

# The President's Unconstitutional Treatymaking

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## ABSTRACT

The President of the United States frequently signs international agreements but postpones ratification pending Senate consent. Under international law, a state that signs a treaty subject to later ratification must avoid acts that would defeat the treaty's object and purpose until the nation clearly communicates its intent not to join. As a result, the President in signing assumes interim treaty obligations before the treatymaking process is complete. Despite the pervasiveness of this practice, scholars have neglected the question of its constitutionality. As this Article demonstrates, the practice is unconstitutional. Neither the text, structure, nor history of the Constitution supports the practice. Nor can the practice be justified under the President's authority to enter sole executive agreements or as a longstanding practice in which Congress has acquiesced. The result, ironically, is that the President often acts unconstitutionally when employing the treatymaking process outlined in Article II of the Constitution. Yet the President need not avoid the Article II process to cure this constitutional defect. The President avoids constitutional violation by consenting to international agreements through means other than signature subject to ratification.

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## INTRODUCTION

Article II of the U.S. Constitution authorizes the President to make treaties “provided two thirds of the Senators present concur.”<sup>1</sup> The President often signs treaties long before the U.S. Senate concurs. Indeed, many of the most prominent treaties of our day have been signed by the executive but remain unapproved by the Senate: the Kyoto Protocol;<sup>2</sup> the First and Second Additional Protocols to the Geneva Conventions;<sup>3</sup> the International Covenant on Economic, Social, and Cultural Rights;<sup>4</sup> the Convention on the Rights of the Child;<sup>5</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>6</sup> among others.<sup>7</sup> Sometimes the lag between signature and ratification is substantial; these treaties were signed in the 1970s, ’80s, and ’90s.<sup>8</sup> International law, in both its treaty and customary dimensions, provides that in the interim between presidential signature and ratification, signature triggers an international obligation to avoid actions that “would defeat the object and purpose of [the] treaty” until the United States makes clear its intent not to

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1. U.S. CONST. art. II, § 2, cl. 2. For a detailed description of the treaty-making process, see THOMAS M. FRANCK, MICHAEL J. GLENNON & SEAN D. MURPHY, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 353–59 (3d ed. 2008).
  2. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148 (signed by United States Nov. 12, 1998), *available at* [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg\\_no=XXVII-7-a&chapter=27&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg_no=XXVII-7-a&chapter=27&lang=en).
  3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (signed by United States Jan. 23, 1979), *available at* <http://treaties.un.org/pages/showDetails.aspx?objid=08000002800f3586>; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (signed by United States Jan. 23, 1979), *available at* <http://treaties.un.org/pages/showDetails.aspx?objid=08000002800f3cb8>.
  4. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (signed by United States Oct. 5, 1977), *available at* [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg_no=IV-3&chapter=4&lang=en).
  5. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (signed by United States Feb. 16, 1995), *available at* [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg_no=IV-11&chapter=4&lang=en).
  6. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (signed by United States July 17, 1980), *available at* [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg_no=IV-8&chapter=4&lang=en).
  7. Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 309 & n.5 (2007).
  8. *See supra* notes 2–6; *see also* Bradley, *supra* note 7, at 309.

ratify.<sup>9</sup> The result is that the President, in signing subject to ratification, assumes treaty obligations before completing the constitutional processes for creating international agreements.<sup>10</sup>

This problem has received little attention in the literature.<sup>11</sup> Most who have addressed the issue have done so in passing. Some have concluded that the President's assumption of interim obligations is constitutional due, for example, to historical practice. Others have suggested the opposite, though none has fully engaged the issue. Indeed, the most fulsome analysis notes "tension" between interim obligations and Article II but does not focus on establishing the unconstitutionality of the assumption of interim obligations.<sup>12</sup>

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9. Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Article 18 provides in full:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

*Id.* For ease of reference, this Article occasionally refers to these obligations as "article 18 obligations," recognizing, of course, that some nations, like the United States, incur these obligations as a matter of customary international law.

10. Similar problems arise when the executive fails to submit to the Senate for its consent reservations proposed by our treaty partners, *see* CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 16–17 (Comm. Print 2001) [hereinafter CRS, TREATIES], and when a treaty applies provisionally before the United States has completed the constitutional process for expressing consent, *see id.* at 113–14; *see also* Vienna Convention, *supra* note 9, art. 25; *infra* note 365. While these phenomena are not the focus of this Article, this Article's analysis transfers. It is not so obvious, however, that this Article's analysis applies to executive acceptance of the procedural provisions of a treaty (addressing such things as how and when consent may be expressed). *See, e.g.*, Vienna Convention, *supra* note 9, art. 24(4) ("The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text."); J. MERVYN JONES, FULL POWERS AND RATIFICATION 86, 87, 89 (1949) (noting that "[s]ignature brings the formal clauses of the treaty . . . into immediate operation"). Because it is accepted that the President ultimately must express U.S. consent to a treaty, perhaps the President has unilateral authority to agree to at least some of the conditions under which consent will be given. *See infra* notes 32, 101 and accompanying text. Other conditions, such as those governing entry into force, arguably affect the United States only after Senate or congressional consent has been given and thus may not present the problem of executive assumption to the same extent that interim obligations do.

11. *See infra* Part I.

12. Bradley, *supra* note 7, at 308, 330, 334 (noting "tension"); *id.* at 319 (noting "constitutional issue"); *id.* at 327 (noting "potential constitutional conflict"); *id.* at 334 (noting "constitutional concerns");

This Article fills that gap. It exposes the President's unilateral assumption of interim obligations to constitutional light, concluding that the practice finds no support in constitutional text, structure, or history. Part I discusses the relatively scarce scholarly commentary on the issue of interim obligations. Part II explains the scope of the constitutional problem, establishing that the President assumes interim obligations on a significant scale. Relying on constitutional text, structure, and history, Part III establishes that the President's assumption of interim obligations violates the Constitution. Part IV addresses arguments that have been, or might be, offered against finding a constitutional violation in interim obligations. Part V addresses the implications in both domestic and international law of this Article's unconstitutionality thesis.

## I. SCHOLARLY COMMENTARY

Few scholars have addressed the constitutional dimension of interim obligations.<sup>13</sup> Ed Swaine, in an article evaluating whether the principle of interim obligations adequately controls strategic state behavior in treaty-making, noted “the constitutional questions that interim obligations pose—chiefly for divided power systems like the United States, where the President's ability to bind the United States without Senate advice and consent is potentially controversial.”<sup>14</sup> In the same footnote, however, he explained that he would not address the issue.<sup>15</sup> In the same issue of the *Stanford Law Review*, David Sloss asserted—in an article assessing the need for judicial, rather than procedural, protections of federalism in treaty-making—that “[t]he President has the constitutional authority to sign . . . an agreement [that is legally binding on signature] only if he obtains ex ante congressional authorization, or if the agreement is within the scope of his independent constitutional authority.”<sup>16</sup> On this assertion, one might conclude that presidential assumption of interim obligations is unconstitutional unless the obligations could be incurred through sole executive agreement. Yet, Sloss carves out interim obligations from the force of his argument by observing, in a footnote, that “the President's constitutional authority to sign international

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*see also id.* at 319–27 (arguing that limitations on the President's authority to enter sole executive agreements indicate that the President's power to incur interim obligations is also limited).

13. Members of the Senate, by contrast, have noted and attempted to address the problem of interim obligations. *See infra* notes 273–289 and accompanying text (discussing senatorial resistance to assertions of presidential power arising from unratified treaties).

14. Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2065 n.19 (2003).

15. *Id.*

16. David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1993 (2003).

agreements that require subsequent ratification has never been seriously challenged, even in cases where the Constitution arguably requires use of the Article II treaty mechanism.”<sup>17</sup>

David Scott comes closer to addressing the constitutional question in a student comment on the President’s authority to require return of treaties submitted to the Senate in order to un-sign them.<sup>18</sup> He briefly asserts that “the Senate circumvents the Treaty Clause” by failing to return a treaty to the President for un-signing, thereby preserving interim obligations.<sup>19</sup> Yet Scott does not develop the constitutional analysis or acknowledge the President’s prior violation in unilaterally incurring obligations. Robert Turner, in a student note addressing the implications of postponed ratification of the Treaty on Limitations of Strategic Offensive Arms (SALT II), goes so far as to conclude that presidential assumption of interim obligations is constitutional.<sup>20</sup> His support, however, is brief and conclusory. He argues that the Constitution gives the federal government treaty-making power and that interim obligations are a “necessary element of the treaty-making process.”<sup>21</sup> At a minimum, he concludes that interim obligations are constitutional if the Senate acquiesces in the postponement of ratification.<sup>22</sup>

The greatest support for the constitutionality of presidentially incurred interim obligations comes from Michael Glennon, who briefly argues that such obligations are constitutional because they arise from a longstanding norm of international law.<sup>23</sup> Curtis Bradley provides the strongest counterweight.<sup>24</sup> Yet

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17. *Id.* at 1993 n.152.

18. See David C. Scott, Comment, *Presidential Power to “Un-Sign” Treaties*, 69 U. CHI. L. REV. 1447 (2002).

19. *Id.* at 1476–77.

20. See Robert F. Turner, Note, *Legal Implications of Deferring Ratification of SALT II*, 21 VA. J. INT’L L. 747, 777–78 (1981).

21. *Id.* at 777.

22. *Id.*

23. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 170–73 (1990). Glennon also argues that “[t]he President clearly possesses the authority to sign treaties and in view of the effect accorded signature by international law, he may constitutionally infer from that signature the further authority to act so as not to defeat the object or purpose of a signed treaty.” *Id.* at 173. At the same time, Glennon confesses that “international law can confer no power on the President; only the United States Constitution can do so.” *Id.* The content Glennon sees in the President’s authority to sign derives from international law, not the Constitution. As a result, the argument seems to fall on Glennon’s own terms. Glennon is left with the assertion that the President cannot, “[i]n refraining from acts that would defeat the purpose of a signed treaty, . . . exceed his own independent powers.” *Id.* As explained below, the President’s independent powers cannot support the full range of interim obligations that may arise under international law. See *infra* Part IV, notes 195–211 and accompanying text.

24. See Bradley, *supra* note 7. Oona Hathaway discusses the unconstitutionality of presidential unilateralism in treaty-making but does so in the context of executive agreements entered pursuant to ex

Bradley goes only so far as to assert that executive assumption of interim obligations “appears to be in tension with” Article II.<sup>25</sup> Rather than explore that constitutional tension, Bradley focuses on explaining (1) why “the president’s [limited] power to enter into ‘sole executive agreements’” does not eliminate the tension, and (2) why a narrow conception of the scope of interim obligations both reflects international law and reduces constitutional concerns.<sup>26</sup> In sum, notwithstanding the constitutional stature of the issue, scholars have done little more than identify the problem and stake out tentative and conclusory positions.

This Article steps into this scholarly void. It provides an empirically grounded sense of the scope of the President’s assumption of interim obligations and establishes that, in light of constitutional text, structure, and history, the practice violates the Constitution.<sup>27</sup> It then discusses implications of this problem.<sup>28</sup>

## II. SCOPE OF THE PROBLEM

U.S. law recognizes four types of international agreement: Article II treaties and three types of executive agreements—executive agreements pursuant to Article II treaties, congressional-executive agreements, and sole executive agreements.<sup>29</sup> Article II treaties are made by the President with the concurrence of two-thirds of the Senate.<sup>30</sup> Executive agreements pursuant to Article II treaties are made by the President under authorization from prior Article II treaties.<sup>31</sup> Congressional-executive agreements result from the bicameralism and presentment that produce ordinary statutes.<sup>32</sup> Congressional authorization for

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ante congressional authorization. See Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 146–47, 205–15 (2009).

25. Bradley, *supra* note 7, at 308; see also *id.* at 309, 334.

26. *Id.* at 308; see also *id.* at 309, 321–32, 334. Although Bradley does not develop the constitutional question, this Article benefits tremendously from Bradley’s research on the phenomenon of unratified treaties.

27. See *infra* Parts II–III.

28. See *infra* Part V.

29. See 11 FOREIGN AFFAIRS MANUAL § 723.2 (2006); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 & cmt. a (1987); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1254–55 (2008).

30. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”). For examples of these agreements, see Hathaway, *supra* note 29, at 1257–58, 1261–66 & nn.57, 59–60, 63–67 & 69, 1268 & n.75.

31. See Hathaway, *supra* note 29, at 1255. For examples of these agreements, see *id.* at 1261–63 nn.56–58 & 62.

32. See *id.* at 1239, 1255. At the same time, a congressional-executive agreement most likely cannot be entered through congressional override of presidential opposition given the President’s role in transmitting internationally the United States’s consent to the agreement. See, e.g., RESTATEMENT

these agreements may come ex ante or ex post negotiation by the executive.<sup>33</sup> Sole executive agreements are entered by the President without express approval from Congress.<sup>34</sup>

Some of these agreements arguably do not pose a risk of unconstitutional interim obligations. The President's adoption of an ex ante congressional-executive agreement or an executive agreement pursuant to an Article II treaty comes after Congress or the treaty-makers have authorized the President's actions.<sup>35</sup> Properly entered sole executive agreements do not require approval outside the executive. Article II treaties and ex post congressional-executive agreements, by contrast, often involve unconstitutional assumption of interim obligations, as the approval from the other U.S. participants in the international agreement process—two-thirds of the Senate or a majority of both houses of Congress—may come after the President has signed the agreement and unilaterally incurred interim obligations.<sup>36</sup>

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(THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987) (“Congress cannot itself conclude . . . an [international] agreement; it can be concluded only by the President, who alone possesses the constitutional power to negotiate with other governments.”); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1254 (1995) (“The proposition that Congress could bind the United States to an international agreement against the wishes of the President is dramatically at odds with the well-accepted principle that the President is the primary representative of the nation in foreign affairs.”); *infra* note 101 and accompanying text.

33. See Hathaway, *supra* note 29, at 1255–56. Hathaway provides a detailed description of the congressional-executive agreements the United States entered between 1980 and 2000. See *id.* at 1256 n.48, 1261–63 nn.55–58, 1264–69 & nn.63–68, 70 & 74–80 (discussing ex ante congressional-executive agreements); *id.* at 1256 & n.49, 1264 n.64, 1268 n.77 (discussing ex post congressional-executive agreements).
34. See *id.* at 1239, 1255 & n.47. For examples of these agreements, see *id.* at 1262–63 nn.57–62.
35. The conclusion that ex ante congressional-executive agreements and agreements pursuant to Article II treaties do not involve unconstitutional interim obligations may be too hasty. Both types of agreements may be grounded in such broad and unguided delegations of authority to the President as to render both interim and ultimate obligations under these agreements unconstitutional. See Hathaway, *supra* note 24, at 145–49, 155–67, 205–15 (discussing the massive delegation effected by ex ante congressional authorizations and the resulting inconsistency with constitutional separation of powers); *infra* notes 350–352, 354 and accompanying text. Whether certain delegations of authority to enter international agreements are unconstitutional exceeds this Article's scope. See *infra* text accompanying note 351. This Article focuses instead on those agreements that involve presidential assumption of interim obligations without even formal authorization by Congress or the Senate.
36. The constitutional concerns raised by interim obligations persist at least until the Senate or Congress votes on a treaty or congressional-executive agreement. Once the Senate or Congress approves the agreement, all required participants in treaty-making have approved at least interim obligations under the treaty. Likewise, if the Senate or Congress rejects, or reserves as to particular portions of, the agreement, the Senate's or Congress's action may communicate intent not to ratify and thereby terminate interim obligations as to all or part of the agreement. See Vienna Convention, *supra* note 9, art. 18(a).



The problem posed by Article II treaties and ex post congressional-executive agreements is, on one metric, less expansive than one unversed in U.S. treaty-making might assume. While the Article II treaty is the only type of federal agreement whose formation is detailed in the Constitution, Article II treaties are now far less common than congressional-executive agreements.<sup>37</sup> The majority of international agreements the United States enters are made through the congressional-executive process<sup>38</sup> and are largely of the ex ante variety.<sup>39</sup>

At the same time, Article II treaties and ex post congressional-executive agreements are both quantitatively and qualitatively important. A significant number of U.S. international agreements remain Article II treaties or ex post congressional-executive agreements. Between 1980 and 2000 alone, the United States entered close to four hundred Article II treaties as well as a small number of ex post congressional-executive agreements.<sup>40</sup> In roughly the last decade, the President has submitted 155 Article II treaties to the Senate.<sup>41</sup>

Qualitatively, these two processes have been used to address important international issues. Ex post congressional-executive agreements have been used for “agreements on fisheries, trade, atomic energy, investment, education, and the environment.”<sup>42</sup> For example, the North American Free Trade Agreement and the Bretton Woods Agreements creating the International Monetary Fund and the World Bank were entered as ex post congressional-executive

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37. Congressional-executive agreements also outnumber sole executive agreements. *See, e.g.*, R. ROGER MAJAK, CONG. RESEARCH SERV., 95TH CONG., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICE 20–21 (Comm. Print 1977) (charting the relatively low number of pure executive agreements from 1946 to 1972); C.H. McLaughlin, *The Scope of the Treaty Power in the United States II*, 43 MINN. L. REV. 651, 721 (1959) (calculating that of 2890 treaties and executive agreements between 1938 and 1957, 160 (5.5 percent) were what McLaughlin terms “presidential agreements”); *infra* note 38.
38. Hathaway concludes that between 1980 and 2000, the United States entered “2744 executive agreements” and “372 Article II treaties.” Hathaway, *supra* note 29, at 1254 n.45. *But cf. id.* at 1258 (identifying 375 Article II treaties between 1980 and 2000). She was unable to identify an authorizing statute for 782 executive agreements, leaving open the possibility that those agreements are sole executive agreements or agreements pursuant to an Article II treaty. *See id.* at 1259–60 & n.53. That leaves roughly two thousand agreements that are clearly congressional-executive.
39. *Id.* at 1256 (noting that ex ante agreements “make up the largest group of congressional-executive agreements” and that ex post “agreements are much less common”). For U.S. Department of State guidelines for selecting the type of agreement to use, see 11 FOREIGN AFFAIRS MANUAL § 723.3 (2006). Unless otherwise noted, this Article addresses modern U.S. treaty-making practice as reflected, in part, in the most comprehensive study of that practice: Hathaway’s analysis of U.S. treaty-making between 1980 and 2000. *See* Hathaway, *supra* note 29, at 1248–71.
40. Hathaway, *supra* note 29, at 1254 n.45 (Article II treaties); *see id.* at 1256 & n.49, 1268 n.77 (ex post congressional-executive agreements); Hathaway, *supra* note 24, at 150–51 & n.16 (identifying nine ex post congressional-executive agreements and expecting there were others).
41. *See infra* Tables 2–3.
42. Hathaway, *supra* note 29, at 1256; *see id.* at 1256 n.49, 1268 n.77.

agreements.<sup>43</sup> Article II treaties have been used to address such things as “extradition . . . , taxation[,] . . . investment . . . , [commerce] . . . , fisheries and wildlife . . . , arms control . . . , maritime matters . . . , shipping and marine pollution . . . [,] the environment . . . , aviation, consular relations, . . . telecommunications, international law and organization, human rights, labor, nuclear safety, intellectual property/copyrights, dispute settlement and arbitration, and legal documents.”<sup>44</sup> Indeed, “the Article II process was used exclusively during the 1980s and 1990s” for extradition, “human rights . . . and dispute settlement.”<sup>45</sup> Similarly, “all significant international agreements” in the areas of “arms control . . . , aviation . . . , the environment . . . , labor . . . , consular relations . . . , taxation . . . , and telecommunications . . . were concluded through the Article II process.”<sup>46</sup> Moreover, at least in recent decades, 35 percent of Article II treaties have been multilateral compared to 6 percent of executive agreements.<sup>47</sup>

Even if Article II treaties and ex post congressional-executive agreements were not so quantitatively and qualitatively important, the mere fact that the relatively scant constitutional text pauses to address Article II treaty-making highlights the significance of the Article II process. Along these lines, there has been significant scholarly debate regarding the interchangeability of Article II treaties and congressional-executive agreements.<sup>48</sup> In one prominent exchange, Bruce Ackerman and David Golove asserted that Article II treaties and ex post congressional-executive agreements are completely fungible, while Laurence Tribe argued that ex post congressional approval of international agreements is unconstitutional.<sup>49</sup> To the extent the debate leads to the conclusion that the

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43. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 891–92 (1995); Hathaway, *supra* note 29, at 1256 n.49; see also Ackerman & Golove, *supra*, at 892 & n.425, 901–02 (identifying additional agreements entered as ex post congressional-executive agreements).

44. Hathaway, *supra* note 29, at 1257; see also *id.* at 1258.

45. *Id.* at 1261.

46. *Id.* at 1261–62.

47. *Id.* at 1254 n.45. Given the fact that the congressional-executive agreement is used much more frequently than the Article II treaty, “the . . . majority of [recent] multilateral agreements are concluded through congressional-executive agreements.” *Id.* at 1240; see *id.* at 1254 n.45 (noting that between 1980 and 2000, the United States entered 152 multilateral executive agreements and 130 multilateral Article II treaties).

48. See, e.g., *id.* at 1243–48 (describing the debate). The debate has also played out in the courts. See *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319–20 (11th Cir. 2001) (dismissing a suit claiming that the North American Free Trade Agreement could be entered as an Article II treaty but not as a congressional-executive agreement).

49. Compare Ackerman & Golove, *supra* note 43, at 802–03 & n.6, 805–08, 811, 837–929 (documenting the rise of the interchangeability of Article II treaties and ex post congressional-executive agreements and arguing in support of that development), with Tribe, *supra* note 32, at 1235 n.47, 1249–86, 1300–01 (rejecting the constitutionality of ex post congressional-executive

Article II process is exclusive, at least for certain types of agreements, Article II treaties may play an even more prominent role in the future.

Both Article II treaties and ex post congressional-executive agreements frequently involve interim obligations. The President often negotiates and signs these agreements, subject to later ratification upon consent of a supermajority of the Senate or a majority of both houses of Congress.<sup>50</sup> A review of the 155 treaties submitted to the Senate during the 106th to the 111th Congresses—1999 to 2010, or roughly the last decade—reveals that 139, or roughly 90 percent, were signed by the executive subject to ratification.<sup>51</sup> Ironically, the Vienna Convention on the Law of Treaties—the treaty source for interim obligations—is an agreement the United States signed but has not yet ratified.<sup>52</sup> The Convention was signed in 1970 and referred to the Senate in 1971, but remains in the Senate.<sup>53</sup>

Not only is signature subject to ratification common with Article II treaties and ex post congressional-executive agreements, the interim between signature and ratification can also be substantial.<sup>54</sup> As noted at the outset of this

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agreements while recognizing executive authority to enter non-Article II agreements, an authority that can be expanded through ex ante congressional delegation). The *Restatement* asserts that “[t]he prevailing view is that the Congressional-executive agreement can be used as an alternative to the treaty method in every instance.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987); cf. Hathaway, *supra* note 29, at 1338–49 (arguing that congressional-executive agreements can be used for all but those few agreements that exceed Congress’s Article I authority).

50. Throughout this Article, I refer to the President’s negotiation and signature of international agreements. Of course, neither negotiation nor signature may actually be done by the President but by executive branch officials. See 1 U.S.C. § 112b(a) (2006) (recognizing that departments and agencies enter agreements on the United States’s behalf); 11 FOREIGN AFFAIRS MANUAL §§ 725.1, 725.6, 725.7, 725.9 (2006) (recognizing that negotiation and signature may be effected by negotiating officer or office); Hathaway, *supra* note 29, at 1262 n.57 (observing that “the Agreement To Ban Smoking on International Passenger Flights Between Canada, the United States, and Australia . . . was signed for the United States by Federico Pena, who was at the time the U.S. Secretary of Transportation”). The constitutional problem arises regardless of who signs for the executive.
51. See *infra* Tables 2–3 (identifying, among treaties submitted to the Senate during the 106th to 111th Congresses, those signed subject to ratification and those for which consent does not involve signature, respectively).
52. See UNITED NATIONS TREATY COLLECTION, VIENNA CONVENTION ON THE LAW OF TREATIES, [http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&cntdsg\\_no=XXIII-1&chapter=23&Temp=mtmsg3&lang=en](http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&cntdsg_no=XXIII-1&chapter=23&Temp=mtmsg3&lang=en) (last visited Dec. 5, 2011) (noting that the United States signed the Vienna Convention on April 24, 1970, but has not yet ratified the treaty).
53. See Library of Congress, *Treaties: 92d Congress*, THOMAS, <http://thomas.loc.gov/home/treaties/treaties.html> (select “92nd (1971–1972)”; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, intro. note (1987).
54. Bradley, *supra* note 7, at 309 (“At least since World War I, it has not been uncommon for a significant period of time to elapse between the United States’ signature and ratification of a treaty.”); see also *id.* at 309–13, 320; *infra* Table 2.

Article, prominent modern treaties were signed in the 1970s, '80s, and '90s but remain unratified.<sup>55</sup> These are not the most extreme examples. In 1925, the United States signed the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.<sup>56</sup> The Senate ratified the treaty almost fifty years later in December 1974.<sup>57</sup> Approximately thirty-eight years passed between the United States's signature of the Genocide Convention in 1948 and Senate ratification in 1986.<sup>58</sup> Table 2 in the Appendix identifies additional signed treaties that went unratified for roughly half a century. More generally, Table 2 lists all treaties that have both been signed subject to ratification and submitted to the Senate in roughly the last decade.<sup>59</sup> The treaties are listed according to the length of time between signature and ratification.<sup>60</sup> Among these treaties, the interim between signature and ratification has ranged from roughly a tenth of a year (one to two months) to over fifty years. Excluding the two treaties involving the lengthiest interim obligations, the average interim has been 2.5 years.<sup>61</sup> Of course, this figure may understate the average lag between signature and ratification by focusing only on those treaties that have achieved ratification. The lag may be indefinite for some treaties that have been submitted to the Senate.<sup>62</sup> The same may be true for treaties that have not even been submitted.<sup>63</sup>

55. See *supra* notes 2–6, 8 and accompanying text.

56. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *done* June 17, 1925, 26 U.S.T. 571, 94 U.N.T.S. 65 (entered into force for the United States Apr. 10, 1975), *available at* <http://treaties.un.org/pages/showDetails.aspx?objid=0800000280167ca8>.

57. *Id.*

58. Convention on the Prevention and Punishment of the Crime of Genocide, *done* Dec. 9, 1948, S. EXEC. DOC. O, 81-1, 78 U.N.T.S. 277; UNITED NATIONS TREATY COLLECTION, CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en) (last visited Dec. 5, 2011) (noting the date of U.S. signature); Library of Congress, *Treaties: 81st Congress*, THOMAS, <http://thomas.loc.gov/home/treaties/treaties.html> (search “Convention on the Prevention and Punishment”; then select “Treaty Number: 81-15”) (noting the date of U.S. Senate approval).

59. See *infra* note 359.

60. See *infra* Table 2.

61. See *infra* Table 2; note 361.

62. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 6. Although this treaty has twice been reported out of Committee, the Senate has failed to vote on it. See Library of Congress, *Treaties: 96th Congress*, THOMAS, <http://thomas.loc.gov/home/treaties/treaties.html> (search “Convention on the Elimination of All Forms of Discrimination Against Women”; then select “Treaty Number: 96-53”). For a more comprehensive list of treaties waiting in the Senate, see *Treaties Pending in the Senate*, U.S. DEPT OF STATE, <http://www.state.gov/s/l/treaty/pending> (last updated May 12, 2011).

63. See, e.g., Convention on the Rights of the Child, *supra* note 5. The Convention on the Rights of the Child was signed under President Clinton but, as of December 2011, has not been submitted to

Under Article 18 of the Vienna Convention, a nation assumes the obligation “to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval.”<sup>64</sup> These interim obligations persist “until [the state] shall have made its intention clear not to become a party to the treaty.”<sup>65</sup> Although the United States has not ratified the Vienna Convention on the Law of Treaties, it is generally accepted, and the executive has repeatedly affirmed, that interim obligations arise upon signature as a matter of customary international law.<sup>66</sup> Consequently, when the President signs an Article II treaty or an ex post congressional-executive agreement pending ultimate consent, he unilaterally assumes enforceable treaty obligations. The obligations are not just theoretical. For example, claims that the United States has violated the object and purpose of an unratified treaty have begun to be brought in U.S. courts.<sup>67</sup> Courts have not always addressed these claims, but at least one court has credited such a claim.<sup>68</sup> More significantly, the executive has relied on interim obligations to support taking certain actions consistent with unratified treaties.

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the Senate, notwithstanding the Obama administration’s expressed desire to ratify the treaty. *See, e.g.,* Bradley, *supra* note 7, at 310; John Heilprin, *Obama Administration Seeks to Join U.N. Rights of the Child Convention*, HUFFINGTON POST, June 22, 2009, [http://www.huffingtonpost.com/2009/06/23/obama-administration-seek\\_n\\_219511.html](http://www.huffingtonpost.com/2009/06/23/obama-administration-seek_n_219511.html). At the same time, a failure to submit to the Senate or of the Senate to consent may, at some point, communicate an intent not to join, thereby terminating interim obligations. *See* Vienna Convention, *supra* note 9, art. 18(a).

64. Vienna Convention, *supra* note 9, art. 18. As Article 18 articulates, interim obligations arise both on signature and on exchange of “instruments constituting the treaty” when these acts are “subject to ratification, acceptance or approval.” *Id.* For convenience, this Article focuses on the assumption of interim obligations through signature subject to ratification, but its analysis applies equally to the assumption of such obligations through other means.

65. *Id.*

66. *See infra* notes 261–272 and accompanying text.

67. *See Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 373 n.7 (2d Cir. 2004) (involving an object and purpose claim based on the Convention for the Unification of Certain Rules for International Carriage by Air, S. TREATY DOC. NO. 106-45, May 28, 1999 (Montreal Convention)); *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618, 624 (E.D. Tex. 2006) (quoting *United States v. Royal Caribbean Cruises*, 24 F. Supp. 2d 155, 159 (D.P.R. 1997)), *rev’d on other grounds*, 534 F.3d 398 (5th Cir. 2008); *United States v. Royal Caribbean Cruises*, 11 F. Supp. 2d 1358, 1369 (S.D. Fla. 1998) (involving an interim-obligations claim under the unratified United Nations Convention on the Law of the Sea); *Royal Caribbean Cruises*, 24 F. Supp. 2d at 159–60 (same).

68. *See Royal Caribbean Cruises*, 24 F. Supp. 2d at 159–60 (holding the United States to a provision of the unratified United Nations Convention on the Law of the Sea, based in part on the principle of interim obligations); *see also* *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 304 n.14 (1st Cir. 1999) (relying on the signed but unratified United Nations Convention on the Law of the Sea “only to the extent that it incorporates customary international law,” but “also not[ing] that the United States ‘is obliged to refrain from acts that would defeat the object and purpose of the agreement’” (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(3) (1987)) (citing Vienna Convention, *supra* note 9, art. 18)).

To illustrate, “[a]fter the Senate defeated the Comprehensive Test Ban Treaty, the [Clinton] administration cited Article 18 . . . to justify a continued moratorium on underground nuclear testing.”<sup>69</sup> Arguments based on interim obligations have also been raised in international tribunals.<sup>70</sup>

The constraints these obligations impose on a signing state’s interim activities are defined by international law and have been described both expansively and narrowly.<sup>71</sup> Some claim that the obligations “bind[ ] signatory nations not to violate [the] treaty at all.”<sup>72</sup> Others argue that the obligations prohibit acts that “violate any of the ‘core’ or ‘important’ provisions in the treaty.”<sup>73</sup> Still others claim that interim obligations are “best construed as precluding only actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty ratification.”<sup>74</sup> In more concrete terms,

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69. John R. Bolton, *Unsign That Treaty*, WASH. POST, Jan. 4, 2001, *reprinted in* 147 CONG. REC. S9216 (daily ed. Sept. 10, 2001); *see also* John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 TRANSNAT’L L. & CONTEMP. PROBS. 1, 47 (2000); John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 211–12 (2000); *infra* notes 281–283 and accompanying text (describing actions of the Carter and Reagan administrations pursuant to the unratified but signed SALT II agreement); *cf.* 144 CONG. REC. 7585 (daily ed. Apr. 30, 1998) (statement of Sen. John Ashcroft) (introducing legislation to thwart Clinton administration efforts to implement the signed but unratified Kyoto Protocol); *The Law of Treaties and Other International Agreements*, 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW § 2, at 706 [hereinafter 1979 DIGEST] (asserting, under Article 18, interim obligations of the Soviet Union).
70. *See infra* notes 222, 227–231 and accompanying text.
71. *See* David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565, 594–609 (2010) (summarizing and criticizing four interpretations of the obligation not to defeat a treaty’s object and purpose while promoting a fifth interpretation); Paul V. McDade, *The Interim Obligation Between Signature and Ratification of a Treaty*, 32 NETH. INT’L L. REV. 5, 10 & nn.22–23 (1985) (noting extremes in asserted general international law definitions of interim obligations); *cf.* Martin A. Rogoff, *The International Legal Obligation of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263, 296–99 (1980) (discussing the uncertain scope of the Article 18 obligation).
72. Bradley, *supra* note 7, at 308; *see also id.* at 309, 316.
73. *Id.* at 308; *see also id.* at 309, 316.
74. *Id.* at 308; *see also* 1979 DIGEST, *supra* note 69, § X, at 693 (quoting the executive branch’s position that “pending legislation [on deep sea mining] would not defeat the object and purpose of the [Law of the Sea] Treaty since implementation of the Treaty by the parties . . . would not be rendered impossible or even more difficult by virtue of the legislation”); Bradley, *supra* note 7, at 327–31; Memorandum From Roberts B. Owen, U.S. Dep’t of State Legal Adviser (Feb. 21, 1980) [hereinafter Owen Memorandum], *reprinted in* S. EXEC. REP. NO. 96-33, at 45, 47–48 (1980) (stating that “signatories are clearly not obliged to carry out all treaty provisions” but at a minimum must “avoid actions which could render impossible the entry into force and implementation of the treaty, or defeat its basic purpose and value to the other party or parties[,]” a standard that must be applied “on a case-by-case basis”); *cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 cmt. i (1987) (“Testing a weapon in contravention of a clause prohibiting such a test might violate the purpose of the agreement, since the consequences of the test might be irreversible. Failing to dismantle a

commentators have claimed, for example, that U.S. interim obligations under the signed but unratified Convention on the Rights of the Child prohibited the United States from executing juveniles,<sup>75</sup> a conclusion the U.S. Supreme Court has since reached as a matter of domestic constitutional law.<sup>76</sup> The ultimate definition of interim obligations under international law can expand or contract the problem these obligations present in domestic constitutional law.<sup>77</sup> However, without eliminating the obligations, definition cannot eliminate the constitutional issue altogether.<sup>78</sup>

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weapon scheduled to be dismantled under the treaty might not defeat its object, since the dismantling could be effected later.”)

75. See William A. Schabas, Panel Discussion, *Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent With International Human Rights Law?*, 67 *FORDHAM L. REV.* 2793, 2812 (1999) (arguing that, as a signatory to the Convention on the Rights of the Child, “the United States is bound to respect the object and purpose of the Convention” and therefore may not execute juveniles); see also Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada*, 21 *WHITTIER L. REV.* 215, 224 (1999) (same). But see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 *DUKE L.J.* 485, 512–13 (2002) (contending that U.S. signature of the Convention on the Rights of the Child and the American Convention on Human Rights does not require the United States to abolish the juvenile death penalty, as both treaties “contain a long list of rights” and therefore “do not appear to have [abolition] as their object and purpose”). For examples of potential interim obligations under other treaties, see Bradley, *supra* note 7, at 315–18, 331 n.113 (discussing the Convention on the Rights of the Child, Comprehensive Nuclear Test Ban Treaty, First Additional Protocol to the Geneva Conventions, and Rome Statute of the International Criminal Court (ICC)); *id.* at 325–26 (discussing the interim obligations the President might constitutionally assume under a disarmament treaty or the Rome Statute of the ICC); *id.* at 329 (discussing, using a narrow definition of interim obligations, the obligations that international law might impose with regard to treaties requiring disarmament or cession of territory or objects); Owen Memorandum, *supra* note 74, at 45, 48 (discussing SALT II treaty).
76. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding the juvenile death penalty unconstitutional); see Bradley, *supra* note 7, at 315 & n.38.
77. Bradley, *supra* note 7, at 308, 327, 331.
78. See *id.* at 308. Curtis Bradley, for example, argues that if the narrowest definition of interim obligations is accurate—“precluding only actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification”—“the obligation[s] have] little relevance to many types of treaties, such as human rights treaties, where pre-ratification conduct inconsistent with the treaty is not likely to undo the bargain reflected in the treaty.” *Id.*; see also *id.* at 327–28, 332. He concedes, however, that “there is still some potential for constitutional conflict” both under this narrow definition and as a result of uncertainty regarding the definition of the obligations. *Id.* at 308; see also *id.* at 332 (“[Even if interim obligations] have little relevance to certain types of treaties, . . . there is probably still some potential for conflict between the Constitution and the object and purpose obligation.”); *id.* at 334 (“Even under the narrow construction of Article 18, there is likely to be some gap between the president’s independent constitutional authority and the international law of signing obligations . . .”). The constitutional problem largely evaporates if customary international law does not impose interim obligations on the United States. While some might perceive customary international law in that way, see *id.* at 333 & n.120, this Article proceeds on the view, accepted by the United States,

### III. THE CONSTITUTIONAL VIOLATION

As the above discussion demonstrates, presidential assumption of interim obligations is a significant phenomenon. The phenomenon is of constitutional dimension. Notwithstanding scholarly neglect of the issue, the Constitution's text, structure, and history make clear that the President may not unilaterally assume treaty obligations.

#### A. Text

Article II provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>79</sup> This text seems to classify treaty-making principally as an executive power.<sup>80</sup> Not only does the text appear in Article II, which addresses presidential authority,<sup>81</sup> but the text specifically vests power in the President.<sup>82</sup> Absent more, treaty-making might seem to be a presidential function. Yet the President's treaty-making power is contingent and in critical ways. It is contingent on the participation of another organ of the federal government—the Senate.<sup>83</sup> According to the text, the Senate's participation includes not just concurring in the treaty negotiated but in providing advice and consent.

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that customary international law imposes interim legal obligations. See, e.g., *infra* notes 261–272 and accompanying text.

79. U.S. CONST. art. II, § 2, cl. 2.

80. *But cf.* THE FEDERALIST NO. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (arguing that treaty-making “partake[s] more of the legislative than of the executive character”); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 30–135 (1979) (exploring in detail the framers' understanding of the executive power, and concluding that the executive's foreign affairs authority was intended to be less expansive than currently assumed).

81. See David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2241 & nn.56–57 (2010); see also Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, in 1 PERSPECTIVES IN AMERICAN HISTORY 234, 246, 250, 257–81 (1984) (exploring the muddled significance of placement of treaty power within Article II).

82. *But see* Bestor, *supra* note 80, at 92–93 (acknowledging, but ultimately rejecting, the notion that “[b]y altering the wording and changing the location of the treaty clause, the framers might be supposed to have shown an intention to transfer the control of foreign policy from legislative to executive hands”).

83. See 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 425 (Rufus King) (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS] (relying on the text of Article II to conclude that “the President [acting] alone” may not make treaties).



Whatever advice and consent originally meant or means today,<sup>84</sup> its inclusion suggests a multifaceted role for the Senate in treaty-making.<sup>85</sup>

That role, of course, includes consent. In describing Senate consent in terms of senators, the text reminds not just that multiple organs of the federal government are required for treaty-making but that many individuals must participate in the process.<sup>86</sup> Two-thirds of the senators present must approve the treaty. This supermajority requirement standing alone highlights the critical nature of Senate participation. The requirement is all the more probative in comparative perspective; “[o]nly five other countries in the world . . . require a supermajority vote in their legislature” for treaty ratification.<sup>87</sup> The Constitution’s combination of multiple bodies and individuals, multiple roles, and supermajority approval leaves no doubt that Article II nowhere contemplates the assumption of treaty obligations by the President alone.

Article I, which outlines the process used to approve congressional-executive agreements, likewise confirms the Constitution’s strong preference for multiactor international agreement making. “All legislative Powers . . . granted [by the Constitution are] . . . vested in a Congress of the United States, which . . . consist[s] of [two houses:] a Senate and House of Representatives.”<sup>88</sup> While the President may suggest legislation to Congress,<sup>89</sup> formal approval of congressional-executive agreements begins in Congress.<sup>90</sup> “Every Bill<sup>91</sup> *which shall have passed* the House of Representatives and the Senate,” and only such

84. See *infra* notes 179–183 and accompanying text.

85. See FRANCK ET AL., *supra* note 1, at 353–59.

86. This was a change from the Articles of Confederation under which votes to approve treaties were cast by states rather than by individual members of Congress. Hathaway, *supra* note 29, at 1284.

87. *Id.* at 1271–72. “Several other countries specify special voting procedures that include a supermajority threshold [but only] for particular subsets of treaties.” *Id.* at 1272 n.83. In Hathaway’s view, the supermajority requirement is unnecessarily costly. See *id.* at 1310–14.

88. U.S. CONST. art. I, § 1.

89. *Id.* art. II, § 3.

90. As with ordinary legislation, the agreement may have originated in the executive: The President may “recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient.” *Id.* However, the President only recommends for Congress’s consideration. Authorization begins when Congress approves the measure.

91. The Constitution protects against evasion of the bicameralism and presentment requirements by adding that, in addition to bills,

*[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.*

*Id.* art. I, § 7, cl. 3 (emphasis added); see *INS v. Chadha*, 462 U.S. 919, 946–47 (1983) (citing 2 RECORDS, *supra* note 83, at 301–05).

bills, must “be presented to the President of the United States.”<sup>92</sup> Approval, as under Article II, involves multiple federal organs. The Vice President even gets involved if the Senate is “equally divided.”<sup>93</sup> If the President vetoes a bill, it returns to the specific “House in which it shall have originated.”<sup>94</sup> That house has an opportunity to consider the President’s objections and by “two thirds of that House . . . agree to pass the Bill.”<sup>95</sup> The bill and the President’s objections then pass to the other house for its independent consideration.<sup>96</sup> In each house, the votes of individual congressmembers must be recorded, highlighting again the participation not only of federal organs but of numerous officials in the approval process.<sup>97</sup> A supermajority vote by the officials in the second house produces a law without the President’s approval.<sup>98</sup> Similarly, a bill may become law upon approval by a simple majority in both houses if the President fails to return the bill “within ten Days” after presentment, “unless *Congress* by their Adjournment prevent its Return.”<sup>99</sup> In the statutory process, law can be made without presidential consent or upon presidential inaction.<sup>100</sup> While approval by override or inaction is likely not an option for congressional-executive agreements, given the President’s role in communicating consent internationally,<sup>101</sup> the inclusion of these options in the bicameralism and presentment arrangement suggests the preeminence of Congress in that arrangement. These provisions provide no support for the conclusion that the President can unilaterally assume interim obligations under Article I.

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92. U.S. CONST. art. I, § 7 (emphasis added).

93. *Id.* art. I, § 3, cl. 4.

94. *Id.* art. I, § 7.

95. *Id.*

96. *Id.* (“If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered . . .”).

97. *Id.* (“But in all such Cases . . . the Names of the Persons voting for and against the Bill shall be entered on the Journals of each House respectively.”).

98. *Id.* (“[I]f approved by two thirds of that [second] House, it shall become a Law.”).

99. *Id.* (emphasis added).

100. See Tribe, *supra* note 32, at 1253 n.108, 1257–58 (“The clear message of the Veto Override Clause is that, whenever Congress is authorized to take bicameral action, Congress may do so without the cooperation of the President, given a sufficient supermajority vote.”).

101. See JONES, *supra* note 10, at 91–92 (explaining that ratification is not effective until transmitted internationally); Bradley, *supra* note 7, at 335; Hathaway, *supra* note 24, at 209; Hathaway, *supra* note 29, at 1325–30, 1333–36; Tribe, *supra* note 32, at 1257 (noting this argument). Based on evaluation of arguments both for and against override in the context of international agreements, Tribe concludes that Article I’s override provision presents problems for advocates of the congressional-executive agreement. See *id.* at 1252–58.

## B. Structure

Constitutional structure likewise contradicts presidential power to unilaterally assume interim obligations. The asserted power is immediately suspect in light of the Constitution's general distribution of powers along both horizontal and vertical axes. The Constitution's more specific distribution of foreign affairs authority confirms the suspicion. While Justice Sutherland in *United States v. Curtiss-Wright*<sup>102</sup> described "the President as the sole organ of the federal government in the field of international relations,"<sup>103</sup> it is clear that the President's authority in the area of foreign affairs is far from exclusive. Along both federal and federalist lines, the power to conduct foreign affairs is divided. On the federal level, the Constitution assigns Congress significant, and even the judiciary some, authority over foreign affairs. From a federalist perspective, the opportunity to conduct foreign affairs is vested largely, but by no means exclusively, in the federal government.

### 1. Federal Distribution of Foreign Affairs Authority

The Constitution distributes foreign relations authority among all three branches of the federal government.<sup>104</sup> While the President and Congress receive the lion's share of that authority, even the federal judiciary receives some. The President is commander-in-chief and sits atop executive departments like the State Department; he may enter treaties and appoint ambassadors and consuls with Senate approval; and he may "receive Ambassadors and other public Ministers."<sup>105</sup> Congress's enumerated foreign affairs powers are numerous and include regulating foreign commerce<sup>106</sup> and U.S. territories,<sup>107</sup> overseeing certain foreign relations initiatives of U.S. states,<sup>108</sup> and defining and punishing violations of international law.<sup>109</sup> The federal judiciary's constitutional authority extends, inter alia, to "cases . . . arising under . . . Treaties," "Cases of admiralty and maritime Jurisdiction," and "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."<sup>110</sup> The federal

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102. 299 U.S. 304 (1936).

103. *Id.* at 320.

104. *See Bestor, supra* note 80, at 34, 41.

105. U.S. CONST. art. II, § 2.

106. *Id.* art. I, § 8, cl. 3.

107. *Id.* art. IV, § 3, cl. 2.

108. *Id.* art. I, § 10, cl. 3.

109. *Id.* art. I, § 8, cl. 10.

110. *Id.* art. III, § 2, cl. 1. *But cf. id.* amend. XI (restricting federal judicial power to hear lawsuits by foreign nationals against U.S. states).

distribution of foreign affairs authority is more fully laid out in the table below, which lists constitutionally enumerated powers of each branch in three columns and groups related powers in rows.

**TABLE 1. Constitutional Distribution of Foreign Affairs Authority<sup>111</sup>**

President	Congress	Judiciary
<ul style="list-style-type: none"> <li>• Act as commander-in-chief of Army, Navy, and state militia in U.S. service</li> </ul>	<ul style="list-style-type: none"> <li>• Provide for the common defense</li> <li>• Create and support Army and Navy</li> <li>• Organize, outfit, and dictate training for state militia</li> <li>• Regulate Army, Navy, and state militia in U.S. service</li> <li>• Declare war, issue letters of marque and reprisal, and regulate captures</li> <li>• Call forth state militia to repel invasions</li> </ul>	
<ul style="list-style-type: none"> <li>• Obtain the opinion of executive department heads<sup>112</sup></li> </ul>		

111. Distinguishing between domestic and foreign affairs powers is an uncertain endeavor, particularly in a globalized world. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 35 (2009); cf. Moore, *supra* note 81, at 2250–55. My intent here is not so much to ensure a definitive list or comparison of powers by which the various branches may influence foreign affairs as to illustrate the diffuse allocation of, and overlap in, federal foreign affairs authority. The powers identified in the chart are taken (sometimes word for word) from Article I, §§ 8–9; Article III, § 1; Article IV, § 3; Article II, §§ 2–3; and Article III, § 2 for Congress, the President, and the judiciary, respectively.

112. U.S. CONST. art. II, § 2, cl. 1. The scope of presidential authority over executive agencies is a matter of debate, with some arguing that “the President has the power to direct agency outcomes,” as agencies are “instruments of the Executive,” and others arguing that the President’s “role involves management of” agencies that are “delegates of Congress.” Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMM. 339, 377–78 (2010); see also, e.g., Peter L. Strauss, *Overseer, or “the Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (concluding that the President’s role is generally to oversee, not to decide).

President	Congress	Judiciary
<ul style="list-style-type: none"> <li>Negotiate treaties and submit to the Senate</li> </ul>	<ul style="list-style-type: none"> <li>Provide advice and consent and concur in treaties (Senate)</li> <li>Vest jurisdiction in federal courts<sup>113</sup></li> </ul>	<ul style="list-style-type: none"> <li>Adjudicate cases arising under U.S. treaties</li> </ul>
<ul style="list-style-type: none"> <li>Appoint ambassadors, public ministers, and consuls</li> <li>Receive ambassadors and other public ministers</li> </ul>	<ul style="list-style-type: none"> <li>Prevent U.S. officials from accepting valuables or positions from foreign governments</li> <li>Vest jurisdiction in federal courts</li> <li>Define and punish law of nations violations<sup>114</sup></li> </ul>	<ul style="list-style-type: none"> <li>Adjudicate cases affecting ambassadors, public ministers, and consuls</li> <li>Exercise original jurisdiction at Supreme Court in cases affecting ambassadors, public ministers, and consuls</li> </ul>
	<ul style="list-style-type: none"> <li>Define and punish piracy and felonies on the high seas</li> <li>Vest jurisdiction in federal courts</li> </ul>	<ul style="list-style-type: none"> <li>Adjudicate admiralty and maritime cases</li> </ul>
	<ul style="list-style-type: none"> <li>Vest jurisdiction in federal courts</li> </ul>	<ul style="list-style-type: none"> <li>Adjudicate cases between U.S. states or citizens and foreign states or nationals<sup>115</sup></li> </ul>
	<ul style="list-style-type: none"> <li>Appropriate funds<sup>116</sup></li> </ul>	
	<ul style="list-style-type: none"> <li>Regulate foreign commerce</li> </ul>	

113. In exercising its authority to “ordain and establish” lower federal courts, Congress has significant discretion to decide how much jurisdiction to provide these courts. U.S. CONST. art. III, § 1; *see* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3526 (3d ed. 2004) (detailing the “orthodox view [that] Congress is free to grant or withhold” federal subject matter jurisdiction).

114. I list Congress’s power “[t]o define and punish . . . Offenses against the Law of Nations” opposite the President’s powers to appoint and receive ambassadors, as offenses against the rights of ambassadors were a prominent violation of the law of nations at the founding of the United States. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–17, 720, 724 (2004).

115. The Eleventh Amendment qualifies the federal judicial power, excluding authority to hear suits by foreign nationals against states. U.S. CONST. amend. XI.

116. The extent to which Congress can use its appropriations power to limit the President’s actions in foreign affairs has been a matter of significant debate. *See FRANCK ET AL.*, *supra* note 1, at 806–78.

President	Congress	Judiciary
	<ul style="list-style-type: none"> <li>Regulate the value of U.S. and foreign money</li> </ul>	
	<ul style="list-style-type: none"> <li>Impose taxes, duties, imposts, and excises</li> </ul>	
	<ul style="list-style-type: none"> <li>Borrow money and pay debt</li> </ul>	
	<ul style="list-style-type: none"> <li>Create naturalization rules</li> </ul>	
	<ul style="list-style-type: none"> <li>Oversee various forms of state participation in foreign affairs<sup>117</sup></li> </ul>	
	<ul style="list-style-type: none"> <li>Regulate U.S. territories and admit new states</li> </ul>	

Tabular presentation of federal foreign affairs power highlights three features. First, a ribbon of foreign affairs authority extends through the federal triumvirate.<sup>118</sup> No one branch has a monopoly. Second, notwithstanding the general understanding that the President is the lead player in foreign affairs,<sup>119</sup> Congress rather than the President arguably receives the bulk of the express powers related to foreign affairs.<sup>120</sup> Third, in many cases, authority over a particular area is shared. The President is the commander-in-chief, but Congress may raise and regulate the Army and Navy.<sup>121</sup> The President can appoint ambassadors but only with Senate consent,<sup>122</sup> and the Supreme Court's original jurisdiction, as well as the federal judicial power generally, extends to "Cases

117. See *infra* Part III.B.2.

118. See Bestor, *supra* note 80, at 34, 41.

119. See, e.g., *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (gathering Supreme Court precedent for this understanding).

120. Of course, this conclusion relies on the contested assumption that the Constitution allocates foreign relations authority among the federal branches rather than identifying limited exceptions to the President's otherwise general foreign affairs power. Compare 15 THE PAPERS OF JAMES MADISON 69–72, 81–84 (Thomas A. Mason et al. eds., 1985) (relying, as Helvidius, on the Constitution's distribution of powers related to foreign affairs to discern the President's authority), with 15 THE PAPERS OF ALEXANDER HAMILTON 36–42 (Harold C. Syrett & Jacob E. Cooke eds., 1969) (arguing, as Pacificus, that the Constitution vests foreign affairs authority in the President with limited, express exception). See also Bestor, *supra* note 80, at 30–135 (exploring in detail the framers' understanding of the scope of executive power over foreign affairs); H. Jefferson Powell, *The Founders and the President's Authority Over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1471 (1999) (challenging recent conventional wisdom "that the President exercises far greater power over foreign affairs than the Constitution authorizes"); Rakove, *supra* note 81, at 258–67 (discussing the framers' understanding of the scope of executive power, including the Madison-Hamilton debate).

121. U.S. CONST. art. I, § 8, cls. 12–14; *id.* art. II, § 2, cl. 1.

122. *Id.* art. II, § 2, cl. 2.

affecting Ambassadors.”<sup>123</sup> Indeed, the phenomenon of shared authority is quite standard with regard to the President’s express foreign affairs powers.<sup>124</sup> The table understates the overlap as the Necessary and Proper Clause grants Congress the authority to execute the powers of the President (and judiciary), producing even broader coupling of foreign affairs authority.<sup>125</sup> As these observations reveal, the structure of federal foreign affairs power runs counter to unilateral executive authority to assume interim obligations.

Supreme Court case law regarding executive authority supports this understanding of the Constitution’s foreign affairs structure. The Supreme Court has long recognized the shared nature of foreign relations power. In *Youngstown Sheet and Tube Co. v. Sawyer*,<sup>126</sup> Justice Jackson’s concurrence emphasized the importance of structure over isolated grants of authority in understanding the Constitution’s operation in the area of foreign affairs.<sup>127</sup> In particular, Justice Jackson explained that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>128</sup> The familiar result is that “[w]hen the President acts” with congressional authorization, “his authority is at its maximum, for it includes all that he possesses . . . plus all that Congress can delegate.”<sup>129</sup> When the President acts contrary to Congress’s will, “his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>130</sup> When Congress has not spoken, the President must “rely upon his own powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or its distribution is uncertain” such that the President’s actions may or may not be constitutional.<sup>131</sup> All this addition, subtraction, and exploration of the zone of twilight results from the fact that federal foreign affairs authority is shared.

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123. *Id.* art. III, § 2, cls. 1–2.

124. *See* 3 RECORDS, *supra* note 83, at 424 (Rufus King) (“[I]n respect to foreign affairs, the President has no exclusive binding power, except that of receiving the Ambassadors and other foreign Ministers . . .”); Bestor, *supra* note 80, at 33–34 (noting that the Constitution’s four express presidential powers over foreign affairs must be exercised with another branch or are half powers where the complementary half is vested in or shared with another branch).

125. U.S. CONST. art. I, § 8.

126. 343 U.S. 579 (1952).

127. *Id.* at 635 (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”).

128. *Id.*

129. *Id.*

130. *Id.* at 637.

131. *Id.*

This shared structure has guided the outcome in recent prominent cases. In *Medellín v. Texas*,<sup>132</sup> the Court addressed the President's authority to domestically implement treaty obligations that are otherwise non-self-executing and therefore unenforceable in U.S. courts.<sup>133</sup> The Court resorted to "Justice Jackson's familiar tripartite scheme" as "the accepted framework for evaluating executive action in" foreign affairs.<sup>134</sup> Reasoning that the Constitution authorizes the President "to 'make' a treaty" but grants Congress the authority to "transform[ ] an international obligation arising from a non-self-executing treaty into domestic law," the Court rejected President George W. Bush's unilateral effort to transform an International Court of Justice (ICJ) judgment into preemptive, judicially enforceable federal law.<sup>135</sup> Given the Constitution's dispersion of both treaty-making and lawmaking authority, the Court concluded, "It should not be surprising that our Constitution does not contemplate vesting [treaty implementation] power in the Executive alone."<sup>136</sup>

In *Hamdi v. Rumsfeld*,<sup>137</sup> the Court considered the President's authority to detain "a United States citizen on United States soil as an 'enemy combatant.'"<sup>138</sup> Both the plurality and Justice Thomas upheld the detention on the ground that Congress, through the Authorization for the Use of Military Force (AUMF), authorized the President to detain.<sup>139</sup> Justice Souter, by contrast, found the AUMF generally insufficient to satisfy an earlier statute prohibiting the detention of U.S. citizens without congressional authorization.<sup>140</sup> Despite their different conclusions, each of these opinions relied on the shared structure of foreign relations authority.

As in *Hamdi*, the Court in *Hamdan v. Rumsfeld*<sup>141</sup> looked to congressional action to assess the legality of the President's use of military commissions to

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132. 552 U.S. 491 (2008). *Medellín* represents the Court's most important pronouncement on the domestic role of treaties in almost two centuries, if not ever. See Moore, *supra* note 81, at 2229 & n.6, 2264 & n.196.

133. See *Medellín*, 552 U.S. at 498, 523 & n.13.

134. *Id.* at 524.

135. *Id.* at 526 (quoting U.S. CONST. art II, § 2); see *id.* at 525–27.

136. *Id.* at 527.

137. 542 U.S. 507 (2004) (plurality opinion).

138. *Id.* at 509; see also *id.* at 516.

139. See *id.* at 509, 517–19; *id.* at 587 (Thomas, J., dissenting). Justice Thomas, however, disagreed with qualifications the plurality placed on "the President's authority to detain enemy combatants." *Id.* at 587–88.

140. *Id.* at 541–45, 547–51 (Souter, J., concurring). In reaching this conclusion, Justice Souter expressly relied on the separation of authority between Congress and the executive. *Id.* at 545.

141. 548 U.S. 557 (2006).



try detainees in the war on terror.<sup>142</sup> The Court concluded that Congress in the Uniform Code of Military Justice prohibited the President's resort to military commissions.<sup>143</sup> As Justice Breyer emphasized in concurrence, "The Court's conclusion ultimately rest[ed] upon a single ground: Congress [had] not issued the Executive a 'blank check.'"<sup>144</sup> Rather, "Congress ha[d] denied the President the legislative authority to create military commissions of the kind at issue."<sup>145</sup>

As this case law makes clear, the President does not stand alone in foreign affairs. The notion that the President may assume interim treaty obligations thus contends with the constitutional structure evident in the assignment of foreign relations authority and in Supreme Court jurisprudence operationalizing that assignment.

## 2. Federalist Distribution of Foreign Affairs Authority

Presidential acceptance of interim obligations also chafes against the federalist distribution of foreign affairs authority. Conventional wisdom has maintained that federalism is irrelevant in the area of foreign affairs.<sup>146</sup> There

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142. See *id.* at 593 & n.23 ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))); *id.* at 636 (Breyer, J., concurring) ("The Court's conclusion ultimately rests on a single ground: Congress has not issued the Executive a 'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here." (citation omitted)); *id.* at 636–37 (Kennedy, J., concurring) ("[This] is a case where Congress, in the proper exercise of its powers as an independent branch of government . . . has considered the subject of military tribunals and set limits on the President's authority."); see also *id.* at 613, 627–28 (majority opinion); *id.* at 642–43 (Kennedy, J., concurring); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 931–32 (2007).

143. See *Hamdan*, 548 U.S. at 567, 592–95, 613–33; see also *id.* at 636 (Breyer, J., concurring); *id.* at 636–53 (Kennedy, J., concurring).

144. *Id.* at 636 (Breyer, J., concurring).

145. *Id.*

146. See Bestor, *supra* note 80, at 38 (arguing that "[t]he Constitution . . . gives to the federal government a monopoly" on foreign affairs); Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1093 (1999) (noting the twentieth-century perception, widely held among commentators, that federalism is irrelevant in foreign affairs); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1224 (1999) ("In recent decades, few have challenged the proposition that the states have little role to play on the international stage."); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1129–30 (2000) (observing that orthodoxy has recognized a federal monopoly over foreign affairs); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1, reporters' note 5 (1987) (detailing the minimal role of states in foreign

is plenty to cite in support of this wisdom. The Constitution lodges authority to enter treaties in the President and Senate and expressly prohibits states from entering treaties (or alliances or confederations).<sup>147</sup> The Supremacy Clause identifies treaties as supreme law that may preempt state constitutions and statutes.<sup>148</sup> And the Supreme Court has repeatedly made categorical statements about the states' invisibility in the realm of foreign affairs.<sup>149</sup>

At the same time, the Constitution, both as written and as enforced by the Supreme Court, provides significant latitude for state involvement in foreign affairs. With congressional consent, states may constitutionally “lay . . . Imposts or Duties on Imports or Exports,”<sup>150</sup> impose “dut[ies] of Tonnage” in state ports, “enter into . . . Agreement[s] or Compact[s] . . . with a foreign Power,” “keep Troops . . . [and] Ships of War in time of Peace,” and “engage in War.”<sup>151</sup> Indeed, states may unilaterally go to war if “actually invaded, or in such imminent Danger as will not admit of delay.”<sup>152</sup> These are narrow (and in the case of war, unlikely) powers, given the nearly universal requirement of congressional consent. At the same time, they expressly contemplate some state involvement in foreign affairs. Perhaps more telling, to the extent these powers turn on federal approval, that approval always involves Congress. In the Constitution's federalist division of foreign affairs authority, Congress—rather than the President—is given the core oversight role.

While the Constitution contemplates certain state actions in foreign affairs, states participate in foreign affairs in many additional ways. They enact laws that affect foreign nationals, send trade missions, engage in cultural exchanges, enact binding and nonbinding provisions on foreign relations issues such as human

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affairs). In referring to conventional wisdom, I reference the view that arguably prevailed in the twentieth century. See Bradley, *supra*, at 1090–91.

147. U.S. CONST. art I, § 10, cl. 2; *id.* art. II, § 2, cl. 2. The Constitution likewise prohibits states from “grant[ing] Letters of Marque and Reprisal.” *Id.* art. I, § 10, cl. 1.

148. *Id.* art. VI.

149. See, e.g., *United States v. Pink*, 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear.”); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (“[F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”).

150. The Constitution emphasizes Congress's oversight role in providing that “all such Laws shall be subject to the Revision and Control of Congress.” U.S. CONST. art. I, § 10, cl. 2.

151. *Id.* art. I, § 10, cls. 2, 3.

152. *Id.* art. I, § 10, cl. 3. Similarly, states may “lay any Imposts or Duties on Imports or Exports” to the extent “absolutely necessary for executing [the state's] inspection Laws.” *Id.* art. I, § 10, cl. 2. However, “the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States.” *Id.*

rights, and undertake (independent of the federal government) to accomplish international objectives such as reduction of greenhouse gases.<sup>153</sup>

The Supreme Court's recent jurisprudence has cleared room for such activities by increasingly leaving questions of federal preemption of state law to the federal political branches, where the nature of the actors, lawmaking and treaty-making processes, and inertia hamper federal preemption of state initiatives.<sup>154</sup> Whether under statutory, dormant foreign commerce, or dormant foreign affairs preemption, the Court has carved out a greater role for the political branches in assessing whether to preempt state law.<sup>155</sup> This trend is also evident in cases addressing the domestic legal status of international law. The Supreme Court recently endorsed a broad notion of non-self-execution, with the result that more treaties must be statutorily implemented by Congress before they will be judicially enforceable against conflicting state provisions.<sup>156</sup>

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153. See, e.g., Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821–22, 826–27 (1989) (identifying various foreign relations activities in which states engage); see also *Zschernig v. Miller*, 389 U.S. 429, 430–32 (1968) (striking down an Oregon statute governing inheritance rights of nonresident aliens); Felicity Barringer & Kate Galbraith, *States Aim to Cut Gases by Making Polluters Pay*, N.Y. TIMES, Sept. 16, 2008, <http://nytimes.com/2008/09/16/us/16carbon.html> (discussing ten states' efforts to reduce greenhouse gas emissions despite federal failure to pursue such efforts); cf. Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875, 922–25, 930–32 (2006) (discussing cities' enforcement of international law norms, transnational mobilization, and increased representation in global governance).
154. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (“[F]ederal lawmaking procedures . . . preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism.”); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–58 (1954) (describing features of the Senate, House of Representatives, and presidency that serve to protect state interests, and observing that “the national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to” protecting the states against federal intrusion); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1362 (2001) (“Inertia and inefficiency are similar tools that play an important role in protecting state autonomy from federal incursions.”).
155. This trend is arguably evident in comparing historical and recent cases involving each of these doctrines. Compare *Hines v. Davidowitz*, 312 U.S. 52 (1941), with *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (statutory preemption), and *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434 (1979), with *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (dormant foreign commerce preemption), and *Zschernig*, 389 U.S. at 429, with *Am. Ins. Ass'n v. Garamendi*, 542 U.S. 55 (2003) (dormant foreign affairs preemption).
156. See *Medellin v. Texas*, 552 U.S. 491 (2008); Moore, *supra* note 81, at 2264–65, 2286–89 (discussing *Medellin's* adoption of a broad doctrine of non-self-execution that limits judicial enforcement of treaties); David H. Moore, *Medellin, the Alien Tort Statute, and the Domestic Status of International Law*, 50 VA. J. INT'L L. 485, 490–91 (2010) (noting that *Medellin's* “self-execution analysis includes considerations that will likely lead lower courts to classify treaties as non-self-executing more frequently”); see also David H. Moore, *Law(Makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. 32, 46 (2009) (same).

The Court has likewise suggested that federal courts may not apply customary international law to preempt state law without constitutional or congressional authorization.<sup>157</sup> The cumulative effect is that states have greater leeway to engage in behavior bearing on foreign affairs.

This is not to suggest that state participation in foreign affairs limits the federal government's, or more specifically the President's, foreign relations authority. The federalist dimension of foreign affairs authority, with its ample space for state action, does not reduce federal power to act in foreign affairs but bolsters the observation that the President does not possess a monopoly on foreign affairs authority.

### 3. Distribution of Lawmaking Authority

The structure of federal lawmaking likewise weighs against presidential unilateralism in treaty-making. As discussed above, Article I details the structural division of federal lawmaking authority.<sup>158</sup> The President can suggest, but cannot make, statutes without both houses of Congress. Conversely, Congress cannot pass laws without submission to the President and cannot overcome a veto but through bicameral supermajority. Neither house can make law alone. Indeed, “[n]either House, during the Session of Congress, [is authorized], without the Consent of the other, [to so much as] adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”<sup>159</sup>

The Constitution identifies very few things that one house can do alone.<sup>160</sup> In the event no candidate for President or Vice President receives the vote of

157. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); Bradley, Goldsmith & Moore, *supra* note 142, at 873, 892, 902–09, 935–36 (arguing that after *Sosa*, customary international law becomes federal law on constitutional or congressional authorization); David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV. 1, 8, 31–37, 48–49 (2006) (discussing *Sosa*'s position that customary international law may be applied by federal courts when the political branches so authorize).

158. See *supra* notes 88–101 and accompanying text.

159. U.S. CONST. art. I, § 5, cl. 4. “[I]n Case of Disagreement between [the House and Senate], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper.” *Id.* art. II, § 3.

160. See *INS v. Chadha*, 462 U.S. 919, 955–56 & n.21 (1983). The Supreme Court has described the House's authority to initiate and the Senate's prerogative to try impeachments as separate powers. *Id.* at 955; see U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6. However, as both initiation and trial are necessary to effect impeachment, the arrangement seems to be another illustration of shared authority. Even if these are separate powers, Senate impeachment proceedings against the President are presided over by the Chief Justice of the Supreme Court and require a supermajority vote to succeed. *Id.*

a majority of electors, the House of Representatives, voting by state, chooses the President and the Senate the Vice President.<sup>161</sup> Consequently, if both the President and Vice President must be chosen, the houses together are responsible for selecting the two principal executive officers. The Senate can approve treaties and presidential appointments.<sup>162</sup> Yet the Senate does so in conjunction with the President and may only approve treaties by supermajority.<sup>163</sup> Each house can independently decide certain internal matters, such as the selection of officers and rules of procedure,<sup>164</sup> but generally the houses are highly interdependent. The lawmaking structure in which they figure is one of “finely wrought” shared powers, not of unilateral action, presidential or otherwise.<sup>165</sup>

### C. History

The history of Article II and federal foreign affairs power more generally, as well as of bicameralism and presentment, strengthens the case made by constitutional text and structure that the President may not assume unilateral obligations.

Article II’s provenance demonstrates the strength of the founding commitment to a legislative role in treaty-making. Under the Articles of Confederation, Congress possessed “the sole and exclusive right and power of . . . entering into treaties.”<sup>166</sup> Perhaps unsurprisingly, the Constitutional

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161. U.S. CONST. amend. XII.

162. *Id.* art. II, § 2, cl. 2.

163. *Id.*

164. *See id.* art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers . . . .”); *id.* art. I, § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore . . . .”); *id.* art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.”); *id.* art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”); *id.* art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”); *Chadha*, 462 U.S. at 956 n.21.

165. *Chadha*, 462 U.S. at 951; *see also* *Clinton v. City of New York*, 524 U.S. 417, 440 (1998) (holding the presidential line-item veto unconstitutional because it is inconsistent with “the ‘finely wrought’ procedure that the Framers designed” (quoting *Chadha*, 462 U.S. at 951)); *id.* at 438–40, 448–49 (discussing the constitutional scheme of lawmaking).

166. ARTICLES OF CONFEDERATION of 1781, art. IX; *see* Bestor, *supra* note 80, at 51–52 (noting that the Committee of States created by the Articles of Confederation could not enter treaties

Convention similarly anticipated vesting the treaty power in the Senate alone.<sup>167</sup> Madison then suggested a role for the President in treaty-making.<sup>168</sup> Others went so far as to support the transfer of the treaty power to the President alone.<sup>169</sup> But there was opposition to transferring the treaty power exclusively to the President. Among other things, “[g]iving [the treaty power] to the President alone would . . . ‘smack[ ] too much of monarchy’”;<sup>170</sup> involving both the Senate and the President served to balance power.<sup>171</sup> Indeed, including the President would secure functional advantages enjoyed by the President in conducting foreign affairs—for example, the ability to act quickly and secretly<sup>172</sup>—while protecting against abuse of the treaty power.<sup>173</sup>

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and, by statute, was even denied the authority to transact business with other countries except as authorized by specific legislation).

167. See 2 RECORDS, *supra* note 83, at 143–45, 155, 169, 183, 197, 297, 382–83, 392–95; 3 *id.* at 427; 4 *id.* at 44–46, 52–53; see also FRANCK ET AL., *supra* note 1, at 349; Ackerman & Golove, *supra* note 43, at 808–10; Rakove, *supra* note 81, at 234, 240. The Convention initially thought to vest the treaty power in the Senate notwithstanding Hamilton’s suggestion that the power should be exercised by the President and Senate together. See 1 RECORDS, *supra* note 83, at 292, 300; Bestor, *supra* note 80, at 81–82. Hamilton’s preference for a shared treaty power is particularly telling given his passion, in the domestic context, for a strong executive. See *id.*; Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 581, 584–91 (1974).
168. 2 RECORDS, *supra* note 83, at 392; see also Bestor, *supra* note 80, at 108–09; Rakove, *supra* note 81, at 240–41 & n.14. *But cf.* 2 RECORDS, *supra* note 83, at 540 (reporting that Madison “moved to authorize a concurrence of two thirds of the Senate to make treaties of peace, without the concurrence of the President”); Rakove, *supra* note 81, at 247 (discussing same).
169. See 2 RECORDS, *supra* note 83, at 297 (reporting that Mercer contended that the treaty power “belonged to the Executive Department,” though “adding that Treaties would not be final so as to alter the laws of the land, till ratified by legislative authority”); 3 *id.* at 251–52 (reporting that Pinckney recalled that “[a] few members [of the Convention] were desirous that the President alone might possess [the treaty] power”); Rakove, *supra* note 81, at 242–43; *cf.* THE FEDERALIST NO. 75, *supra* note 80 (Alexander Hamilton) (responding to the criticism that treaty-making is an executive power); Rakove, *supra* note 81, at 254 (discussing same). For a discussion of the weight to give Mercer’s views, see Bestor, *supra* note 80, at 103–06.
170. Hathaway, *supra* note 29, at 1279 n.102 (quoting Rakove, *supra* note 81, at 242); see also 3 RECORDS, *supra* note 83, at 251, 342 (articulating reasons why treaty power should not reside in the President alone).
171. See THE FEDERALIST NO. 64, *supra* note 80, at 393–94 (John Jay) (noting the improbability “that the president and two-thirds of the senate will ever be capable of” corruption); 3 RECORDS, *supra* note 83, at 166 (James Wilson) (“Neither the President nor the Senate solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people.”).
172. See THE FEDERALIST NO. 64, *supra* note 80, at 390–91 (John Jay) (suggesting “that perfect *secrecy* and immediate *dispatch* are sometimes requisite” in treaty-making and that the President is best able to secure these).
173. See THE FEDERALIST NO. 75, *supra* note 80, at 449 (Alexander Hamilton) (“The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.”); 3 RECORDS, *supra* note 83, at 348 (identifying

Some thought that checking the treaty power also required participation of the more populous and proportional House of Representatives.<sup>174</sup> Prominent founders like James Madison and James Wilson sought to secure a role for the House in treaty-making.<sup>175</sup> Nonetheless, the “Convention excluded the House . . . on the ground that [it] was ill-suited to the secrecy and dispatch often required in treaty negotiation.”<sup>176</sup> During the ratification debates, “constitutional critics [continued to cite] . . . the exclusion of the House,” playing on sympathies for broader congressional involvement in the treaty process.<sup>177</sup>

The Constitution ultimately assigned the treaty power to the President and the Senate alone.<sup>178</sup> The original assignment embraced a role for the Senate in addition to final approval. “[I]t was expected that the Senate would be directly involved in negotiating treaties and would serve as the President’s ‘council of advisors’ in treaty making.”<sup>179</sup> Indeed, the Senate arguably was to “retain[ ] the more

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the functional benefits of executive treaty-making, while noting that apprehension of executive power motivated Senate participation in making treaties); Hathaway, *supra* note 29, at 1278 (stating that vesting treaty power in the President and the Senate “was seen as a way to keep the federal government from bargaining away regional interests”); Rakove, *supra* note 81, at 242–43, 246–49, 251 (noting concern in the Convention and during ratification for checking the Senate’s abuse of the treaty power).

174. See Bestor, *supra* note 80, at 94–96, 131 n.530; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2033–34 (1999).

175. See 2 RECORDS, *supra* note 83, at 382–83, 392–95, 538, 548, 639; 3 *id.* at 127, 371; 4 *id.* at 58; Bestor, *supra* note 80, at 109–12, 123–24; Hathaway, *supra* note 29, at 1278–79 & n.97; Rakove, *supra* note 81, at 241 & n.14, 246, 248–49; Yoo, *supra* note 174, at 2033–34, 2036.

176. Moore, *supra* note 81, at 2243; see Rakove, *supra* note 81, at 242–43 & n.16, 246, 248–49; Yoo, *supra* note 174, at 2025–39; see also THE FEDERALIST NO. 64, *supra* note 80, at 390 (John Jay) (noting that the Senate, with its extended and staggered terms of office, is better suited to treaty-making, which requires consistency, the development of expertise, and time intensive consideration); THE FEDERALIST NO. 75, *supra* note 80, at 451 (Alexander Hamilton) (discussing functional reasons for exclusion of the House from treaty-making).

177. Moore, *supra* note 81, at 2243; Rakove, *supra* note 81, at 251; Yoo, *supra* note 174, at 2039–40; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2222, 2231–32 (1999). The Constitution’s exclusion of the House is unusual. As Hathaway explains:

The United States, Mexico, and Tajikistan are the only countries in the world that provide for significantly less involvement by a part of the legislature in treaty making than in domestic lawmaking . . . and make the results of this process automatically part of domestic law in more than a few confined areas of law.

Hathaway, *supra* note 29, at 1309.

178. See U.S. CONST. art. II, § 2, cl. 2; see also 2 RECORDS, *supra* note 83, at 495, 498–99, 538, 540–41, 549, 574, 599, 659; 3 *id.* at 162, 166, 251–52, 342; Ackerman & Golove, *supra* note 43, at 810–13 (noting how firmly entrenched the Senate’s role in treaty-making was in eighteenth and nineteenth century constitutional understanding).

179. Hathaway, *supra* note 29, at 1278; see also 1979 DIGEST, *supra* note 69, at 688 (quoting a Library of Congress report for the proposition “that the advice and consent clause ‘assumes that the President and Senate will be associated throughout the entire process of making a treaty’”); 3 RECORDS, *supra* note 83, at 424–25 (“The Constitution does not say that treaties shall be concluded, but that they

influential role” in treaty-making.<sup>180</sup> According to Arthur Bestor’s forceful historical analysis, “[t]he Senate was expected to give its advice in the form of instructions” to the executive and “was expected to [withhold its consent] only if” the final treaty deviated “from the instructions.”<sup>181</sup> The Senate’s concurrence role was short-lived, however. By his second term, President Washington had largely abandoned seeking advice, and that precedent has prevailed to the present.<sup>182</sup> Today, the Senate arguably recaptures at least some of its advice-and-consent role by conditioning its consent on the President’s acceptance of senatorial reservations, understandings, and declarations.<sup>183</sup> The President denies the Senate even that opportunity, however, when he alone consents to interim obligations.

The other face of the Senate’s role is approval. Conflicting regional interests at the founding gave rise to a concern that the treaty power might be used to “disproportionately disadvantage a particular region or subset of states.”<sup>184</sup> The requirement of not only Senate, but supermajoritarian, consent addressed that concern, checking both the executive and the Senate majority.<sup>185</sup>

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shall be made, by and with the advice and consent of the Senate: none therefore can be made without such advice and consent; and the objections against the agency of the Senate in making treaties, or in advising the President to make the same, cannot be sustained . . . .”); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 405 (2000) (noting that “[m]any of the Founders believed that the advice function required that the President consult with the Senate prior to negotiating and signing a treaty”); Rakove, *supra* note 81, at 235, 247, 249–50, 257, 275, 280 (asserting and gathering authorities who conclude “that the Federal Convention [and constitutional ratifiers] intended and expected the Senate to participate in the framing as well as the ratification of treaties”).

180. Rakove, *supra* note 81, at 251–57; *see also* Bestor, *supra* note 80, at 30–135 (making a detailed and forceful case for intended Senate preeminence in the crafting of foreign policy, including through treaty-making). *But cf.* Rakove, *supra* note 81, at 267–80 (postulating that, in light of foreign affairs experiences under the Articles of Confederation, the framers may have sought to provide increasing room for the President to identify and pursue national interests in foreign affairs).
181. Bestor, *supra* note 80, at 65 n.255, 109–12, 115–21, 129–30, 133.
182. Hathaway, *supra* note 29, at 1280, 1308; *see also* Ackerman & Golove, *supra* note 43, at 869–70; Bradley & Goldsmith, *supra* note 179, at 405–06.
183. Bradley & Goldsmith, *supra* note 179, at 405. *But cf.* Ackerman & Golove, *supra* note 43, at 905 (characterizing Senate reservations as dysfunctional substitutes for advice). In the congressional-executive context, Congress has sometimes, by legislation, required the President to consult on new congressional-executive agreements. *See id.* at 904–06 (discussing the consultation required by the Trade Act of 1974).
184. Hathaway, *supra* note 29, at 1281. This concern was not merely theoretical. Spain had offered to “give the United States trade concessions that would benefit the North[] in exchange” for a temporary cession of “rights of free navigation on the Mississippi,” which threatened southern trade and expansion. *Id.* at 1283; *see also* Bestor, *supra* note 80, at 60–68 (describing in detail how this regional conflict had affected negotiations with Spain during the period of Confederation); Hathaway, *supra* note 29, at 1281–85.
185. *See* 3 RECORDS, *supra* note 83, at 166, 307, 342, 348, 371, 424–25; Ackerman & Golove, *supra* note 43, at 810; Bestor, *supra* note 80, at 97–99 & n.381, 113–14; Hathaway, *supra* note 29, at



As this history reflects, Article II was born of interrelated concerns for the unilateral and too facile exercise of power and interest in legislative participation in treaty-making. Presidential adoption of interim obligations runs afoul of these concerns.

The historical development of bicameralism and presentment similarly cuts against presidential unilateralism. The history of bicameralism and presentment understandably unfolded in the context of lawmaking rather than treaty-making. Nonetheless, because the statutory process has become the primary U.S. vehicle for entering international agreements, it is worth noting the great emphasis on divided authority that appears in this history.

As the Great Compromise of 1787 demonstrated, bicameralism was a convenient way to accommodate the large and small states' competing interests in proportional and equal representation.<sup>186</sup> But bicameralism was far more than a convenient broker. Bicameralism responded to "the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into impertinent and pernicious resolutions."<sup>187</sup> As Madison explained:

A second branch of the legislative assembly, distinct from, and dividing power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two bodies in schemes of usurpation or perfidy, where the ambition or corruption of the one would otherwise be sufficient.<sup>188</sup>

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1281; Rakove, *supra* note 81, at 271–75, 279–80. *But cf. id.* at 252–53, 275–80 (noting a concern during the ratification process over whether the supermajority requirement provided sufficient protection, while also exploring the idea that presidential involvement was important to protect national interests).

186. *See, e.g.*, THE FEDERALIST NO. 62, *supra* note 80, at 375 (James Madison) (noting that "[t]he equality of representation in the Senate is another point which, being evidently the result of compromise between the opposite pretensions of the large and the small States, does not call for much discussion"); Bestor, *supra* note 80, at 94.

187. THE FEDERALIST NO. 62, *supra* note 80, at 377 (James Madison).

188. *Id.* This principle is also reflected in the anecdote of a breakfast between Jefferson and Washington in which Jefferson questioned Washington on his acceptance of a second house in the legislature. "Why," asked Washington, "did you pour that coffee into your saucer?" "To cool it," quoth Jefferson. "Even so," said Washington, "we pour legislation into the senatorial saucer to cool it." 3 RECORDS, *supra* note 83, at 359; *see also* THE FEDERALIST NO. 51, *supra* note 80, at 319 (James Madison) ("In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches. . . ."); THE FEDERALIST NO. 63, *supra* note 80, at 384 (James Madison) (arguing for a senate on the ground that "the danger [of legislative betrayal of the people] will be evidently greater where the whole legislative trust is lodged in the hands of one body of men than where the concurrence of separate and dissimilar bodies is required in every public act").

The importance of bicameralism in averting the misuse of power was so well understood and accepted that Madison commented both that the principle would not be contested and therefore “need not be proved” and that “it would be more than superfluous to enlarge upon it.”<sup>189</sup>

The need for presentment was also generally accepted. As Joseph Story observed:

In the [C]onvention there does not seem to have been much diversity of opinion on the subject of the propriety of giving to the president a negative on the laws. The principal points of discussion seem to have been, whether the negative should be absolute, or qualified; and if the latter, by what number of each house the bill should subsequently be passed, in order to become law; and whether the negative should in either case be exclusively vested in the president alone, or in him jointly with some other department of the government.<sup>190</sup>

The need for presentment was so well accepted that to ensure that Congress did not evade presentment “by simply calling a proposed law a ‘resolution’ or a ‘vote’ rather than a bill,” the drafters added that “[e]very Order, Resolution, or Vote” that required bicameral approval also required presentment.<sup>191</sup> Presentment provided insurance against the misuse of legislative power vis-à-vis both the presidency and the public.<sup>192</sup> At the same time, the veto power could be abused.<sup>193</sup> The framers opted for a veto that could be overcome by congressional supermajority, placing the ultimate authority to make law in Congress.<sup>194</sup> Presidential assumption of interim obligations evades

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189. THE FEDERALIST NO. 62, *supra* note 80, at 377 (James Madison).

190. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 611 (3d ed. 1858); *see also* INS v. Chadha, 462 U.S. 919, 946 (1983) (“The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming a law was uniformly accepted by the Framers.”).

191. *Chadha*, 462 U.S. at 945, 947; *see also supra* note 91.

192. *See Chadha*, 462 U.S. at 947–48; THE FEDERALIST NO. 51, *supra* note 80, at 319 (James Madison) (describing presentment as a “further precaution[ ]” “against dangerous [legislative] encroachments”); THE FEDERALIST NO. 73, *supra* note 80, at 442 (Alexander Hamilton) (“The primary inducement to conferring the [veto] power . . . upon the executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design.”).

193. THE FEDERALIST NO. 51, *supra* note 80, at 320 (James Madison) (noting that the veto “might be perfidiously abused”); THE FEDERALIST NO. 73, *supra* note 80, at 442 (Alexander Hamilton) (responding to the argument “that the power of preventing bad laws [by veto] includes that of preventing good ones”).

194. *See* U.S. CONST. art. I, § 7, cls. 2–3; THE FEDERALIST NO. 73, *supra* note 80, at 444 (Alexander Hamilton) (invoking lower probability “that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time . . . than that such views should taint the resolutions and conduct of a bare majority”).

bicameralism and places lawmaking authority, at least temporarily, in the President's hands. On textual, structural, and historical grounds, the President's assumption of interim obligations runs afoul of the Constitution.

#### IV. ARGUMENTS AGAINST THE UNCONSTITUTIONALITY THESIS

Various arguments have been, or might be, offered to justify presidential assumption of interim obligations. This Part addresses these. The two most substantial arguments are that executive assumption of interim obligations is supported by the President's authority to enter sole executive agreements and by historical practice and congressional acquiescence.

##### A. Presidential Authority to Enter Sole Executive Agreements

The first argument is that the President's authority to enter sole executive agreements supports unilateral assumption of interim obligations as well.<sup>195</sup> This argument has some traction. If the President can unilaterally enter a permanent agreement with another state, he ought to be able to take the arguably lesser step of accepting interim obligations. However, as Bradley has asserted, the President's power to enter sole executive agreements can at best reduce the constitutional problem presented by interim obligations.<sup>196</sup> It is generally understood that the President's sole executive authority is more limited than his authority to enter Article II treaties or congressional-executive agreements.<sup>197</sup> Sole executive agreements arise outside the two constitutionally outlined processes used for international agreements.<sup>198</sup> Were sole executive agreements fungible with Article II treaties and congressional-executive agreements, the protective procedures of advice and consent and bicameralism and presentment would be dismantled.<sup>199</sup> Sole executive agreements rely on presidential power and are thus likely to fall in Justice Jackson's categories in which Congress has failed to address or disapproved executive conduct.<sup>200</sup> They have been upheld by the Supreme Court but

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195. Cf. Martin A. Rogoff & Barbara E. Gauditz, *The Provisional Application of International Agreements*, 39 ME. L. REV. 29, 55–62 (1987) (relying on the President's authority to enter sole executive agreements to support the constitutionality of executive consent to provisional application of treaties).

196. See Bradley, *supra* note 7, at 308, 324–25.

197. See *id.* at 308, 322.

198. See *id.*

199. See *id.* (collecting commentary).

200. See *id.* at 308, 322–23. *But cf.* *Dames & Moore v. Regan*, 453 U.S. 654, 675–88 (1981) (placing the executive's suspension of claims under a U.S.-Iran sole executive agreement in the category in

generally in narrow areas, including claims settlement and government recognition.<sup>201</sup> The authority to unilaterally settle claims or recognize foreign governments is likely to sustain interim obligations under few Article II treaties or ex post congressional-executive agreements, given the breadth of subjects these agreements may address.<sup>202</sup>

Moreover, the Court recently emphasized that the President's claims settlement authority is limited and provides scant support for expansion of presidential power.<sup>203</sup> In *Medellín*, the Solicitor General cited the President's authority to settle claims through sole executive agreement to support President Bush's effort to implement an ICJ judgment.<sup>204</sup> The Court responded by cabinining the President's claims settlement authority, describing it as "narrow and strictly limited."<sup>205</sup> "The claims-settlement cases," the Court explained, "involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals."<sup>206</sup> The relevant cases have upheld the President's settlement authority based on the fact that executive claims settlement is "a systematic, unbroken, executive practice" "going back over 200 years,"<sup>207</sup> "never before questioned," and acquiesced in by Congress "throughout [the practice's] history."<sup>208</sup> The Court had previously emphasized that Congress's acquiescence was not the product of mere silence but of enactment and frequent amendment of the International Claims Settlement Act to provide for distribution of claims settlement funds.<sup>209</sup> While history supported presidential claims settlement

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which the President acts with congressional approval, based on congressional acquiescence and supportive legislation in related areas).

201. See *Dames & Moore*, 453 U.S. 654 (upholding a U.S.-Iran sole executive agreement based on the President's claim settlement authority); *United States v. Pink*, 315 U.S. 203 (1942) (upholding the U.S.-Soviet Litvinov agreement based on the President's government recognition power); *United States v. Belmont*, 301 U.S. 324 (1937) (same); *Bradley*, *supra* note 7, at 308, 321; cf. 11 FOREIGN AFFAIRS MANUAL § 723.2-2(c) (2006) (asserting additional constitutional powers pursuant to which the President may enter sole executive agreements).
202. See *supra* text accompanying notes 42–47.
203. *But cf.* Hathaway, *supra* note 29, at 1239 n.6 (arguing that while sole executive agreements "have generally been used for very limited purposes . . . [t]hat may . . . be beginning to change, as sole executive agreements have in very recent years been used to establish agreements that in earlier times would likely have been made through the Article II treaty process").
204. *Medellín v. Texas*, 552 U.S. 491, 525, 530 (2008).
205. *Id.* at 532.
206. *Id.* at 531.
207. The first claims settlement by sole executive agreement appears to have occurred in 1799. See *Dames & Moore v. Regan*, 453 U.S. 654, 679 n.8 (1981).
208. *Medellín*, 552 U.S. at 531 (quoting *Dames & Moore*, 453 U.S. at 686).
209. *Dames & Moore*, 453 U.S. at 680–81. Moreover, in enacting the International Emergency Economic Powers Act, "Congress stressed that '[n]othing in this act is intended . . . to impede the settlement of claims of U.S. citizens against foreign countries.'" *Id.* at 681–82 (quoting 50 U.S.C.

authority, the *Medellin* Court concluded that that authority could not be “stretch[ed] so far as to support” President Bush’s effort to enforce the ICJ judgment.<sup>210</sup> No such history supported presidential execution of ICJ judgments.<sup>211</sup> *Medellin*’s cabining of sole executive authority reduces the currency of the notion that the President’s (already limited) sole executive power renders interim obligations constitutional. The result is that presidential authority to enter sole executive agreements is likely to sustain only a modest number of interim obligations under Article II treaties or ex post congressional-executive agreements.

### B. History of Executive Assumption of Interim Obligations

The history of executive assumption of interim obligations—the second main argument in favor of the practice’s constitutionality—similarly fails to sustain the practice. On this point, the critical history is not the drafting history of the Constitution but the history of consent by signature subject to ratification and of the customary international law of interim obligations. The crucial question is how long the President has engaged in signature subject to ratification under a customary principle that assigns interim obligations to that signature. The Supreme Court has said that history does not create new constitutional powers in the President, but, as illustrated above, the Court has also relied heavily on history in interpreting the President’s powers.<sup>212</sup>

“[I]f the signing obligation . . . existed under customary international law when the Constitution was drafted and ratified . . . it could be argued that the Constitution was implicitly granting the President this background authority by virtue of his role in the treaty process.”<sup>213</sup> Alternatively, under Supreme Court jurisprudence, an unbroken, unquestioned, multicentury history of presidential assumption might, as in the claims settlement context, demonstrate congres-

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§ 1706(a)(1) (Supp. III 1976); S. REP. NO. 95-466, at 6 (1977)). Similarly, Congress “rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements,” typically by requiring “congressional approval . . . before they would be considered effective.” *Id.* at 685 & n.11.

210. *Medellin*, 552 U.S. at 532.

211. *Id.*

212. *See, e.g., id.* at 530–32. In *Medellin*, the Court acknowledged that a longstanding executive practice can demonstrate congressional acquiescence and that “acquiescence can [in turn] be treated as ‘a gloss on Executive Power vested in the President by § 1 of Art. II.’” *Id.* at 530–31 (quoting *Dames & Moore*, 453 U.S. at 686) (some internal quotation marks omitted). At the same time, *Medellin* emphasized that “the Court has been careful to note that ‘[p]ast practice does not, by itself, create power.’” *Id.* at 531–32 (quoting *Dames & Moore*, 453 U.S. at 686).

213. Bradley, *supra* note 7, at 325.

sional acquiescence and ultimate constitutionality.<sup>214</sup> Something less than this may not.<sup>215</sup> As even those who advance the historical argument concede, “if the rule of article 18 embodies a precept of customary international law that has emerged only recently, the constitutional and international legal systems may not be in harmony.”<sup>216</sup>

That concession is well grounded. In the early 1980s, the Supreme Court confronted a statutory provision that authorized either the Senate or the House to overturn decisions to suspend deportation made by the executive under authority delegated by Congress.<sup>217</sup> The first such veto provision had appeared in 1932.<sup>218</sup> Since that time, nearly three hundred such procedures had been included in almost two hundred statutes and the rate of incidence was increasing over time.<sup>219</sup> Nonetheless, the Supreme Court declared that its constitutional inquiry was “sharpened rather than blunted by the” increasing use of the contested procedure and found the procedure unconstitutional.<sup>220</sup>

Under these standards, the argument that presidential assumption of interim obligations is constitutional based on its historical pedigree fails. (Indeed, the standards would have to be relaxed considerably before the argument could succeed.) Michael Glennon is the only scholar to attempt the historical argument with any seriousness. Yet, he demonstrates neither a founding-era understanding that the President was authorized to assume interim obligations nor an unbroken chain of hundreds of years of unquestioned practice demonstrating acquiescence. In attempting to identify a longstanding, international rule of interim obligations, Glennon cites fairly limited primary evidence:<sup>221</sup> a decision from the

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214. See *supra* notes 207–208 and accompanying text.

215. See Tribe, *supra* note 32, at 1280–81 (arguing that while “[t]he Supreme Court recognized long ago that longstanding congressional or executive practice may be relevant to deciding constitutional questions. . . . an argument based primarily on congressional practice should rarely be persuasive unless that practice extends back to our nation’s founding”).

216. See GLENNON, *supra* note 23, at 171.

217. *INS v. Chadha*, 462 U.S. 919, 923, 925 (1983).

218. *Id.* at 944.

219. *Id.* at 944–45.

220. *Id.* at 944; see *id.* at 959.

221. See GLENNON, *supra* note 23, at 172 & nn.53–56. Glennon might also have cited the historical use of sole executive agreements to incur “explicitly provisional or temporary international obligations.” Hathaway, *supra* note 24, at 171 n.90. As Hathaway documents, however, “[t]here were only two such agreements” “[u]p through the early 1900s,” and both involved the President’s authority as commander-in-chief—one addressed the exchange of prisoners from the War of 1812 and the other a U.S.-Great Britain dispute over the “[o]ccupation of San Juan Island.” *Id.* at 171 & n.90; see also *id.* at 178 n.121 (noting President Franklin Delano Roosevelt’s use of a sole executive agreement to exchange U.S. destroyers for U.K. military bases). Sole executive agreements also came to be used to “la[y] out the terms of future agreement negotiations.” *Id.* at 175 n.107. However, such sole executive agreements were apparently “regarded as binding only

Permanent Court of International Justice (PCIJ) and from an arbitral tribunal, both from the 1920s;<sup>222</sup> a 1903 statement from U.S. Secretary of State John Hay in connection with the unsuccessful U.S.-Colombia Canal Treaty;<sup>223</sup> an

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on the Presidents who made them.” *Id.* Consequently, these agreements do little to support an executive power to assume interim obligations.

222. See *infra* notes 227–231 and accompanying text for discussion of these and other decisions. As the discussion reflects, “Jurisprudence, both national and international, in respect to [interim obligations] . . . appears to be scant and not very helpful.” Am. Soc’y of Int’l Law, *Codification of International Law: Law of Treaties*, 29 AM. J. INT’L L. SUPP. 653, 784 (1935).

223. Secretary of State Hay does refer to obligations upon signing. In discussing the Hay-Herran treaty to build an interoceanic canal—a treaty that the United States and Columbia signed but that the Colombian Congress ultimately rejected—Hay cites what he describes as the “familiar rule that treaties[, in general and absent stipulation to the contrary, are] binding on the contracting parties from the date of their signature, and that in such case the exchange of ratifications confirms the treaty from that date.” U.S. DEPT OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 299 (1903) [hereinafter STATE DEPARTMENT PAPERS]. From this notion of retroactivity, Hay “necessarily [infers] that the two Governments, in agreeing to the treaty through their duly authorized representatives, bind themselves, pending its ratification, not only not to oppose its consummation, but also to do nothing in contravention of its terms.” *Id.*

This reference to interim obligations is puzzling in its context and scope. As noted, there is disagreement even a century later regarding whether interim obligations are as broad as Hay asserts. See *supra* notes 71–74 and accompanying text; see also Am. Soc’y of Int’l Law, *supra* note 222, at 784 (calling Secretary Hay’s statement “of doubtful soundness”). With regard to context, the reference would have been telling had it appeared in acknowledging the force of some unfavorable interim restraint against U.S. interests. Yet Hay does not cite interim obligations in support of such a restraint on the United States or even Colombia. Cf. STATE DEPARTMENT PAPERS, *supra*, at 279–81 (citing “inchoate rights and duties” arising from a treaty with Panama that the United States had not yet ratified to justify U.S. resistance to Colombian invasion of secessionist Panama). During the United States’s extensive monitoring and promotion of Colombian approval of the canal treaty, the United States, it appears, never invoked the principle of interim obligations. See *id.* at 132–225. Instead, the reference comes in response to grievances that Colombia filed against the United States after Columbia rejected the canal treaty, Panama declared independence from Colombia, the United States prevented Columbia from landing troops to quash the revolution, and Panama and the United States entered a canal treaty of their own. See *id.* at 283–314. Moreover, the citation to interim obligations is preceded by the caveat that “[t]he Department [of State] is not disposed to controvert the principle that treaties are not definitely binding till they are ratified.” *Id.* at 299. Further, Hay’s notion of interim obligations is derived from a default rule of retroactivity that has not survived in modern treaty law. See Vienna Convention, *supra* note 9, art. 28 (adopting a default rule of nonretroactivity); Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT’L L. & ECON. 71, 85–88 (1991); Tariq Hassan, *Good Faith in Treaty Formation*, 21 VA. J. INT’L L. 443, 458 (1981). Finally, Secretary Hay’s statement does not reflect a widely accepted norm, even within the U.S. government. In discussions concerning the Hay-Herran convention, Colombia asserted that “a treaty prior to its ratification is nothing but a project which, according to the law of nations, neither confers rights nor imposes obligations.” STATE DEPARTMENT PAPERS, *supra*, at 307; see also *id.* at 153, 185. And it appears that consistent U.S. support for interim obligations as customary norms began in the 1960s. See *infra* note 262 and accompanying text. Indeed, prior to that time, U.S. Secretaries of State made clear that obligations accrued on ratification. For example, in 1939, Secretary Hull represented to Britain:

1885 treaty, the Final Act of Berlin, which expressly recognized interim obligations;<sup>224</sup> Latin American states' practice;<sup>225</sup> and 1857 legal advice to Britain's Foreign Office.<sup>226</sup>

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This Government considers that, in the case of any treaty or convention to which it is a signatory, it has not accepted any obligations or acquired any rights until it has duly ratified such instrument in accordance with its constitutional procedure and until the requirements of the treaty or convention with reference to exchange or deposit of ratification also have been fulfilled by it. . . . This position, it is believed, is in accordance with the customary and reasonable rule in regard to the interpretation of treaties.

5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 199–200 (1943). In 1924, Secretary Hughes denied a request from the Netherlands that a treaty “be put into effect from the date of signature, without awaiting its ratification by the United States as provided in the agreement, . . . stating ‘this Government finds itself unable to give application to the treaty prior to the exchange of ratifications and proclamation thereof.’” *Id.* at 202. And in 1919, Secretary Lansing acknowledged that

[t]here would seem to be no doubt that the United States Government is not in a position to demand representation of any character on the Reparation Commissions until it ratifies the Treaty, because it has neither rights nor obligations under the Treaty until it becomes effective for the United States at the date of the deposit of its ratifications.

*Id.* at 211.

224. In 1953, Lauterpacht claimed that this and treaties with similar provisions “[were] no more than declaratory of an existing principle.” H. Lauterpacht, *Law of Treaties*, [1953] 2 Y.B. Int'l L. Comm'n 110, U.N. Doc. A/CN.4/Ser.A/1953/Add/1; see Rogoff, *supra* note 71, at 280–81 & n.56 (discussing treaties with such provisions); see also Am. Soc'y of Int'l Law, *supra* note 222, at 785–86 (same); McDade, *supra* note 71, at 11 & n.26 (same). Because treaty provisions can alter rules of customary international law as between the parties, it could as easily be that these treaties recognized interim obligations because customary international law did not. See Hassan, *supra* note 223, at 453; *infra* note 338; see also Am. Soc'y of Int'l Law, *supra* note 222, at 786 (“It would perhaps be going too far to say that the principle laid down in [the Final Act of Berlin and other treaties] expresses what . . . is the general understanding as to the duty of signatories prior to ratification.”).
225. Glennon cites Kaye Holloway for the assertion that Latin American states followed the principle of interim obligations. GLENNON, *supra* note 23, at 172 n.56. Holloway, speaking not of interim obligations but of the obligation to ratify a signed treaty, states that “it would seem that [Latin American States] observe the terms of agreements or treaties signed but not ratified.” KAYE HOLLOWAY, MODERN TRENDS IN TREATY LAW: CONSTITUTIONAL LAW, RESERVATIONS AND THE THREE MODES OF LEGISLATION 47 n.28 (1967). In support of that proposition, Holloway cites to Warren Kelchner, who, in trying to explain why Latin American states sign but fail to ratify many treaties, notes that “Latin American states very frequently follow the terms of agreements which they have signed without formal action.” WARREN H. KELCHNER, LATIN AMERICAN RELATIONS WITH THE LEAGUE OF NATIONS 163 (1929). At heart, then, the Latin American support for the principle of interim obligations that Glennon cites appears to be nothing more than a habit of following treaties without completing the step of ratifying them.
226. Like Hay's statement, the advice given to the British monarch derives not from an independent notion of interim obligations but from the retroactivity of ratification. See *supra* note 223. The advisors reason that because “the ratifications, when exchanged, will relate back to, and confirm the Convention, as from the” date of signature, the Queen cannot take actions “which may at all affect any of the stipulations of the Treaty” “whilst the ratification of the Treaty is under consideration.” Report by the Attorney-General and the Queen's Advocate (May 15, 1857), *in*



Not all this evidence supports a rule of interim obligations. In the PCIJ decision on which Glennon (and many others) rely, the Court recognized that international law embraces a norm of good faith.<sup>227</sup> Yet, after concluding that the relevant treaty did not prohibit the conduct at issue, the Court expressly declined to “consider the question whether, and if so how far, the signatories of a treaty are under an obligation to abstain from any action likely to interfere with its execution when ratification has taken place.”<sup>228</sup> The arbitral decision

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LORD MCNAIR, *THE LAW OF TREATIES* 200, 201 (1961). Again, this basis for interim obligations—retroactivity—is a notion that does not survive in the Vienna Convention. *See supra* note 223. Moreover, “[w]hether the duty which the law officers considered to be incumbent on Great Britain is one of good faith or strict law is not stated.” MCNAIR, *supra*, at 200. And it is possible that the advice was meant to provide cover for the Queen. Britain had signed a treaty to cede the Bay Islands to Honduras. *Id.* at 201. While ratification of the treaty was under consideration, the Bay Islanders, “British subjects who had settled there under the assurance of protection from the Crown” and who opposed cession, requested that the Queen confirm a Constitution they had drafted. David Waddell, *Great Britain and the Bay Islands, 1821–61*, 2 *HIST. J.* 59, 71–73 (1959); *see* MCNAIR, *supra*, at 201. The advice provided would allow the Queen to refuse her subjects’ request, thereby avoiding strengthening ties with them and undermining the treaty project with Honduras.

227. Certain German Interests in Polish Upper Silesia, 1926 P.C.I.J. (ser. A) No. 7, at 39 (Aug. 25).
228. *Id.* at 38–40; *see also* McDade, *supra* note 71, at 14; Rogoff, *supra* note 71, at 278–79. For other cases in which the Permanent Court of International Justice or its successor fell short of endorsing a norm of interim obligations, see *North Sea Continental Shelf (Ger./Den.)*, 1969 I.C.J. 25, ¶¶ 26–27, 37, ¶ 60, 46, ¶ 83 (Feb. 20) (concluding that Germany was not bound by a treaty it had signed but not ratified); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 28, 30 (Jan. 12) (opining, “[w]ithout going into the question of the legal effect of signing an international convention,” that a state that has signed but not yet ratified a treaty obtains a “provisional status,” which allows it to formulate provisional objections to reservations proffered by other states, but emphasizing that until ratification these objections “merely serve[ ] as a notice to the other State of the eventual attitude of the signatory State”); *Territorial Jurisdiction of the International Commission of the River Oder (Eng. v. N. Ir.)*, 1929 P.C.I.J. (ser. A) No. 23, at 19–22, ¶¶ 42–43, 46–54 (refusing to apply the Barcelona Convention against Poland because Poland had not ratified the Convention, even though Poland had, in the Treaty of Versailles, agreed to the drafting of the Barcelona Convention to supersede provisions of the Treaty of Versailles); *Mavrommatis Jerusalem Concessions (Greece v. Eng.)*, 1925 P.C.I.J. (ser. A) No. 5, at 39, ¶ 95 (declining to “examine the question whether [relevant] international instruments might, before their ratification, have produced certain legal effects as regards the contracting Parties”); *Mavrommatis Palestine Concessions (Greece v. Eng.)*, 1924 P.C.I.J. (ser. B) No. 3, at 33–34, ¶¶ 84–85, 87 (finding jurisdiction where the relevant treaty, which had only been signed at the time the case was initiated, had been ratified by the time of the Court’s judgment); *id.* at 57, ¶ 150 (Moore, J., dissenting) (concluding “that the enforcement of unratified treaties . . . is beyond the [PCIJ’s] jurisdiction” and that “[t]he doctrine that governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified, is obsolete, and lingers only as an echo from the past”); *Settlers of German Origin in Poland*, 1923 P.C.I.J. (ser. B) No. 6, at 28, ¶ 53, 42, ¶ 108 (noting the understanding that between the signing and coming into force of the Treaty of Peace, triggering cession of territory, ceding states were “to be considered as having continued to be competent to undertake transactions falling within the normal administration of the country”); *see also* JONES,

Glennon cites<sup>229</sup> “is generally regarded as the only true precedent for the interim obligation,” but the decision’s probative value is undercut by the fact that “the conduct [in question] was an international derelict even absent a treaty,” and by the fact that the case concerned, not a state that might fail to ratify, but a state that had ratified the treaty prior to the tribunal’s award.<sup>230</sup> Moreover, the

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*supra* note 10, at 81–83 (discussing the *River Oder* and *Mavromatis Palestine Concessions* cases); Rogoff, *supra* note 71, at 275–77, 279 (discussing the *River Oder*, *Continental Shelf*, and *German Settlers* cases).

Various municipal decisions that might be cited to support interim obligations, haling as they do from the 1920s and 1950s, do little to advance the claim of a longstanding norm. See HACKWORTH, *supra* note 223, at 214; HOLLOWAY, *supra* note 225, at 59 & n.59; Charne, *supra* note 223, at 81; Hassan, *supra* note 223, at 454 n.56; McDade, *supra* note 71, at 16–17. Nor do all these decisions offer compelling support for a norm of interim obligations. Cf. *infra* note 256 and accompanying text (discussing U.S. jurisprudence that ratification is retroactively effective to the time of signature). In *Sbrager v. Workmen’s Accident Insurance Institute for Moravia & Silesia*, for example, the Supreme Court of Poland concluded that a convention that was awaiting “only the exchange of ratifications” should be enforced, but the court based its decision not on mere signature, but on equitable considerations in light of the fact that Poland had enacted a statute authorizing ratification of the treaty. 1927–28 DIGEST 396, 399. More fundamentally, the court noted that the treaty had since been ratified and, as a measure of public law, was retroactive and should be applied to all pending actions. *Id.* As a result, the decision is not precedent for a principle of interim obligations.

229. *Megalidis v. Turkey*, 1927–28 DIGEST 395.

230. Swaine, *supra* note 14, at 2070 n.44; see Treaty of Lausanne, 28 L.N.T.S. 12, 13 n.1 (1924) (noting that states ratified the treaty on various dates in 1924); McDade, *supra* note 71, at 14 (noting that “it would appear that only one decision [*Megalidis*] rests explicitly on the rule imposing an interim obligation between signature and ratification”); Rogoff, *supra* note 71, at 277, 289–90 (stating that *Megalidis* is “[t]he only decision of an international tribunal which clearly rests on the rule imposing an obligation not to defeat the object or purpose of a treaty between signature and entry into force” but that its “precedential value . . . is somewhat reduced . . . by the high probability that the Turkish seizure was illegal under international law as an unlawful expropriation of alien-owned property”); 1951 U.N.Y.B. 40 ¶ 51, 42 ¶ 77 (noting that “ratification had taken place before the court was called upon to pronounce its award, and that fact might very well have influenced the decision”).

Other arbitral opinions likewise fall short of establishing a norm of interim obligations. In *Ignacio Torres v. United States*, an arbitral decision from around 1871, the umpire suggested in dicta that certain restraints may accrue on signature, but only under narrow circumstances and not necessarily as a legal matter. See MCNAIR, *supra* note 226, at 200; 4 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY 3800–02 (1898). Thus, the umpire noted:

Many of the best authorities hold that peace begins *de jure* when it is signed and not from the day it is ratified . . . This, however, is far from being unconditional. If a peace were signed with a moral certainty of its ratification and one of the belligerents were, after this, making grants of land in a province which is to be ceded, before the final ratification, it would certainly be considered by every honest jurist a fraudulent and invalid transaction.

*Id.* Likewise, “so soon as peace has been preliminarily signed active hostilities ought to cease, according to the spirit of civilization and consistent with the very idea and object of the whole transaction, which is to stop war and establish peace.” *Id.* at 3801.

decision does not necessarily perceive interim obligations as legal obligations but as lesser derivatives of the principle of good faith.<sup>231</sup> Other evidence Glennon cites is likewise equivocal.<sup>232</sup>

Even if all this evidence strongly supported a norm of interim obligations, the evidence falls far short of demonstrating the “general and consistent practice of states followed . . . from a sense of legal obligation” that is required to render the norm customary international law.<sup>233</sup> As a result, Glennon fails to demonstrate, as he concedes he must,<sup>234</sup> that interim obligations upon signature have long been part of international customary law.<sup>235</sup> Indeed, even if his historical evidence were mountainous, it begins only in 1857.<sup>236</sup>

Significant evidence of interim obligations prior to this time is unlikely. Interim obligations attach to the practice of consenting to treaties by signing them subject to discretionary ratification. In the history of modern treaty-making, this practice is relatively recent.<sup>237</sup> During the seventeenth century, monarchs, as principals, sent diplomatic agents to negotiate and sign treaties on their

In *Portugal v. Germany*, the arbitral tribunal applied the unratified Declaration of London. 1929–30 DIGEST 489–90. However, “the Tribunal was bound to apply . . . international conventions laying down express rules recognised by the Parties,” and both parties “admitted before the Tribunal that although the Declaration of London, not having been ratified, had no binding force, it was to be regarded as codifying agreed principles of international law.” *Id.* at 488, 489.

In the *Iloilo Claims* case, the arbitral tribunal refused to impose on the United States the obligations of a signed treaty of cession until the treaty was ratified. *Id.* at 336.

231. See Am. Soc’y of Int’l Law, *supra* note 222, at 785 (noting the Tribunal’s reference to good faith).
232. Notes 223 to 226 discuss weaknesses in evidence that Glennon cites or that might be cited to support a longstanding norm of interim obligations. These notes do not purport to identify every piece of historical evidence that might be uncovered in support of interim obligations, but to demonstrate failings in commonly cited evidence. See also MCNAIR, *supra* note 226, at 199 (“There exists a good deal of material, much of it somewhat inconclusive, which shows that States which have signed a treaty requiring ratification have thereby placed certain limitations upon their freedom of action during the period which precedes its entry into force.”); McDade, *supra* note 71, at 12, 13–16 & n.51, 27 (noting both that “[t]he value of . . . early practice in contributing to an emergent norm of customary international law [of interim obligations] . . . is unclear” and that support for the norm from international case law is sparse, often appears in dicta, and is disputed by scholars); Rogoff, *supra* note 71, at 288–89 (“[T]he primary legal materials on which [the customary international law of interim obligations] is based are fragmentary and ambiguous.”).
233. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); cf. *The Paquete Habana*, 175 U.S. 677 (1900) (analyzing hundreds of years of state practice to identify a norm of customary international law).
234. See *supra* text accompanying note 216.
235. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).
236. GLENNON, *supra* note 23, at 172 n.56.
237. See generally Bradley, *supra* note 7, at 313–14. Even Glennon acknowledges that “[t]he concept that a state might refuse to ratify a treaty signed on its behalf evolved gradually during the nineteenth century.” GLENNON, *supra* note 23, at 172 n.56.

behalf.<sup>238</sup> Ratification was the act by which the monarch confirmed that the agent had acted within his authority.<sup>239</sup> “[T]hrough formally necessary, [ratification] could not be refused unless the envoy had exceeded his authority.”<sup>240</sup> This mandatory understanding of ratification receded only gradually.<sup>241</sup>

Eighteenth-century commentators generally continued to recognize the obligation to ratify the acts of an authorized envoy.<sup>242</sup> Treaty practice comported with that position: “[N]ormally, ratification followed signature up to the nineteenth century”; refusals to ratify “were exceptional” and generated protests “of the violation of a legal duty.”<sup>243</sup>

With the American and French Revolutions and the more general shift from monarchy to democracy, ratification began in earnest to transform from an obligatory formality into an act of discretion.<sup>244</sup> For example, in 1797, when President John Adams gave the American representatives to France authority to negotiate, he obligated them to transmit back to him any agreements “for his final ratification with the advice and consent of the Senate of the United States if this is given.”<sup>245</sup> France, in empowering its envoy during the same time frame, similarly retained discretion whether to ratify.<sup>246</sup> Prussia took a step toward discretionary ratification in 1795, Belgium in 1839, and Austria in 1918.<sup>247</sup> Britain began the journey to discretionary ratification in the early 1800s.<sup>248</sup> Even as various states were moving toward discretionary ratification, however, “many other states continued to” guarantee ratification.<sup>249</sup> The shift to discretionary

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238. See JONES, *supra* note 10, at 66.

239. See *id.* at 66–68, 87; Bradley, *supra* note 7, at 313–14.

240. JONES, *supra* note 10, at 66 (footnote omitted); see also *id.* at 6; Bradley, *supra* note 7, at 313–14.

241. JONES, *supra* note 10, at 68.

242. See *id.* at 68–69. *But cf. id.* (recognizing that one commentator, Bynkershoek, who was probably ahead of his time, described the obligation as one of good faith); *id.* at 69 (suggesting the possibility that “at the end of the eighteenth century . . . sovereigns did not take the legal duty of ratifying . . . too seriously”).

243. *Id.* at 70.

244. *Id.* at 12, 16, 32, 74; see also *id.* at 70 (“The thesis of a liberty to ratify or not to ratify acquires concrete force, in practice, during the democratic era.”); Bradley, *supra* note 7, at 314. At the same time, the modern notion that ratification is a final step in consent, rather than mere confirmation of a negotiating agent’s power, has roots in Roman practice. See JONES, *supra* note 10, at 66–68.

245. JONES, *supra* note 10, at 14 (emphasis omitted) (quoting I PRADIER-FODÉRE, COURS DE DROIT DIPLOMATIQUE 377 (1881)).

246. *Id.* at 13–14; see also *id.* at 77 (describing France’s insistence that it retained discretion not to ratify an 1840s treaty with England).

247. *Id.* at 13–15, 17.

248. *Id.* at 15–19; see also *id.* at 77–79 (describing British officials’ endorsement of some form of obligatory ratification in the 1840s and 1860s).

249. *Id.* at 16.

ratification was gradual and at times halting.<sup>250</sup> France reverted to the notion of obligatory ratification during the Napoleonic era.<sup>251</sup> In the late 1700s and early 1800s, U.S. officials, both in internal deliberations and in communications with other states, likewise endorsed some version of obligatory ratification.<sup>252</sup> If other states had not reserved discretion regarding ratification, the United States insisted that these states were obliged to ratify even as the United States claimed discretion.<sup>253</sup> Other states protested the novel U.S. practice.<sup>254</sup> Recognizing, perhaps, the foreign relations problems its practice caused, the United States communicated to other states as late as 1869 that “refusal or amendments by the Senate indicated no disrespect.”<sup>255</sup> Even U.S. courts had a hard time transitioning from the prior norm; inspired by “the older notion of ratification, . . . [they, for a long time,] deemed treaties that were ratified by the United States to be retroactive to the time of the U.S. signature.”<sup>256</sup> And nineteenth-century commentators emphasized that even in the system of discretionary ratification, “ratification must not[, as a political matter,] be lightly refused.”<sup>257</sup>

Eventually, “unratified treaties became a common feature in international relations.”<sup>258</sup> “The stream of unratified treaties [following] 1920 has established beyond doubt that the contemporary rule of practice is that ratification is dis-

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250. See GLENNON, *supra* note 23, at 172 n.56 (“The concept that a state might refuse to ratify a treaty signed on its behalf evolved gradually during the nineteenth century.”); JONES, *supra* note 10, at 16 (reminding that “[a]ll this did not happen in a day”).

251. JONES, *supra* note 10, at 15.

252. See *id.* at 74–75 (discussing internal and external communications by the U.S. Secretary of State to this effect).

253. See *id.* at 75–77.

254. See *id.* at 75, 77; see also Bradley, *supra* note 7, at 314.

255. JONES, *supra* note 10, at 77.

256. Bradley, *supra* note 7, at 314; see also JONES, *supra* note 10, at 92–102. In 1850, for example, the Supreme Court stated that treaty obligations, “unless suspended by some condition or stipulation therein contained, commence[ ] with their execution, by the authorized agents of the contracting parties; and that their subsequent ratification by the principals themselves has relation to the period of signature.” *United States v. D’Auterive*, 51 U.S. (10 How.) 609, 623 (1850). The result is [t]hat any act or proceeding . . . between the signing and the ratification of a treaty, by either of the contracting parties, in contravention of the stipulations of the compact, would be a fraud upon the other party, and could have no validity consistently with a recognition of the compact itself.

*Id.* Because the Court’s recognition of obligations between signature and ratification appears to derive from the understanding that signature is effective and ratification ministerial, it is not clear that the Court’s position provides support for interim obligations before modern ratification which is discretionary and decisive. Moreover, this doctrine of retroactivity does not appear to have been widely adopted abroad, undermining any claim that it reflected customary international law. See 5 HACKWORTH, *supra* note 223, at 207–08.

257. JONES, *supra* note 10, at 16, 78–79; see also *id.* at 79–80 (discussing late nineteenth-century and early twentieth-century scholarship asserting notions of obligatory ratification).

258. *Id.* at 77.

cretionary, and that no reasons need be given for refusing to ratify a treaty.”<sup>259</sup> However, as this history demonstrates, discretionary ratification is a relatively modern phenomenon. The practical precondition for a norm of interim obligations thus did not exist until well into U.S. history.<sup>260</sup>

Consistent U.S. support for the principle of interim obligations is even more recent. The United States maintains that interim obligations were a feature of customary international law before they were codified in Article 18 of the Vienna Convention.<sup>261</sup> The United States did not begin to take this position consistently until 1964, it appears.<sup>262</sup> The executive has since repeated the assertion many times.<sup>263</sup> For example, in submitting the Vienna Convention to the President, the Secretary of State noted that the as yet inoperative “Convention [was] already generally recognized as the authoritative guide to current treaty law and practice.”<sup>264</sup> More importantly, he asserted that

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259. *Id.* at 79; *see also id.* at 32 (declaring that, at least by 1949, “ratification [was] discretionary” and “[did] not follow signature as a matter of course”).

260. The ex post congressional-executive agreement is also a relatively recent phenomenon. “[E]x post . . . agreements are largely the invention of the New Deal period.” Hathaway, *supra* note 24, at 169.

261. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, intro. note & nn.1–2 (1987); Bradley, *supra* note 7, at 314–15 & n.36, 317. For statements from other states endorsing a norm of interim obligations, *see* McDade, *supra* note 71, at 12–13 & n.36.

262. During his confirmation proceedings, Secretary of State–Designate Colin Powell expressed his “understand[ing] that the United States has consistently supported this principle since the Johnson administration.” *Nomination of Colin L. Powell to Be Secretary of State Before the S. Comm. on Foreign Relations*, 107th Cong. 104 (2001) [hereinafter *Powell Nomination*]. On the advice of the State Department Office of Legal Adviser, he later represented that in 1964 the Johnson administration “stated that the United States regarded [Article 18] as ‘highly desirable’ and as a ‘generally accepted norm[ ] of international law.’” *Id.*; *see also* Treaties and Other International Agreements, 2001 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 212–13 [hereinafter 2001 DIGEST] (repeating Secretary Powell’s answer in response to senators’ concerns over the executive’s endorsement of the norm of interim obligations). *But cf. supra* note 223.

263. *See, e.g.*, 2001 DIGEST, *supra* note 262, at 212 (noting that “the United States regards [the Vienna Convention] as the authoritative guide to current treaty law and practice,” and providing statements from Secretary–Designate Powell regarding U.S. endorsement of the norm of interim obligations); 1979 DIGEST, *supra* note 69, at 692 (quoting an assertion by the U.S. Ambassador to the Law of the Sea Convention that “[t]he Vienna Convention provisions, including Article 18, are for the most part codifications of customary international law”); *id.* at 692–93 (noting the 1965 U.S. “statement to the International Law Commission” that “[t]he United States regards the provisions of . . . [Article 18] as reflecting generally accepted norms of international law” (quoting Y.B. Int’l Law Comm’n 44 (1965)) (internal quotation marks omitted)); *Powell Nomination*, *supra* note 262 (statement of Secretary of State–Designate Colin Powell) (affirming the norm of interim obligations and noting affirmations of prior administrations); Owen Memorandum, *supra* note 74, at 45–48 (noting various such representations by the executive).

264. Letter of Submittal From William P. Rogers, U.S. Sec’y of State, to President Richard M. Nixon (Oct. 19, 1971), State Dep’t Bull. 684, 685 (Dec. 13, 1971) [hereinafter Rogers Letter of Submittal]; *see also* Memorandum of Charles Bevans, Assistant Legal Adviser for Treaty Affairs (June 6, 1974),

the “rule [of interim obligations reflected in Article 18 was] widely recognized in customary international law.”<sup>265</sup> U.S. courts have acknowledged the Vienna Convention’s customary international law status as well.<sup>266</sup>

The United States has demonstrated its conviction that the norm of interim obligations qualifies as customary international law in deed as well as in word by acting consistently with the norm on a number of occasions.<sup>267</sup> The best example arises from the treaty creating the International Criminal Court (ICC).<sup>268</sup> Recognizing significant problems with the treaty that precluded submission to the Senate, but wishing to influence the ICC’s subsequent development, the Clinton administration signed the treaty on December 31, 2000, only weeks before President Clinton departed the White House.<sup>269</sup> After the Bush administration assumed power, State Department official John Bolton informed the United Nations Secretary General by letter that “the United States does not intend to become a party to the treaty.”<sup>270</sup> Both in this letter and in related public statements, the administration made clear that the letter to the Secretary General was intended to terminate interim obligations incurred as a result of

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*in* The Law of Treaties, 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 235 (describing “the Vienna Convention . . . , although not yet in force, . . . [as] the most recent consensus of the world community on the law of treaties”). This does not mean that the Vienna Convention merely codifies customary international law. The Convention involved both codification and development of the law of treaties. *See, e.g.*, LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW 123 (5th ed. 2009) (“The Convention is regarded as in large part (but not entirely) declaratory of existing law.”); GLENNON, *supra* note 23, at 171 & n.47 (noting authorities who perceive the Vienna Convention as both codifying and advancing the law of treaties); Rogers Letter of Submittal, *supra*, at 689 (calling the Vienna Convention “a major achievement in the development and codification of international law”).

265. Rogers Letter of Submittal, *supra* note 264, at 685.

266. *See, e.g.*, Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308–09 (2d Cir. 2000) (treating “the Vienna Convention as an authoritative guide to the customary international law of treaties,” and collecting cases to the same effect); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, intro. note (1987).

267. *See* Bradley, *supra* note 7, at 333 & n.122.

268. Rome Statute of the International Criminal Court, *done* July 17, 1998, 2187 U.N.T.S. 3 (signed by United States Dec. 31, 2000, as recorded in the U.N. Treaty Collection, *available at* [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&cmdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&cmdsg_no=XVIII-10&chapter=18&lang=en) (last visited June 2, 2011)). The events surrounding the United States’s “unsigned” of the Rome Statute are recounted in various sources. *See, e.g.*, BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, INTERNATIONAL LAW 101–02 (5th ed. 2007); Bradley, *supra* note 7, at 311–12 & n.15, 317, 333.

269. *See* CARTER, TRIMBLE & WEINER, *supra* note 268, at 101–02; Bradley, *supra* note 7, at 311 & n.15.

270. Bradley, *supra* note 7, at 311–12 & n.16, 317 (quoting Letter From John R. Bolton, Under Sec’y for Arms Control & Int’l Sec., U.S. Dep’t of State, to Kofi Annan, Sec’y General, United Nations (May 6, 2002) [hereinafter ICC Letter]).

President Clinton's signature.<sup>271</sup> The Bush administration took similar but less formal steps with regard to the Kyoto Protocol.<sup>272</sup> Again, however, these indications of U.S. support for the customary norm of interim obligations are recent.

Furthermore, the executive's acceptance of the norm of interim obligations has not gone unquestioned. Executive assumption of interim obligations has met with opposition in the Senate. An early example of this opposition focused not specifically on interim obligations but more generally on presidential power under an unratified treaty. The administration of President Grant had negotiated a treaty with the Dominican Republic to acquire that nation.<sup>273</sup> The treaty stipulated that until "[t]he people of the Dominican Republic shall . . . express . . . their will concerning the cession . . . the United States shall . . . *protect the Dominican Republic against foreign interposition.*"<sup>274</sup> In a lengthy and impassioned speech, Senator Charles Sumner of Massachusetts argued that the Constitution did not authorize the President to assume war powers without congressional authorization and, critically for our purpose, that an unratified treaty did not change that result.<sup>275</sup> Given the Constitution's inclusion of the Senate in the treaty-making process, the President could not derive power from such a treaty.<sup>276</sup> In Senator Sumner's words (directed more particularly to the President's continued usurpation of authority after the Senate rejected the treaty), "The President ha[d] not even a puff of air to stand on."<sup>277</sup> There is no suggestion that an additional unilateral act, such as presidential signing, would have provided even that.

This resistance from the 1870s is not an isolated event. In 1979, for example, fourteen senators sent a letter to the Carter administration's representative to the Law of the Sea Conference concerning the consequences of U.S. signature of the Law of the Sea Convention.<sup>278</sup> Because "some ha[d] suggested that signature . . . imposes certain legal obligations upon the signing party," the senators asked for the administration's views, emphasizing "the Senate's interest

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271. See generally Bradley, *supra* note 7, at 317 (citing ICC Letter, *supra* note 270; Marc Grossman, Under Sec'y for Political Affairs, U.S. Dep't of State, Remarks to the Center for Strategic and International Studies (May 6, 2002), available at [http://www.amicc.org/docs/Grossman\\_5\\_6\\_02.pdf](http://www.amicc.org/docs/Grossman_5_6_02.pdf); Pierre-Richard Prosper, U.S. Ambassador for War Crimes Issues, Foreign Press Center Briefing (May 6, 2002), available at <http://www.iccnw.org/documents/USProsperUnsigning6May02.pdf>).

272. See *id.* at 312–13, 333 n.122; see also *id.* at 313 n.21, 333 n.122 (discussing the Bush administration's similar, but less formal, denunciation of the Comprehensive Nuclear Test Ban Treaty).

273. See CONG. GLOBE, 42d Cong., 1st Sess. 296–97 (1871).

274. *Id.* at 302 (quoting S. EXEC. DOC. NO. 17, at 99 (1871)).

275. See *id.* at 294, 302–03.

276. See *id.*

277. *Id.* at 303.

278. 1979 DIGEST, *supra* note 69, at 690.



in any implications that signature may have before the Constitutional requirement of Senate advice and consent and Presidential ratification has taken place.”<sup>279</sup> Later, on the Senate floor, Senator Edmund Muskie, one of the authors of the letter, gave the President his “advice . . . that the fixing of the mere signature of any executive branch official on a Law of the Sea Treaty or any other treaty [pursuant to the unratified Vienna Convention] will not bind [the Senate] from taking any action which anyone claims would defeat the object or purpose of the treaty.”<sup>280</sup>

Similar protest resulted from the executive’s treatment of the signed but unratified SALT II agreement during the Carter and Reagan years. President Carter directed “the Defense Department to comply fully and precisely with all the provisions of the unratified . . . treaty.”<sup>281</sup> State Department lawyers presumably relied on interim obligations of some variety to justify the directive.<sup>282</sup> Similarly, the Reagan administration represented that the United States was bound to avoid “actions which would ‘defeat the object and purpose’ of the signed but unratified treaty” until “the United States made clear its intent not to ratify,” which the United States did in 1981.<sup>283</sup> In a July 2, 1984, letter to President Reagan, Senators Steve Symms and John East challenged the positions of both administrations. They argued that President Carter’s directive “constituted de facto presidential ratification of the treaty, without the advice and consent of the Senate.”<sup>284</sup> Further, the senators were clearly dismissive of both administrations’ acceptance of interim obligations under international law<sup>285</sup> and claimed that, to the extent the Carter administration

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279. *Id.*

280. *Id.* at 691.

281. 131 CONG. REC. S2083 (daily ed. Feb. 25, 1985).

282. *Id.* (noting that “undoubtedly the lawyers at the Department of State would argue that such action was required by customary international law for a reasonable time during the pendency of the treaty”).

283. *Id.* at S2081 (quoting Fact Sheet From Reagan Administration to Congress) (internal quotation marks omitted); *see also id.* (reproducing Letter From President Ronald Reagan to Senator John P. East (Aug. 6, 1984)).

284. *Id.* at S2083.

285. *See id.* at S2081 (referring to interim obligations as “international law (*as perceived by the State Department*)” (emphasis added)); *id.* at S2083 (noting that interim obligations terminated upon communication of the decision not to ratify “even under *certain interpretations* of customary international law” (emphasis added)); *id.* (noting that “undoubtedly the lawyers at the Department of State would argue that such action was required by customary international law for a reasonable time during the pendency of the treaty”); *id.* (asserting that “whatever appearance of propriety that *certain interpretations* of customary international law might have lent to the illegal Carter directive of March 1980, those already *shaky underpinnings* were removed by the 1981 notification to the Soviet Union that the executive branch did not intend to ratify” (emphases added)).

justified its acts by reference to such obligations, it “placed international law above the Constitution.”<sup>286</sup> Other Senators expressed similar concerns.<sup>287</sup>

These vignettes are not exhaustive.<sup>288</sup> For example, during Senate consideration of Colin Powell’s nomination as Secretary of State in 2001, Senator Jesse Helms asserted that the notion of obligations that precede Senate consent is an “unconstitutional myth” that would “effectively supersede Article II of our Constitution.”<sup>289</sup> Senators have not stood alone in their protests; members of the

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286. *Id.*

287. *See* 135 CONG. REC. S9301 (Aug. 1, 1989) (statement of Sen. Jesse Helms) (protesting U.S. efforts to comply with the unratified and expired SALT II treaty, and referring to “presumed” interim obligations that existed “in the view of international lawyers” until the United States communicated its intent not to ratify); 132 CONG. REC. S9069 (July 15, 1986) (statement of Sen. John Danforth) (noting Senate opposition to President Carter’s threat to convert SALT II “into an executive agreement,” and opposing efforts to bind the executive by law to parts of SALT II on grounds that “the executive should only be required to adhere to [a treaty] if it is approved by the Senate and is ratified”); 132 CONG. REC. S4319 (Apr. 16, 1986) (statement of Sen. Robert C. Byrd) (expressing concern over (while still endorsing) the United States’s “continued adherence . . . to the . . . unratified Salt II accords” on the ground that, “normally, it is not a good thing for the Senate to urge compliance with the provisions of any treaty which has not had the Senate’s formal approval . . . [as t]hat road can lead to the surrender of the Senate’s constitutional role in the treaty-making process”); 131 CONG. REC. S9480 (July 15, 1985) (statement of Sen. Jesse Helms) (opposing the nomination of Richard R. Burt as Ambassador to Germany because he was “the principal architect of the interim restraint theory . . . that we should observe the unratified SALT II Treaty even though it was never ratified”); *see also* 131 CONG. REC. S13713 (Oct. 22, 1985) (statement of Sen. Steve Symms) (noting “serious Constitutional and legal problems involved in prolonged U.S. compliance with an unratified SALT II Treaty”).

288. *See, e.g.*, 147 CONG. REC. S9215–16 (Sept. 10, 2001) (statement of Sen. Larry Craig) (proposing, with thirteen other senators, to prohibit the use of funds to support the International Criminal Court, and entering into the record a January 4, 2001, *Washington Post* article by John R. Bolton complaining of President Clinton’s reliance on interim obligations and asserting that such obligations “cannot sensibly apply to our government of separated powers”); 144 CONG. REC. S3936–37 (Apr. 30, 1998) (statement of Sen. John Ashcroft) (introducing a “bill to prohibit the use of Federal funds to implement the Kyoto Protocol . . . unless or until the Senate has” approved the Protocol, arguing that “the President may not on his own bind the sovereignty of the United States to the terms of a treaty unless that treaty has been ratified by two-thirds of the Senate”); *cf.* 155 CONG. REC. S7048 (June 25, 2009) (statement of Sen. John Cornyn) (rejecting the view that the United States is bound by customary international law norms derived from treaties “that the Senate has never ratified”); Territorial Regimes and Related Issues, 2 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1571–72 (1991–99) (expressing concern about the use of an executive agreement to establish provisional boundaries with Mexico, pending ratification of a treaty); CRS, TREATIES, *supra* note 10, at 15–16 (discussing problems that result from executive failure to consult the Senate before treaties are fully negotiated and submitted).

289. *Powell Nomination*, *supra* note 262; *see also* 2001 DIGEST, *supra* note 262, at 212–13 (noting Senator Helms’s questioning of Secretary of State–Designate Powell, and observing that, “[i]n recent years, questions have been raised by some members of the U.S. Senate concerning the legal ramifications of signing a treaty” and, “[i]n particular, . . . the position of the Executive Branch that, under Article 18 . . . , a country that has signed but not ratified a treaty may not take action that would defeat the object and purpose of the treaty”). *But cf. id.* at 98 (statement of Sen.

House of Representatives have raised related objections to the misuse of presidential authority.<sup>290</sup> Critically, these examples illustrate that some presidential unilateralism, including acceptance of interim obligations, has met with congressional opposition.<sup>291</sup>

Even as members of Congress have questioned the constitutionality of interim obligations, scholars have debated when interim obligations became part of customary international law, further undercutting any notion of a longstanding, unquestioned practice. Some scholars assert that Article 18 of the Vienna Convention exceeded what was accepted as customary international law.<sup>292</sup> Others maintain, consistent with the U.S. position, that Article 18 codified customary international law.<sup>293</sup> Among these are scholars who suggest that the twenty-year process of preparing the Vienna Convention placed interim obligations in the customary firmament.<sup>294</sup> This perspective is reflected in the

Christopher Dodd) (noting that “[w]hen President Clinton signed the [Rome Statute of the ICC], he committed the United States not to work against the purposes or objectives of the treaty”).

290. See 146 CONG. REC. H5687–88 (July 10, 2000) (statement of Rep. Joseph Knollenberg) (successfully amending an appropriations bill using language employed in other such bills to prevent the Clinton administration from implementing or preparing to implement the signed but unratified Kyoto Protocol, and, in the process, asserting that “[i]t will be up to Congress to assure that backdoor implementation of the Kyoto Protocol does not occur”); 146 CONG. REC. H5153–54 (June 26, 2000) (statement of Rep. David Vitter) (successfully amending an appropriations bill to prevent the Clinton administration from using funds to implement unratified treaties that “would strengthen the 1972 ABM Treaty”); 146 CONG. REC. H4823–26, H4828–29, H4837–40, H4863 (June 21, 2000) (evidencing bipartisan support for a successful amendment to an appropriations bill to prevent implementation of the Kyoto Protocol while permitting executive action under related, existing laws); 145 CONG. REC. E787 (Apr. 27, 1999) (Letter From Rep. Bob Shaffer to Lt. Gen. Lester L. Lyles (Apr. 15, 1999)) (criticizing the Clinton administration for “parading the [outdated] ABM Treaty and its unratified amendments as a reason to delay the development of space-based defenses”); see also 147 CONG. REC. H232 (Feb. 8, 2001) (statement of Rep. Ron Paul) (asserting that “invoking unratified treaties is a slap in the face to the rule of law and our republican form of government”); 145 CONG. REC. E1494, E1496 (July 1, 1999) (statement of Rep. Tom DeLay) (placing in the Congressional Record a resolution of the Daughters of the American Revolution condemning executive orders implementing unratified treaties).
291. *But cf.* Rogoff & Gauditz, *supra* note 195, at 39–40, 54–56, 63–78 (noting both congressional opposition to and acquiescence in executive consent to provisional application of international agreements).
292. See GLENNON, *supra* note 23, at 171 & n.50 (collecting commentary); 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW 1429, 1432 n.13 (2d ed. 1945); JONES, *supra* note 10, at 81–90; 1 D.P. O’CONNELL, INTERNATIONAL LAW 223 (2d ed. 1970); SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 19, 43 (2d ed. 1984).
293. See GLENNON, *supra* note 23, at 171–72 & n.51; HOLLOWAY, *supra* note 225, at 58–61; Charme, *supra* note 223, at 74–85; Rogoff, *supra* note 71, at 284.
294. See DAMROSCH ET AL., *supra* note 264, at 123 (describing the history of the Vienna Convention, including the twenty-year span between initiation and conclusion); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 252–53 (2009) (relying on the history of the creation of the Vienna Convention in asserting that Article

views of the four successive Rapporteurs who led the Convention effort.<sup>295</sup> J.L. Brierly, the first Rapporteur, took the position that there was some, but insufficient, evidence to conclude that the principle of interim obligations was a customary norm that could be codified in the Convention.<sup>296</sup> Subsequent Rapporteurs concluded that interim obligations figured in customary international law.<sup>297</sup> Regardless of who is correct, the very uncertainty regarding when the norm of interim obligations emerged undermines the assertion that the President has long acted in the shadow of such a norm.

Consequently, even if a longstanding, unquestioned executive practice may demonstrate congressional acquiescence and alter the constitutional calculus derived from the Constitution's text, structure, and history, the evidence does not support alteration here. Both the underlying practice of discretionary ratification and the customary international law of interim obligations arrived relatively recently. And presidential assumption of interim obligations has met with resistance in the Senate. The result is that the President's assumption of interim obligations is likely constitutional only in those limited situations in which the President could enter a sole executive agreement: when the President possesses independent constitutional authority over the subject at issue (for example, recognizing foreign governments or issuing pardons)<sup>298</sup> or when the President exercises his historic claims settlement power. These situations likely will cover only a small percentage of interim obligations that arise. Indeed, the executive likely chooses to invoke the Article II or congressional-executive process in part because the President lacks authority to use a sole executive agreement.

### C. Additional Arguments

Various other arguments have been, or might be, offered to paper over the unconstitutionality of interim obligations. All are readily dismissed. Perhaps the least substantial is the suggestion that these obligations are not troubling because they are temporary.<sup>299</sup> As the examples at the outset of this Article and

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18 codified customary international law); Rogoff, *supra* note 71, at 284 (noting that "Article 18 represents the codification of a rule of customary international law, as it was developed in the decisions of international tribunals and state practice, and was refined in the work of the International Law Commission and the Vienna Conference on the Law of Treaties").

295. See Bradley, *supra* note 7, at 328–29; Rogoff, *supra* note 71, at 285–87.

296. Bradley, *supra* note 7, at 328; Rogoff, *supra* note 71, at 285.

297. See Bradley, *supra* note 7, at 328–29; Rogoff, *supra* note 71, at 285–88.

298. See U.S. CONST. art. II, § 2, cl. 1; *id.* § 3; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).

299. *Cf.* Owen Memorandum, *supra* note 74, at 50 (noting that "the rule stated in Article 18 is strictly a temporary measure"); Rogoff & Gauditz, *supra* note 195, at 61 (arguing that executive consent to

in Table 2 in the Appendix demonstrate, temporary in this context can mean decades.<sup>300</sup> The interim between signature and Senate approval is often significant and sometimes indefinite.<sup>301</sup> The average interim between signature and ratification for treaties submitted to the Senate in roughly the last decade has been 2.5 years.<sup>302</sup> Such a span exceeds the life of many properly enacted statutes.<sup>303</sup> By constitutional mandate, for example, “no Appropriation of Money [to raise and support Armies] shall be for a longer Term than two Years.”<sup>304</sup> Further, fully ratified treaties may include termination or withdrawal provisions that effectively render them temporary.<sup>305</sup> No one claims, as a result, that these treaties may be made by the President alone. The temporary nature of interim obligations thus does not solve the constitutional problem.

One might argue instead that interim obligations do not present a constitutional problem because they are political rather than legal in nature.<sup>306</sup> In conducting foreign affairs, the President undoubtedly may and frequently does

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provisional application of a treaty would likely be upheld given the temporary nature of provisional obligations).

300. See *supra* notes 2–8 and accompanying text; see *infra* Table 2.

301. See Bradley, *supra* note 7, at 309–13 (providing examples of treaties that have long remained unratified, and discussing reasons for this phenomenon); *infra* Table 2.

302. See *supra* note 61 and accompanying text.

303. A recent and an historical example illustrate the point: There has been much talk of repealing the Obama administration’s signature healthcare initiative enacted by the 111th Congress. See, e.g., Jennifer Steinhauer & Robert Pear, *G.O.P. Newcomers Set Out to Undo Obama Victories*, N.Y. TIMES, Jan. 2, 2011, <http://www.nytimes.com/2011/01/03/us/politics/03repubs.html>. Similarly, the first broad grant of federal question jurisdiction was enacted “in 1801 by the outgoing Federalist Party but was repealed the following year.” Bradley, Goldsmith & Moore, *supra* note 142, at 913 n.233.

304. U.S. CONST. art. I, § 8, cl. 12.

305. Vienna Convention, *supra* note 9, art. 54(a) (acknowledging that a party may terminate or withdraw from a treaty “in conformity with the provisions of the treaty”).

306. Cf. Turner, *supra* note 20, at 777 (“It might be argued that article 18 . . . creates no real obligations.”). Glennon similarly argues that the President’s observation of Article 18 obligations until at least half the Senate disapproves does not contravene the constitutional two-thirds consent requirement because “article 18 . . . does not place the treaty in force; it simply proscribes action that would defeat the object and purpose of the treaty.” GLENNON, *supra* note 23, at 174 n.61. The argument assumes that interim obligations are different than the obligations of completed treaties in some dispositive way. Perhaps Glennon reasons that interim obligations derive, for the United States, from customary international law and therefore are not subject to constitutional treaty-making processes. Yet that rationale might apply to completed-treaty obligations as well. Ratification arguably renders treaty obligations effective for the United States due to customary international law norms regarding the effect of ratification. Likewise, interim obligations and completed obligations both derive from U.S. consent. These similarities undercut the notion that completed but not interim obligations must conform to constitutional requirements. Alternatively, Glennon may be assuming that interim obligations do not trigger concerns because they are not formally treaty obligations. The argument is difficult to sustain in light of the fact that interim obligations derive from the substance of treaty obligations and the process of consenting to those obligations.

make political commitments. It is true that, historically, some perceived interim obligations as moral rather than legal.<sup>307</sup> However, the United States has since emphasized “that whatever doubt may have existed in the past, the rule expressed in Article 18 of the Vienna Convention has become a legal obligation binding upon all states.”<sup>308</sup> As a result, while the political-commitments argument may have had traction historically, its day has passed.

Nor can interim obligations be sustained on their utility alone. Several have suggested that the power to assume interim obligations is helpful, indeed critical, to the United States’s ability to enter treaties.<sup>309</sup> This argument is empirically suspect and constitutionally deficient. As noted above, there are various vehicles—such as the dominant *ex ante* congressional-executive agreement—through which the United States may enter international agreements without assuming interim obligations on the President’s authority alone.<sup>310</sup> The United States need not avoid the Article II treaty, however, to avoid unconstitutional interim obligations. Signature subject to ratification is not the only method for expressing consent; the Vienna Convention recognizes several other avenues and allows states to adopt still more.<sup>311</sup> Presumably, other states would accede to U.S. use of such avenues, notwithstanding the current prevalence of signature subject to ratification, where the alternative triggers the argument that U.S. consent to interim obligations was unconstitutionally given.<sup>312</sup> That argument is particularly compelling where

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307. See Owen Memorandum, *supra* note 74, at 47; see also Am. Soc’y of Int’l Law, *supra* note 222, at 779–84, 786–87; McDade, *supra* note 71, at 18–21 & nn.67–70.

308. Owen Memorandum, *supra* note 74, at 47; see also Hassan, *supra* note 223, at 458; Rogoff, *supra* note 71, at 271, 284–90.

309. See GLENNON, *supra* note 23, at 173 (suggesting that the conclusion that the President lacks authority to incur interim obligations “would undermine the ability of the United States to function in the community of nations”); Turner, *supra* note 20, at 777 (“[T]he drafters of the Constitution clearly gave the United States the ability to enter into treaties, and article 18 would seem to be a necessary element of the treaty-making process.”); Owen Memorandum, *supra* note 74, at 50 (stating that interim “obligation[s] are] regarded internationally as an essential part of the conduct required of States which choose to sign treaties subject to later ratification” and are therefore “a necessary precondition to normal U.S. participation in treaty negotiations”).

310. See *supra* notes 29–39 and accompanying text.

311. Vienna Convention, *supra* note 9, art. 11 (“The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”). Signature subject to ratification is efficient in that signature can also serve to authenticate the text of a treaty. See *id.* art. 10(b); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 610 (7th ed. 2008). “[B]ut a text may be authenticated in other ways, for example by incorporating the text in the final act of a conference or by initialing.” *Id.*

312. Vienna Convention, *supra* note 9, art. 46. *But see infra* note 329 (noting the argument that international law would not excuse the United States from interim obligations in the face of an assertion that presidential assumption violates the U.S. Constitution).

the Supreme Court has made clear that “the fact that a given . . . procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution.”<sup>313</sup>

A closely related argument falls on similar grounds. In the 1980s, State Department Legal Adviser Robert Owen asserted that the President’s constitutional authority to make treaties includes the authority to incur interim obligations because interim obligations are part of international treaty-making.<sup>314</sup> The argument misperceives the President’s treaty-making authority and elides the relationship between international and domestic law. As outlined above, the President’s treaty-making authority is shared.<sup>315</sup> That the President has a role in treaty-making does not mean he can do whatever treaty-making might involve. Nor is the President’s constitutional authority expanded by the emergence of interim obligations in international law. While international (and foreign) law has been cited to confirm understanding of constitutional provisions,<sup>316</sup> bare international law does not trump express constitutional limitations. Indeed, in *Medellín*, the Court emphasized that the President must adhere to the Constitution in implementing international law obligations.<sup>317</sup> The same should be true when the President is incurring such obligations.

Owen also argued that interim obligations are constitutional because they protect the benefit of the treaty bargain after signature, thereby preserving the Senate’s prerogative “to consider fully and accept or reject the treaty.”<sup>318</sup>

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313. *INS v. Chadha*, 462 U.S. 919, 944 (1983); *see also id.* at 959 (“There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President.”); Tribe, *supra* note 32, at 1302 (“[T]he claim that a particular governmental practice . . . is efficacious, is consistent with democratic theory, and is in some popular or moral sense ‘legitimate’ just doesn’t cut much ice when the question before us is whether that practice is *constitutional*.”).

314. *See* Owen Memorandum, *supra* note 74, at 49–50; *see also* Turner, *supra* note 20, at 777.

315. *See supra* Part III.

316. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (“The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”).

317. *See Medellín v. Texas*, 552 U.S. 491, 524–30 (reiterating that “[t]he President’s authority to act . . . ‘must stem either from an act of Congress or from the Constitution itself,’” and concluding that constitutional text and structure prevent the President from unilaterally converting a non-self-executing treaty into judicially enforceable federal law (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952))); *cf. id.* at 531 (acknowledging that, “if pervasive enough, a history of *congressional acquiescence* can be treated as a ‘gloss on Executive Power vested in the President’” (emphasis added) (quoting *Dames & Moore*, 453 U.S. at 686)).

318. Owen Memorandum, *supra* note 74, at 50.

This argument, while intriguing, is inconsistent both with the norm of interim obligations and the Constitution. Without offending the international law of interim obligations, the President may reject ratification and thereby terminate interim obligations, as President Bush did with the Rome Statute of the ICC.<sup>319</sup> International law does not secure a Senate prerogative to consider treaties at all, let alone under the same conditions as the President. Nor does the Constitution guarantee to the Senate such a right. The Constitution establishes a sequential treaty-making process in which the President has been able to decide never to submit a treaty to the Senate or wait decades to do so. Neither the Constitution nor the agents it creates can hope to secure the international, or even domestic, status quo during this process. Instead, the Senate considers whether the treaty makes sense under conditions prevailing at the time of consideration. Indeed, this prerogative is not the Senate's alone. Even after Senate consent, the President may decide not to ratify a previously signed treaty,<sup>320</sup> a helpful safety valve if conditions have changed. Perhaps most fundamentally, the notion that presidential assumption of interim obligations secures Senate authority sacrifices one Senate prerogative for another. It attempts to secure the conditions under which the Senate considers a treaty while excluding the Senate altogether from the assumption of interim treaty obligations. The prerogative to participate at all seems to dwarf the prerogative to participate under certain conditions. Presidential assumption of interim obligations sacrifices, more than it secures, Senate power.<sup>321</sup>

## V. IMPLICATIONS

The conclusion that presidential assumption of interim obligations is unconstitutional has important implications both internationally and domes-

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319. Vienna Convention, *supra* note 9, art. 18(a) (providing that interim obligations continue “until [a state] shall have made its intention clear not to become a party to the treaty”); *supra* text accompanying notes 268–271 (discussing President Bush's termination of interim obligations under the Rome Statute of the ICC).

320. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. d (1987) (“Even if a treaty has received the advice and consent of the Senate, the President has discretion whether to make the treaty.”).

321. Robert Turner adds a highly contextual argument for the constitutionality of interim obligations. He suggests that such obligations are constitutional in contexts in which the President wishes to ratify a treaty but asks the Senate to postpone approval, and the Senate acquiesces, prolonging interim obligations. *See* Turner, *supra* note 20, at 777–78. Turner takes this position even when there is not two-thirds support in the Senate for ratification. *Id.* The Constitution, however, requires not just support from or acquiescence by the President and Senate, but presidential and supermajoritarian senatorial approval. U.S. CONST. art. II, § 2, cl. 2. Turner's argument thus finds little support in the actual constitutional regime.



tically. Under the Vienna Convention on the Law of Treaties, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>322</sup> To the extent this provision reflects customary international law<sup>323</sup> and therefore binds the United States, Congress could not pass a statute to eliminate internationally the interim obligations the President has assumed thus far.<sup>324</sup> At the same time, Article 46 of the Vienna Convention recognizes that a state’s consent to treaty obligations is invalid if that consent manifestly violates a fundamentally important “internal rule regarding competence to conclude treaties.”<sup>325</sup> “A violation is manifest if it would be objectively evident to any State conducting itself . . . in accordance with normal practice and in good faith.”<sup>326</sup> As this Article has argued, the President’s assumption of interim obligation violates an “internal law of fundamental importance regarding competence to conclude treaties”: the Constitution.<sup>327</sup> To date, however, the violation has not been manifest. Given the executive’s position that customary international law imposes interim obligations and related practice of signing agreements subject to ratification, it would not be apparent to other states that presidential assumption of interim obligations violates the U.S. Constitution.<sup>328</sup> This Article lays the foundation for a different result going forward.<sup>329</sup> Exposing the constitutional problem with

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322. Vienna Convention, *supra* note 9, art. 27.

323. According to Mark Villiger, this provision of the Vienna Convention codifies customary international law. VILLIGER, *supra* note 294, at 370, 374–75.

324. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 145 & cmt. c (1987) (“An act of Congress enacted after an international agreement . . . [may] supersede[ the agreement] as domestic law” but “does not affect the international obligations of the United States under the agreement.”).

325. Vienna Convention, *supra* note 9, art. 46(1).

326. *Id.* art. 46(2). Again, these principles, which appear in Article 46 of the Vienna Convention, bind the United States only if they also figure in customary international law. Villiger asserts that, while there was disagreement regarding the content of these principles during the Vienna Convention’s development, “today it can be assumed that Article 46 is declaratory of customary international law.” VILLIGER, *supra* note 294, at 586–87, 593–94.

327. Vienna Convention, *supra* note 9, art. 46(1); see Turner, *supra* note 20, at 778 n.220.

328. *Cf.* Bradley, *supra* note 7, at 332–33 (noting “the Senate Foreign Relations Committee’s concern[ ]” that the United States would not be able to claim a manifest, internal law violation with regard to certain executive agreements “given the extensive U.S. practice of concluding agreements outside of [the Article II] process”).

329. *Cf. id.* (noting the Senate Foreign Relations Committee’s proposal to communicate, in giving “advice and consent to the [Vienna] Convention,” that executive unilateralism in treaty-making violates fundamental U.S. law). Turner asserts that it is unlikely that Article 46 would release a state from its obligations under Article 18, “for article 46 was intended to apply to improperly ratified treaties.” Turner, *supra* note 20, at 778 n.220. It is not clear that Article 46, which speaks of the invalidity of a state’s “consent to be bound,” should be read so narrowly where signature before ratification constitutes consent to be bound to interim treaty obligations. Vienna Convention, *supra* note 9, art. 46(1).

interim obligations renders more viable the claim that presidential consent to interim obligations is, as a matter of international law, invalid. However, international law and other states are unlikely to permit the United States to repeatedly sign subject to ratification and assert the invalidity of the interim obligations that would otherwise attach. Thus, the international law defense of invalidity does not provide a long-term solution to the constitutional problem interim obligations pose.

To cure some of the problems caused by outstanding unratified treaties, the United States might argue that an extended lapse since signature has effectively communicated intent not to ratify and eliminated any obligations. Whether this argument is sufficient under international law is disputed.<sup>330</sup> The argument is also suspect in light of the fact that the United States has ratified treaties after extended delays.<sup>331</sup> A surer approach might be the enactment of a statute endorsing current interim obligations.<sup>332</sup> Such a statute would not solve the problem going forward, however.

Curtis Bradley has suggested two possible courses—short of refusing to sign prior to Senate (or, presumably, full congressional) approval—to prevent future problems.<sup>333</sup> First, he suggests “it may be desirable for the United States, when signing some treaties, to make clear that it will not consider itself bound by the obligations in the treaty unless and until it completes the ratification process.”<sup>334</sup> While this may make good political sense—lowering, as it might, expectations among treaty partners—it does not solve the constitutional problem. It is generally understood that a state avoids obligations of customary international law by persistently and openly objecting to them when the obligations arise.<sup>335</sup> Rather than persistently and openly object, the executive has acknowledged that interim obligations are part of customary international law.<sup>336</sup> Indeed, the executive has conformed to customary international law in

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330. See GLENNON, *supra* note 23, at 173 (“[I]t is unclear at what point authority no longer flows from signature. It may be that signature diminishes as a source of authority for article 18 purposes the longer a treaty remains before the Senate, since inaction can constitute effective rejection.”); Bradley, *supra* note 7, at 335 (“[I]t is arguable that a nation must give formal international notice of its intention not to ratify a treaty.”).

331. See *supra* notes 56–58 and accompanying text.

332. *But see infra* notes 349–351 and accompanying text.

333. Bradley, *supra* note 7, at 334.

334. *Id.*

335. Curtis A. Bradley & Mitu Gulati, *Withdrawing From International Custom*, 120 YALE L.J. 202, 211 (2010) (describing, and attacking, this conventional wisdom).

336. See *supra* notes 261–265 and accompanying text.

attempting to terminate interim obligations.<sup>337</sup> The result is that the United States does not qualify as a persistent objector to the norm of interim obligations under the conventional view. And merely communicating intent not to assume interim obligations does not suffice to eliminate those obligations, unless perhaps other states accept the U.S. position creating a superseding treaty on that point.<sup>338</sup> Violating the norm of interim obligations could eliminate interim obligations, but only if the violation generated a new “general and consistent”<sup>339</sup> state practice supported by a sense of legal obligation.<sup>340</sup> That does not seem to be what Bradley is proposing. Even if it were, the prospects of changing the norm of interim obligations are small, given the breadth of state support for the Vienna Convention.<sup>341</sup> Consequently, while presidential refusal to assume interim obligations under any given treaty may eliminate the effectiveness of those obligations as a matter of domestic law,<sup>342</sup> refusal is unlikely to eliminate those obligations as a matter of international law, raising still the specter of unconstitutionality.

Second, Bradley suggests that if the Senate consents to the Vienna Convention, it “may wish to attach an understanding . . . clarifying the effect of Article 18.”<sup>343</sup> Presumably, the understanding would state that signature will not trigger interim obligations for the United States (at least when the President could not assume those obligations through a sole executive agreement). As an initial matter, this is likely to be treated as a reservation internationally, as it attempts to alter legal obligations under the treaty.<sup>344</sup> Such a reservation would

337. See *supra* notes 267–272 and accompanying text (discussing U.S. efforts to terminate obligations incurred in signing the Rome Statute of the ICC and the Kyoto Protocol); see also *supra* notes 68–69, 281–283 and accompanying text (noting judicial, and additional executive, reliance on interim obligations).

338. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. 4 (1987) (noting that “[a] subsequent agreement will prevail over prior custom” and that “[m]odification of customary law by agreement is not uncommon”); Bradley & Gulati, *supra* note 335, at 211 (recognizing the accepted wisdom “that a [customary international law] rule can be overridden by a later-in-time treaty, but only as between the parties to the treaty,” as “the [CIL] rule continues to bind . . . parties in their relations with nonparty states”).

339. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); see also *supra* note 233 and accompanying text.

340. See Bradley & Gulati, *supra* note 335, at 212 (“The only way for nations to change a rule of CIL . . . is to violate the rule and hope that other nations accept the new practice.”).

341. One hundred eleven states are parties to the Vienna Convention on the Law of Treaties. UNITED NATIONS TREATY COLLECTION, *supra* note 52.

342. See, e.g., *The Paquete Habana*, 170 U.S. 677, 700 (1900).

343. Bradley, *supra* note 7, at 332, 334.

344. See Vienna Convention, *supra* note 9, art. 2(1)(d) (defining “reservation” [as] . . . a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

eliminate customary international law-based obligations, but only as to states who accept the reservation.<sup>345</sup> Even if the 111 states who are parties to the Vienna Convention<sup>346</sup> uniformly accepted the reservation—a highly unlikely proposition—the United States would yet have customary-international-law obligations to nonparty states. To the extent some states refused to accept the reservation, the constitutional problem of interim obligations would likewise persist.<sup>347</sup> Either way, a reservation would not fully eliminate the United States's interim obligations under customary international law.

One might argue that Bradley's proposed reservation is faulty for another reason. Ratification of Article 18 might be precisely what is required to ameliorate the constitutional problem caused by unilateral assumption of interim obligations. If the United States were to ratify the Vienna Convention without reservation to Article 18, the President's assumption of interim obligations arguably would no longer be unilateral. Rather, the assumption would occur pursuant to a prior Article II treaty endorsing obligations upon signature.<sup>348</sup> A similar result would occur if Congress passed a statute authorizing the President to assume interim obligations with regard to future treaties. Under either approach, only future interim, not the treaty's ultimate, obligations would qualify as agreements pursuant to a statute or to an Article II treaty. The result is that ratification or statutory authorization might solve the problem without requiring (but still permitting) the United States to alter preferences for the various treaty-making vehicles it uses. Yet these solutions rely on the widespread assumption that executive agreements pursuant to Article II treaties and congressional-executive agreements are constitutional.<sup>349</sup> Relatedly, these solutions assume that U.S. treaty-makers and lawmakers can delegate broad

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345. See *id.* arts. 20(4)(a)–(b), 21 (stipulating that states may decide whether to accept or reject a proffered reservation and that a treaty that includes the reservation results between reserving and accepting states); *supra* note 338. Under the Vienna Convention, such a reservation may be prohibited if “incompatible with the object and purpose of the treaty.” Vienna Convention, *supra* note 9, art. 19(c).

346. See *supra* note 341.

347. See Vienna Convention, *supra* note 9, arts. 20(4)(b), 21(3) (indicating that rejection of a proffered reservation results in no treaty between the reserving and rejecting state or in a treaty that does not include the treaty provisions addressed by the reservation).

348. As a political and institutional matter, the Senate may not be willing to consent to ratification without reservation to Article 18 if doing so would give the President (including a president coming from the opposing party) discretion to incur interim obligations prior to Senate consent. See Bradley, *supra* note 7, at 308, 334 & n.123.

349. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(2)–(3) & cmts. e–f (1987); 11 U.S. DEPT OF STATE, FOREIGN AFFAIRS MANUAL § 723.2-2 to -2(B) (2006).

authority to the President to assume international obligations.<sup>350</sup> While ultimately beyond the scope of this Article, these assumptions are not without doubt.<sup>351</sup> Indeed, such a delegation might well amount to an attempt to change, by treaty, the very structure of treaty-making on which this Article relies. The Supreme Court has stated that the treaty power does not “extend[ ] so far as to authorize what the Constitution forbids, or a change in the character of the government.”<sup>352</sup>

That leaves, assuming the constitutionality of congressional-executive agreements, such solutions as consenting to international agreements through means other than signature subject to ratification or altering the treaty-making preferences of the United States. That is, the United States might shift even more heavily toward the use of *ex ante* congressional-executive agreements, though under more specific authorizing statutes. However, even if constitutional, there are good arguments that the congressional-executive agreement cannot fully supplant the Article II treaty.<sup>353</sup> Moreover, the choice between different treaty-making vehicles involves weighty policy concerns. *Ex ante* authorization, even if more specific, shifts the balance of power in treaty-making toward the executive.<sup>354</sup> For that reason, favoring *ex ante* congressional-executive agreements may not be the answer. Nor is the answer, as this Article has detailed, increased use of the *ex post* congressional-executive agreement. Hathaway argues that almost all Article II treaties should be entered through the *ex post* congressional-executive process.<sup>355</sup> Using the *ex post* congressional-executive agreement might, as Hathaway argues, secure greater democratic legitimacy, facilitate treaty-making by avoiding the supermajority requirement, and produce “more reliable [international] commitments” that are not as easily terminated by the President alone.<sup>356</sup> Yet Hathaway’s prescription ignores the constitutional problems these agreements can generate.

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350. Cf. Hathaway, *supra* note 24, at 146–47, 214–15 (arguing that formal, but not real, interbranch cooperation in treaty-making is inconsistent with the Constitution’s separation of powers).

351. See *supra* notes 35, 49 and accompanying text.

352. *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); see also Tribe, *supra* note 32, at 1235 n.47, 1249–86, 1300–01 (arguing that the Constitution does not permit the President to submit treaties to Congress for majority approval rather than to the Senate for supermajority consent). *But cf.* Ackerman & Golove, *supra* note 43, at 925–27 (arguing that *INS v. Chadha*, 462 U.S. 919 (1983), could, but should not be, used to hold *ex post* congressional-executive agreements unconstitutional); *id.* at 915 (extolling the Trade Act of 1974 for “discharg[ing] a constitutional function, creating new rules for the law-making system itself”).

353. See *supra* notes 48–49 and accompanying text.

354. See Hathaway, *supra* note 24, at 144–239, 255–56, 266–67 (discussing and criticizing the imbalance in treaty-making authority wrought by *ex ante* congressional authorizations).

355. See Hathaway, *supra* note 29, at 1241–42, 1307, 1354.

356. *Id.* at 1307; see also *id.* at 1307–37, 1355–57 (developing these assertions).

At the end of the day, the least problematic cure appears to be refusing to consent to international agreements through signature subject to ratification. International law, as reflected in the Vienna Convention, does not stand in the way of such a course. The Vienna Convention does not impose, but allows the parties to select, methods of consent.<sup>357</sup> The executive may negotiate for methods that allow the United States to consent to treaties without incurring interim obligations, securing a relatively simple fix to an otherwise significant constitutional problem. As suggested above, if the alternative is an international law claim that the United States's interim obligations are invalid and/or a conclusion that the obligations are unconstitutional in U.S. law, other states may well accommodate the change.<sup>358</sup>

### CONCLUSION

Presidential assumption of interim obligations is a common phenomenon. Despite its pervasiveness, scholars have neglected the question of its constitutionality. As this Article demonstrates, the practice is unconstitutional. Neither the text, nor the structure, nor the history of the Constitution supports the practice. Nor can the practice be justified under the President's limited authority to enter sole executive agreements or as a longstanding practice supported by congressional acquiescence. The result, ironically, is that the President more often than not acts unconstitutionally when he invokes the one treaty-making vehicle specifically outlined in the Constitution. The President need not avoid the Article II treaty process to cure this constitutional defect, however. The President may avoid violating the Constitution by simply refusing to consent to international agreements through signature subject to ratification.

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357. See *supra* note 311 and accompanying text.

358. See *supra* note 312 and accompanying text.

## APPENDIX

TABLE 2. Treaties Signed Subject to Ratification<sup>359</sup>

Treaty Name & Citation (T-Doc.)	Date of Signature	Date of Senate Consent	Duration of Interim Obligations (years) <sup>360</sup>
Convention on Safety of U.N. and Associated Personnel (107-1)	12/19/1994		>17.11 (Ongoing)
Investment Treaty With Nicaragua (106-33)	7/1/1995		>16.58 (Ongoing)
1996 Protocol to Convention on Prevention of Marine Pollution by Dumping of Wastes (110-5)	3/31/1998		>13.83 (Ongoing)
Rotterdam Convention Concerning Hazardous Chemicals and Pesticides in International Trade (106-21)	9/11/1998		>13.38 (Ongoing)

359. Tables 2 and 3 together include all treaties transmitted by the President to the Senate during the 106th Congress to the 111th Congress (1999–2010). Table 2 lists treaties signed subject to ratification. Table 3 lists treaties involving consent through means that do not include signature. Unless otherwise noted, data in Tables 2 and 3 derive from the Library of Congress Thomas Database and from treaty documents available at [www.gpo.gov](http://www.gpo.gov).

A number of the treaties in Table 2 refer not expressly to ratification following signature, but to a subsequent exchange that communicates the completion of the necessary domestic processes to bring the treaty into force. For example, Article 20 of the Treaty With the United Kingdom Concerning Defense Trade Cooperation provides that it will “enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic requirements to bring this Treaty into force.” Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation art. 20, *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-110tdoc7/pdf/CDOC-110tdoc7.pdf>. The President, Senate, and State Department all understood that the United States would consent to this treaty through ratification. See Letter of Transmittal From President Bush to the Senate (Sept. 20, 2007) and Letter of Submittal From the Dep’t of State to the President (Sept. 4, 2002), *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-110tdoc7/pdf/CDOC-110tdoc7.pdf>, as well as the language of the Senate resolution of advice and consent, *available at* <http://thomas.loc.gov/home/treaties/treaties.html> (search “110-7”; then select “Treaty Number: 110-7”). Their understanding is consistent with the Vienna Convention rule that, if the parties so agree, “instruments of ratification . . . establish the consent of a State to be bound by a treaty upon . . . their notification to the contracting States.” Vienna Convention, *supra* note 9, art. 16(c). Consequently, this and other treaties involving consent through similar arrangements are classified as treaties signed subject to ratification and included in Table 2. *See, e.g., infra* note 366.

360. The length of interim obligations was calculated using Excel.

Treaty Name & Citation (T-Doc.)	Date of Signature	Date of Senate Consent	Duration of Interim Obligations (years)
Stockholm Convention on Organic Pollutants (107-5)	5/23/2001		>10.68 (Ongoing)
Treaty on Plant Genetic Resources for Food and Agriculture (110-19)	11/1/2002		>9.24 (Ongoing)
Protocol Amending Tax Convention With Luxembourg (111-8)	5/20/2009		>2.69 (Ongoing)
The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (106-1A)	5/14/1954	9/25/2008	54.36 <sup>361</sup>
Protocol to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air (107-14)	6/28/1956	7/31/2003	47.09 <sup>362</sup>
Partial Revision (1992) of Radio Regulations (107-17)	3/3/1992	9/23/2008	16.56
1995 Revision of Radio Regulations (108-28)	11/17/1995	9/23/2008	12.85

361. I exclude this and the following treaty (that is, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Protocol to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air) when calculating the average duration of interim obligations under the treaties in Table 2 in light of (1) uncertainty as to whether customary international law in the 1950s imposed interim obligations, *see supra* notes 292–297 and accompanying text, and (2) the outlying nature of the interim obligations under these two agreements.

362. This Protocol was originally submitted to the Senate on July 24, 1959, but the Senate returned it to the President in 1967, and it was not submitted to the Senate again until July 31, 2002. Protocol to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air, July 31, 2002, S. TREATY DOC. NO. 107-14. The Vienna Convention, which was not adopted until 1969, allows a state to terminate interim obligations by expressing the intention not to join the treaty. Vienna Convention, *supra* note 9, art. 18(a). If customary international law likewise imposed interim obligations and recognized that Senate return terminated those obligations, interim obligations under the Protocol may have lasted only from 1956 to 1967, and perhaps again from 2002 to 2003. Because the United States ultimately ratified the Protocol, and an argument could be made that Senate return did not therefore terminate interim obligations, I have included the entire span between signature and ratification in Table 2.



Treaty Name & Citation (T-Doc.)	Date of Signature	Date of Senate Consent	Duration of Interim Obligations (years)
Amendments to Constitution and Convention of International Telecommunication Union (ITU) (108-5)	11/6/1998	9/25/2008	9.89
Land-Based Sources Protocol to Cartagena Convention (110-1)	10/6/1999	9/25/2008	8.97
Convention on Supplementary Compensation on Nuclear Damage (107-21)	9/29/1997	8/3/2006	8.84
Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs (109-21)	7/6/1999	12/7/2007	8.42
Patent Law Treaty and Regulations Under Patent Law Treaty (109-12)	6/2/2000 <sup>363</sup>	12/7/2007	7.51
Protocol of 1997 Amending MARPOL Convention (108-7)	12/22/1998	4/7/2006	7.29
Treaty With Sweden on Mutual Legal Assistance in Criminal Matters (107-12)	12/17/2001	9/23/2008	6.77
Protocol to Treaty of Friendship, Commerce, and Navigation With Denmark (108-8)	5/2/2001	10/19/2007	6.46
2002 Amendments to the ITU Constitution and Convention (109-11)	10/18/2002	9/25/2008	5.94
The Protocol to the Agreement of the International Atomic Energy Agency Regarding Safeguards in the United States (107-7)	6/12/1998	3/31/2004	5.80

363. See World Intellectual Property Organization, Treaties and Contracting Parties, Patent Law Treaty, Contracting Parties, available at [http://www.wipo.int/treaties/en/Remarks.jsp?cnty\\_id=1462C](http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1462C).

<b>Treaty Name &amp; Citation (T-Doc.)</b>	<b>Date of Signature</b>	<b>Date of Senate Consent</b>	<b>Duration of Interim Obligations (years)</b>
International Convention on Control of Harmful Anti-Fouling Systems on Ships, 2001 (110-13)	12/12/2002	9/26/2008	5.79
Joint Convention on Safety of Spent Fuel and Radioactive Waste Management (106-48)	9/5/1997	4/2/2003	5.58
Investment Treaty With Honduras (106-27)	7/1/1995	10/18/2000	5.30
Mutual Legal Assistance Agreement With the European Union (109-13)	6/25/2003	9/23/2008	5.24
Extradition Agreement With the European Union (109-14)	6/25/2003	9/23/2008	5.24
Convention Concerning Migratory Fish Stock in the Pacific Ocean (109-1)	9/5/2000	11/18/2005	5.20
U.N. Convention Against Transnational Organized Crime (108-16)	12/13/2000	10/7/2005	4.82
Council of Europe Convention on Cybercrime (108-11)	11/23/2001	8/3/2006	4.69
Treaty With Dominican Republic for the Return of Stolen or Embezzled Vehicles (106-7)	4/30/1996	10/18/2000	4.47
Investment Treaty With Croatia (106-29)	7/13/1996	10/18/2000	4.26
Convention for International Carriage by Air (106-45)	5/28/1999	7/31/2003	4.18
International Convention for the Suppression of Terrorist Bombings (106-6)	1/12/1998	12/5/2001	3.90
Investment Treaty With Rwanda (110-23)	2/19/2008	9/26/2011	3.60
Extradition Treaty With United Kingdom (108-23)	3/31/2003	9/29/2006	3.50
Inter-American Convention Against Terrorism (107-18)	6/3/2002	10/7/2005	3.34

<b>Treaty Name &amp; Citation (T-Doc.)</b>	<b>Date of Signature</b>	<b>Date of Senate Consent</b>	<b>Duration of Interim Obligations (years)</b>
Investment Treaty With Jordan (106-30)	7/2/1997	10/18/2000	3.29
Treaty With United Kingdom Concerning Defense Trade Cooperation (110-7)	6/21/2007	9/29/2010	3.27
Protocol Amending 1949 Convention of Inter-American Tropical Tuna Commission (107-2)	6/11/1999	9/5/2002	3.23
Investment Treaty With Azerbaijan (106-47)	8/1/1997	10/18/2000	3.21
Treaty With Australia Concerning Defense Trade Cooperation (110-10)	9/5/2007	9/29/2010	3.07
International Convention for Suppression of Acts of Nuclear Terrorism (110-4)	9/14/2005	9/25/2008	3.03
Hague Convention on International Recovery of Child Support and Family Maintenance (110-21)	11/23/2007	9/29/2010	2.85
Agreement With Russian Federation Concerning Polar Bear Population (107-10)	10/16/2000	7/31/2003	2.79
Mutual Legal Assistance Treaty With Germany (108-27)	10/14/2003	7/27/2006	2.79
Extradition Treaty With Latvia (109-15)	12/7/2005	9/23/2008	2.79
U.N. Convention Against Corruption (109-6)	12/9/2003	9/15/2006	2.77
Investment Treaty With Lithuania (106-42)	1/14/1998	10/18/2000	2.76
Mutual Legal Assistance Treaty With Bermuda (111-6)	1/12/2009	9/26/2011	2.71
Mutual Legal Assistance Treaty With Japan (108-12)	8/5/2003	4/7/2006	2.67

<b>Treaty Name &amp; Citation (T-Doc.)</b>	<b>Date of Signature</b>	<b>Date of Senate Consent</b>	<b>Duration of Interim Obligations (years)</b>
Extradition Treaty With Estonia (109-16)	2/8/2006	9/23/2008	2.63
Protocols of 2005 to the Convention Concerning Safety of Maritime Navigation and to the Protocol Concerning Safety of Fixed Platforms on the Continental Shelf (110-8)	2/17/2006	9/25/2008	2.61
Treaty With Russia on Mutual Legal Assistance in Criminal Matters (106-22)	6/17/1999	12/19/2001	2.51
Investment Treaty With Bolivia (106-26)	4/17/1998	10/18/2000	2.50
Treaty With Egypt on Mutual Legal Assistance in Criminal Matters (106-19)	5/3/1998	10/18/2000	2.46
Extradition Treaty With Malta (109-17)	5/18/2006	9/23/2008	2.35
Protocol Amending the 1950 Consular Convention With Ireland (106-43)	6/16/1998	10/18/2000	2.34
Treaty With Ukraine on Mutual Legal Assistance in Criminal Matters (106-16)	7/22/1998	10/18/2000	2.24
Treaty With Belize on Mutual Legal Assistance in Criminal Matters (107-13)	9/19/2000	11/14/2002	2.15
Treaty With Malaysia on Mutual Legal Assistance (109-22)	7/28/2006	9/23/2008	2.15
Convention Strengthening Inter-American Tuna Commission (109-2)	11/14/2003	11/18/2005	2.01
Agreement With Canada on Pacific Hake/Whiting (108-24)	11/21/2003	11/18/2005	1.99

<b>Treaty Name &amp; Citation (T-Doc.)</b>	<b>Date of Signature</b>	<b>Date of Senate Consent</b>	<b>Duration of Interim Obligations (years)</b>
Optional Protocol No. 1 to Convention on Rights of the Child on Involvement of Children in Armed Conflict (106-37A)	7/5/2000	6/18/2002	1.95
Optional Protocol No. 2 to Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (106-37B)	7/5/2000	6/18/2002	1.95
Extradition Treaty With Paraguay (106-4)	11/9/1998	10/18/2000	1.94
Tax Convention With Malta (111-1)	8/8/2008	7/15/2010	1.94
International Convention for Suppression of Financing Terrorism (106-49)	1/10/2000	12/5/2001	1.90
Investment Treaty With Mozambique (106-31)	12/1/1998	10/18/2000	1.88
Treaty With France on Mutual Legal Assistance in Criminal Matters (106-17)	12/10/1998	10/18/2000	1.86
Second Protocol Amending Extradition Treaty With Canada (107-11)	1/12/2001	11/14/2002	1.84
Amendments to the Constitution and Convention of the ITU (110-16)	11/24/2006	9/25/2008	1.84
Treaty With Ireland on Mutual Legal Assistance in Criminal Matters (107-9)	1/18/2001	11/14/2002	1.82
Singapore Treaty on the Law of Trademarks (110-2)	3/28/2006	12/7/2007	1.69
Convention With Great Britain and Northern Ireland regarding Double Taxation and Prevention of Fiscal Evasion (107-19)	7/24/2001	3/13/2003	1.64

Treaty Name & Citation (T-Doc.)	Date of Signature	Date of Senate Consent	Duration of Interim Obligations (years)
Protocol Amending Tax Convention With New Zealand (111-3)	12/1/2008	7/15/2010	1.62
Investment Treaty With El Salvador (106-28)	3/10/1999	10/18/2000	1.61
Tax Convention With Bulgaria With Proposed Protocol of Amendment (110-18)	2/23/2007 <sup>364</sup>	9/23/2008	1.58
Protocol Amending Tax Convention With Denmark (109-19)	5/2/2006	11/16/2007	1.54
Protocol Amending Tax Convention With Germany (109-20)	6/1/2006	12/14/2007	1.54
Protocol Amending Tax Convention With Sri Lanka (108-9)	9/20/2002	3/25/2004	1.51
Tax Convention With Bangladesh (109-5)	9/26/2004	3/31/2006	1.51
Protocol Amending Convention With Australia Regarding Double Taxation and Prevention of Fiscal Evasion (107-20)	9/27/2001	3/13/2003	1.46
Protocol Amending Tax Convention With Finland (109-18)	5/31/2006	11/16/2007	1.46

364. While this Tax Convention and Proposed Protocol were signed on February 23, 2007, an additional Protocol amending the Convention was signed on February 26, 2008. See Protocol Amending the Convention Between the Government of the United States of America and the Government of Republic of Bulgaria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Feb. 26, 2008, S. TREATY DOC. NO. 110-18 available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Bulgar08Protocol.pdf>; Letter of Transmittal From President Bush to the Senate (June 4, 2008); Letter of Submittal From the Dep't of State to the President (May 7, 2008), available at <http://www.gpo.gov/fdsys/pkg/CDOC-110tdoc18/pdf/CDOC-110tdoc18.pdf>. The additional Protocol may have altered the interim obligations incurred on February 23, 2007, but would not have eliminated them. Accordingly, the duration of interim obligations under this agreement is calculated from the date on which the Convention and initial Protocol were signed: February 23, 2007.

Treaty Name & Citation (T-Doc.)	Date of Signature	Date of Senate Consent	Duration of Interim Obligations (years)
Extradition Treaty With the Republic of Korea (106-2)	6/9/1998	11/5/1999	1.41
Treaty With Greece on Mutual Legal Assistance in Criminal Matters (106-18)	5/26/1999	10/18/2000	1.39
Treaty With Romania on Mutual Legal Assistance in Criminal Matters (106-20)	5/26/1999	10/18/2000	1.39
Protocol Amending the Tax Convention With France (109-4)	12/8/2004	3/31/2006	1.31
Protocol Amending Tax Convention on Inheritances With France (109-7)	12/8/2004	3/31/2006	1.31
Extradition Treaty With Peru (107-6)	7/26/2001	11/14/2002	1.30
Treaty With Costa Rica on Return of Vehicles and Aircraft (106-40)	7/2/1999	10/18/2000	1.29
Food Aid Convention 1999 (106-14)	6/16/1999	9/20/2000	1.26 <sup>365</sup>
Convention on International Interests in Mobile Equipment and Protocol to Convention on International Interests in Mobile Equipment (108-10)	5/9/2003	7/21/2004	1.20
Protocol Amending 1962 Extradition Convention With Israel (109-3)	7/6/2005	9/15/2006	1.19
Extradition Treaty With South Africa (106-24)	9/16/1999	10/18/2000	1.09
Treaty With South Africa on Mutual Legal Assistance in Criminal Matters (106-36)	9/16/1999	10/18/2000	1.09

365. With regard to this treaty, the United States not only incurred interim obligations but agreed to provisional application. *See* Letter of Transmittal From President Clinton to the Senate (Oct. 13, 1999); Letter of Submittal From the Dep't of State to the President (Sept. 2, 1999), *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-106tdoc14/pdf/CDOC-106tdoc14.pdf>; *supra* note 10.

<b>Treaty Name &amp; Citation (T-Doc.)</b>	<b>Date of Signature</b>	<b>Date of Senate Consent</b>	<b>Duration of Interim Obligations (years)</b>
Treaty With India on Mutual Legal Assistance in Criminal Matters (107-3)	10/17/2001	11/14/2002	1.08
Extradition Treaty With Lithuania (107-4)	10/23/2001	11/14/2002	1.06
Investment Treaty With Bahrain (106-25)	9/29/1999	10/18/2000	1.05
Extradition Treaty With Sri Lanka (106-34)	9/30/1999	10/18/2000	1.05
Tax Convention With Belgium (110-3)	11/27/2006	12/14/2007	1.05
Extradition Treaty With Romania and Protocol to the Treaty on Mutual Legal Assistance in Criminal Matters With Romania (110-11)	9/10/2007	9/23/2008	1.04
Extradition Treaty With Bulgaria and an Agreement on Certain Aspects of Mutual Legal Assistance in Criminal Matters With Bulgaria (110-12)	9/19/2007	9/23/2008	1.01
Protocol Amending 1980 Tax Convention With Canada (110-15)	9/21/2007	9/23/2008	1.01
Treaty With Honduras for Return of Stolen, Robbed, and Embezzled Vehicles and Aircraft, With Annexes and Exchange of Notes (107-15)	11/23/2001	11/14/2002	0.98



Treaty Name & Citation (T-Doc.)	Date of Signature	Date of Senate Consent	Duration of Interim Obligations (years)
Agreement Amending Treaty With Canada Concerning Pacific Coast Albacore Tuna Vessels and Port Privileges (108-1)	8/13/2002 <sup>366</sup>	7/31/2002	0.97
Tax Convention With Iceland (110-17)	10/23/2007	9/23/2008	0.92
Protocol Amending the Tax Convention With Germany (106-13)	12/14/1998	11/5/1999	0.89
Protocol Amending Tax Convention With France (111-4)	1/13/2009	12/3/2009	0.89
Investment Treaty With Uruguay (109-9)	11/4/2005	9/12/2006	0.86
Treaty With Cyprus on Mutual Legal Assistance in Criminal Matters (106-35)	12/20/1999	10/18/2000	0.83
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (109-10A)	12/8/2005	9/29/2006	0.81
The Moscow Treaty (107-8)	5/24/2002	3/6/2003	0.78

366. This agreement was effected by an exchange of notes (dated September 17 and August 13, 2002) between the United States and Canada subject to a later exchange of notes indicating that domestic procedures for consent had been completed. *See* Note on Behalf of the U.S. Secretary of State to the Ambassador of Canada (July 17, 2002); Note From the Canadian Minister and Deputy Head of Mission to the U.S. Secretary of State (August 13, 2002), *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-108tdoc1/pdf/CDOC-108tdoc1.pdf>. The President, Senate, and State Department all described this later exchange of notes as involving ratification. *See* Letter of Transmittal From President Bush to the Senate (Jan. 9, 2003) and Letter of Submittal From the Dep't of State to the President (Oct. 9, 2002), *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-108tdoc1/pdf/CDOC-108tdoc1.pdf>, as well as the language of the Senate resolution of advice and consent, *available at* <http://thomas.loc.gov/home/treaties/treaties.html> (search "108-1"; then select "Treaty Number: 108-1"). Because exchange of instruments subject to ratification triggers interim obligations just as signature subject to ratification does, *see supra* note 64, this agreement is included in Table 2, and the duration of interim obligations is calculated from the date the initial exchange of notes was concluded: August 13, 2002. *Compare supra* note 359.

Treaty Name & Citation (T-Doc.)	Date of Signature	Date of Senate Consent	Duration of Interim Obligations (years)
Tax Convention With Venezuela (106-3)	1/25/1999	11/5/1999	0.78
Treaty With Russia on Measures for Further Reduction and Limitation of Strategic Offensive Arms (111-5)	4/8/2010	12/22/2010	0.71
Protocol Amending Tax Convention With the Netherlands (108-25)	3/8/2004	11/17/2004	0.69
Additional Protocol to Investment Treaty With Romania (108-13)	9/22/2003	5/6/2004	0.62
Additional Protocol Amending Investment Treaty With Bulgaria (108-15)	9/22/2003	5/6/2004	0.62
Additional Investment Protocol With the Slovak Republic (108-19)	9/22/2003	5/6/2004	0.62
Additional Investment Protocol With Latvia (108-20)	9/22/2003	5/6/2004	0.62
Additional Investment Protocol With Lithuania (108-21)	9/22/2003	5/6/2004	0.62
Extradition Treaty With Belize (106-38)	3/30/2000	10/18/2000	0.55
Investment Protocol With Estonia (108-17)	10/24/2003	5/6/2004	0.53
Protocol Amending the Convention With Sweden on Taxes on Income (109-8)	9/30/2005	3/31/2006	0.50
Additional Investment Protocol With the Czech Republic (108-18)	12/10/2003	5/6/2004	0.41
Protocol Amending Investment Treaty With Panama (106-46)	6/1/2000	10/18/2000	0.38
Tax Convention With Slovenia (106-9)	6/21/1999	11/5/1999	0.37

<b>Treaty Name &amp; Citation (T-Doc.)</b>	<b>Date of Signature</b>	<b>Date of Senate Consent</b>	<b>Duration of Interim Obligations (years)</b>
Treaty With Panama on Return of Vehicles and Aircraft (106-44)	6/6/2000	10/18/2000	0.37
Treaty With Mexico on Delimitation of Continental Shelf (106-39)	6/9/2000	10/18/2000	0.36
Treaty With Liechtenstein on Mutual Legal Assistance in Criminal Matters (107-16)	7/8/2002	11/14/2002	0.35
Taxation Convention With Japan (108-14)	11/6/2003	3/9/2004	0.34
Additional Protocol Concerning Business and Economic Relations With Poland (108-22)	1/12/2004	5/6/2004	0.32
Second Additional Protocol Modifying Convention With Mexico Regarding Double Taxation and Prevention of Fiscal Evasion (108-3)	11/26/2002	3/13/2003	0.30
2nd Protocol Amending Tax Convention With Barbados (108-26)	7/14/2004	10/10/2004	0.24
Tax Convention With Denmark (106-12)	8/19/1999	11/5/1999	0.21
Protocols to the North Atlantic Treaty of 1949 on Accession of Albania and Croatia (110-20)	7/9/2008	9/25/2008	0.21
Tax Convention With Italy (106-11)	8/25/1999	11/5/1999	0.19
Protocols to North Atlantic Treaty of 1949 on Accession of Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia (108-4)	3/26/2003	5/8/2003	0.12
Tax Convention With Ireland (106-15)	9/24/1999	11/5/1999	0.11

Total Treaties Signed Subject to Ratification: 139

TABLE 3. Treaties Involving Consent Without Signature

Treaty Name & Citation (T-Doc)	Date of Conclusion	Date of Senate Approval	Method of Consent
The Hague Protocol (106-1B)	5/14/1954		Accession
Convention (No. 182) for Elimination of the Worst Forms of Child Labor (106-5)	6/17/1999	11/5/1999	Ratification
Convention (No. 176) Concerning Safety and Health in Mines (106-8)	6/22/1995	9/20/2000	Ratification
1997 Amendment to Montreal Protocol on Substances That Deplete the Ozone Layer (106-10)	9/15/1997 through 9/17/1997	10/9/2002	Ratification
International Plant Protection Convention (106-23)	11/17/1997	10/18/2000	Acceptance <sup>367</sup>
Amendment to Montreal Protocol (“Beijing Amendment”) (106-32)	12/3/1999	10/9/2002	Ratification
Protocol Relating to the Madrid Agreement (106-41)	6/27/1989	10/17/2002	Accession

367. While the Senate resolution of advice and consent speaks of ratification, this treaty speaks of consent through acceptance. Compare Library of Congress Thomas Database, <http://thomas.loc.gov/home/treaties/treaties.html> (search “106-23”; then select “Treaty Number: 106-23”), with International Plant Protection Convention art. XXI(4-5), Mar. 23, 2000, S. TREATY DOC. NO. 106-23, available at <http://www.gpo.gov/fdsys/pkg/CDOC-106tdoc23/pdf/CDOC-106tdoc23.pdf>. Moreover, the President and Department of State used the term acceptance in transmitting the treaty to the Senate and President, respectively. See Letter of Transmittal From President Clinton to the Senate (Mar. 23, 2000); Letter of Submittal From the Dep’t of State to the President (Feb. 10, 2000), available at <http://www.gpo.gov/fdsys/pkg/CDOC-106tdoc23/pdf/CDOC-106tdoc23.pdf>.

Treaty Name & Citation (T-Doc)	Date of Conclusion	Date of Senate Approval	Method of Consent
Amendments to the 1987 Treaty on Fisheries With Pacific Island States (108-2)	3/30/1999; 3/24/2002 <sup>368</sup>	7/31/2003	Ratification
Protocol of Amendment to International Convention on Simplification and Harmonization of Customs Procedures (108-6)	6/26/1999	9/26/2005	Accession
Amendment to Article 1 of the Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (109-10B)	12/21/2001	9/23/2008	Ratification
CCW Protocol on Explosive Remnants of War (109-10C)	11/28/2003	9/26/2008	Ratification
Amendment to Convention on Physical Protection of Nuclear Material (110-6)	7/8/2005	9/25/2008	Ratification
Protocol of Amendments to Convention on International Hydrographic Organization (110-9)	4/14/2005	7/21/2008	Ratification

368. Whether the United States ratified these Amendments without prior signature is uncertain. There is evidence of initialing by the parties. See Amendments to the 1987 Treaty on Fisheries With Pacific Island States, Feb. 11, 2003, S. TREATY DOC. NO. 108-2, available at <http://www.gpo.gov/fdsys/pkg/CDOC-108tdoc2/pdf/CDOC-108tdoc2.pdf>. However, the Vienna Convention provides for initialing as a means of authenticating the text of agreements. See Vienna Convention, *supra* note 9, art. 10; *but cf. id.* art. 12(2)(a) (noting that, if the parties so agree, initialing can constitute signature, at least when consent to the treaty is to be expressed by signature alone). Moreover, the original treaty to which the Amendments relate provided that amendments must “be adopted by the approval of all the parties, and shall enter into force upon receipt by the depositary of instruments of ratification, acceptance or approval by the parties.” Letter of Submittal From the Dep’t of State to the President (Dec. 28, 2002), available at <http://www.gpo.gov/fdsys/pkg/CDOC-108tdoc2/pdf/CDOC-108tdoc2.pdf>. On these facts, it would appear that the United States did not sign the Amendments subject to ratification.

Treaty Name & Citation (T-Doc)	Date of Conclusion	Date of Senate Approval	Method of Consent
International Convention Against Doping in Sport (110-14)	10/19/2005	7/21/2008	Ratification
Agreement on Conservation of Albatrosses and Petrels (110-22)	6/19/2001		Accession
Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty (111-2)	6/14/2005		Ratification <sup>369</sup>

Total Treaties Involving Consent Without Signature: 16

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369. According to the State Department, this “Annex will enter into force only when the . . . Parties that adopted the Annex notify the depositary government they have approved it.” Letter of Submittal From the Dep’t of State to the President (Mar. 13, 2009), *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-111tdoc2/pdf/CDOC-111tdoc2.pdf>. Both the President and State Department anticipated that approval would be communicated through ratification. *See id.*; Letter of Transmittal From President Obama to the Senate (Apr. 2, 2009), *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-111tdoc2/pdf/CDOC-111tdoc2.pdf>.