, consisted of two elements. First, all treaties supersede conflicting state laws. Second, state and federal courts have a constitutional duty to apply treaties whenever there is a conflict between a treaty and state law, because the

Supremacy Clause specifies that judges are "bound thereby." Thus, the Supreme Court said in 1909: "We do not deem it necessary to consider the constitutional limits of the treaty-making power. A treaty, within those limits, by the express words of the Constitution, is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights."[17] Similarly, more than a century earlier, U.S. Supreme Court Justice Samuel Chase wrote: "That it is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to that treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct."[18] Before 1945, no significant judicial, governmental, or scholarly authority claimed that Article II granted the treaty makers the discretion to opt out of the treaty supremacy rule. The treaty supremacy rule was understood as a mandatory rule, not an optional rule.

In 1959, though, a preliminary draft of the ALI's Restatement on Foreign Relations Law expressed a very different view. It said:

> The provisions of Art. VI, § 2 of the Constitution [the Supremacy Clause] under which treaties may be self-executing are in effect, permissive rather than mandatory. Therefore, not all treaties concluded on behalf of the United States are self-executing. . . . [A non-self-executing] treaty does not operate as a rule for the executive branch . . . *or the States* nor does an individual acquire rights under it until Congress has taken appropriate action to implement it.[19]

Before 1945, self-execution doctrine established that some treaties are non-self-executing, meaning that legislation is needed to authorize federal executive officers to implement the treaty. Moreover, the doctrine established that Article II grants the treaty makers discretion to decide which treaties are self-executing and which ones are non-self-executing.

The de facto Bricker Amendment expanded the concept of self-execution to address the relationship between treaties and state law. Before 1945, treaty supremacy doctrine and self-execution doctrine were two independent doctrines. Treaty supremacy governed the relationship between treaties and state law. Self-execution governed the division of power over treaty implementation between Congress and the President. Thus, Quincy Wright (the leading scholar of constitutional foreign affairs law at the time) wrote in 1951: "the distinction between self-executing and non-self-executing treaties has been used in American constitutional law only with reference to the agency of the Federal Government competent to execute the treaty and has had no reference to the relations between the Federal Government and the States."[20] By expanding the concept of non-self-execution to encompass the relationship between treaties and state law, the de facto Bricker Amendment effectively subsumed treaty supremacy doctrine within self-execution doctrine. In the process, the treaty supremacy rule was converted from a mandatory rule to an optional rule, because it was generally agreed that Article II of the Constitution granted the treaty makers discretion to decide whether a particular treaty would be self-executing or non-self-executing. The idea that the treaty supremacy rule is optional developed organically in the 1950s in the context of debates over the Bricker Amendment and U.S. participation in the then-emerging system of international human rights treaties. The ALI's Restatement of Foreign

Relations Law consolidated the transformation by expressing the NSE exception to the treaty supremacy rule in a manner that was accepted as authoritative by lawyers and judges.

The Rhetoric of Transformation

Sometimes, lawyers and judges want to change the law without admitting that they are changing the law. They often use two different tools to achieve their goals. First, they cite judicial precedents as authority for legal claims, but reinterpret older precedents to support novel claims. Second, they employ familiar legal terms to express their ideas, but use those terms in new ways so that a legal term-of-art acquires a new meaning.[21] The lawyers who created the NSE exception to the treaty supremacy rule employed both strategies.

In modern parlance, lawyers and judges use the terms "self-executing" (SE) and "non-self-executing" (NSE) to express three very different concepts. I refer to these as the "congressional-executive" concept, the "political-judicial" concept, and the "federal-state" concept. All three concepts share one common feature: federal legislation is necessary to implement an NSE treaty, but not to implement an SE treaty. The three concepts express different understandings as to why legislation is needed.

Under the congressional-executive concept, an NSE treaty does not operate as a rule of conduct for federal executive officers unless Congress enacts implementing legislation. In contrast, federal executive officers apply SE treaties as law, and need not await legislative authorization to do so. Justice Brandeis expressed this concept when he said: "For in a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."[22] As discussed previously, treaties that require an expenditure of money are NSE in this sense of the term. Congressional-executive variants of NSE doctrine serve two purposes: they limit the President's power to implement treaties that conflict with prior federal statutes and they preserve a role for the House of Representatives in creating federal laws to implement treaties. (Recall that the President makes treaties with the advice and consent of the Senate, but without House participation.) The congressional-executive concept dates back to the 1790s. It was the dominant concept of self-execution before World War II.

A different concept of self-execution arose in the nineteenth century. Under the "political-judicial" concept, SE treaty provisions are judicially enforceable, but courts may not apply NSE provisions unless Congress enacts implementing legislation. The Supreme Court applied the political-judicial concept in 1884 in *The Head Money Cases.*[23] There, the Court said that "the judicial courts have nothing to do [with NSE treaties] and can give no redress." However, SE treaties "are capable of enforcement as between private parties in the courts of the country."[24] Political-judicial variants of NSE doctrine prevent courts from deciding treaty-related issues in situations that require the exercise of political judgment in choosing how best to carry out U.S. treaty obligations. Under the political-judicial concept, unlike the congressional-executive concept, federal executive officers have the authority to implement NSE treaty provisions, and need not await legislative authorization to do so. For example, federal executive officers do not need legislative authorization to implement an arms control treaty requiring the

destruction of certain types of weapons. However, courts would be reluctant to enforce such a treaty if an individual sued the President to remedy an alleged treaty violation.

The federal-state concept of self-execution arose in the early 1950s in the context of disputes about U.S. participation in human rights treaties and judicial application of the UN Charter's human rights provisions. Under the federal-state concept, an SE treaty supersedes conflicting state laws, but an NSE treaty does not supersede state laws unless Congress enacts legislation to implement the treaty. A California Supreme Court decision in 1952 was the first published judicial decision to apply the federal-state concept of self-execution. (This case was the appeal from the *Fujii* decision discussed previously.) In an opinion rejecting a claim based on the Charter's human rights provisions, the court said: "A treaty . . . does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing."[25] As mentioned before, the federal-state variant of NSE doctrine served a useful purpose by providing a justification for courts to dodge the uncomfortable question whether the Charter's human rights provisions offered stronger protection against racial discrimination than did the Fourteenth Amendment.

Before World War II, lawyers and judges used the terms "self-executing" and "non-self-executing" to express both the congressional-executive concept and the political-judicial concept, without distinguishing clearly between them. The fact that these terms had already acquired two very different meanings before 1945 may have made it easier for lawyers and judges after 1945 to stretch self-execution rhetoric to encompass the federal-state concept. However, they still needed a judicial precedent they could cite as authority to legitimize the extension of self-execution doctrine into the previously distinct realm of treaty supremacy.

In the field of U.S. constitutional law, if a lawyer wants a precedent to support her position, she can find no better authority than an opinion by the great Chief Justice John Marshall. A legal claim gains instant legitimacy if the proponent cites a Marshall opinion as authority. In 1829, in a case called *Foster v. Neilson*, Marshall wrote that an NSE treaty "addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[26] *Foster* involved a dispute over ownership of land in what is now Louisiana. The plaintiffs relied partly on a treaty to support their claim. The defendant's claim was based on a land grant from the federal government. *Foster* said nothing about the relationship between treaties and state law because both parties relied exclusively on federal law to support their claims.[27] Even so, in litigation involving the UN Charter's human rights provisions in the early 1950s, lawyers began citing *Foster* to support the idea that an NSE treaty does not supersede conflicting state laws. By the late twentieth century, the underlying facts had been shrouded in the mists of time, so the judges who cited *Foster* as authority did not realize that *Foster* said nothing about the relationship between treaties and state law. Thus, in *Medellín v. Texas*—where the Supreme Court effectively authorized Texas to violate U.S. treaty obligations—Chief Justice Roberts relied heavily on *Foster* to support the Court's decision.[28]

In sum, lawyers and judges in the early 1950s used the rhetoric of self-execution and the authority of Marshall's opinion in *Foster* to create a novel NSE exception to the Constitution's treaty supremacy rule. With the exception of Quincy Wright, virtually nobody noticed that the newly minted NSE exception constituted a dramatic change from the mandatory treaty supremacy rule that prevailed from the Founding until about 1950. Thus, the de facto Bricker Amendment converted the treaty supremacy rule from a mandatory to an optional rule by means of a process of invisible constitutional transformation.

The Politics of Transformation

The transformation of the treaty supremacy rule was closely linked to the emergence of a new constitutional rule barring racial segregation. Both were revolutionary constitutional changes. Both were responses to the emergence of a new body of international human rights law.

The United Nations Charter took effect in 1945; it codified a new international norm prohibiting racial discrimination. As a party, the United States is obligated to promote "human rights . . . for all *without distinction as to race*."[29] The United Nations adopted the Universal Declaration of Human Rights in 1948, which states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[30] Adoption of the Universal Declaration reinforced the importance of the norm against racial discrimination in the emerging post-war international order. As of 1948, the United States was one of the few countries in the world with a system of legally sanctioned racial segregation. Jim Crow laws in the South were the most notorious example, but various western states had discriminatory laws restricting land ownership,[31] and states throughout the country used their judicial systems to enforce private agreements that maintained racially segregated housing.[32] In light of the glaring discrepancy between U.S. laws and practices and the international norm against race discrimination, the United States came under intense pressure from the international community to abolish race-based discrimination.[33] If the United States wanted to win the Cold War ideological battle with the Soviet Union, it would have to put an end to the uniquely American form of apartheid.

Shortly after the Charter took effect, lawyers in the United States began invoking the Charter's human rights provisions in domestic litigation. Between 1946 and 1954, U.S. courts decided dozens of cases in which civil rights plaintiffs invoked the Charter's human rights provisions to challenge discriminatory state laws.[34] The combination of international pressure and domestic civil rights litigation sparked a process of "acculturation" in the United States. Professors Goodman and Jinks define acculturation as "the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture." The touchstone of acculturation, they say, "is that varying degrees of identification with a reference group generate varying degrees of cognitive and social pressures to conform." Goodman and Jinks emphasize the "civilizing force of hypocrisy" as a crucial element in explaining how the process of acculturation can yield deep, meaningful human rights reform. They claim that "acculturation

narrows the gap between public acts and private preferences through internal cognitive processes: Under certain conditions people change their beliefs to avoid the unpleasant state of cognitive dissonance between what they profess in public and what they believe in private."[35] Cognitive dissonance and the civilizing force of hypocrisy were key factors driving constitutional transformation in the United States between 1946 and 1954. Indeed, the Supreme Court's landmark 1954 decision in *Brown v. Bd. of Education*, holding that racial segregation in public schools is unconstitutional, was a product of acculturation. *Brown* can be explained as a decision to incorporate into the Fourteenth Amendment Equal Protection Clause the strong anti-discrimination norm codified in the UN Charter and the Universal Declaration of Human Rights.

The parties litigated *Brown* in tandem with its companion case, *Bolling v. Sharpe*. *Bolling* involved racial segregation in public schools in the District of Columbia. Petitioners in *Bolling* presented a detailed argument to the effect that racial segregation in public schools violated the UN Charter's anti-discrimination provisions.[36] The United States filed a key amicus brief in *Brown* and *Bolling*, arguing that continued racial discrimination in the United States hindered accomplishment of the nation's foreign policy goals. The government's brief emphasized that continued racial segregation at home undermined the nation's effort to win the Cold War ideological battle with the Soviet Union.[37] In light of the arguments presented, the Court had three basic options in *Brown* and *Bolling*. First, it could have adhered to established precedent under the "separate but equal" doctrine and held that state and local laws permitting racial segregation in public schools were valid. Second, it could have invalidated state and local laws by applying the UN Charter in conjunction with the Supremacy Clause. Both these options were unsatisfactory because, as one contemporary commentator noted, it would be "a reproach to our constitutional system to confess that the values it establishes fall below any requirement of the Charter."[38] Not wanting to reproach our constitutional system, the Court selected the third option: it repudiated the doctrine of "separate but equal" and held that racial segregation in public schools violates the Fourteenth Amendment Equal Protection Clause (*Brown*) and the Fifth Amendment Due Process Clause (*Bolling*).[39] The third option was the only option that allowed the Justices "to avoid the unpleasant state of cognitive dissonance between what they profess in public and what they believe in private."[40] The Justices believed privately in American exceptionalism: the view that the United States has the best constitution in the world. In light of the newly emerging international norm prohibiting race-based discrimination, the Justices could not reconcile their faith in American exceptionalism with the reality of racial segregation. So, they reinterpreted the Constitution to incorporate the UN Charter's strong anti-discrimination norm into the Equal Protection Clause. [41]

As other scholars have explained, *Brown* is properly viewed as a mid-point, not the end-point, of the civil rights revolution in the United States.[42] Just as the U.S. Supreme Court's 1954 decision in *Brown* was a critical turning point in the transformation of the Equal Protection Clause, the California Supreme Court's decision in *Fujii v. State* was a critical turning point in the transformation of the treaty supremacy rule.[43] The plaintiff in *Fujii* was a Japanese national who bought land in California. California's Alien Land Law barred Japanese nationals from

owning land in California. Mr. Fujii filed suit to challenge the validity of the California statute. In a landmark ruling in April 1950, a lower court held that the Alien Land Law was invalid because it conflicted with the UN Charter's human rights provisions and the Charter trumped California law under the Supremacy Clause.[44]

The lower court's decision in *Fujii* was legally sound, but politically explosive.[45] Even before the *Fujii* decision, leaders of the American Bar Association (ABA) had been lobbying vigorously against U.S. participation in international human rights treaties. By the time the California court issued its decision, the ABA was officially on record opposing U.S. ratification of the Genocide Convention, and opposing U.S. participation in the International Covenant on Human Rights, which was then in draft form. *Fujii* persuaded the ABA leadership that more drastic action was necessary. In September 1950, the ABA authorized a study of possible constitutional amendments to avert the perceived threat posed by international human rights treaties. *Fujii* also provoked a strong response from the U.S. Senate. In September 1951, Senator John Bricker introduced the first of several versions of a proposed constitutional amendment that came to be known as the Bricker Amendment. Like the ABA proposal, the Bricker Amendment was designed to address the perceived threat posed by international human rights treaties.[46]

In an effort to counter the political momentum supporting the Bricker Amendment, lawyers who favored U.S. ratification of human rights treaties began to invoke NSE doctrine. In particular, they argued that the draft Covenant on Human Rights could be rendered non-self-executing by including appropriate language in the treaty itself, or in unilateral reservations attached to the treaty. Lawyers presented this argument in internal debates within the ABA. Senior officials in the Eisenhower Administration made similar arguments during Senate testimony in hearings on the proposed Bricker Amendment. By invoking NSE doctrine in this way, they hoped to demonstrate that international human rights law was not as threatening as Senator Bricker and the ABA leadership claimed. However, by applying NSE doctrine in this manner, they obscured the critical distinction between treaty supremacy doctrine (which had previously governed the relationship between treaties and state law) and self-execution doctrine (which had previously governed the distribution of power over treaty implementation among the branches of the federal government). In the process, they created a novel NSE exception to the Constitution's treaty supremacy rule.[47]

Fujii illustrates this point. On appeal to the California Supreme Court, the California Attorney General argued that the UN Charter did not "supersede" the Alien Land Law because the Charter is not self-executing.[48] The California Supreme Court accepted this argument. It said: "A treaty . . . does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing."[49] The court then analyzed the UN Charter's human rights provisions, concluding that they are not self-executing.[50] The holding that the Charter is not self-executing enabled the court to dodge the uncomfortable question whether the Alien Land Law violated the Charter's human rights provisions.[51] It bears emphasis that the California Supreme Court was not concerned about the division of power over treaty implementation among the branches of the federal government, which was the traditional focus of self-execution

doctrine. Instead, the court applied NSE doctrine to protect California's autonomy, as a sovereign state, from the "foreign" influence of the Charter's human rights provisions. This was a very different concept of non-self-execution than any court had ever applied before. *Fujii* was the first published decision by any state or federal court in U.S. history that applied NSE doctrine to support a decision that a treaty did not supersede conflicting state laws.

The American Law Institute (ALI) published the Restatement (Second) of Foreign Relations Law in 1965. The Restatement effectively codified the NSE exception to the treaty supremacy rule that the California Supreme Court articulated in *Fujii* (in 1952), and that the Eisenhower Administration endorsed in Senate testimony on the proposed Bricker Amendment (in 1953). After 1965, judges and scholars accepted the NSE exception to the treaty supremacy rule on the strength of the ALI's authority.

Why did American lawyers accept the NSE exception to the treaty supremacy rule? Four factors help answer this question. First, reliance on the authority of *Foster v. Neilson*, combined with confusion about the proper definition of the term "non-self-executing," concealed the expansion of self-execution doctrine to encompass the previously distinct doctrine of treaty supremacy. Consequently, most of the lawyers responsible for the de facto Bricker Amendment probably did not realize that the NSE exception to the treaty supremacy rule was a dramatic departure from prior law. Second, President Eisenhower was firmly opposed to the proposed Bricker Amendment. Creation of an NSE exception to the treaty supremacy rule helped the Eisenhower Administration defeat the Bricker Amendment in the Senate, because the NSE exception supported the Administration's argument that human rights treaties were not as threatening as Senator Bricker feared. Third, the United States was engaged in a Cold War ideological battle with the Soviet Union, and the Soviets were exploiting every available opportunity to criticize racist policies and practices in the United States. In cases like *Bolling* and *Fujii*, a judicial holding that state law did not comply with the Charter's human rights provisions would have caused a major diplomatic embarrassment for the nation. NSE doctrine conveniently allowed the courts to avoid that embarrassment by ducking the question whether state law conflicted with the Charter.

Finally, cases like *Bolling* and *Fujii* created severe cognitive dissonance for American lawyers and judges. If courts applied the UN Charter and traditional treaty supremacy doctrine to invalidate discriminatory state and local laws, they would have been tacitly admitting that the Charter provided stronger protection against racial discrimination than did the Fourteenth Amendment. Such an admission would have been contrary to their faith in American exceptionalism. To address that cognitive dissonance, the California Supreme Court in *Fujii* and the U.S. Supreme Court in *Brown* and *Bolling* reinterpreted the Fourteenth Amendment to incorporate the UN Charter's strong anti-discrimination norm into the Equal Protection Clause. Meanwhile, the *Fujii* court endorsed an NSE exception to the treaty supremacy rule. The NSE exception helped judges preserve their faith in American exceptionalism by enabling them to duck the uncomfortable question whether international human rights law provides stronger protection for human rights than does the U.S. Constitution. In cases where it appears that the

answer is "yes," courts preferred to reinterpret the Fourteenth Amendment to satisfy international human rights standards, rather than applying the treaty supremacy rule.

Organization of the Book

The remainder of the book is divided into four parts. Part One addresses treaty supremacy in the Founding era. The analysis is fairly abbreviated. Part One touches briefly on the Articles of Confederation, the Federal Convention, the state ratification debates, and the first decade after adoption of the Constitution. The reason for brevity is *not* that the Founding era is unimportant. Rather, the reason for brevity is that there is no significant scholarly disagreement regarding the book's central claim about the Founding era. At that time, all key participants understood that treaty supremacy addressed the relationship between treaties and state law, whereas non-self-execution was a federal separation of powers doctrine. Therefore, no influential member of the Founding generation advocated an NSE exception to the treaty supremacy rule.[52]

Part Two covers the period from 1800 to 1945. In contrast to Part One, this part attempts to be fairly comprehensive. Comprehensiveness is necessary to debunk the myth that there was an NSE exception to the treaty supremacy rule before 1945. The lawyers, judges and scholars who carried out a successful constitutional revolution after World War II did a remarkably good job of perpetrating that myth. Because falsehoods are buried deeply in contemporary understandings of the relevant legal history, quite a bit of excavation is needed to uncover the truth. The final chapter of Part Two discusses social, political, and intellectual developments between 1900 and 1945 that laid the groundwork for the ensuing constitutional transformation.

Part Three analyzes the period from 1945 to 1965. Whereas Part Two focuses heavily on courts, Part Three is primarily concerned with developments outside the courts. The American Bar Association (ABA), the American Law Institute (ALI), civil rights organizations, and the U.S. Senate feature prominently in this part of the story. In brief, the birth of modern international human rights law unleashed a torrent of human rights activism in both domestic and international fora. That human rights activism, in turn, sparked a strong political backlash in the United States. The backlash generated substantial political momentum in both the ABA and the U.S. Senate in favor of the proposed Bricker Amendment. Members of Washington's foreign policy establishment joined forces with leading international lawyers to defeat the proposed amendment. That coalition produced a new version of NSE doctrine that helped reverse the momentum supporting the Bricker Amendment. A similar coalition of foreign policy professionals and international lawyers joined forces under the umbrella of the ALI to produce the Restatement (Second) of Foreign Relations Law. The Restatement codified the new NSE exception to the treaty supremacy rule as black letter law, thereby consolidating the process of constitutional transformation.

Part Four addresses two questions. Chapter 14 discusses contemporary, doctrinal controversies related to self-execution and treaty supremacy. The history examined in Parts One to Three provides an alternative perspective to help illuminate certain doctrinal issues that are still hotly contested today. Chapter 15 discusses the implications of the de facto Bricker

Amendment for contemporary constitutional theory. I suggest that the phenomenon of invisible constitutional transformation is a subject that merits further study. Additionally, the story of the de facto Bricker Amendment injects a cautionary note into contemporary scholarship on "popular constitutionalism." Whereas much of that scholarship celebrates constitutional change outside the courts as a triumph of democracy and popular sovereignty, the history of the de facto Bricker Amendment suggests that constitutional change outside the courts is not always consistent with principles of democratic legitimacy.

[1] The Federalist, No. 22 (Alexander Hamilton).
[2] 552 U.S. 491 (2008).
[3] *See* Balkin (2011); Kramer (2004); Ackerman (2000); Tushnet (1999).
[4] *See* Siegel (2006).
[5] United Nations Charter, art. 55 (emphasis added).
[6] Fujii v. California, 217 P.2d 481 (Cal.App.2nd 1950).
[7] *See* Chapters 10 and 11.
[8] Restatement (Second).
[9] The Federalist, No. 44 (James Madison).
[10] 552 U.S. 491 (2008). Article 94 requires the United States to comply with decisions of the International Court of Justice (ICJ) in cases where it is a party. The death row prisoner in *Medellín* sought a court order to compel compliance with a decision in which the ICJ ruled against the United States.
[11] The rationale can be explained as follows. Under the traditional rule, the Supremacy Clause meant that courts must resolve all conflicts between treaties and state law in favor of treaties. Hence, if a litigant claimed that a state law conflicted with a treaty, the court was generally required to address the merits of that claim. Under the NSE exception, though, courts are permitted to apply state law, regardless of whether the state law conflicts with a treaty. Therefore, when presented with an alleged conflict between a treaty and state law, courts do not have to decide whether state law actually conflicts with the treaty, because they are permitted to apply state law even if there is a conflict.
[12] *See* Chapter 14, pp. __ (summarizing current controversies).
[13] *See* Henkin (1995); Sloss (1999).
[14] *See, e.g.*, U.N. Doc. A/HRC/30/12 (July 20, 2015) (documenting gaps between international standards and domestic human rights protection in the United States).
[15] U.S. CONST. art. II, § 2.
[16] U.S. CONST. art. VI, cl. 2 (emphasis added).
[17] Maiorano v. Baltimore & Ohio R.R. Co., 213 U.S. 268, 272-73 (1909).
[18] Ware v. Hylton, 3 U.S. 199, 237 (1796) (Chase, J.).
[19] Restatement (Second), Preliminary Draft 5, § 3.04, cmt. c (emphasis added).
[20] Wright (1951).
[21] *See* Balkin and Siegel (2006), at 930-33.
[22] Cook v. United States, 288 U.S. 102, 119 (1933).
[23] 112 U.S. 580 (1884).
[24] *Id*. at 598-99.
[25] Fujii v. State, 242 P.2d 617, 620 (CA 1952).
[26] Foster v. Neilson, 27 U.S. 253, 314 (1829). Marshall did not actually use the term "non-self-executing" in *Foster*, but the quoted passage is frequently cited as the basis for modern NSE doctrine.
[27] *See* Chapter 4.
[28] Medellin v. Texas, 552 U.S. 491, 504-05, 508, 514-15 (2008).
[29] U.N. Charter, arts. 55, 56.
[30] Universal Declaration of Human Rights (1948).
[31] *See, e.g.*, Fujii v. State, 242 P.2d 617 (CA 1952) (invalidating California's Alien Land Law); Namba v. McCourt, 204 P.2d 569 (OR 1949) (invalidating Oregon's Alien Land Law).
[32] *See, e.g*., Hurd v. Hodge, 334 U.S. 24 (1948) (holding that courts may not enforce racially restrictive covenants in the District of Columbia); Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that state courts may not enforce racially restrictive covenants in Missouri and Michigan).
[33] *See* Dudziak (2000).
[34] *See* Lockwood (1984).
[35] *See* Goodman & Jinks (2013), at 4, 26, 153.
[36] Bolling v. Sharpe, Brief for Petitioners (1954).
[37] Brown v. Bd. of Education (1954) & Bolling v. Sharpe (1954), Brief for United States as Amicus Curiae.
[38] Fairman (1952).
[39] Brown v. Bd. of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

[40] Goodman & Jinks (2013), at 153.
[41] Chapter 11 presents this argument in more detail. I have previously presented a version of this argument in Sloss (2016). Professor Resnik has also made a similar argument. *See* Resnik (2006), at 1598-1606.
[42] *See, e.g.*, Klarman (2004).
[43] Fujii v. State, 242 P.2d 617, 620 (CA 1952).
[44] Fujii v. California, 217 P.2d 481 (Cal.App.2nd 1950).
[45] Reasonable people may disagree about whether there was actually a conflict between the UN Charter and the Alien Land Law. The answer to that question hinges on treaty interpretation. However, assuming that there was a conflict, the court's conclusion that the treaty trumped California law under the Supremacy Clause was firmly grounded in constitutional text, judicial precedent, and original understanding.
[46] *See* Chapters 9 to 11. *See also* Tananbaum (1988); Kaufman (1990).
[47] *See* Chapters 10 and 11.
[48] Fujii Case File, Petition for Hearing in the Supreme Court of the State of California, at 14-15.
[49] Fujii v. State, 242 P.2d 617, 620 (CA 1952).
[50] *See id.*, at 619-22.
[51] The California Supreme Court did not decide whether there was a conflict between the Charter and the Alien Land Law. Instead, the Court said that Fujii could not prevail on his Charter argument, even if the Alien Land Law did conflict with the Charter, because the Charter was not self-executing. Ultimately, the Court ruled in favor of Fujii on the basis of the Equal Protection Clause.
[52] The leading originalist defense of NSE doctrine tacitly concedes the treaty supremacy point, and defends NSE doctrine purely on federal separation of powers grounds. *See* Yoo, Globalism (1999).