

EXECUTIVE AGGRANDIZEMENT IN FOREIGN AFFAIRS LAWMAKING

Michael P. Van Alstine^{*}

This Article analyzes the claimed power of the president to create federal law on the foundation of the executive's status as the constitutional representative of the United States in foreign affairs. Executive branch advocates have claimed such a power throughout constitutional history. In the most recent act of this historical drama, President Bush last year issued a surprise "Determination," which asserted that executive powers implied from Article II of the U.S. Constitution permit the president both to create and to unilaterally enforce the foreign affairs obligations of the United States under international law.

The Article first sets the context with a summary of the wide array of practical powers of the president in matters of foreign affairs. Unfortunately, the Constitution's text provides only limited guidance on the president's legal powers on this score. Nonetheless, as the Article describes, the supposed constitutional silence has motivated numerous presidents to assert a domestic lawmaking authority to advance executive branch policy preferences in foreign affairs. The broad claims of presidential power by the present Bush Administration have revived these historical controversies with particular vigor.

With this background, the Article develops three core principles of executive lawmaking on the foundation of the foreign affairs obligations of the United States: (1) that the Constitution does not vest in the president a general, discretionary lawmaking power in foreign affairs, even to enforce formal rights recognized in or formal obligations owed under international law; (2) that the president nonetheless may obtain such a power through an express or implied delegation from the U.S. Congress, including through the vehicle of a treaty; and (3) that the Constitution itself delegates to the president certain powers in foreign affairs, but the domestic incidents of these powers are both few and limited, and must yield to congressional power in any event.

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^{*} Professor of Law, University of Maryland School of Law. Dr. Jur., 1994, M. Jur. Comp., 1992, University of Bonn, Germany; J.D., 1986, George Washington University. I would like to express my gratitude to Professors Mark Graber, Julian Ku, and Nicholas Quinn Rosenkranz for their comments on earlier drafts of this Article and to Professors Greg Young and Jana Singer for thoughtful conversations on the themes developed herein. I also thank Ann Marie Molinaro, Karlene Fischer, and Jennifer Sweigart for their excellent research assistance.

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INTRODUCTION

The scope of the “executive Power” vested in the president by Article II of the U.S. Constitution¹ has provoked controversy since the very founding of the Republic. Considered only for affirmative grants of power, the president’s Article II authority would appear to be quite limited.² Undaunted by the text, advocates of strong presidential power beginning with Alexander Hamilton have nonetheless advanced essentialist claims about the nature of the executive in our tripartite, federal system of government.³ Taken at their most expansive, these claims hold that, in contrast to the specifically enumerated legislative powers in Article I, the Constitution vests in the president the complete residuum of executive powers not expressly allocated to the other branches.⁴

In no field has the claim of implied executive powers been as forceful as in foreign affairs.⁵ Aided by the U.S. Supreme Court’s penchant for expansive rhetoric on the subject,⁶ some have argued that in matters of foreign affairs,

1. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

2. See *id.* art. II, § 2, cl. 1 (designating the president as the “Commander in Chief of the Army and Navy of the United States”); *id.* art. II, §§ 2–3 (granting the president the authority, with the advice and consent of the U.S. Senate, to appoint and receive ambassadors and other public ministers).

3. See 7 THE WORKS OF ALEXANDER HAMILTON 81 (John C. Hamilton ed., 1851) [hereinafter HAMILTON] (arguing that the Vesting Clause of Article II grants implied executive powers to the president and reasoning that “[t]he general doctrine of our Constitution [is] that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument”); *infra* notes 184–191 and accompanying text (examining Hamilton’s views in greater detail).

4. See, e.g., H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 543–44 (1999) (arguing that the structure of the U.S. Constitution confers on the president certain “autonomous” and “independent” powers); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1677 (2002) (arguing that the distinctive wording of Article II’s Vesting Clause “indicates that . . . the President’s powers include inherent executive powers that are unenumerated in the Constitution”); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1395–1400 (1994) (broadly examining the powers conferred on the president through the Vesting Clause of Article II).

5. See, e.g., Powell, *supra* note 4, at 541–44 (presenting the argument that Article II impliedly confers on the president expansive powers over foreign affairs); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252–61 (2001) (developing a comprehensive historical and textual defense for implied executive powers in foreign affairs).

6. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (observing that the president has a “unique responsibility” in “foreign and military affairs”); *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (stating that the president has “the lead role . . . in foreign policy”); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (observing that the president “possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation’s organ in foreign affairs”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318–19 (1936) (asserting that the president is the “sole organ” in foreign affairs).

the president possesses inherent, perhaps even extraconstitutional, powers.⁷ Recent expansive assertions of implied executive authority by the present administration against the backdrop of national security considerations have also added a particularly combustible fuel to the controversy.⁸

On a separate plane, an equally contentious debate has raged over whether, and if so how, international law penetrates into our domestic legal system. The power of the president and the U.S. Senate to transform treaty obligations into judicially enforceable federal law is now beyond reasonable dispute.⁹ Nonetheless, some scholars have of late advanced a spirited challenge¹⁰

7. The concept of extraconstitutional executive powers in foreign affairs traces its lineage to Justice Sutherland's famous dicta in *Curtiss-Wright*, 299 U.S. at 318–19 (asserting that “the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution,” but rather they were “vested in the federal government as necessary concomitants of nationality” and locating much of such vested powers in the president); see also G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 4–5 (1999) (arguing that the early twentieth century witnessed a constitutional transformation such that “by the late 1930s federal executive hegemony in foreign relations had become constitutional orthodoxy”). But see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 329 nn.9–10 (2d ed. 1996) (canvassing commentary critical of Justice Sutherland's views in *Curtiss-Wright*).

8. The Bush Administration has relied on claims of implied and inherent Article II authority for an assertion of a broad array of powers, including those regarding the war in Iraq and the detainment of alleged supporters of international terrorism. See, e.g., U.S. DEP'T OF JUSTICE, *LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1* (2006) [hereinafter NSA ACTIVITIES MEMORANDUM], available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> (asserting that the president has “inherent constitutional authority . . . to conduct warrantless surveillance for intelligence purposes”); Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def. 11–15, 32–34 (Jan. 22, 2002) [hereinafter Bybee Memorandum] (supporting the presidential detention of alleged foreign terrorists on the basis that “[f]rom the very beginnings of the Republic” the Vesting Clause of Article II “has been understood to grant the President plenary control over the conduct of foreign relations”); Memorandum from John Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel of the Dep't of Def. 14–16 (Jan. 9, 2002) [hereinafter Yoo/Delahunty Memorandum] (supporting detention and use of force against alleged terrorists in the United States on the same grounds); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 548 (2004) (observing that “[i]n recent years” the theory of implied executive powers under Article II “has gained newfound popularity” among the Bush Administration and its supporters).

9. See *infra* notes 154–159, 304–316 and accompanying text (analyzing the power of the treaty lawmakers to create federal law through “self-executing” treaties).

10. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849 (1997) (criticizing the “nationalist” view that customary international law is an element of federal common law); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1664 (1997) (same).

to the distilled modern wisdom that international law generally operates as a direct element of federal common law.¹¹

Throughout constitutional history, advocates of executive authority have attempted to insert a presidential lawmaking power at the intersection of these debates. Their specific claim is that the existence of a norm of international law confers on the executive a discretionary lawmaking authority to compel domestic compliance on its own initiative. Alexander Hamilton, for example, sought to justify the domestic application of President George Washington's Neutrality Declaration on the national executive's supposed authority to enforce the existing state of international law.¹² During the first Adams Administration, then-Congressman John Marshall likewise made an impassioned plea for a presidential power to implement treaty obligations through domestic enforcement measures.¹³ Similar claims have come from numerous presidents, including most prominently James Madison, James Monroe, John Tyler, Chester Arthur, William McKinley, Woodrow Wilson, Franklin Roosevelt, Harry Truman, Ronald Reagan, and William Clinton.¹⁴

A recent surprise "Determination" by President George W. Bush has revived this enduring debate with particular controversy. In a simple two-paragraph memorandum to the attorney general,¹⁵ the administration claimed—amidst abundant ironies¹⁶—that the implied executive powers of Article II include an authority to compel compliance with international law as

11. See, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (defending the majority view and reviewing extensive U.S. Supreme Court authority for the proposition that customary international law operates as an element of federal common law); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

12. See *infra* notes 66–68 and accompanying text (discussing this episode in greater detail).

13. See *infra* notes 70–75 and accompanying text (reviewing Marshall's arguments in their historical context).

14. See *infra* Part I.B (canvassing these historical assertions of authority).

15. Memorandum from President George W. Bush to Alberto R. Gonzales, U.S. Att'y Gen. (Feb. 28, 2005) [hereinafter *Determination*], available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>; see also *infra* note 115 and accompanying text (quoting the relevant paragraph of the *Determination* in full).

16. As explained in more detail below, the president's order involved federal intrusion into an area of traditional state competence (criminal law). See *infra* Part I.C.2. Moreover, the state at issue was the president's home state of Texas, and its authorities immediately rejected his assertion of authority. See *infra* note 128. Finally, the president's actions directly conflicted with an earlier position of the Clinton Administration, which asserted that our federal system did not permit the national government to so intrude into state prerogatives. See *infra* note 284 (explaining that in an earlier proceeding on the same issue, the Clinton Administration declared that the president does not possess the power now claimed).

determined solely by the president.¹⁷ Specifically, the Determination ordered state courts to implement a decision of the International Court of Justice (ICJ),¹⁸ even though the administration has argued that neither the decision itself nor the related treaty obligations are directly enforceable by the affected individuals in domestic law.¹⁹ Moreover, a core feature—and presumably a core purpose—of this assertion of executive power is that it removes from the judicial branch any responsibility for interpreting and applying the domestic law incidents of international law in the United States.²⁰

Unfortunately, the Court has never squarely confronted the specific constitutional issues at stake. Indeed, President Bush's recent Determination produced only substantial disarray in the present Court, and ultimately a decision to defer consideration to future proceedings.²¹

In this Article, I undertake a critical examination of the president's constitutional authority both to create the formal foreign affairs obligations of the United States and to compel compliance as a matter of federal law. Part I first sets the legal and factual context. After a brief review of the president's constitutional powers in foreign affairs,²² it reviews the historical assertions of executive lawmaking authority over foreign affairs lawmaking.²³ Part I then examines the recent revival of the controversy by the Bush Administration in its claim to a unilateral, discretionary power to define and enforce international law.²⁴

Part II turns to the first—and most controversial—of the three core principles of executive lawmaking: The Constitution does not vest in the president a general, independent lawmaking power in foreign affairs, even to enforce formal obligations under international law. This principle results from a critical examination of three core constitutional claims advanced by scholars and executive branch advocates to support executive lawmaking in the field. Distilled to their essence, these claims argue that where a matter is fundamental

17. Determination, *supra* note 15; see also Brief for the United States as Amicus Curiae Supporting Respondent at 49–57, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) [hereinafter U.S. Amicus Brief *Medellín*], available at <http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.pdf> (defending the president's authority to issue the Determination).

18. Determination, *supra* note 15 (citing *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31)).

19. See *infra* notes 114–123 (examining the administration's defense of the Determination). In an unrelated case a year later, the Court agreed with the narrow claim that decisions of the International Court of Justice (ICJ) are not formally binding on the courts of the United States. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006); *infra* notes 134–141 and accompanying text (reviewing this decision).

20. See *infra* notes 117–123 (analyzing the claim that domestic enforcement of international law is solely a matter for the “political branches”).

21. See *infra* Part I.C.3.

22. See *infra* Part I.A.

23. See *infra* Part I.B.

24. See *infra* Part I.C.

to the foreign affairs obligations of the United States, the executive has the constitutional power to compel compliance as a matter of domestic law on its own initiative, even without the express or even implied consent of the U.S. Congress.

The first claim, founded on the Take Care Clause of Article II,²⁵ reasons that because international law is part of federal law, the president has a discretionary power to “take Care” that it is “faithfully executed.”²⁶ The second claim is premised on an essentialist understanding of the “executive Power” of Article II. This broader and more abstract view holds that the Vesting Clause of Article II²⁷ represents an affirmative grant of “residual” powers that inhere in the president, which include an authority to shape and enforce domestically the executive’s formal foreign affairs policy.²⁸ Part II finally addresses a subtle, but potentially powerful, third claim, which relates to the domestic effect of treaties. Although the most recent controversy focuses on a particular constellation of treaties, a close examination of the structure and idiom of the supporting arguments reveals a campaign to secure sole executive control over the domestic enforcement of treaty law in general.²⁹ While some of the claims of executive power are more compelling than others, I conclude in Part II that none tells a convincing story that is faithful to both the separation of powers doctrine and the constitutional controls on executive lawmaking.

This does not mean that the United States lacks the means to ensure compliance with its formal foreign affairs obligations, nor that the Constitution precludes executive agency in the process. Rather, the answer is found in fidelity to the separation of powers doctrine. This insight is at the foundation of a second, and less controversial, principle of foreign affairs lawmaking³⁰: The executive branch of government does not possess a general, independent authority to compel domestic compliance with all forms of international law. Nonetheless, as Part III explains, the president may obtain such a power through an express or implied delegation, whether from the Congress as a whole via Article I legislation or from the Senate via a treaty.

Part IV examines the third core principle of foreign affairs lawmaking, which focuses on a final, narrow field of powers expressly delegated to the president by the Constitution. Article II confers on the national executive certain independent powers with foreign affairs implications, including control over ambassadorial

25. U.S. CONST. art. II, § 3.

26. See *infra* Part II.A.

27. U.S. CONST. art. II, § 1, cl. 1.

28. See *infra* Part II.B.

29. See *infra* Part II.C.

30. See *infra* Part III.

relations,³¹ command of the armed forces,³² and the power to "make Treaties."³³ As Part IV explains, however, the domestic law incidents of these powers are both few and limited, and must always yield to the legislative powers of Congress.

"Taken by and large," the distinguished constitutional historian Edward Corwin wrote in the last century, "the history of the presidency is a history of aggrandizement."³⁴ This observation has been particularly apt in the field of foreign affairs, where expansive Supreme Court rhetoric, coupled with the absence of noteworthy federalism limits on national power, has led to ever-broader executive encroachments into the lawmaking province of the legislative branch. In this light, the present administration's claim of a unilateral, discretionary power to define and enforce international law reflects little more than the most recent act in an historical drama of interbranch competition. The message of this Article, however, is that it is precisely in such circumstances that the separation of powers doctrine should operate as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."³⁵

I. THE CONTEXT FOR A CONSTITUTIONAL CONTROVERSY OVER EXECUTIVE POWER

A. Executive Power, Foreign Affairs, and Federal Lawmaking

Article II, Section 2, of the Constitution delegates to the president the power to "make Treaties," provided a supermajority of the Senate concurs.³⁶ The president also has certain undefined domestic powers to create international obligations for the United States in his capacity as the nation's "constitutional representative"³⁷ in foreign affairs.³⁸ Of their nature, however, these obligations are creatures of international law and function primarily as elements of that external legal regime.

31. U.S. CONST. art. II, §§ 2-3 (granting the president the authority, with the advice and consent of the Senate, to appoint and receive ambassadors and other public ministers).

32. *Id.* art. II, § 2, cl. 1 (designating the president as the "Commander in Chief of the Army and Navy of the United States").

33. *Id.* art. II, § 2, cl. 2.

34. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 29-30 (Randall W. Bland et al. eds., 5th rev. ed. 1984).

35. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*).

36. U.S. CONST. art. II, § 2, cl. 2.

37. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting S. REP. NO. 14-8, at 24 (1816)).

38. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1987) ("[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.").

Does the general “executive Power” of Article II also grant to the president a discretionary authority to transform these international obligations into domestic law? Before this question can be profitably analyzed we must first recall briefly both the constitutional allocation of authority over foreign affairs and the role of international law in our federal legal system. This groundwork will bring into focus the profound issues at stake in recognizing an independent and discretionary executive power to enforce international law.

It is familiar ground that, in its most basic design, the Constitution establishes a national government of limited, enumerated, and mostly shared lawmaking powers.³⁹ The field of foreign affairs, however, represents a marked departure from this model. Throughout its history, the Court has emphasized that “foreign affairs and international relations [are] matters which the Constitution entrusts solely to the Federal Government”⁴⁰ and that the “[t]he Constitution . . . speaks with no uncertain sound upon this subject.”⁴¹

Unfortunately, the boundaries of national power in foreign affairs sometimes have been distorted precisely by the Court’s penchant for expansive rhetoric on executive power in the field. The most prominent, though by no means only,⁴² example of this phenomenon is the Court’s unrestrained observation in *United States v. Curtiss-Wright Export Corp.*⁴³ that the president is the “sole organ” of the United States in its external relations.⁴⁴ The Court itself has described the distilled effect of this rhetoric as an “historical gloss on the ‘executive Power’” of Article II, which confers on the president the “vast share of responsibility for the conduct of our foreign relations.”⁴⁵

The challenge arises when executive control over external relations collides with the constitutional allocation of authority over domestic lawmaking. Simple presidential policy preferences do not alone lead to a general derivative power to create domestic law whenever a matter touches on

39. See *Miller v. French*, 530 U.S. 327, 341 (2000) (“The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this ‘very structure’ of the Constitution that exemplifies the concept of separation of powers.” (quoting *INS v. Chadha*, 462 U.S. 919, 946 (1983))).

40. *Zschernig v. Miller*, 389 U.S. 429, 436 (1968); see also *Curtiss-Wright*, 299 U.S. at 317 (“The Framers’ Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.”); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (observing that “[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power”).

41. *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

42. See *supra* note 6.

43. 299 U.S. 304.

44. *Id.* at 319.

45. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)); see also *supra* note 6.

foreign affairs, a point the Court emphatically affirmed over a half century ago.⁴⁶ Nonetheless, the president's direct control over the country's sovereign international conduct results in near exclusive authority in the external realm, at least in the absence of contrary congressional actions.⁴⁷ For example, in the international domain, there can be little room for reasonable dispute that the president's status as commander-in-chief,⁴⁸ power to "make Treaties,"⁴⁹ and responsibility over ambassadorial relations⁵⁰ include an authority to recognize governments,⁵¹ direct external military conflicts, and manage our general external legal relations with foreign nations.⁵²

The practical effect of this arrangement is that the president possesses a near monopoly over the creation of sovereign obligations of the United States under international law.⁵³ As the nation's "constitutional representative"⁵⁴ in foreign legal affairs, the president controls the expression of national consent to the distillation of customary international law.⁵⁵ Moreover, executive branch officials serve as the formal representatives of the United States in a variety of

46. See *Youngstown*, 343 U.S. at 587 (rejecting the assertion that the president had the power, based on "the several constitutional provisions that grant executive power to the President," to seize steel mills to avoid a labor strike, and observing that "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").

47. See *id.* at 635-36 & n.2 (Jackson, J., concurring) (observing that the president may "act in external affairs without congressional authority"); cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(1)-(2) (1987) (drawing a distinction between the authority of the president to interpret an international agreement of the United States "in its relations with other states" and the "final authority" of federal courts "to interpret an international agreement for purposes of applying it as law in the United States").

48. U.S. CONST. art. II, § 2, cl. 1. (designating the president as the "Commander in Chief of the Army and Navy of the United States").

49. *Id.* art. II, § 2, cl. 2. (granting the president the authority to "make Treaties," provided a supermajority of the Senate concurs).

50. *Id.* art. II, §§ 2-3 (granting the president the authority, with the advice and consent of the Senate, to appoint and to receive ambassadors and other public ministers).

51. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."); *Baker v. Carr*, 369 U.S. 186, 212 (1962).

52. See *infra* Part IV (examining the extent to which the express constitutional delegations of power in Article II represent an independent executive lawmaking power).

53. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (observing that although the U.S. Congress has express powers to regulate the field, "in foreign affairs the President has a degree of independent authority to act"); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (stating that in matters of foreign affairs the president often has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved" and declaring that the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations [is] a power which does not require as a basis for its exercise an act of Congress").

54. *Curtiss-Wright*, 299 U.S. at 319.

55. Rules of customary international law arise "from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

international organizations,⁵⁶ including the United Nations,⁵⁷ nearly all of which directly or indirectly participate in generating principles of international law.

To be sure, the executive power over treaty-making—the other principal source of international law⁵⁸—is constrained by the constitutional requirement of senatorial consent. Beginning as early as the Washington Administration, however, presidents have made international law agreements with foreign powers without the Senate's advice and consent.⁵⁹ And on the foundation of occasional, if ambiguous, Court approval,⁶⁰ recent occupants of the White House have concluded nearly 15,000 such "sole executive agreements" in the last fifty years alone.⁶¹

These foreign commitments by the president on behalf of the United States are creatures of international law and primarily function as elements of that independent, external legal regime. The mere existence of these international obligations also creates, however, an important constitutional conflict in the domestic legal realm.⁶² Although not without controversy, the accepted wisdom, as most prominently declared by the Court over one hundred years ago, is that "[i]nternational law is part of our law."⁶³ It would seem, then, that executive control over formal international lawmaking carries with it an independent Article II power to create supreme federal law solely on the president's initiative.⁶⁴

56. See, e.g., 22 U.S.C. § 2021(a) (2000) (authorizing the president to appoint representatives to the International Atomic Energy Agency); *id.* § 290(a) (authorizing the president to appoint representatives to the World Health Organization).

57. See *id.* § 287 (authorizing the president to appoint representatives to the United Nations).

58. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) ("International agreements create law for the state parties thereto . . .").

59. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) ("Presidents from Washington to Clinton have made many thousands of agreements . . . on matters running the gamut of U.S. foreign relations." (citing HENKIN, *supra* note 7, at 219, 496 n.163)).

60. See *infra* notes 90–103 and accompanying text.

61. See U.S. DEP'T OF STATE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS CONCLUDED DURING THE YEAR 2 (2005) [hereinafter TREATIES CONCLUDED] (on file with author).

62. Under international law, the president, except in extreme circumstances, has the authority to bind the United States even where he exceeds his domestic constitutional authority. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311(3) (providing that a state "may not invoke a violation of its internal law to vitiate its consent to be bound [to international agreements] unless the violation was manifest and concerned a rule of fundamental importance").

63. *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Doe I v. Unocal Corp.*, 395 F.3d 932, 948 (9th Cir. 2002) (observing that "it is 'well settled that the law of nations is part of federal common law'" (quoting *Trajano v. Marcos* (*In re Estate of Marcos Human Rights Litig.*), 978 F.2d 493, 502 (9th Cir. 1992))); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (citing the "settled proposition that federal common law incorporates international law"), *cert. denied*, 518 U.S. 1005 (1996).

64. Recent executive branch enthusiasts have claimed that this executive authority extends to a "unilateral" power to interpret and reinterpret the domestic effect of even formal treaty obligations. See John Yoo, *Politics as Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 868 (2001) (book review). For a critical

Before critiquing this reasoning in Part II, it is important to briefly recall that presidents have claimed domestic law authority derived from international law since the earliest days of the Constitution. As discussed below,⁶⁵ President Bush's recent assertion of executive authority has revived this enduring debate with particular vigor. To be sure, episodic political considerations have impelled some presidents to a contrary view; but this only brings into better focus the risks of recognizing an unchecked executive power to create domestic law solely at the discretion of the president.

B. Historical Assertions of Executive Authority Over Foreign Affairs Lawmaking

Controversies over the president's power to compel compliance with executive prerogatives regarding international law have existed since the very founding of the Republic. Alexander Hamilton—perhaps the most ardent of Federalist theorists—first articulated such an argument in his famous *Pacificus* defense of President Washington's attempt to enforce his Neutrality Proclamation. As part of a broader defense of executive control over foreign policy,⁶⁶ Hamilton asserted that “[t]he President is the Constitutional Executor of the laws” of which “[o]ur treaties, and the laws of nations, form a part.”⁶⁷ Hamilton reasoned that because the national executive had the power to determine that neutrality was the existing state of the nation under international law, “it becomes both its province and its duty to enforce the laws incident to that state of the nation.”⁶⁸

response to this argument, see Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1274–80 (2002). The Court itself recently refused to follow the executive's interpretation of an international treaty. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

65. See *infra* Part I.B.

66. The thrust of Hamilton's broader Federalist defense of President Washington's Neutrality Proclamation was that in matters of foreign affairs, the executive power includes all authority not textually allocated to another branch, an issue Part II.B takes up in greater detail. Nonetheless, Hamilton recognized that the war declaration and treaty-making powers, for example, were exceptions to his general theory. See Prakash & Ramsey, *supra* note 5, at 329–31 (explaining that in Hamilton's view of the Constitution, “[n]either a declaration of war nor treaty-making was implicated by the President's actions, so they were ‘executive’ (and thus presidential) under Article II, Section 1” and observing that in this regard Hamilton's argument coincided with their theory of executive powers over foreign affairs). For more extensive and competing reviews of Hamilton's views on the executive power over foreign affairs in connection with the Neutrality Proclamation, see *id.* at 328–32; Bradley & Flaherty, *supra* note 8, at 679–86.

67. HAMILTON, *supra* note 3, at 84; see also *id.* at 79 (describing the national executive “as the *organ* of intercourse between the nation and foreign nations [and] as the *power* which is charged with the execution of the laws, of which treaties form a part”); *id.* at 82 (“The Executive is charged with the execution of all laws, the law of nations, as well as the municipal law, by which the former are recognized and adopted.”).

68. *Id.* at 82; see also Bradley & Flaherty, *supra* note 8, at 679–83 (comprehensively examining the context of Hamilton's comments on the Neutrality Declaration).

This issue returned to prominence as part of the famous Robbins Affair during the administration of John Adams. In early 1799, the British government requested the extradition of an alleged mutineer, Jonathan Robbins, who was in federal custody in South Carolina based on certain provisions in the controversial Jay Treaty⁶⁹ between the two countries.⁷⁰ The federal judge overseeing the matter refused to act, however, without the direction of the president.⁷¹ Unfortunately for Adams, the treaty provisions at issue were ambiguous on the scope of extraditable offenses,⁷² and Congress had not implemented the treaty through domestic legislation.

The Robbins Affair thus brought into sharp focus the power of the president to enforce international treaties on executive authority alone. Adams ultimately directed the judge to deliver Robbins to British custody,⁷³ and the judge complied.⁷⁴ Adams's actions, however, engendered substantial political controversy and provoked a famous defense of executive authority by then-Congressman John Marshall. Marshall reasoned that the answer to the issue was to be found in the executive authority to enforce the laws, including the international law obligations set forth in a treaty:

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. . . . Congress, unquestionably, may prescribe the mode . . . but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.⁷⁵

69. 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1776–1909, at 590 (1910) [hereinafter 1 TREATIES].

70. The true identity of the alleged mutineer was in doubt. The British government claimed he was a British subject by the name of Thomas Nash. For a comprehensive review of the Robbins Affair and the constitutional debates it engendered, see Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

71. See H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* 80 (2002).

72. The treaty provision at issue, Article 27, did not expressly permit extradition for mutiny or piracy. Instead, it provided only that the treaty parties would “deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other.” 1 TREATIES, *supra* note 69, at 605. Although there was little doubt that Robbins was a crewmember, his involvement in the murders committed in connection with the mutiny was substantially unclear. For more details on the facts of the Robbins Affair, see Wedgwood, *supra* note 70, at 235–48.

73. Letter from Timothy Pickering, U.S. Sec’y of State, to Thomas Bee, U.S. Dist. J., S.C., (June 3, 1799), in 10 ANNALS OF CONG. 516 (1800).

74. See POWELL, *supra* note 71, at 80.

75. 10 ANNALS OF CONG. 613–14.

There are strong grounds to doubt Marshall's specific assertions regarding the domestic enforcement of treaties.⁷⁶ Nonetheless, his rhetoric and reasoning have had particular historical traction. Marshall's assertion in the course of his speech that the president is "the sole organ of the nation in its external relations" has become a common idiom for broad assertions of executive power in foreign affairs, including in the Court's prominent dicta on the subject in *Curtiss-Wright*.⁷⁷ Moreover, over a century and a half after his speech, the dissenters in the famous *Youngstown Sheet & Tube Co. v. Sawyer*⁷⁸ case unsuccessfully attempted⁷⁹ to channel Marshall's message to justify President Truman's seizure of steel mills to support the undeclared Korean War.⁸⁰

The validity of the broader proposition of executive authority to assert domestic power solely on the foundation of international law nonetheless remained unclear. Not long after the Robbins Affair, for example, President Madison cited accepted usages of international law to justify seizing the property of a private noncombatant in the United States.⁸¹ Although the Court

76. Careful analysis reveals that the Robbins debate was, in substance, merely the first serious confrontation with what we now term the self-execution doctrine. In Marshall's view, the Jay Treaty created a self-executing governmental power to deliver Robbins to British custody, and the only question—which in his view was well within the executive's power under Article II's Take Care Clause—was the particular mode of execution. See *id.* at 613 (arguing that the Robbins case "was completely within the twenty-seventh article of the treaty"); *id.* at 614 (comparing the Jay Treaty with an act of Congress and reasoning that "[i]f . . . there was an act of Congress in the words of the treaty . . . could the President, who is bound to execute the laws, have justified the refusal to deliver up the criminal, by saying, that the Legislature had totally omitted to provide for the case?"). Thirty years later, Marshall—now Chief Justice of the Supreme Court—expressly recognized the rule that some treaties create directly enforceable domestic law and some do not. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (drawing a distinction between a treaty that "operates of itself without the aid of any legislative provision" and one that "import[s] a contract, when either of the parties engages to perform a particular act" and noting that the latter "addresses itself to the political, not the judicial department").

77. 299 U.S. 304, 319 (1936) (quoting Marshall's "sole organ" language as support for a broad discussion of executive power in foreign affairs); see also *infra* note 94 and accompanying text (describing the Court's reliance on the same rhetoric to justify the domestic enforcement of sole executive agreements).

78. 343 U.S. 579 (1952).

79. See *infra* note 235 and accompanying text (reviewing the Court's rejection of President Truman's claimed authority based solely on foreign affairs policy).

80. See *Youngstown*, 343 U.S. at 684–85 (Vinson, C.J., dissenting) (quoting Congressman Marshall's observations with approval as support for the argument that, given the exigencies of the Korean War, President Truman had the authority to seize steel mills to avoid a labor strike).

81. See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814) (reviewing President Madison's assertion of authority). Madison similarly relied on a unilateral interpretation of a treaty with Spain to justify occupation of western Florida in 1810. See Proclamation of Oct. 27, 1810, reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 480–81 (James D. Richardson ed., 1896) ("Whereas the territory [of western Florida] of which possession was not delivered to the United States in pursuance of the treaty concluded at Paris . . . [I] have deemed it right and requisite that possession should be taken of the said territory in the name and

rejected that specific claim,⁸² throughout the nineteenth century presidents took unilateral action without effective challenge based on claimed international law rights or obligations.⁸³ Prominent examples include President Tyler's dispatch of troops to occupy the new State of Texas in 1844 even before the Senate approved the treaty of annexation;⁸⁴ President Arthur's 1882 authorization of foreign military forces on U.S. soil based on an international agreement with Mexico;⁸⁵ President McKinley's joining of a far-ranging international protocol with China at the conclusion of the Boxer Rebellion in 1901;⁸⁶ President Wilson's unilateral arming of merchant vessels in 1917 based on a claimed right to determine the nation's state of belligerency under international law;⁸⁷ and the same president's reliance on international law to justify censoring

behalf of the United States."); ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND THE CONSTITUTIONAL POWER: THE ORIGINS* 292–303 (1976). Eight years later, Secretary of State John Quincy Adams interpreted the same treaty to justify President Monroe's occupation of Amelia Island. For Monroe's message to Congress concerning Amelia Island, see 31 *ANNALS OF CONG.* 111–13 (1818); 4 *MEMOIRS OF JOHN QUINCY ADAMS* 38 (Charles Francis Adams ed., 1875); SOFAER, *supra*, at 340.

82. See *Brown*, 12 U.S. at 128–29 (concluding that such a question of policy based on international usages is "not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary"); see also Jeanne M. Woods, *Presidential Legislating in the Post-Cold War Era: A Critique of the Barr Opinion on Extraterritorial Arrests*, 14 *B.U. INT'L L.J.* 1, 31–32 (1996) (analyzing the *Brown* opinion in light of a contemporary executive branch assertion of authority).

83. For a review of the history of such presidential assertions of authority, see CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 37–42 (1920).

84. See 6 *JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE* 279–91 (1844). President Monroe's attorney general, William Wirt, similarly argued in 1822 that international law would justify the president's unilateral seizure and return of a slave to a foreign national. William Wirt, *Restoration of a Danish Slave*, in 1 *OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES* 567–71 (Benjamin F. Hall ed., 1852).

85. See *Agreement Concerning Pursuit of Indians Across the Border, U.S.–Mex.*, July 19, 1882, reprinted in 1 *TREATIES*, *supra* note 69, at 1144–45 (asserting that "the constitution of the United States empowers the President . . . to allow the passage without the consent of the Senate"); see also BERDAHL, *supra* note 83, at 40–42.

86. See BERDAHL, *supra* note 83, at 39–40; see also 2 *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS* 1776–1909, at 2006–12 (1910).

87. See U.S. DEP'T OF STATE, *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES*, SUPP. 1, at 171 (1917) (setting forth a letter from President Wilson informing foreign states of the arming of U.S. merchant ships); see also BERDAHL, *supra* note 83, at 68–70. At least one congressional opponent expressly rejected Wilson's claim of a power to determine and enforce the nation's obligations under international law. See 54 *CONG. REC.* 4884 (1917) (statement of Sen. Stone) (rejecting the claim that the president's authority to execute the law includes a power "to determine an issue between this Nation and some other sovereignty—an issue involving questions of international law—and to authorize him to settle that law for himself, and then proceed to employ the Army and Navy to enforce his decision").

radio stations in advance of World War I.⁸⁸ Political expediency, on the other hand, has led some presidents to disclaim an independent executive power to enforce international law, most notably in connection with mob violence against foreign nationals in the late 1800s.⁸⁹

The Court stoked the controversy considerably in the early twentieth century with its initial proclamations on the validity of international agreements concluded on the authority of the president alone. The Court's direct engagement with the issue first occurred in the early 1930s, when President Franklin Roosevelt asserted a power to seize private assets on the foundation of the so-called Litvinov Agreement with the Soviet Union.⁹⁰ The Court sustained Roosevelt's action in *United States v. Belmont*,⁹¹ maintaining, without supporting authority, that the president's power to conclude such a binding international agreement without the Senate's consent "may not be doubted."⁹² Relying solely on *Belmont*, the Court later reaffirmed the domestic enforceability of the Litvinov Agreement in *United States v. Pink*⁹³ against a challenge by a private individual. Beyond formulaic citations to the president's status as "sole organ" in foreign affairs,⁹⁴ however, in neither case did the Court explain the constitutional foundation for an executive authority to enforce such an international law obligation as a matter of domestic law.

Unfortunately, the Court's more recent declarations on the subject have only contributed to the ambiguity over executive authority. Four decades after *Belmont* and *Pink*, the Court reviewed the authority of Presidents Carter and Reagan to issue executive orders on the foundation of the so-called

88. See Exec. Order of Aug. 5, 1914, reprinted in 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7962 (James D. Richardson ed., 1921); see also PHILIP QUINCY WRIGHT, THE ENFORCEMENT OF INTERNATIONAL LAW THROUGH MUNICIPAL LAW IN THE UNITED STATES 122 (Ernest L. Bogart et al. eds., 1916).

89. See Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 496–97 (2004) (discussing the inability of the executive branch to control mob violence against foreign citizens in the late 1800s in violation of treaty obligations, and observing that "the federal government continued to disclaim the ability to force state governments to act in absence of federal legislation authorizing federal prosecutions").

90. For a broader review of the related history, see Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 145–54 (1998).

91. 301 U.S. 324 (1937).

92. *Id.* at 330 (stating that "in respect of what was done here, the Executive had authority to speak as the sole organ of that government" and that "[t]he assignment and the agreements in connection therewith did not . . . require the advice and consent of the Senate").

93. 315 U.S. 203, 222–25 (1942).

94. See *Belmont*, 301 U.S. at 330; see also *Pink*, 315 U.S. at 223 (quoting *Belmont* for the proposition that "all international compacts and agreements" are to be treated with similar dignity" to treaties under the Supremacy Clause "for the reason that 'complete power over international affairs is in the national government'"). For a more comprehensive analysis of the *Belmont* and *Pink* cases, see Ramsey, *supra* note 90, at 145–56.

Algiers Accords to resolve an international hostage crisis in Iran.⁹⁵ One of these executive orders sought to implement a mandatory dispute resolution procedure for certain private claims as set forth in the Accords.⁹⁶ The Court endorsed this domestic exercise of authority on the foundation of the sole executive agreements.⁹⁷ But it also declared that it was “crucial” to its decision that Congress had “implicitly approved” the executive actions.⁹⁸

Only two terms ago, however, the Court seemed to backtrack substantially when it addressed the preemptive effect of certain international agreements concluded by President Clinton to resolve lingering private claims from the Second World War.⁹⁹ In *American Insurance Ass’n v. Garamendi*,¹⁰⁰ the Court first reaffirmed the largely unchallenging proposition that the president may conclude external executive agreements with foreign states without “ratification by the Senate or approval by Congress.”¹⁰¹ But in a substantially more questionable passage, the Court also broadly observed that such agreements “[g]enerally . . . are fit to preempt state law, just as treaties are.”¹⁰² It then found that the executive agreements by Clinton preempted a California insurance law specifically targeted at the subject of the international agreements.¹⁰³

I will have much more to say below about this Supreme Court jurisprudence on the domestic effect of sole executive agreements. The repeated historical confrontations over executive lawmaking in foreign affairs nonetheless set an important context for the most recent iteration of the enduring constitutional controversy over executive power in foreign affairs. Predictably, the present administration has now seized on *Garamendi* and its apparently reinvigorated ancestors as a springboard for the comprehensive claim that the president has a discretionary and unreviewable power both to define and to compel domestic compliance with international law.

95. *Dames & Moore v. Regan*, 453 U.S. 654, 662–68 (1981) (reviewing the Accords).

96. See Exec. Order No. 12,294, 3 C.F.R. 139 (1981).

97. *Dames & Moore*, 453 U.S. at 679–80.

98. *Id.* at 680.

99. See, e.g., Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-F.R.G., Jul. 17, 2000, 39 I.L.M. 1298 (2000). For a review of the history of this agreement and related agreements with France and Austria, see *American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 402–08 (2003).

100. 539 U.S. 396.

101. *Id.* at 415.

102. *Id.* at 416.

103. *Id.* at 420–29.

C. The Return of the Constitutional Controversy

1. The International Court of Justice Decision on the International Law Obligations of the United States

The contemporary revival of the controversy over executive lawmaking in foreign affairs emerges from an authoritative decision by the ICJ in 2004 that interpreted a binding treaty obligation of the United States. The United States (along with over 150 other countries) is a party to the Vienna Convention on Consular Relations.¹⁰⁴ Among other provisions, this treaty obligates member states to inform detained foreign nationals of their right to consult with the consular officers of their home state in order to arrange for legal representation.¹⁰⁵

Following a variety of preliminary rulings,¹⁰⁶ including derivative actions in the U.S. Supreme Court,¹⁰⁷ the ICJ concluded in *Case Concerning Avena and other Mexican Nationals* (Mex. v. U.S.)¹⁰⁸ that the Vienna Convention creates rights directly in favor of individuals.¹⁰⁹ It also found that the United States had violated these treaty obligations by failing to inform fifty-one Mexican nationals currently on death row of their rights under the Vienna Convention.¹¹⁰ To vindicate those rights, the ICJ ordered the United States to provide “by means of its own choosing” some form of judicial “review and reconsideration” to determine whether the violations had caused prejudice in the criminal proceedings against the covered Mexican nationals.¹¹¹ Although formally limited to those fifty-one individuals, *Avena* also called into question the convictions of tens of thousands of foreign nationals held in U.S. prisons.¹¹²

104. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 262 [hereinafter Vienna Convention]; see also UN.org, List of Member States, <http://www.un.org/Overview/member.html> (last visited Oct. 16, 2006) (listing the member states).

105. Vienna Convention, *supra* note 104, art. 36, para. 1.

106. See *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); Order on Request for the Indication of Provisional Measures, *Case Concerning the Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 99, ¶ 41 (Apr. 9).

107. The Court rejected early attempts to enforce the preliminary rulings of the ICJ on the basis of procedural defaults by death row claimants. See *Fed. Republic of Germany v. United States*, 526 U.S. 111 (1999) (per curiam) (rejecting even a direct appeal by Germany asserting the original jurisdiction granted by Article III of the Constitution); *Breard v. Greene*, 523 U.S. 371, 375–77 (1998) (per curiam).

108. 2004 I.C.J. 12 (Mar. 31).

109. *Id.* at 43, 59–60.

110. *Id.* at 65–66, 72.

111. *Id.* at 72; see also *id.* at 59–60, 65–66.

112. In its *Avena* opinion, the ICJ took pains to emphasize that, while its decision only applied to the death row inmates covered by Mexico’s claim, the general conclusions may well extend to other nationals of Mexico and those of other Vienna Convention member states. *Id.* at 69–70

2. The President's Surprise Assertion of a Discretionary Power to Enforce International Law

It is not surprising that just a few months after *Avena*, the Court granted a petition for a writ of certiorari by a covered Mexican national, Jose Medellín, to consider the domestic law force of both the Vienna Convention and the ICJ's ruling.¹¹³ However, hopes for an authoritative resolution of this issue were dashed even before the Court could hold oral arguments. In an amicus curiae brief filed only a month before the scheduled arguments, the solicitor general revealed that the president had made a surprise "Determination" regarding the ICJ's decision.¹¹⁴ In a simple memorandum addressed to the attorney general of the United States, the president declared:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the Case Concerning *Avena* and Other Mexican Nationals (*Mexico v. United States of America*) (*Avena*), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.¹¹⁵

The Determination essentially purports to implement the ICJ's decision solely on the president's initiative and through state courts. Asserting discretion supposedly housed in the executive branch, the president also carefully limited the Determination to the fifty-one Mexican nationals within the strict scope of the ICJ's *Avena* holding.¹¹⁶

More important for present purposes is the breadth of the claimed authority on which the Determination is based. In its brief to the Court, the

("[T]he fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States."). It should come as no surprise to an observer of national events that state and federal prisons now hold tens of thousands of foreign nationals. See PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2005, at 5 (May 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/df/pjim05.pdf> (reporting that in 2005 over 90,000 noncitizens were held in federal and state prisons).

113. Medellín v. Dretke, 543 U.S. 1032 (2004).

114. U.S. Amicus Brief Medellín, *supra* note 17, at 41–42.

115. Determination, *supra* note 15; see also U.S. Amicus Brief Medellín, *supra* note 17, at 41–42 (quoting the president's memorandum in full).

116. See U.S. Amicus Brief Medellín, *supra* note 17, at 46 ("The President's determination that judicial review and reconsideration should be afforded in this nation's courts applies to the 51 individuals whose rights were determined in the *Avena* case.").

solicitor general argued that neither the Vienna Convention¹¹⁷ nor its Optional Protocol¹¹⁸ on ICJ jurisdiction,¹¹⁹ nor the obligation in the U.N. Charter to comply with such binding decisions¹²⁰ creates a private right to enforce the ICJ's *Avena* decision in U.S. courts.¹²¹ Rather, the administration reasoned, these treaties merely reflect obligations under international law.¹²² As a result, enforcement is to be achieved by the "political branches," not by domestic courts at the behest of individuals.¹²³

3. The Disarray in the U.S. Supreme Court

The peculiar legal circumstances occasioned by the presidential Determination produced substantial disarray in the Supreme Court. The best the Court could muster as a whole was a *per curiam* opinion dismissing Medellín's writ of certiorari as improvidently granted.¹²⁴ This opinion concluded that "several threshold issues" could independently preclude the federal habeas relief Medellín sought.¹²⁵ Moreover, and more important for present purposes, the *per curiam* opinion observed that, in light of the president's Determination, the newly initiated state court proceedings "may provide Medellín with the review and reconsideration of his Vienna Convention claim that the ICJ required."¹²⁶ Regarding the core question of the constitutionality of the

117. *Id.* at 18 ("Article 36 of the Vienna Convention . . . does not give a foreign national a judicially enforceable right to challenge his conviction or sentence."); *id.* at 33 ("Article 36 does not mention the possible effect of an ICJ decision [and] therefore cannot be a source for private enforcement of an ICJ decision.").

118. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

119. U.S. Amicus Brief Medellín, *supra* note 17, at 33–34 ("The Optional Protocol . . . operates only as a grant of 'jurisdiction' to the ICJ [and thus] does not commit the United States to comply with a resulting ICJ decision, much less make such a decision privately enforceable in a criminal proceeding by an individual.").

120. U.N. Charter art. 94, para. 1. (obligating member states "to comply with the decision of the International Court of Justice in any case to which it is a party").

121. U.S. Amicus Brief Medellín, *supra* note 17, at 34 (arguing that Article 94 of the U.N. Charter is not directly enforceable in domestic courts but rather merely "constitutes a *commitment* on the part of U.N. members to take *future* action" to comply with binding ICJ decisions).

122. See *id.* at 37 ("Article 94 creates an international obligation on U.N. members to comply with an ICJ decision; it does not empower a private individual to enforce it.").

123. See *id.* at 34 (asserting that the contemplated future compliance would occur through the member states' "political branches"); *id.* at 35 (citing the right of a prevailing party before the ICJ to seek redress before the U.N. Security Council under Article 94(2) of the U.N. Charter and arguing that this provision "envision[s] that the political branches of a Nation may choose not to comply with an ICJ decision").

124. Medellín v. Dretke, 544 U.S. 660, 667 (2005) (*per curiam*).

125. *Id.* at 664.

126. *Id.*

Determination itself, however, the Court (as stated in Justice O'Connor's dissent) "remain[ed] rightfully agnostic."¹²⁷

Beyond these generalities, there was little agreement among the members of the Court on the merits of the case.¹²⁸ Justice Ginsburg, joined by Justice Scalia, concurred in the result but argued that the proper approach would have been to grant the motion for a stay pending the outcome of a new state habeas action.¹²⁹ In contrast, Justice O'Connor argued in the principal dissent joined by Justices Stevens, Souter, and Breyer that the Court should have directly addressed the substantial constitutional issues raised by the ICJ's decision and the president's Determination.¹³⁰ Justices Souter¹³¹ and Breyer¹³² (the latter joined by Justice Stevens) confused the picture further with separate dissenting opinions emphasizing aspects of the arguments advanced in Justice O'Connor's principal dissent. Justice Breyer also left the decided impression that the president had the authority at least to preempt state law through the Determination.¹³³

In an unrelated case a year later,¹³⁴ the Court again sidestepped the question of whether the Vienna Convention creates rights that are directly enforceable by individuals in domestic courts.¹³⁵ Instead, it found that violations of the Convention's notice provisions do not require the suppression of later-gathered evidence¹³⁶ and reaffirmed its earlier holding in *Breard v. Greene*¹³⁷

127. *Id.* at 673 (O'Connor, J., dissenting).

128. In contrast to the Court, the response of the State of Texas to the president's Determination was unequivocal. The State Attorney General's brief to the Court described the president's assertion of a unilateral authority to implement international law as "utterly unprecedented." Brief of Respondent in Response to Petitioner's Motion to Stay at 5, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). A separate public statement was even more direct. In issuing "the executive Determination," the State Attorney General declared, the president "exceed[ed] the constitutional bounds for federal authority." Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16.

129. *Medellín*, 544 U.S. at 668 (Ginsburg, J., concurring); *id.* at 668–69 (arguing that a dismissal would permit the Court "to resolve, clearly and cleanly, the controlling effect of the ICJ's *Avena* judgment" in light of the president's Determination at a later point).

130. *Id.* at 673 (O'Connor, J., dissenting) (arguing that it was provident of the Court "to avoid questions of national importance when they are bound to recur").

131. *Id.* at 691–92 (Souter, J., dissenting) (arguing that in the absence of a stay, "the next best course would be to take up the questions on which certiorari was granted," but suggesting that on remand the court of appeals should have been instructed to "take no further action until the anticipated Texas litigation responding to the President's position had run its course").

132. *Id.* at 693–94 (Breyer, J., dissenting) (arguing that in the absence of a stay, the Court should vacate the Fifth Circuit Court of Appeals' judgment in order to "remove from the books an erroneous legal determination" that U.S. courts are not at all bound by the ICJ's decision in *Avena*).

133. *Id.* (stating that the combined effect of the president's Determination and the particular arrangement of treaties created "the very real possibility of [Medellín's] victory in state court").

134. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

135. *Id.* at 2677–78 (assuming without deciding that the Convention creates judicially enforceable rights and also denying petitioner's claims on unrelated grounds).

136. *Id.* at 2681–82.

137. 523 U.S. 371, 375 (1998) (per curiam).

that the Convention did not displace state-law procedural default rules.¹³⁸ In doing so, the Court also concluded that, although deserving of “respectful consideration,”¹³⁹ the contrary interpretations of the Convention by the ICJ in *Avena*¹⁴⁰ are not binding on domestic courts.¹⁴¹

Nonetheless, neither the splintered opinions in *Medellín* nor the Court’s subsequent treatment of Vienna Convention claims a year later¹⁴² has offered any valuable guidance on the core issue of the president’s lawmaking power in foreign affairs.¹⁴³ The final result of the assertion of power by the present administration is an apparent power vacuum in our nation’s compliance with undisputed obligations under international law. This vacuum is in appearance only, however, for the result of the administration’s ultimate position is simply to remove all competing enforcement agencies. What is left is a claimed unilateral power of the executive branch to create, interpret, and enforce the nation’s international obligations in its unreviewable discretion.

From what source does this claimed executive power emanate? Part II discusses how, from the very framing of the Constitution, scholars and executive branch officials have advanced theories to support an implied executive authority to implement international law. Some of these claims are more compelling than others. I argue, however, that none of these theories advances a convincing account that is faithful to both the separation of powers doctrine and the constitutional limits on executive lawmaking. The result is the first core principle that the president does not possess a general discretionary power to both define and require domestic law compliance with international law, much less with general executive prerogatives in foreign affairs.

II. PRINCIPLE ONE: THE ABSENCE OF A GENERAL EXECUTIVE LAWMAKING AUTHORITY IN FOREIGN AFFAIRS

Support for an independent presidential authority to implement international obligations comes from an unusual coalition of forces. Indeed, we find an odd alignment of perspectives between strong international law advocates

138. *Sanchez-Llamas*, 126 S. Ct. at 2682–84.

139. *Id.* at 2683 (quoting *Breard*, 523 U.S. at 375).

140. See *supra* notes 106–112 and accompanying text.

141. *Sanchez-Llamas*, 126 S. Ct. at 2684 (“Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.”).

142. The Court’s opinion in *Sanchez-Llamas* contained only a cryptic mention of the president’s Determination. *Id.* at 2685 (observing without further comment that “the United States has agreed to ‘discharge its international obligations’ in having state courts give effect to the decision in *Avena* (quoting the Determination, *supra* note 15)).

143. See *supra* note 128.

and the present Bush Administration, which one could describe with little risk of offense as unenthusiastic on the subject.

This part analyzes the various theories advanced by these disparate interests in favor an executive authority to enforce international law. The first subpart addresses the view that the Take Care Clause of Article II, Section 3, of the Constitution alone empowers the president to enforce all purported international obligations.¹⁴⁴ The next subpart revisits the recurrent executive branch claim of broad authority over foreign affairs, which was first advanced by the Washington Administration. It is this essentialist understanding of the “executive Power” of Article II that the present administration seeks to extend to implementing international law as a matter of domestic law.¹⁴⁵ The final subpart examines the more specific argument that the president possesses a constitutionally grounded, discretionary power to define and enforce the nation’s treaty obligations.¹⁴⁶ Given the foundation of a formal international treaty, this claim would seem the most direct and least controversial. Careful review reveals that more powerful forces are at work, however, for embedded in the defense of the Determination is a radical restructuring of the role of treaty law in our domestic legal system.

A. International Law, Executive Power, and the Take Care Clause

1. Treaties and the Take Care Clause Syllogism

The only serious textual argument for a presidential authority to compel domestic enforcement of international law is found in Article II’s instruction that the president “take Care that the Laws be faithfully executed.”¹⁴⁷ As we have seen,¹⁴⁸ this claim has played prominently in historical assertions of presidential power, including originalist assertions by Alexander Hamilton¹⁴⁹ and then-Congressman John Marshall.¹⁵⁰

144. See *infra* Part II.A.

145. See *infra* Part II.B.

146. See *infra* Part II.C.

147. U.S. CONST. art. II, § 3.

148. See *supra* notes 66–81 and accompanying text.

149. HAMILTON, *supra* note 3, at 82 (asserting in defense of President Washington’s Neutrality Declaration that “[t]he executive is charged with the execution of all laws, the laws of nations as well as the municipal law, by which the former are recognized and adopted”).

150. See 10 ANNALS OF CONG. 613–14 (1800) (asserting that President Adams had the authority to interpret and enforce an international treaty as the person “who conducts the foreign intercourse, and is to take care that the laws be faithfully executed”); *supra* notes 70–75 and accompanying text (examining the historical context of this claim in more detail).

This claim is not merely of historical interest, however. To the contrary, the near consensus view among modern international law scholars holds that the president's Take Care Clause duties broadly extend to the domestic enforcement of international law in general.¹⁵¹ As Louis Henkin famously articulated, "There can be little doubt that the President has the duty, as well as the authority, to take care that international law, as part of the law of the United States, is faithfully executed."¹⁵² Not surprisingly, this consensus view also prevails in the specific circumstances that gave rise to the present administration's assertion of a unilateral authority to enforce a decision of the ICJ.¹⁵³

Ultimately, the claim of Take Care Clause advocates proceeds from a simple syllogism: Pursuant to Article VI of the Constitution, treaties and other international law obligations function as supreme federal law; the national executive has the "lead role" in matters of foreign affairs and has the duty to take care that such laws are faithfully executed; therefore, the president has the power to enforce the nation's foreign affairs obligations as a matter of federal law.

There is a superficial appeal to this account, especially for treaties. A moment's scrutiny reveals, however, that there is an important disconnect between the major and minor premises of the syllogism. Let us first explore the "treaties as law" premise. To be sure, under the Supremacy Clause, treaties may operate as directly applicable federal law without legislative implementation.¹⁵⁴

151. See, e.g., Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Constitutional?*, 80 NW. U. L. REV. 322, 332 (1986); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1567 (1984); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1118-19 (1985); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 402-05 (1987); Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 378 (1987); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. c (1987) ("That international law and agreements of the United States are law of the United States means also that the President has the obligation and necessary authority to take care that they be faithfully executed.").

152. Henkin, *supra* note 151, at 1567.

153. In the aftermath of the Court's decision in *Breard*, regarding a preliminary order from the ICJ, Carlos Vasquez reasoned that "[i]f the courts lacked the authority to enforce the ICJ Order," then the president had the power to enforce the nation's existing treaty commitments because "[t]he President has the responsibility and authority to 'faithfully execute'" the laws. Carlos Manuel Vasquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 685 (1998). But see *id.* at 689 (suggesting that the particular constellation of treaties at issue may have delegated enforcement authority to the president).

154. See *Foster v. Nelson*, 27 U.S. (2 Pet.) 253, 254 (1829) ("Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.").

But not all treaties, indeed not even a majority,¹⁵⁵ are of this nature. Whether by design,¹⁵⁶ declaration,¹⁵⁷ or constitutional necessity,¹⁵⁸ some treaties remain solely a subject of international law; they do not penetrate of their own force to create immediately applicable domestic law.

Thus, the mere existence of a ratified treaty does not mean that it inevitably falls within the Take Care Clause mandate. Instead, before the president has an authority to execute the treaty form of federal law, one must first determine that the treaty at issue reflects law that is immediately enforceable.¹⁵⁹ This principle applies even for the more prosaic form of federal law: Article I legislation. Consider as an illustration the Rules Enabling Act,¹⁶⁰ which empowers the Court¹⁶¹ to create procedural rules for federal litigation¹⁶² with assistance of the federal Judicial Conference.¹⁶³ Through this Act, Congress undoubtedly created “law” under the Supremacy Clause, but it also delegated implementing authority specifically to a body outside of the executive branch. As a result, the general duty under the Take Care Clause

155. The State Department lists nearly one thousand treaties to which the United States is a party. See U.S. Dep’t of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2006* (2006), <http://www.state.gov/s/treaty/treaties/2006/index.htm>. In contrast, there are only approximately four hundred self-executing treaties currently in force, although this category is growing in both number and scope in recent years. See Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 917 (2004) (canvassing the self-executing treaties presently in force for the United States).

156. Some treaties by their substance are either directed solely to the relations of sovereigns inter se, are merely aspirational, or otherwise are so indeterminate as to preclude judicial enforcement. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (providing that a treaty is non-self-executing if it “manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation”); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 713–15 (1995) (stating that treaties whose provisions “do not set forth sufficiently determinate standards for evaluating the conduct of the parties and their rights and liabilities” have been held to be judicially unenforceable).

157. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (providing that a treaty is non-self-executing “if the Senate in giving consent to a treaty . . . requires implementing legislation”).

158. A treaty may not, for example, exercise a power, such as the appropriation of money, that is textually allocated to another constitutional institution. See U.S. CONST. art. I, § 9, cl. 7 (providing that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”).

159. A particular treaty may delegate a discretionary enforcement power to the president. See *infra* Part III.

160. 28 U.S.C. §§ 2071–2077 (2000).

161. *Id.* § 2072(a) (delegating to the Supreme Court “the power to prescribe general rules of practice and procedure and rules of evidence” for the lower federal courts).

162. See *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (affirming the constitutionality of this delegation of rulemaking authority to the Court).

163. 28 U.S.C. § 2073 (prescribing the procedures for the Judicial Conference in making recommendations to the Court regarding the promulgation of federal procedural and evidentiary rules).

would not empower the president to assume the lawmaking authority specifically delegated by Congress to another entity.¹⁶⁴

The same is true of treaties. If a particular treaty does not create of its own force a directly cognizable federal law right, obligation, or power, there is nothing—at least not yet—for the president to “execute” under the Take Care Clause.¹⁶⁵ Indeed, for some treaties, the clear, sometimes explicitly declared, will of the treaty lawmakers at the time of adoption precludes a direct penetration of the international law obligations into domestic law.¹⁶⁶ Consider as an extreme illustration a treaty to which the Senate has given its consent only on the express condition that it does not directly create or otherwise alter domestic law, now a common occurrence for human rights treaties.¹⁶⁷ With this bounded consent, the general Take Care Clause mandate would not permit the president to disregard the limitation, assume a lawmaking power, and transform the treaty into domestic law by executive fiat.

With this insight, it becomes clear that there is no immediate connection between the major and minor premises of the Take Care Clause syllogism. Specifically, the problem arises from equating the reference to “laws” in the Take Care Clause with the “law” contemplated in the Supremacy Clause. The president’s duties under the former provision indeed extend to the execution of so-called “self-executing” treaties.¹⁶⁸ But the Take Care Clause is essentially a

164. See *Mistretta v. United States*, 488 U.S. 361, 386 n.14 (1989) (“[R]ulemaking pursuant to a legislative delegation is not the exclusive prerogative of the Executive. . . . On the contrary, rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch.”).

165. See, e.g., *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998) (“‘Non-self-executing’ means that absent any further actions by the Congress to incorporate them into domestic law, the courts may not enforce them.”) (emphasis added); *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001) (same).

166. In the most recent controversy, the Bush Administration itself has argued that the Senate gave its consent on the understanding that the Vienna Convention does not “change or affect present U.S. laws or practice.” U.S. Amicus Brief Medellín, *supra* note 17, at 21–22 (observing that “[t]he Senate Foreign Relations Committee . . . cited as a factor in its endorsement of the treaty that ‘[t]he Convention does not change or affect present U.S. laws or practice’” (quoting S. EXEC. REP. NO. 91-9, at 2 (1969))).

167. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (examining the constitutionality of the practice); David N. Cinotti, Note, *The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land*, 91 GEO. L.J. 1277, 1278 (2003) (“The Senate has attached [such] declarations to every major human rights treaty to which it has given its advice and consent since World War II.”); *infra* note 230 (citing two prominent examples).

168. On the other hand, as Derek Jinks and David Sloss have convincingly explained, the Take Care Clause *obligates* the president to adhere to those treaty obligations that directly penetrate as judicially cognizable domestic law. Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 158 (2004) (“Historical materials support the view that the President’s duty under the Take Care Clause includes a duty to execute treaties that

duty, not a power, as even some of the more aggressive proponents of executive authority have acknowledged.¹⁶⁹ Its operative verb thus states that the president “shall” faithfully execute the laws.

In the end, the defining word in the Take Care Clause is “faithfully.” This adverbial limit makes clear that any derivative executive authority reaches only as far as the mandate of the law the president seeks to execute. The extent of the law defines the extent of the power.¹⁷⁰ This is true whether the “law” at issue is an Article I statute passed by Congress or an Article II treaty endorsed by the Senate.

A treaty, just like a statute, certainly may create a power in favor of the government or a private obligation enforceable by the government. In such a case, the Take Care Clause will function to support—and circumscribe—executive action. Moreover, a treaty, just like a statute, may delegate lawmaking authority to the executive, a point I explore in more detail below.¹⁷¹ Such a power does not flow, however, from the mere existence of an international treaty obligation.

2. The Take Care Clause and International Law as “Our Law”¹⁷²

It is an irony of modern international law scholarship that the Take Care Clause syllogism is more powerful for the less formal forms of international law: customary international law and sole executive agreements. Unlike treaties, these forms of international law find no mention at all in the Supremacy Clause of Article VI. Nonetheless, as we have seen, the accepted “modern position”¹⁷³ holds that “[i]nternational law is part of our law”¹⁷⁴

are the law of the land.”). Although all treaties are the “Law of the Land” under the Supremacy Clause, those that do not so penetrate likewise do not fall within the Take Care Clause mandate.

169. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1198 n.221 (1992) (concluding that the text of the Take Care Clause “suggests an obligation of watchfulness, not a grant of power,” although asserting a broader defense of certain executive powers based on the Vesting Clause of Article II).

170. See *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (“The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814) (concluding with regard to President Madison’s assertion of authority based on international usages that such a question of policy is “not for the consideration of a department which can pursue only the law as it is written”).

171. See *infra* Part III.

172. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

173. Bradley & Goldsmith, *supra* note 10, at 816; see also *id.* at 849, 870 (describing the view that customary international law operates as supreme federal law).

174. *The Paquete Habana*, 175 U.S. at 700; see also *Doe I v. Unocal Corp.*, 395 F.3d 932, 948 (9th Cir. 2002) (observing that “it is ‘well settled that the law of nations is part of federal common law’” (quoting *Trajano v. Marcos* (*In re Estate of Marcos Human Rights Litig.*), 978 F.2d 493, 502

through the vehicle of federal common law.¹⁷⁵ There is much to question in the breadth of this basic proposition.¹⁷⁶ With regard to executive enforcement authority, in any event, this broader strand of the Take Care Clause syllogism is an argument that at once proves too little and too much.

First, under the modern consensus view, the domestic enforcement of international law does not depend on discretionary executive agency. Rather, international legal norms penetrate as part of federal common law of their own force and without presidential sanction.¹⁷⁷ Consequently, the Take Care Clause syllogism only leads to an obligation of the president, not a discretionary power.¹⁷⁸ Although the national executive clearly has a role in shaping sovereign obligations on the international plane over time,¹⁷⁹ the Article II duty to take care that the laws are "faithfully executed," taken alone, does not create a discretionary power regarding their enforcement in domestic law.¹⁸⁰

(9th Cir.1992)); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (citing the "settled proposition that federal common law incorporates international law"), *cert. denied*, 518 U.S. 1005 (1996).

175. Koh, *supra* note 11, at 1825–26 (reviewing extensive Court authority holding that customary international law operates in federal law as an element of federal common law); *see also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) ("[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."); *The Paquete Habana*, 175 U.S. at 700 ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of nations.").

176. See Bradley & Goldsmith, *supra* note 10, at 816–17 (setting forth a comprehensive "critique of the modern position," which they describe as holding that "customary international law preempts inconsistent state law under the Supremacy Clause, binds the President under the Take Care Clause, and even supersedes prior inconsistent federal legislation").

177. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States."); *Banco Nacional de Cuba*, 376 U.S. at 436 (rejecting a claim that federal courts must take cognizance of international law regarding the act of state doctrine only "when the Executive Branch expressly stipulates"). For a broad examination and defense of the consensus view on the domestic force of international law, see JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 3–98 (2003); *id.* at 169–92 (defending the view that the president is bound by international law).

178. See Glennon, *supra* note 151, at 332 (describing the "obligation" of the president under the Take Care Clause to enforce international law); Lobel, *supra* note 151, at 1119 ("The President has a constitutional obligation to executive international law."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. c (asserting that in light of the Take Care Clause, the president has the "obligation" to enforce international law).

179. See *supra* notes 47–61 and accompanying text.

180. Some have asserted controversially that the executive may violate customary international law. *See, e.g.,* Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988) (contending that international law alone is not binding on the president); Bybee Memorandum, *supra* note 8, at 32 ("Customary international law . . . cannot bind the executive branch under the Constitution because it is not federal law."). Even if correct, this power to subtract does not carry the necessary implication of a discretionary executive power to create federal law in the first instance.

More fundamentally, the proposition that all international law is self-executing domestic law proves too much in a constitutional system founded on a separation of powers. The practical effect of executive control over our country's sovereign international conduct is that the president has a nearly unfettered power to create international law on behalf of the United States.¹⁸¹ If correct, the modern consensus view would mean that this unilateral executive power would, under the force of the Take Care Clause, automatically carry with it a similarly unilateral power to create domestically enforceable supreme federal law.¹⁸² To illustrate the point, under this view a president would have the authority to preempt state tort claims or consumer protection statutes merely through a sole executive agreement with, say, Liechtenstein.

This extreme example reveals that any executive lawmaking in foreign affairs requires more than a combination of international law and the Take Care Clause. There may indeed be circumstances under which the president may create preemptive federal law without the immediate involvement of Congress, a point I explore in more detail below.¹⁸³ But the mere existence of the Take Care Clause neither requires executive agency for the enforcement of international law nor enhances executive authority to create that law in the first instance.

B. The President's Inherent Executive Powers in Foreign Affairs

1. Refuting the Claim of Unilateral Executive Power Over Foreign Affairs Lawmaking

a. The Article II Vesting Clause Thesis

A second claim of presidential power over the enforcement of foreign affairs law is the broadest and most abstract. It proceeds from an essentialist understanding of the "executive Power" vested in the president by Article II

181. See *supra* notes 53–61 and accompanying text.

182. Absent extraordinary circumstances, international law holds that, once concluded, an executive agreement is binding even if the president exceeds his constitutional powers under domestic law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311(3) (providing that a state may not rely on a violation of its internal law to vitiate its consent to an international agreement "unless the violation was manifest and concerned a rule of fundamental importance"); *id.* § 311 cmt. c (concluding that because of the doubt regarding the scope of the president's power in foreign affairs, "improper use of an executive agreement in lieu of a treaty would ordinarily not be a 'manifest' violation").

183. See *infra* Parts III–IV.

of the Constitution. Building (again) on expansive claims originally advanced by Alexander Hamilton,¹⁸⁴ this view holds that Article II's Vesting Clause¹⁸⁵ represents not merely a self-evident preface, but rather an affirmative grant of power to the national executive.¹⁸⁶ Moreover, the apparent contrast with the "herein granted" limitation on the legislative power in Article I¹⁸⁷ means that the unlimited Vesting Clause of Article II confers on the president a "residuum" of executive power.¹⁸⁸ Thus, the theory runs, all powers that an executive traditionally held in 1789 inhered in the U.S. president without the need for further textual elaboration.¹⁸⁹ These broad, implied or inherent

184. See HAMILTON, *supra* note 3, at 80–81 (advancing a Vesting Clause argument for implied executive powers); see also *Myers v. United States*, 272 U.S. 52, 118 (1926) (citing and agreeing with Hamilton's basic argument on the implied executive powers conferred by Article II).

185. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

186. See Calabresi, *supra* note 4, at 1405 ("If the constitutional text counts for anything at all, it seems quite clear to me that the Article II . . . Vesting Clause[] must be [a] power grant[], although of a very limited and unusual kind."); *id.* at 1389–1400 (examining this claim in greater detail). The extent of the president's Vesting Clause power is a source of debate among scholars. Compare Calabresi & Rhodes, *supra* note 169, at 1195 (arguing that Congress cannot limit the president's control over executive affairs), with A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994) (criticizing the approach of Calabresi and Rhodes, and arguing that Congress has some power to limit the president's power over the executive branch).

187. See Prakash & Ramsey, *supra* note 5, at 256–57 (noting that Article I's Vesting Clause limits Congress's legislative powers to those "herein granted" and reasoning that "[t]he Article II Vesting Clause lacks such language, thereby suggesting that it may vest powers beyond those subsequently enumerated"); Yoo, *supra* note 4, at 1677–78 (arguing that the absence in Article II of a "herein granted" limitation such as in Article I "indicates that Congress's legislative powers are limited to the enumeration in Article I, Section 8, while the President's powers include inherent executive powers that are unenumerated in the Constitution").

188. See Bradley & Flaherty, *supra* note 8, at 546–47 (observing that the "Vesting Clause Thesis" of supporters of executive power holds that the apparent contrast with the initial clause of Article I, together with certain historical assertions, mean that the Article II Vesting Clause "implicitly grants the President a broad array of residual powers not specified in the remainder of Article II"). However, as Nicholas Rosenkranz has explained, there is nothing unusual in a textual structure that limits legislative power but has no corresponding limit on executive power: The president's duty of "faithful[] execut[ion]" has reference to the laws first created (principally) by Congress. Although the doctrine of enumerated powers limits Congress's legislative warrant, it makes complete sense for the Constitution to make clear that the president is obligated to execute *all* laws adopted within that warrant, given that "Congress can expand the powers of the President by giving him a new law to execute." Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1894–96 (2005).

189. See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 20 (1993) (arguing that unless such powers are elsewhere limited or reallocated, "whatever power was held by the 'Executive' in 1789 must have been understood to inhere in the President"); Prakash & Ramsey, *supra* note 5, at 253 (noting that power over foreign affairs was understood by the framers to be part of the executive power).

executive powers exist unless limited by the more specific provisions of Article II, Sections 2 and 3,¹⁹⁰ or express allocations to Congress in Article I.¹⁹¹

The same basic reasoning applies to presidential authority over the special field of foreign affairs, but apparently with a greater force. As Saikrishna Prakash and Michael Ramsey have argued in some detail, national executives in the founding period enjoyed substantial control over matters of foreign affairs.¹⁹² The more explicit grants of power to make treaties and appoint and receive ambassadors¹⁹³ likewise add support to the thesis that something fundamentally executive is at work in the conduct of foreign affairs. Such notions also undoubtedly have played a role in the Court's quotable declarations that the president is the "sole organ" in the field of foreign relations¹⁹⁴ with the "vast share of responsibility for the conduct of our foreign relations."¹⁹⁵

This reasoning is at the foundation of a whole range of powers claimed by the present administration. With a vigor that is impressive even by high historical standards, the Bush Administration has defended unilateral presidential action in a variety of contexts as an exercise of the national executive's implied or inherent powers in foreign affairs.¹⁹⁶ Not surprisingly, the "Vesting

190. See Calabresi, *supra* note 4, at 1398 (asserting that it "seems absolutely clear to me Section 2 of Article II defines, explicates, and substantially limits the Article II, Section 1 grant of the executive power"); Yoo, *supra* note 4, at 1678 ("[T]he enumeration in Article II marks the places where several traditional executive powers were diluted or reallocated. The Vesting Clause, however, conveyed all other unenumerated executive powers to the President.").

191. See Monaghan, *supra* note 189, at 20 (asserting that "unless the Constitution reallocates formerly 'executive' powers to Congress generally, or to the Senate particularly," the Vesting Clause of Article II confers on the president all executive powers understood at the founding of the Constitution); Calabresi & Rhodes, *supra* note 169, at 1165–68 (same). This was a principal argument of Alexander Hamilton. See HAMILTON, *supra* note 3, at 80–81 (arguing that the contrast with the "herein granted" limitation means that the enumeration of powers in Article II "ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government").

192. Prakash & Ramsey, *supra* note 5, at 252–53 (arguing that given the historical context of the Vesting Clause, "the President's executive power includes a general power over foreign affairs"). *But see id.* at 254 (concluding that "the President's executive power over foreign affairs does not exceed the powers of the eighteenth-century English monarch over foreign affairs").

193. See U.S. CONST. art. II, §§ 2–3.

194. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting then-Congressman John Marshall, 10 ANNALS OF CONG. 613 (1800)).

195. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952).

196. The Bush Administration has relied on the Vesting Clause of Article II for an assertion of a broad array of powers, including those regarding the war in Iraq and the detainment of alleged supporters of international terrorism. See, e.g., Bybee Memorandum, *supra* note 8, at 10–15 (citing the reasoning of Alexander Hamilton and John Marshall as support for the argument that "any unenumerated executive power, especially one relating to foreign affairs, must be construed as within the control of the President" and arguing that such inherent executive powers include the detention of alleged foreign terrorists); Yoo/Delahanty Memorandum, *supra* note 8, at 14–16 (asserting the

Clause Thesis"¹⁹⁷ also appears prominently in the most recent assertion that the president has a discretionary executive power to compel domestic law compliance with international obligations declared by the ICJ.¹⁹⁸ The more specific argument—which in the end reflects no decrease in scope¹⁹⁹—is that the executive power over foreign affairs permits the president to enforce settlements of international law disputes between the United States and foreign nations²⁰⁰ as a matter of supreme federal law.²⁰¹ The exercise of this power, moreover, neither requires congressional approval²⁰² nor even a formal executive agreement under international law.²⁰³

This subpart will demonstrate that, whatever the merits of the Vesting Clause claim in other contexts, it fails in its extension to foreign affairs law-making. From its text, context, and foundational principles, the Constitution refutes any claim of an inherent, discretionary executive power to enforce international law.

same foundation as in the Bybee Memorandum for use of force by the president in the United States); Bradley & Flaherty, *supra* note 8, at 548 (observing that “[i]n recent years, the Vesting Clause Thesis has gained newfound popularity” among the Bush Administration and its supporters).

197. Bradley & Flaherty, *supra* note 8, at 546–47 (describing the claim of implied executive powers through the Vesting Clause of Article II as the “Vesting Clause Thesis”).

198. See U.S. Amicus Brief *Medellín*, *supra* note 17, at 44 (asserting that the power to compel compliance with international treaty obligations is founded “on the President’s authority under Article II of the Constitution to manage foreign affairs”).

199. Although the instant executive Determination addresses only a binding judgment of the ICJ, the assertion of authority is not so limited. See *id.* at 45 (claiming an executive power to “determine how the United States will comply with a decision reached after completion of formal dispute-resolution procedures”). The power is also not dependent on the specific source of the dispute. It extends to a presidential decision to comply with all “international obligations.” *Id.* at 42 (asserting an “authority of the President to determine the means by which the United States will implement its international legal obligations”).

200. See *id.* at 45 (asserting that if the president has the unilateral authority to conclude a formal executive agreement with a foreign state, “the President should be equally free to resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after completion of formal dispute-resolution procedures with that foreign government”).

201. See *id.* at 43–44 (asserting that the executive determination has the full preemptive force of “the supreme law of the land” under Article VI).

202. See *id.* at 42 (arguing that because the power is implied in the constitutional vesting of executive power in Article II, the president may create supreme federal law through the Determination “without the need for implementing legislation” (citing *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Sanitary Dist. v. United States*, 266 U.S. 405 (1925))).

203. See *id.* at 45 (claiming that a requirement of a formal executive agreement would “hamstring the President in settling international controversies” (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 398 (2003))).

b. Textual Allocations of Authority in Foreign Affairs and the Importance of Interbranch Cooperation

The received wisdom is that in the field of foreign affairs, the Constitution's text is so opaque as to offer little for constructive scholarly analysis.²⁰⁴ Whatever its broader validity, this assertion does not hold true for formal federal lawmaking. In this field as well, the Constitution's textual distribution of powers in foreign affairs reflects a core principle of interbranch cooperation for the creation of supreme federal law.

Indeed, the delegations of foreign affairs lawmaking authority to Congress—and thus away from unilateral executive authority—are numerous, explicit, and detailed. In foreign business and trade, for example, Article I, Section 8, reserves to Congress—with the acquiescence, or over the veto, of the president²⁰⁵—the power to regulate foreign commerce,²⁰⁶ the value of foreign currency,²⁰⁷ the amount of export and import duties,²⁰⁸ and the naturalization of foreign nationals.²⁰⁹ In addition, Congress has the power to declare war on behalf of the United States.²¹⁰ But the Constitution also delegates to Congress extensive powers to provide for the external defense of the country,²¹¹ to raise and support an army and navy,²¹² and to make rules for the regulation of both land and naval forces.²¹³

204. See Prakash & Ramsey, *supra* note 5, at 233 (noting in a comprehensive review of executive powers over foreign affairs that, because of the textual challenges, most scholars “have given up on the Constitution”).

205. See U.S. CONST. art. I, § 7, cl. 2.

206. *Id.* art. I, § 8, cl. 3 (granting Congress the power to “regulate Commerce with foreign nations”).

207. *Id.* art. I, § 8, cl. 5 (granting Congress the power to “regulate the Value . . . of foreign Coin”).

208. *Id.* art. I, § 8, cl. 1 (granting Congress the power to impose “Duties, Imposts and Excises”). Section 10 of the same article also prohibits states from imposing such charges except as is “absolutely necessary” for inspection purposes. *Id.* art. I, § 10, cl. 2.

209. *Id.* art. I, § 8, cl. 4 (granting Congress the power to “establish an uniform Rule of Naturalization”).

210. *Id.* art. I, § 8, cl. 11.

211. *Id.* art. I, § 8, cl. 1 (granting Congress the power to raise revenue to “provide for the common Defence . . . of the United States”).

212. *Id.* art. I, § 8, cl. 12 (granting Congress the power to “raise and support Armies”); *id.* art. I, § 8, cl. 13 (granting Congress the power to “provide and maintain a Navy”).

213. *Id.* art. I, § 8, cl. 14 (granting Congress the power to “make Rules for the Government and Regulation of the land and naval Forces”).

Although little noted in this context,²¹⁴ the Constitution also assigns to Congress an essential responsibility for regulating issues of international law. In addition to the power to declare war,²¹⁵ Article I, Section 8, grants to Congress the general authority over the definition and punishment of “Offences against the Law of Nations.”²¹⁶ The Constitution was equally explicit where it addressed the most immediate and sensitive international law issues of its time: piracy,²¹⁷ reprisals for international offenses,²¹⁸ and captures of foreign ships and other property.²¹⁹ In short, the responsibility for the domestic law regulation of these core matters of international law is expressly allocated to Congress (or, more carefully, to the interbranch cooperation contemplated for Article I lawmaking).

The Court cited these express delegations to Congress only last term in its decisive rejection of executive claims of authority to create special military tribunals to try international terrorists.²²⁰ In *Hamdan v. Rumsfeld*,²²¹ the Court—quoting the landmark civil war era case of *Ex parte Milligan*²²²—underscored that even in a time of war, a legislative power such as the creation of penal tribunals “can derive only from the powers granted jointly to the President and Congress.”²²³

Article II expressly delegates certain independent powers to the president, including the status of commander-in-chief and substantial control over ambassadorial relations.²²⁴ But beyond these specific fields, there is a substantial amount of well-grounded controversy about even the basic account that Article II’s Vesting Clause reflects an implicit grant of other, general authority to the president.²²⁵ Moreover, even the strong claim to implied executive powers

214. For a positive example, see Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 346 (2005) (noting the argument that courts should defer to executive authority regarding issues of international law but asserting that “[t]he text of the Constitution . . . undermines this argument by vesting Congress—rather than the President—with much of the authority to make decisions regarding international law”). But see Glennon, *supra* note 151, at 325 (arguing that the president may not violate customary international law because Article I, Section 8, Clause 10, delegates exclusive authority over international law violations to Congress).

215. U.S. CONST. art. I, § 8, cl. 11.

216. *Id.* art. I, § 8, cl. 10.

217. *Id.* (granting Congress the power to “define and punish Piracies and Felonies committed on the high Seas”).

218. *Id.* art. I, § 8, cl. 11 (granting Congress the power to “grant Letters of Marque and Reprisal”).

219. *Id.* (granting Congress the power to “make Rules concerning captures on Land and Water”).

220. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

221. 126 S. Ct. 2749.

222. 71 U.S. (4 Wall.) 2 (1866).

223. *Hamdan*, 126 S. Ct. at 2749.

224. U.S. CONST. art. II, §§ 2–3; see also *infra* Part IV (addressing the independent powers of the president).

225. See Bradley & Flaherty, *supra* note 8, at 551 (setting forth a comprehensive challenge to “the Vesting Clause Thesis on both textual and historical grounds”); Curtis A. Bradley, *A New*

acknowledges, as it must, that the president's Article II powers are "residual" only.²²⁶ Whatever their general scope, they are qualified by, and otherwise must yield to, the more specific allocations of power elsewhere in Article II and in Article I. This principle applies as well to the field of foreign affairs.²²⁷

The power to create domestic law incident to treaty-making is one such express allocation away from the executive. Both the specific and the general power to transform treaties into domestic law are expressly assigned to legislative institutions. Let us focus first on the specific allocation in the Article II treaty power. The president indeed has a general power to "make" treaties. But Article II, Section 2, qualifies that power by requiring the consent of two-thirds of the Senate before a treaty can operate as the "supreme Law of the Land."²²⁸ Therefore, by express allocation of authority, the Senate's consent is an essential element for creating domestic law incident to an international treaty. Accordingly, it is well established that the president is bound by reservations, understandings, or other conditions imposed by the Senate upon granting its consent,²²⁹ including specifically regarding a treaty's effect in domestic law.²³⁰

Likewise, the Constitution allocates away from the executive the general power to transform an international treaty obligation into domestic law. Even when a treaty does not create directly enforceable domestic law of its own force, Congress possesses the authority to pass implementing legislation. The Necessary and Proper Clause of Article I expressly assigns to Congress as a whole the authority to "carry[] into Execution . . . all other Powers vested by this Constitution" in

American Foreign Affairs Law?, 70 U. COLO. L. REV. 1089, 1104–07 (1999) (referring somewhat pejoratively to excessive claims of presidential power in the field as "foreign affairs exceptionalism").

226. See *supra* notes 184–191 and accompanying text (explaining the "residuum" argument and citing authority).

227. See Prakash & Ramsey, *supra* note 5, at 253 (concluding after a comprehensive historical and textual analysis that "the President's executive foreign affairs power is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution's text") (emphasis omitted).

228. See Calabresi, *supra* note 4, at 1396–97 (explaining that precisely because the Vesting Clause of Article II confers undefined executive powers, the limits in Sections 2 and 3 of Article II, such as the necessary consent of the Senate in treaty-making, "become all the more vital to explain, limit, and define the otherwise immense power that section 1 of Article II has granted").

229. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. b (1987) ("Since the President can make a treaty only with the advice and consent of the Senate, he must give effect to conditions imposed by the Senate upon its consent.").

230. A common example of this phenomenon is the now routine practice of declaring that human rights treaties are not self-executing. For two prominent examples, see COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 9, 19, 23 (1994); COMM. ON FOREIGN RELATIONS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30, at 30–31 (1992).

the national government,²³¹ including the Article II treaty power.²³² Indeed, in its most famous rejection of a claim of executive lawmaking incident to foreign affairs,²³³ the Court properly declared that the Necessary and Proper Clause reflected an “exclusive constitutional authority” of Congress.²³⁴

c. The Disconnect Between Executive Power and Foreign Affairs Lawmaking

A textual analysis thus reveals compelling evidence that the Constitution assigns to the legislative branch an essential role in the domestic implementation of executive policy prerogatives, even in matters of foreign affairs and international law. But there is also a more fundamental problem with a claim of a corresponding unilateral executive power. Whatever the proper scope of the president’s implied Article II authority, it remains in its essence a power to execute, not create, the law. The Court put to rest any contrary argument in *Youngstown*: “In the framework of our Constitution,” it declared, “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”²³⁵ Only last term, the Court in *Hamdan v. Rumsfeld* powerfully reaffirmed this principle in its rejection of unilateral executive authority to create special military tribunals beyond the scope of congressional sanction.²³⁶ The Texas Court of Criminal Appeals likewise concluded in the subsequent proceedings in *Medellín*—although the precise reasoning of the splintered opinions differed—that the president’s informal determination “do[es] not constitute binding federal law” to preempt the neutral state law of general application at issue there.²³⁷

The mere presence of foreign policy implications does not alter this point. Even the strong claim of implied executive powers examined above

231. U.S. CONST. art I, § 8, cl. 18 (emphasis added).

232. See *Missouri v. Holland*, 252 U.S. 416, 431–32 (1920). For a criticism of the power of Congress to implement treaties beyond the scope of its Article I powers, see Rosenkranz, *supra* note 188.

233. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting President Truman’s claim that the president had an implied authority to seize steel mills to support the Korean War).

234. *Id.* at 588–89 (declaring in the face of claims that prior presidents had asserted certain domestic powers that “even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution ‘in the Government of the United States, or in any Department or Officer thereof’”).

235. *Id.* at 587–88. In making this observation, the Court also specifically rejected the assertion that the president had such a lawmaking power “because of the several constitutional provisions that grant executive power to the President.” *Id.*

236. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) (“The power to make the necessary laws is in Congress; the power to execute in the President.” (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139–40 (1866))).

237. *Ex parte Medellín*, No. AP-75207, 2006 WL 3302639, at *28 (Tex. Crim. App. Nov. 15, 2006).

holds that the president impliedly retained only those unallocated powers held by an executive in the framing period.²³⁸ However, as the most comprehensive support for the Vesting Clause Thesis itself acknowledges, the traditional understanding of executive authority at the crafting of Article II “did not include the power to create domestic law to advance foreign affairs objectives.”²³⁹ The “residuum” of executive authority may well include a circumscribed power to manage policy *external* to our domestic legal system. But the president requires the consent of Congress as a whole, or two-thirds of the Senate for treaties, to transform this external policy into domestic law.²⁴⁰

This is the subtle, but powerful, message from the Court’s important decision last term in *Hamdan*. At issue there was the president’s authority to establish military tribunals to try combatants in an international conflict.²⁴¹ Even though this involved an area at the core of the foreign affairs interests of the United States, the Court implicitly assumed²⁴²—and Justice Kennedy in concurrence expressly stated²⁴³—that Justice Jackson’s famous three-part structure in *Youngstown* governs the analysis of presidential power. Indeed, Justice Thomas in dissent vigorously complained that the majority opinion “openly flouts our well-established duty to respect the Executive’s judgment in matters of military operations and foreign affairs.”²⁴⁴ Notwithstanding these clear implications for executive control over foreign affairs, Justice Kennedy in his decisive concurrence declared that the creation of military tribunals “raises separation-of-powers concerns of the highest order.”²⁴⁵

2. The Failure of the Sole Executive Agreement Analogy

The response to the Constitution’s specific textual allocations of authority to Congress is that the “historical gloss” on the Article II executive power nonetheless grants to the president a unilateral power to conclude sole executive

238. See *supra* notes 188–191 and accompanying text.

239. Prakash & Ramsey, *supra* note 5, at 255 (concluding after a review of historical sources that “the traditional executive power did not include the power to enact foreign affairs legislation”); see also *id.* at 355 (concluding that “the President cannot make law as a means of implementing his executive power”).

240. See *id.* at 256 (concluding that “the President must rely on Congress (or two-thirds of the Senate) to give foreign policy any domestic legal effect”).

241. *Hamdan*, 126 S. Ct. at 2759–62.

242. *Id.* at 2774 n.23.

243. *Id.* at 2800 (Kennedy, J., concurring) (“The proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson” in his concurring opinion in *Youngstown*.).

244. *Id.* at 2823 (Thomas, J., dissenting).

245. *Id.* at 2800 (Kennedy, J., concurring).

agreements with foreign states.²⁴⁶ As noted above²⁴⁷ (and enthusiastically recounted by the present administration),²⁴⁸ the Court's broad rhetoric in cases such as *Curtiss-Wright*²⁴⁹ and its newer relation, *Garamendi*,²⁵⁰ holds that "in foreign affairs the President has a degree of independent authority to act"²⁵¹ that "does not require as a basis for its exercise an act of Congress."²⁵² More specifically, some general passages suggest that all executive agreements concluded by the president may preempt state law.²⁵³ Neither the rhetoric nor the holding in *Garamendi*, however, supports an extension beyond its factual context, for the following two interrelated reasons.

a. Confusing Executive Authority With Congressional Authorization

The first and most important reason against the executive-agreement analogy is that the president concluded the agreements in *Garamendi* and its predecessors on a foundation of longstanding congressional approval of the specific type of executive settlement agreements at issue.²⁵⁴ Although it was more than a bit generous in its application to the specific facts,²⁵⁵ the Court emphasized that the practice of executive settlement of private international claims is supported by nearly two hundred years of congressional

246. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring))).

247. See *supra* notes 99–103 and accompanying text.

248. See U.S. Amicus Brief Medellín, *supra* note 17, at 45.

249. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 330 (1936) (citing the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

250. See *supra* note 246; see also U.S. Amicus Brief Medellín, *supra* note 17, at 44 (relating these quotations as support for the administration's position).

251. *Garamendi*, 539 U.S. at 414 ("Nor is there any question generally that there is executive authority to decide what [foreign] policy should be.").

252. U.S. Amicus Brief Medellín, *supra* note 17, at 44 (quoting *Curtiss-Wright*, 299 U.S. at 320).

253. See, e.g., *Garamendi*, 539 U.S. at 416 (stating that "[g]enerally . . . valid executive agreements are fit to preempt state law" just as treaties are).

254. See *id.* at 402–09; *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (emphasizing in upholding a similar executive agreement that settled foreign claims that it was "crucial" to its decision that Congress had "implicitly approved" of the executive actions).

255. See Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 886 (2004) (criticizing the Court's factual reading of congressional acquiescence for the specific executive agreements at issue and observing that "[t]he Court's endorsement of extravagant preemptive effect of the executive's policy in *Garamendi* contrasts markedly with its parsimonious reading of relevant congressional statutes").

acquiescence.²⁵⁶ In this light, the *Garamendi* line of authority is consistent with the separation of powers restrictions on executive lawmaking.

Unfortunately, in certain passages, the Court's rhetoric muddled this message of congressional authorization.²⁵⁷ Nonetheless, given the longstanding acquiescence by Congress—the constitutionally sanctioned lawmaking institution—the preemptive effect of the specific executive agreements in *Garamendi* did not flow solely from implied Article II executive powers in foreign affairs. Rather, consistent with the constitutional mandate of interbranch cooperation, the presidential power to displace state law issued from the combined force of domestic congressional consent and external executive authority over foreign affairs.²⁵⁸

Moreover, the specific holding in *Garamendi* and its predecessors cannot perform the broader mission of authorizing domestic enforcement of all executive actions in foreign affairs.²⁵⁹ To be sure, a necessary attribute of the president's representation of the United States on the international stage (often, as we have seen, with the express consent of Congress)²⁶⁰ is a power to set and manage policy in the regular interaction with foreign states. There are also sound reasons for this arrangement: The unity of the national executive represents an important institutional advantage in analyzing and responding to the delicate issues that often attend international diplomacy.²⁶¹

256. See *Garamendi*, 539 U.S. at 415 (observing that the practice of settling private claims by executive agreement “goes back over 200 years . . . and has received congressional acquiescence throughout its history”).

257. Later in *Garamendi*, the Court discusses the *absence* of congressional *disapproval* in two statutes relating specifically to insurance and the investigation of the disposition of assets during the Holocaust. See *id.* at 427–28 (citing McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2000); Holocaust Assets Commission Act of 1998, 112 Stat. 611, *reprinted in note following* 22 U.S.C. § 1621 (2000)). Taken alone, this discussion should not diminish the central point. Given the general longstanding acquiescence in private claims settlement, the only question was whether Congress had disapproved of the specific subject of the executive agreements at issue. Unfortunately and misguidedly, the Court then concluded its analysis of this point with another reference to the “independent” powers of the president in foreign affairs. See Denning & Ramsey, *supra* note 255, at 890 (faulting the Court for this discussion of independent presidential powers).

258. See *infra* Part III.B (examining executive lawmaking authority in foreign affairs on the foundation of congressional delegation).

259. See U.S. Amicus Brief Medellín, *supra* note 17, at 45 (citing *Garamendi*, 539 U.S. at 415; *Dames & Moore*, 453 U.S. at 679, 682–83; *United States v. Pink*, 315 U.S. 203, 223 (1942); *United States v. Belmont*, 310 U.S. 324, 330–31 (1937)) (asserting that if the president has the unilateral authority to conclude a formal executive agreement with a foreign state, “the President should be equally free to resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after completion of formal dispute-resolution procedures with that foreign government”).

260. See *supra* notes 56–57 and accompanying text.

261. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (observing that the president, “not Congress, has the better opportunity of knowing the conditions which prevail in

Nor is there a problem in recognizing a presidential authority to formalize the results of this diplomacy through executive agreements. Backed by the sanction of international law,²⁶² these agreements merely reflect an expedient, yet formal, mechanism for regulating relations with foreign states. When so confined to the executive's diplomatic authority over the external, international law realm, such sole executive agreements may well fall within the implied executive authority to manage foreign relations.

The disconnect occurs in the attempt to equate this power to create international obligations with an authority to enforce them as domestic law. The congressional authorization cited in *Garamendi* does not provide such an authority, for it addresses only the enforcement of private international settlements, as the principal opinion by the Texas Court of Criminal Appeals also observed in the subsequent proceedings in *Medellín*.²⁶³ All that remains is any independent executive power. And as demonstrated above,²⁶⁴ the text and structure of the Constitution allocate the domestic authority to implement foreign affairs policy not to the executive alone, but to the interbranch cooperation prescribed for any other exercise of the national government's formal lawmaking powers.

b. The Prohibition of Affirmative State Interference With Foreign Affairs

A careful reading of *Garamendi* reveals that it does not support a general presidential lawmaking power for a second, related reason. There, the Court began its analysis with the unremarkable proposition that at some point state power must yield to the exclusive authority of the national government in foreign affairs.²⁶⁵ The scope of this preemption, in the absence of federal foreign

foreign countries" (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321 (1936)); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (noting the special expertise of the executive branch in matters of foreign affairs because "[t]hey are delicate, complex, and involve large elements of prophecy").

262. See Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on Treaties] (defining a "treaty" as an "international agreement concluded between States in written form and governed by international law . . . whatever its particular designation").

263. See *Ex parte Medellín*, No. AP-75207, 2006 WL 3302639, at *19 (Tex. Crim. App. Nov. 15, 2006) (citing *Garamendi* and concluding that "there is no similar history of congressional acquiescence relating to the President's authority to unilaterally settle a dispute with another nation by executive order, memorandum, or directive"); see also *supra* notes 254–256 and accompanying text.

264. See *supra* notes 205–219 and accompanying text.

265. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (stating that "[t]here is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy" in light of the Constitution's allocation of authority over foreign affairs to the national government in the first place).

affairs lawmaking through a statute or treaty, was uncertain before *Garamendi*, and the opinion did little to clarify the situation.²⁶⁶ But regardless of the precise contours of this “dormant” foreign affairs power, state lawmaking clearly wanes as it extends beyond matters of traditional state competence to regulate directly external relations with foreign nations.

The state statute at issue in *Garamendi* presented a good example of this phenomenon. The statute involved California’s targeted attempt to regulate by state statute (The Holocaust Victim Insurance Relief Act)²⁶⁷ events intricately related to the resolution of a formally declared war. As the *Garamendi* Court took pains to emphasize, such state attempts to resolve claims in the aftermath of international hostilities may directly interfere with our nation’s efforts to settle conflicts with foreign adversaries.²⁶⁸ That the states may not so affirmatively meddle in foreign affairs is the clear import of the prohibition on state treaty-making,²⁶⁹ and the requirement that the states obtain congressional approval before concluding “any agreement or compact” with a foreign power.²⁷⁰ This specific constitutional text has a particular force even beyond the exclusive national power to control foreign affairs policy in general.

266. The leading case on the scope of the dormant foreign affairs powers, *Zschernig v. Miller*, 389 U.S. 429 (1968), has been subject to substantial scholarly criticism. See e.g., Bradley, *supra* note 225, at 1104–07; Goldsmith, *supra* note 10, at 1664; Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 342–43 (1999). The majority opinion in *Zschernig* endorsed the view that any state action with more than an incidental effect on foreign affairs was preempted even if it did not conflict with any express national policy. *Zschernig*, 389 U.S. at 432–41. In an opinion concurring in the result only, Justice Harlan disagreed. In his view, the dormant foreign affairs power preempts only those state laws that conflict with a specific federal policy in the field. *Id.* at 459 (Harlan, J., concurring). The *Garamendi* Court did not take a position on these competing views of “field” and “conflict” preemption, reasoning only that the California statute at issue there failed even the more lenient approach advocated by Justice Harlan. *Garamendi*, 539 U.S. at 418–20.

267. California Holocaust Victim Insurance Relief Act of 1999, Assem. B. 600, 1999 Leg., Reg. Sess. (Cal. 1999).

268. *Garamendi*, 539 U.S. at 420 (observing that “claims remaining in the aftermath of hostilities may be ‘sources of friction’ acting as an ‘impediment to resumption of friendly relations’ between the countries involved” (quoting *United States v. Pink*, 315 U.S. 203, 225 (1942))); *id.* at 397 (stating that because of the potential for friction arising from such outstanding claims, “there is a ‘longstanding practice’ of the national Executive to settle them in discharging its responsibility to maintain the Nation’s relationships with other countries” (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981))).

269. See U.S. CONST. art. I, § 10, cl. 1 (prohibiting the states from concluding “any Treaty, Alliance, or Confederation”).

270. See *id.* art. I, § 10, cl. 2 (requiring the consent of Congress before a state may conclude “any Agreement or Compact . . . with a foreign Power”). By analogy to interstate compacts, this provision precludes the states from concluding any understanding with a foreign power without the consent of Congress if doing so would tend “to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.” *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. f (1987) (discussing the constitutional limits on foreign “Agreements by States of the United States”).

There is much to question in the majority opinion's analysis in *Garamendi*, in particular its penchant for expansive rhetoric on independent presidential powers unmoored from congressional authorization.²⁷¹ It may be correct to observe that, in its capacity as the external representative of the nation, the national executive may create foreign affairs norms of sufficient force to preclude affirmative state interference.²⁷² But the president does not thereby obtain the general preemptive power to displace all state law in furtherance of his unilateral foreign affairs policy.²⁷³ Rather, the important distinction is between a prohibition on targeted state obstruction of external affairs and the power of the national government to displace neutral state laws of general application in areas of traditional state competence.²⁷⁴ The former is implied in the constitutional assignment of authority over foreign affairs to the national government; the latter, however, is a matter for the formal lawmaking procedures expressly prescribed by the Constitution.²⁷⁵

3. Executive Power and Compliance With Lawmaking Procedures

This latter point suggests an even more fundamental problem with a unilateral, discretionary executive authority to implement all international law. Whether for Article I statutes or Article II treaties, the Constitution requires compliance with "finely wrought and exhaustively considered"²⁷⁶ lawmaking procedures. This reflection of core separation of powers principles protects against intemperate or arbitrary governmental action by mandating cumbersome interbranch collaboration for an exercise of federal lawmaking powers.

271. See Denning & Ramsey, *supra* note 255, at 925–43 (convincingly criticizing the majority opinion in *Garamendi* in this regard).

272. The president also has certain powers derived directly from express constitutional grants, such as the status as commander-in-chief of the armed forces. I examine these powers in Part IV.

273. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (invalidating a presidential executive order founded on foreign affairs powers because it "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President").

274. For an excellent examination of this broader point in terms of the "dormant treaty power," see Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1254 (2000).

275. The *Garamendi* opinion ultimately suggests a form of balancing test that weighs the strength of the national foreign affairs policy against the state interest in regulating the subject matter. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425 (2003) (giving preference to national foreign affairs policy, "given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies" in the manner of the California statute at issue); see also Denning & Ramsey, *supra* note 255, at 930–33 (noting the problems in applying such a balancing test).

276. *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

And we do not put too fine a point on this by observing, as did Justice Kennedy in *Clinton v. City of New York*,²⁷⁷ that separation of powers was designed to execute the “fundamental insight” that “[c]oncentration of power in the hands of a single branch is a threat to liberty.”²⁷⁸

The claim of a unilateral, discretionary executive authority to implement all international law entirely disregards these structural protections. A review of the most recent assertion of executive authority in this regard amply demonstrates this point. The president’s Determination on the enforcement of the ICJ’s *Avena* decision²⁷⁹ was merely set forth in a two-paragraph memorandum to the attorney general.²⁸⁰ It did not follow any publicly accessible procedures, was not subject to advance notice or comment, did not involve consultation with Congress, and was not even published in any formal open forum (such as the Federal Register). Knowledge of the memorandum outside of the executive branch first came with the filing of the administration’s amicus curiae brief in *Medellín v. Dretke*.²⁸¹ The principal effect—perhaps even the principal purpose—of the presidential action, moreover, was to avert a definitive Court ruling on the very issue the Determination addressed.

In addition, the claimed executive lawmaking power is entirely discretionary. The defense of the Determination asserts that, although the international obligation supposedly creates the foundation for executive power, international law carries no domestic obligation or limitation. Thus, Article II’s implied executive powers supposedly permit the president to preclude enforcement of even a binding judgment of the ICJ.²⁸² And because the national executive has the “lead role” in managing foreign affairs, even the particular form and extent of domestic compliance supposedly lies within presidential discretion.²⁸³

As a result, whether the law exists at all would be subject to the fleeting whims of the president from administration to administration. A unilateral

277. 524 U.S. 417.

278. *Id.* at 450 (Kennedy, J., concurring).

279. See *supra* notes 108–112 and accompanying text.

280. Determination, *supra* note 15.

281. U.S. Amicus Brief *Medellín*, *supra* note 17, at 41–42 (disclosing and quoting the president’s memorandum).

282. *Id.* at 40 (asserting that “[i]n particular circumstances, the President may decide that the United States will not comply with an ICJ decision”).

283. *Id.* at 41 (stating that “once the President makes a decision to comply with an ICJ decision, the President must then consider the most appropriate means of compliance”); *id.* at 42 (claiming an “authority of the President to determine the means by which the United States will implement its international legal obligations”); *id.* at 41 (asserting that “in some cases, compliance may be achieved through unilateral Executive Branch action” but that “[i]n other cases, the Executive Branch may seek implementing legislation as means of compliance”).

lawmaking decision made by one may be unmade unilaterally by the next.²⁸⁴ Moreover, the practical consequences of recognizing such an executive lawmaking authority are substantial. Since 1945 alone, presidents have concluded over 15,000 formal executive agreements with foreign states.²⁸⁵ Presumably, any such action by the president would be subject to later congressional override, but only pursuant to the cumbersome lawmaking procedures deliberately imposed by the Constitution. Until then, therefore, the executive would have the ability to make and unmake law on its own initiative without the involvement of Congress.

4. Foreign Affairs Lawmaking and Federalism

The “fundamental insight”²⁸⁶ of the separation of powers doctrine is not diluted merely because the claimed lawmaking authority seeks to displace state law. The present executive Determination carefully limits its scope to enforcement in state, not federal, courts.²⁸⁷ In doing so, it avoids a variety of potential conflicts with federal statutes that regulate federal court jurisdiction over habeas corpus petitions.²⁸⁸ Presumably because of this, Justice Breyer suggested in his dissenting opinion in *Medellín* that claims based on the Determination “when considered in state court are stronger than when considered in federal court.”²⁸⁹

The premise of this reasoning is once again that foreign affairs and, derivatively, international law are matters entrusted solely to the national

284. This variability of the law is illustrated by the very issue that prompted the present Determination. The prior occupant of the executive office—not a strong advocate of states’ rights—determined only seven years earlier that the national government did not have the authority the present administration now claims. See Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-1390) (“Our federal system imposes limits on the federal government’s ability to interfere with the criminal justice systems of the States. The ‘measures at [the United States] disposal’ under our Constitution may in some cases include only persuasion That is the situation here.”).

285. See TREATIES CONCLUDED, *supra* note 61 (listing 15,550 such agreements concluded between 1946 and 2004).

286. See *supra* note 278 (quoting *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring)).

287. U.S. Amicus Brief *Medellín*, *supra* note 17, at 41–42 (declaring that the United States would fulfill its international obligations regarding the ICJ’s *Avena* decision “by having state courts give effect to the decision” (quoting Determination, *supra* note 15)); *id.* at 42–43 (arguing that the Determination operates as “supreme Law of the Land” under the Supremacy Clause and therefore displaces any state law limits on state court jurisdiction).

288. In its amicus brief in *Medellín*, the administration separately argued that the federal Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, bars claims by petitioners such as Jose Medellín, who failed to assert Vienna Convention claims in lower courts in a timely matter. U.S. Amicus Brief *Medellín*, *supra* note 17, at 10–18 (citing 28 U.S.C. § 2253 (2000)).

289. *Medellín v. Dretke*, 544 U.S. 660, 694 (2005) (Breyer, J., dissenting) (stating that as a result of that the combined effect of the president’s Determination and the particular arrangement of treaties at issue, there was a “very real possibility of [Medellín’s] victory in state court”).

government.²⁹⁰ Taken alone, this observation is correct.²⁹¹ It is also accurate that the federalism limitations on Article I legislation do not apply to Article II treaty-making.²⁹² But the reference to the absence of federalism limits on foreign affairs powers merely leads the analysis back to the separation of powers constraints discussed above.²⁹³ Specifically, the principle that the national government has exclusive control over foreign affairs does not mean that the president alone can exercise all national powers that may touch on the field.

The Constitution's "finely wrought"²⁹⁴ procedures for exercising the national government's power also apply to the displacement of state law, including by presidential action.²⁹⁵ These procedures, moreover, draw no distinction between foreign affairs and any other subject matter. Indeed, the significance of this procedural aspect of the separation of powers principle is heightened precisely because of the absence of substantive federalism limits on national power in the field.²⁹⁶

There is no better illustration of this point than the Article II treaty power, the Constitution's principal vehicle for bridging the gap between international law and domestic law. The supermajority voting threshold, coupled with the basic right of equal state representation,²⁹⁷ makes clear that the requirement of Senate consent was imposed to prevent the national government from

290. See U.S. Amicus Brief Medellín, *supra* note 17, at 42–44.

291. See *supra* Part I.A.

292. As David Golove has convincingly explained, the treaty power of Article II represents a separate and independent delegation of lawmaking authority to the federal government. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1284 (2000) (concluding that the treaty power is an independent power, not merely a "secondary mode for exercising the legislative powers delegated to Congress"). As a result, the power to make treaties is not constrained by the subject matter limitations on national legislative power as reflected Article I's specific enumeration of powers (and, in confirmation, the Tenth Amendment).

293. See *supra* notes 276–283 and accompanying text.

294. *Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

295. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1393 (2001) (noting that Court decisions precluding executive lawmaking are founded on the separation of powers doctrine, but "such lawmaking also threatens federalism by evading constitutionally prescribed lawmaking procedures designed to preserve the governance prerogatives of the states").

296. See *id.* at 1445–52 (emphasizing the importance of separation of powers as a safeguard of federalism with regard to sole executive agreements); Denning & Ramsey, *supra* note 255, at 898, 925 (examining the importance of separation of powers in foreign affairs).

297. See Eugene W. Hickok, Jr., *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217, 256–57 (1986) (observing that the Senate was created to protect the lawmaking prerogatives of the states); Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 674–80 (1999) (same).

using treaties to displace state lawmaking prerogatives in the absence of sufficiently compelling national interests.²⁹⁸ With this structure for the approval of treaties, it would be odd indeed if the Constitution impliedly permitted the president first to create international law by less formal means and then to bypass the Senate and displace state law on his own initiative.

C. Executive Aggrandizement and the Treaty Power

A final argument for executive authority in foreign affairs focuses on treaties, but nonetheless has profound implications for the general distribution of lawmaking authority in our constitutional system. A superficial reading of the administration's specific defense of the recent Determination suggests it rests only on a narrow claim about the particular combination of treaties at issue.²⁹⁹ However, closer examination also reveals that more powerful forces are at work. At issue is not merely the enforcement of a particular treaty, but a broader campaign by the executive branch to wrest complete control over the treaty form of federal lawmaking from both the Congress and the federal courts.

1. The Doctrine of Non-self-executing Treaties

Full appreciation of the significance of recent events requires a brief review of the Constitution's distinctive arrangement for treaties. Treaties begin their life and "rise[] to maturity as creatures of international law."³⁰⁰ Nonetheless, many modern treaties are also designed to protect the rights of private individuals or are otherwise directed toward the internal, domestic law of the

298. See Golove, *supra* note 292, at 1098–99 (observing that "the Senate, fortified by a minority veto, was charged with the special *political* task of refusing its consent to any treaty that trenched too far on the interests of the states without serving a sufficiently powerful countervailing national interest"); *id.* at 1272 ("The Framers . . . created a system designed to ensure rigorous scrutiny of treaties that threatened to undermine state interests . . .").

299. Recall that in the administration's view neither the Vienna Convention nor its Optional Protocol on ICJ jurisdiction creates rights that are directly enforceable in domestic courts. See *supra* notes 114–123 and accompanying text. Citing the executive's role as representative of the United States in both the United Nations and the ICJ, the administration nonetheless argues that the obligation in Article 94 of the U.N. Charter to comply with binding decisions of the ICJ "implicitly" grants to the president a discretionary power to compel domestic compliance with ICJ decisions. See U.S. Amicus Brief Medellín, *supra* note 17, at 40. Indeed, the combination of Article 94 and the national executive's general powers in foreign affairs means that the president may "establish [a] binding federal rule without the need for implementing legislation." *Id.* at 42.

300. Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1899 (2005) (examining the international law foundations of treaties); see also Vienna Convention on Treaties, *supra* note 262, arts. 9–18 (setting forth the international law rules governing the negotiation of and state consent to treaties).

treaty partners.³⁰¹ Such is the case, for example, with the Vienna Convention, which is at the center of the most recent controversy over executive power.³⁰²

Under the Supremacy Clause, treaties enjoy the same constitutional dignity as Article I statutes. As a result, a particular treaty may, if its substance so directs, create federal rights or powers that are directly cognizable in our domestic legal system,³⁰³ even without legislative implementation.³⁰⁴ It is nonetheless important to emphasize in this connection that whether a treaty is generally “self-executing” in this way is an analytically distinct threshold issue from whether it creates remedial rights that are enforceable by private citizens in domestic courts.³⁰⁵

As we have seen, however, not all treaties, indeed not even a majority, are of this nature.³⁰⁶ Commonly referred to as “non-self-executing,”³⁰⁷ these treaties do not of their own force penetrate to create directly applicable rights or obligations. When a treaty in this way solely “import[s] a contract”³⁰⁸ between sovereigns, its enforcement remains exclusively a matter of international, not domestic, law. A breach may of course occasion international legal sanction and even various forms of retribution.³⁰⁹ But without legislative implementation by Congress, a violation of such treaty obligations is not a matter cognizable in the domestic legal system of the United States.³¹⁰

301. For a comprehensive review of the existing treaties that are directly enforceable as domestic law in the United States, see Van Alstine, *supra* note 155, at 917.

302. See *supra* notes 104–105 and accompanying text.

303. See, e.g., *The Head Money Cases*, 112 U.S. 580, 598 (1884) (describing what are now known as self-executing treaties as ones that “partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of th[is] country”).

304. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (describing such a treaty as one that operates of itself without the need for legislative implementation) (“Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889) (stating that courts may enforce a treaty if it “operates by its own force”).

305. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) (making the same observation).

306. See *supra* notes 155–158 and accompanying text.

307. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4).

308. *Foster*, 27 U.S. at 314.

309. See *The Head Money Cases*, 112 U.S. 580, 598 (1884) (observing that when “the interest and the honor of the governments which are parties to [a treaty fail] . . . its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war”).

310. See *id.* (observing that with regard to breaches of treaties that do not create domestic law, “[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress”); *Foster*, 27 U.S. at 314 (observing that when a treaty merely “import[s] a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department”).

2. Executive Appropriation of Control Over "Self"-executing Treaties

The recent expansive claims of executive authority in foreign affairs do not challenge these core principles of treaty law. Rather, the campaign for executive control over the treaty form of federal law accomplishes its goal through a subtle recharacterization of the "self" aspect of the self-execution doctrine.

The case for executive control over treaties is made most directly in the defense of President Bush's recent Determination. This defense first asserts that there should be a presumption against the direct private enforcement of treaties in domestic courts.³¹¹ Therefore, even where a treaty addresses private rights, directly affected private parties presumptively should not have standing to enforce them.³¹² The next step in reasoning, however, is the significant one: Because a treaty nonetheless reflects an international "obligation," the president has the authority to require compliance as a matter of federal law.³¹³ The idiom of a "self-executing" treaty remains,³¹⁴ as it must if the treaty is to create domestically enforceable law at all. Nonetheless, the doctrine is subtly transformed from "self"-execution into "executable" at the discretion of the president from time to time. The result is that the president has a power, but not an obligation, to enforce treaties in domestic law.³¹⁵

This assumption of a discretionary presidential power over the domestic effect of treaties fails on a variety of levels. First, the executive branch claim elides the important distinction between international obligation and domestic

311. See U.S. Amicus Brief Medellín, *supra* note 17, at 19.

312. See *id.* In a passage that does not clarify whether its reference point is historical or legal, the comments to the *Restatement (Third) of the Foreign Relations Law of the United States* state that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a. In a disturbing trend, some recent courts have concluded on this basis that there is a formal legal presumption against direct enforcement of treaties by individuals. See, e.g., *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005), *rev'd on other grounds*, 126 S. Ct. 2749 (2006); *United States v. Emuegbunam*, 268 F.3d 377, 389–90 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 195–96 (5th Cir. 2001).

313. See U.S. Amicus Brief Medellín, *supra* note 17, at 27 (asserting that the executive branch has the authority to bring a claim "to vindicate a treaty right in the event of its denial" and finding this executive power in the "inherent authority of the United States," which "stems from the constitutionally grounded primacy of the national government in the realm of foreign affairs and the need for the United States to be able to effectuate treaty obligations and speak with one voice in dealing with foreign nations").

314. See *id.* at 38 (arguing that although Article 36 of the Vienna Convention does not create individually enforceable rights, it nonetheless "is self-executing in the sense that state authorities are required to observe the terms of the Convention without implementing legislation").

315. In the same vein, the administration asserted in a recent case that, even if a treaty is not judicially enforceable on its own, the president also has the power to make it so. See Reply Brief for Appellants at 11, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 04-5393), 2005 WL 189857 (asserting that the Third Geneva Convention did not create judicially enforceable rights and that "Neither Congress Nor The Executive" had made them judicially enforceable) (emphasis added).

lawmaking. All treaties reflect a commitment of some nature under international law.³¹⁶ Under our constitutional system, however, not all treaties penetrate by their own force to create domestic law rights, obligations, or powers. This is the essence of the notion—however one captures the concept in words—of a “non-self-executing treaty.”

Moreover, it has been clear from the very recognition of the doctrine that for such treaties, the responsibility for transforming the international law obligation into domestic rule of law falls to Congress as a whole.³¹⁷ Chief Justice Marshall could hardly have been clearer in his foundational 1829 opinion in *Foster v. Neilson*.³¹⁸ Where a treaty merely represents a promise of the United States under international law, he declared, “the ratification and confirmation which are promised *must be the act of the legislature*. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject.”³¹⁹ And, of course, the Constitution expressly grants to Congress the authority to do so in the Necessary and Proper Clause of Article I.³²⁰

This is not to deny the existence of an international law obligation to comply with treaty commitments, including, as appropriate, through changes to domestic law. Nor am I suggesting that domestic institutions have the discretion not to comply with self-executing treaties. Rather, the important distinction here is between treaties that create judicially cognizable domestic law and those that do not.³²¹ The national government certainly may create

316. For some treaties the obligation may be clear and detailed. The specific limits imposed by some arms control treaties present a good example. For others, the “obligation” may be aspirational only. A variety of human rights treaties reflect this phenomenon. See, e.g., *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (observing that “[t]he United States has signed numerous treaties over the years, many containing highly general and ramifying statements” and identifying the Universal Declaration of Human Rights as one such “aspirational” treaty).

317. See, e.g., *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 (3d Cir. 2003) (“[A] non-self-executing treaty is one that ‘must be implemented by legislation before it gives rise to a private cause of action.’” (quoting *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979))); *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998) (“‘Non-self-executing’ means that absent any further actions by the Congress to incorporate them into domestic law, the courts may *not* enforce them.”) (emphasis added); *Beazley v. Johnson*, 242 F. 3d 248, 167 (5th Cir. 2001) (same); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . .”).

318. 27 U.S. (2 Pet.) 253 (1829).

319. *Id.* at 315.

320. U.S. CONST. art. I, § 8, cl. 18; see also *Missouri v. Holland*, 252 U.S. 416, 431–32 (1920) (expressly upholding congressional authority to implement a treaty pursuant to the Necessary and Proper Clause).

321. All treaties operate as “law” under the Supremacy Clause in the sense that they create a legal foundation for congressional implementation, even if Congress otherwise would not have such a power under Article I. See *Holland*, 252 U.S. at 431–32. The distinction, rather, is between those treaties that possess only this general attribute and those that operate directly as judicially cognizable federal law without congressional implementation.

directly applicable federal law through treaties. In parallel with Article I legislation, however, the Constitution once again mandates interbranch cooperation (in this context between the president and the Senate) to achieve that end.³²²

This requirement of interbranch cooperation before treaties operate as domestic law reflects an important constitutional allocation of authority. Similar to that of the president, the Senate's involvement is essential to the process. Where a treaty does not "by its own force"³²³ create law cognizable in domestic courts, it represents an express or implied decision by the institutions constitutionally empowered to do so (the president and the Senate, either individually or together) that enforcement in domestic law requires a further act of political will by our national polity. In other words, such a treaty reflects the absence of the required political deal between the president and Senate on the creation of supreme federal law through such a vehicle alone.

A treaty—likewise in parallel with Article I legislation—may delegate discretionary authority to executive branch officials, a point the next part develops in detail.³²⁴ But the longstanding tradition has been of Senate consent on a binary basis: Treaties either directly implement international law into supreme federal law of their own force or require implementing legislation by Congress.³²⁵ Accordingly, where an analysis of the Article II process for a particular treaty reveals Senate consent to "self"-execution—whether express or implied from the substance of the treaty issue³²⁶—the proper course of action is for the courts to enforce the treaty itself, not leave the decision to executive discretion according to the prevailing political winds.

If accepted, finally, the claimed executive implementation authority for treaty "obligations" has the potential to effect a profound reallocation of federal lawmaking authority. The administration's reliance on Article 94 of the U.N. Charter to support the Determination alone proves this point. Article 94 is but one of a variety of Charter obligations accepted by member states to

322. A particularly powerful recognition of this point is found in the recent case of *Igartúa-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005). There, an en banc First Circuit Court of Appeals declared that even though treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *Id.* at 150. The court also observed that "[t]he law to this effect is longstanding." *Id.*

323. The Chinese Exclusion Case, 130 U.S. 581, 600 (1889) (describing a treaty that is directly enforceable in domestic courts).

324. See *infra* Part III.

325. See *supra* notes 317–319 and accompanying text (examining both Court precedent and executive branch understandings that non-self-executing treaties require implementation by Congress); see also *supra* Part II.B.1 (examining the distinction in greater detail).

326. See *supra* notes 156–158 and accompanying text.

comply with decisions of U.N. institutions.³²⁷ The most noteworthy of these is the general commitment in Article 25 to carry out decisions of the Security Council.³²⁸ If one follows the logic of the present administration, any formal agreement among the members of the Security Council (say, on proscribing the death penalty or prohibiting support of Israel) would alone be a source of authority for the president to create domestic law on his own initiative and without the involvement of Congress.³²⁹

III. PRINCIPLE TWO: FOREIGN AFFAIRS LAWMAKING AND LEGISLATIVE DELEGATION

The analysis immediately above demonstrated that the “executive Power” of Article II does not vest in the president an independent authority to transform all foreign affairs obligations into domestic law. Nonetheless, there is an important national interest in complying with international law. There is also value in the observation that the intricacies of international diplomacy may require flexibility in crafting situational responses, and in the intuition that in many cases, this flexibility is properly housed in the executive branch.

This part explains how these important ends can be achieved consistent with the separation of powers limitations on executive authority. Although the national executive does not possess a general independent lawmaking authority in foreign affairs, it may obtain such a power through an express or implied delegation, including through the vehicle of a treaty.

327. U.N. Charter art. 25 (obligating member states “to accept and carry out the decisions of the Security Council in accordance with the present Charter”); *id.* art. 49 (obligating member states to “join in affording mutual assistance in carrying out the measures decided upon by the Security Council” with regard to responses to breaches of the peace and acts of aggression).

328. *Cf. Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (holding that Article 25 of the U.N. Charter is not self-executing, at least in the sense that it authorizes individual enforcement of Security Council resolutions in domestic courts).

329. The general obligation in Article 25 of the Charter is to be contrasted with the specific obligations in Articles 41 and 49. The latter relate to compliance with Security Council decisions under Chapter VII, which addresses “threats to the peace, breaches of the peace, and acts of aggression.” Congress, via Article I legislation, specifically delegated to the president an authority to impose sanctions to comply with the obligations in Article 41 of the U.N. Charter relating to “measures not involving the use of armed force.” United Nations Participation Act, 22 U.S.C. § 287c (2000). Various presidents, including George W. Bush, have expressly relied on this delegated authority to issue executive orders on the foundation of Security Council Resolutions. *See, e.g.*, Exec. Order No. 11,322, 3 C.F.R. 606 (1966–1970) (ordering certain sanctions against Rhodesia); Exec. Order No. 13,315, 3 C.F.R. 252 (2003) (ordering certain sanctions against Iraq). If the president has an independent Article II power to implement all treaty obligations, however, this delegation of authority would be superfluous.

A. Executive Power and the Nondelegation Doctrine

As noted above,³³⁰ the text and structure of the Constitution reflect a model of enumerated powers allocated to specific federal institutions. With this premise, the Court has long emphasized that the Constitution vests federal legislative powers in Congress alone.³³¹ Indeed, “the integrity and maintenance of the system of government ordained by the Constitution,”³³² the Court has reasoned, “mandate that Congress generally cannot delegate its legislative power to another Branch.”³³³

This “nondelegation” doctrine proceeds from the core separation of powers precept that, even by agreement, “one branch of the Government may not intrude upon the central prerogatives of another.”³³⁴ Nonetheless, separation of powers itself functions, as Justice Jackson famously observed a half century ago, on the premise that “practice will integrate the dispersed powers into a workable government.”³³⁵ As a result, the Court has long recognized that in fulfilling its legislative functions, Congress may obtain the assistance of its coordinate branches through circumscribed delegations of lawmaking power.³³⁶

The traditional vehicle for such delegations of authority has been an Article I statute, and the traditional recipient has been an executive branch agency.³³⁷

330. See *supra* note 39 and accompanying text.

331. See *Loving v. United States*, 517 U.S. 748, 758 (1996) (“The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . .”).

332. *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

333. *Id.*; see also *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (observing that Article I, Section 1, vests all legislative power in Congress and thus, “permits no delegation of those powers”); *Loving*, 517 U.S. at 758 (“[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.”); *Field*, 143 U.S. at 692 (“That congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”).

334. *Loving*, 517 U.S. at 757.

335. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”); see also *Mistretta*, 488 U.S. at 381 (observing that “our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which ‘would preclude the establishment of a Nation capable of governing itself effectively’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam))).

336. See, e.g., *Loving*, 517 U.S. at 758 (observing that the Court had “established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself”); *Mistretta*, 488 U.S. at 372 (“We also have recognized . . . that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.”).

337. The Court has also held that Congress may delegate what is in essence lawmaking authority to the federal courts. See, e.g., *Touby v. United States*, 500 U.S. 160, 165 (1991) (“Congress

Nonetheless, although this point has not been analyzed extensively in the legal literature,³³⁸ there is nothing in principle to preclude such delegations through treaties as well.³³⁹ The Court obliquely recognized this point a century ago.³⁴⁰

The limited strictures of the nondelegation doctrine (see immediately below) likewise should attach in the treaty context. To be sure, the Treaty Power is found in Article II, and thus is not directly influenced by Article I's instruction that "All" legislative powers therein are vested in Congress.³⁴¹ Nonetheless, the federal power to make treaties, like Article I legislation, is also subject to a specific lawmaking procedure that includes, significantly, the consent of a supermajority of the Senate.³⁴² Therefore, because Article II nowhere expressly authorizes such a transfer, any delegation of discretionary powers must likewise conform to the separation of powers limitations implied in the structure of the Constitution.³⁴³

does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to . . . judicial actors."); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (sanctioning federal common law where "Congress has given the courts the power to develop substantive law" (citing *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963))). For a broader examination of this, see Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

338. See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1561–62 (2003) (observing that power may be delegated to the executive branch through treaties as part of a broader discussion of delegation to international institutions); Van Alstine, *supra* note 155, at 944–67 (analyzing the power of the treaty lawmakers to delegate discretionary powers to the federal courts).

339. See *Wilson v. Girard*, 354 U.S. 524, 530 (1957) (concluding that there was "no constitutional . . . barrier" to the enforcement of an executive agreement authorized by a treaty); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(3) (1987) (providing that the president may conclude international agreements "as authorized by treaty"); S. COMM. ON FOREIGN RELATIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. NO. 106-71, at 5 (2001) [hereinafter TREATIES AND THE SENATE] (observing that "[s]ome executive agreements are expressly authorized by treaty or an authorization for them may be reasonably inferred from the provisions of a prior treaty," and noting examples).

340. See *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893) ("It is no new thing for the law-making power, acting . . . through treaties made by the President and Senate . . . to submit the decision of questions, not necessarily of judicial cognizance . . . to the final determination of executive officers . . ."); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329 (1994) (noting but not addressing the possibility of the president obtaining "authority delegated by . . . a ratified treaty").

341. Particularly in recent years, the Court has emphasized in its nondelegation analysis that Article I vests in Congress "[a]ll legislative Powers herein granted" which by its express terms "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (citing *Loving*, 517 U.S. at 771); see also *Mistretta*, 488 U.S. at 371–72 (also citing Article I's vesting clause in analyzing a statutory delegation).

342. See U.S. CONST. art. II, § 2 cl. 2.

343. See Bradley, *supra* note 338, at 1562 ("As with federal legislation, there are procedural requirements specified in the Constitution for making treaties—most notably the requirements of senatorial consent and presidential ratification—and these requirements may similarly impose limits on delegation.").

B. Delegated Power, Foreign Affairs Lawmaking, and Fidelity to Separation of Powers

In its essence, the nondelegation doctrine functions to ensure that each branch of government fulfills its essential constitutional responsibilities. The doctrine accordingly mandates that delegations of authority by legislative institutions comply with two core requirements. First, from the very nature of "delegation," the conferral of authority must reflect the will of the institutions empowered to create federal law in the first place (for statutes, the legislature, with the subsequent involvement of the executive; for treaties, the reverse).³⁴⁴ In addition, the constitutional lawmaker must reasonably mark out for the recipient (and reviewing courts) the boundaries of the delegated authority.³⁴⁵

In the instant context, however, one can largely dispense with the latter element for specific acts of congressional delegation. Already weak as a general proposition,³⁴⁶ the requirement of circumscribed authority diminishes almost to nonexistence in the field of foreign affairs. Throughout its long history of delegation jurisprudence, the Court has repeatedly declared that in the foreign affairs arena, the president has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."³⁴⁷ This enhanced latitude arises precisely because the delegations build on a foundation of existing presidential power and expertise in the field.³⁴⁸

344. See *Mistretta*, 488 U.S. at 379 (emphasizing that a delegation must permit a court "to ascertain whether the will of Congress has been obeyed" (quoting *Yakus v. United States*, 321 U.S. 414, 425-26 (1944))).

345. In the Court's famous articulation of this principle, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); see also *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (declaring that a delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority").

346. Historically, the Court has only twice invalidated statutory delegations as granting excessive decisionmaking authority. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

347. *Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936)); see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374-76 (2000) (citing the "plenitude of Executive authority" when Congress expressly or implicitly delegates authority in the field of foreign affairs); *Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring) ("The Court has recognized that, in the area of foreign policy, Congress may leave the President with wide discretion that otherwise might run afoul of the nondelegation doctrine.").

348. See *Loving v. United States*, 517 U.S. 748, 772 (1996) (upholding a broad grant of authority over a military justice issue because of the president's authority as commander-in-chief, and observing in this regard that "the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter'" (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975))); *Chi. & S. Air Lines, Inc. v.*

With careful reflection, this flexibility in assessing the breadth of congressional acquiescence is the essential message of the Court's famous rhetoric in *Curtiss-Wright*,³⁴⁹ on which advocates of unilateral executive power commonly rely.³⁵⁰ In rejecting a claim of "unlawful delegation of legislative power,"³⁵¹ the Court emphasized that in foreign affairs, Congress acts against the backdrop of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."³⁵² As we have seen, there is little of concern in the observation that the president has independent powers in the *external* realm.³⁵³ The significant message from *Curtiss-Wright* is that, when Congress acts in this field of executive competence, courts properly accord an important degree of latitude in recognizing and interpreting a delegation of authority to the president. Indeed, this reasoning is fully consistent with Justice Jackson's foundational reasoning in *Youngstown* that executive authority is at its apex when the president acts in such a field with the express or implied consent of the legislative branch.³⁵⁴

Sound reasons also exist for some flexibility on the other essential element—an intent to delegate—where the subject of congressional action is foreign affairs.³⁵⁵ Precisely because of the institutional advantages the executive branch enjoys in foreign affairs, the Court has properly recognized that Congress

Waterman S.S. Corp., 333 U.S. 103, 109 (1948) (observing that because the executive "also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs," Congress may "delegate very large grants of its power over foreign commerce to the President").

349. *Curtiss-Wright*, 299 U.S. at 304.

350. See NSA ACTIVITIES MEMORANDUM, *supra* note 8, at 6–7 (citing *Curtiss-Wright* as support for an argument that the president has "inherent constitutional authority" to order warrantless searches for foreign intelligence purposes); Bybee Memorandum, *supra* note 8, at 12 (same regarding executive authority to disregard treaty obligations on the detention of enemy combatants); Yoo/Delahanty Memorandum, *supra* note 8, at 15–16.

351. *Curtiss-Wright*, 299 U.S. at 322.

352. *Id.* at 320.

353. See *supra* notes 260–262 and accompanying text.

354. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."); *id.* at 637 (stating that in such a case, the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation"); see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000) (relying on this observation from *Youngstown* to uphold a broad statutory delegation of authority to the president to impose economic sanctions on the country of Myanmar).

355. See *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981) (observing that a "failure of Congress to specifically delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive" (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981))).

may be accommodative on executive lawmaking authority when it legislates in the field.³⁵⁶ Thus, even a longstanding history of clear congressional acquiescence may reflect an implied intent to delegate lawmaking authority,³⁵⁷ particularly where Congress has adopted related legislation without expressing its disapproval of consistent executive foreign affairs practices in the past.³⁵⁸ The same reasoning should apply for delegations through treaties, whose very purpose is to regulate relations with foreign states. Thus, the Court has recognized that a treaty may reflect the Senate's implied intent to delegate the authority to conclude and enforce derivative executive agreements.³⁵⁹

An endorsement of implied delegations in foreign affairs does not entirely dispense with the core requirement of legislative intent,³⁶⁰ however, as presidents have periodically discovered in a variety of internationally embarrassing incidents in the past.³⁶¹ Nonetheless, where executive action finds a

356. See *Field v. Clark*, 143 U.S. 649, 691 (1892) (observing that the precedents at the time "all show that, in the judgment of the legislative branch of the government, it is often desirable, if not essential . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations"); *Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (justifying increased accommodation for finding delegations to the president in foreign affairs because "he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries" (quoting *Curtiss-Wright*, 299 U.S. at 320)).

357. See *supra* notes 254–258 and accompanying text (discussing Court endorsement of sole executive agreements concluded on the foundation of a history of congressional acquiescence); see also *Dames & Moore*, 453 U.S. at 678–79 (observing that an implied delegation in foreign affairs may be found "[a]t least . . . where there is no contrary indication of legislative intent and when . . . there is a history of congressional acquiescence" in presidential actions).

358. See *Dames & Moore*, 453 U.S. at 678 (stating that "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility'" (quoting *Youngstown*, 343 U.S. at 637)).

359. See *Wilson v. Girard*, 354 U.S. 524, 528–29 (1957) (holding that subsequent Senate consent to a security treaty with Japan reflected an implied authorization to the president to conclude an implementing executive agreement).

360. The Court forcefully emphasized this point even for treaties in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), early in the last century. There, the Court rejected a presidential claim of implied authority to extradite a person simply because a corresponding treaty with France failed to expressly preclude such an executive power. *Id.* at 9 ("[I]t is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power."); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189–90 (1999) (invalidating an 1850 Executive Order of President Taylor removing Native Americans because the 1837 Treaty on which it was based "makes no mention of removal, and there was no discussion of removal during the Treaty negotiations").

361. See, e.g., Ronan Doherty, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1335–37 (1996) (discussing the inability of presidents around the turn of the twentieth century to prosecute, without congressional authorization, criminal acts perpetrated against foreign nationals in violation of treaty obligations); Ku, *supra* note 89, at 491–98 (same).

foundation in the consent of Congress as a whole or of the Senate in exercise of its Article II treaty powers, there is nothing in constitutional principle to preclude a delegation of an authority to conclude international obligations that are binding as domestic law. In such circumstances, domestic enforcement of international law created by the president without immediate congressional agency is consistent with the constitutional model of interbranch cooperation for the creation of supreme federal law.

C. Delegated Power and International Law

The liberality of delegation analysis in the field of foreign affairs may lead executive branch enthusiasts to suggest a general presumption of implied congressional authorization to implement all international law obligations of the United States. Although constitutionally permissible, a claim of an implied delegation of authority to create domestically enforceable international law solely on executive initiative meets substantial challenges. In particular instances, Congress as a whole has expressly granted such an authority.³⁶² Perhaps the most prominent example of this is the delegation of authority to enforce U.N. Security Council resolutions calling for economic sanctions under Article 41 of the U.N. Charter.³⁶³ These situational examples, however, serve more to undermine than to support a claim of a general congressional acquiescence. Although courts properly afford significant latitude in assessing the extent of delegated authority in foreign affairs,³⁶⁴ a claim of implied comprehensive congressional authorization to enforce all formal executive actions in foreign affairs would confront serious constitutional concerns. In any event, the separation of powers doctrine should refute any assertion of an implied delegation of authority to the president to supersede prior Article I legislation.³⁶⁵

362. See, e.g., 19 U.S.C. § 1351(a) (2000) (granting the president the authority to conclude trade agreements with foreign governments or instrumentalities to assist in the opening of foreign markets to U.S. goods and services); 22 U.S.C. § 2767 (2000) (granting the president the authority to enter into "cooperative project agreements" with the North Atlantic Treaty Organization (NATO) or its member countries); 39 U.S.C. § 407(b)(1) (2000) (authorizing the U.S. Postal Service, with the consent of the president, to enter into "postal treaties or conventions"); 19 U.S.C. § 1629(a) (granting a power to station customs officials in foreign countries "[w]hen authorized by treaty or executive agreement").

363. See 22 U.S.C. § 287(c) (providing that the president may establish and enforce economic sanctions "whenever the United States is called upon by the Security Council to apply measures . . . pursuant to article 41 of [the U.N.] Charter").

364. See *supra* notes 346–358 and accompanying text.

365. See *Clinton v. City of New York*, 524 U.S. 417 (1998) (declaring the Line Item Veto Act unconstitutional because it purported to transfer to the president the unilateral authority to reverse prior legislation); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating a provision that would have allowed one house of Congress to invalidate legislation).

Similar difficulties confront claims of implied delegation in the specific context of treaties. A treaty may authorize subsequent implementation by executive agreement,³⁶⁶ and a number of such treaties addressing external relations exist.³⁶⁷ With regard to penetration into domestic law, however, the longstanding tradition³⁶⁸ has distinguished on a binary basis between those treaties that directly create supreme federal law of their own force and those that require subsequent implementation by Congress. This established distinction sets an important interpretive context for assessing the Senate's intent upon its consent to a treaty. No such general tradition supports some intermediate form of treaty that does not penetrate of its own force, but rather leaves domestic enforcement discretion to the president alone.

The exceptional constellation of treaties—which is unlikely to recur³⁶⁹—at the foundation of the ICJ's *Avena* decision may well represent an example of such an implied delegation.³⁷⁰ This case aside, however, the absence of a tradition of senatorial or congressional acquiescence creates a serious challenge for any claim of a delegation of domestic lawmaking authority to the executive branch to both create and enforce (or not enforce, or later “unenforce”³⁷¹) international obligations in its sole discretion.

366. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(3) (1987) (stating that “the President may make an international agreement as authorized by treaty of the United States”); TREATIES AND THE SENATE, *supra* note 339, at 5 (noting that the president's authority to conclude executive agreements on the foundation of prior treaties “seems well established”).

367. Perhaps the most prominent example of this is the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, for which there are numerous formal implementing executive agreements. See U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2004 444–47 (2004) (listing the implementing executive agreements); see also TREATIES AND THE SENATE, *supra* note 339, at 5 (identifying “the North Atlantic Treaty and other security treaties” as examples of authorizations to the president to conclude implementing executive agreements).

368. See *supra* Part II.C.1–II.C.2 (examining the traditional distinction between self- and non-self-executing treaties in greater detail); *supra* notes 317–319 and accompanying text (examining Court precedent based on the premise that non-self-executing treaties require implementation by Congress).

369. The United States withdrew from the Optional Protocol to the Vienna Convention in the aftermath of the *Avena* decision. See Charles Lane, *U.S. Quits Pact Used in Capital Cases; Foes of Death Penalty Cite Access to Envoys*, WASH. POST, Mar. 10, 2005, at A1. The Reagan Administration also withdrew the United States from the general compulsory jurisdiction of the ICJ in 1985. See U.S. Dep't of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction (Oct. 7, 1985), reprinted in 24 I.L.M. 1742 (1985). As a result, the specific issue of enforcing ICJ decisions is unlikely to recur for the United States.

370. The more compelling argument is that the Vienna Convention is directly enforceable in domestic courts. If that is not the case, the particular combination of Senate consent to the Optional Protocol and the compliance obligation in Article 94 of the U.N. Charter may reflect an implied delegation to the president of authority to implement binding decisions of the ICJ concerning the Vienna Convention alone. See Vazquez, *supra* note 153, at 684–90.

371. See *supra* notes 282–283 and accompanying text (noting the administration's claim that the president has the authority on whether and how treaty obligations are to be enforced in domestic law).

IV. PRINCIPLE THREE: FOREIGN AFFAIRS LAWMAKING AND CONSTITUTIONAL DELEGATION

The final principle of executive lawmaking in foreign affairs returns the analysis to the constitutional text. I have concluded above that the president does not have a general power to enforce all executive prerogatives in foreign affairs as a matter of domestic law. It is worth recalling that the Court specifically rejected presidential attempts to take domestic actions even to support a war that was expressly sanctioned by the U.N. Security Council under international law.³⁷² Just this past term, the Court also rebuffed claims that the president has the constitutional authority to create special military tribunals without the consent of Congress.³⁷³

The Constitution nonetheless delegates to the president certain express powers in foreign affairs whose exercise may have limited domestic law effects. These are found in three principal delegations in Article II: the control over ambassadorial relations;³⁷⁴ the designation as commander-in-chief of the armed forces;³⁷⁵ and the power to “make Treaties.”³⁷⁶ It is of these powers that the Court speaks in its unfortunately casual statement that “in foreign affairs the President has a degree of independent authority to act” without the involvement of Congress.³⁷⁷

The domestic law incidents of these constitutionally delegated powers, however, are both few and narrow in scope. As we have seen, the executive authority over international treaty-making does not, in the absence of senatorial consent, include a power to create domestic law solely on the president’s initiative.³⁷⁸ Instead, the executive’s most prominent affirmative power flows from the authority to receive ambassadors. The Court has properly recognized that this constitutional delegation implies exclusive executive control over the recognition of foreign governments.³⁷⁹ Although founded in an act under

372. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (declaring that “[i]n the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker”).

373. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

374. U.S. CONST. art. II, §§ 2–3 (granting the president the authority, with the advice and consent of the Senate, both to appoint and receive ambassadors and other public ministers).

375. *Id.* art. II, § 2, cl. 1.

376. *Id.* art. II, § 2, cl. 2.

377. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003); see also *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (“The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation’s organ in foreign affairs.”).

378. See *supra* notes 154–167, 311–329 and accompanying text.

379. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (“Political recognition is exclusively a function of the Executive.”); *Nat’l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955).

international law, the exercise of this power may carry derivative effects in domestic law, including those with regard to the sovereign immunity of the recognized government in judicial proceedings.³⁸⁰

In contrast, the role of international law in enhancing the president's commander-in-chief power is substantially more circumscribed. The domestic authority conferred by this power has generated extreme controversy, particularly in recent years.³⁸¹ In the external realm, however, the principal debate focuses not on internal effects,³⁸² but rather on the extent of the presidential power to initiate and wage foreign conflicts.³⁸³ Moreover, and more important for present purposes, the core controversy in this context is over whether international law *limits*, not enhances, presidential power.³⁸⁴ Thus, in the earliest days of the Constitution, the Court made clear that the authority to create domestic law on the foundation of powers recognized under the international law of war falls to Congress, not the president.³⁸⁵ All that remains is a limited power flowing directly from the Constitution to deploy the armed forces,³⁸⁶ direct such forces in

380. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (holding that the president's control over the recognition of foreign governments was binding on the courts regarding the issue of foreign sovereign immunity in domestic courts); *Ex parte Republic of Peru*, 318 U.S. 578 (1943) (same). There should also be no constitutional challenge in enforcing those aspects of international compacts—such as settlements of claims—that are directly bound to executive agreements with the newly recognized government. See *United States v. Pink*, 315 U.S. 203 (1942) (enforcing assignments of assets in connection with President Franklin Roosevelt's recognition of the Soviet Union); *United States v. Belmont*, 301 U.S. 324 (1937) (same).

381. See *supra* note 8 and accompanying text (reviewing the broad assertions of executive authority by the Bush Administration).

382. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303, Reporters' Note 11 (1987) (observing that "[m]ost sole executive agreements have involved military or foreign relations matters having no direct impact on private interests in the United States").

383. Compare Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) (arguing that the power to authorize the use of military force in foreign conflicts resides decisively with Congress), with Yoo, *supra* note 4 (disagreeing with Michael Ramsey and contending that the president has an independent authority to initiate foreign conflicts).

384. See Jinks & Sloss, *supra* note 168, at 146 (examining whether international law, and in particular the Geneva Convention on Prisoners of War, is binding on the president).

385. See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814) (rejecting President Madison's claim that the executive could seize enemy property because such was authorized by international law and declaring that such a question of policy "is proper for the consideration of the legislature, not of the executive or judiciary").

386. See *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (stating that the president may deploy our military forces "abroad or to any particular region"); *Tucker v. Alexandroff*, 183 U.S. 424, 435 (1902) (affirming the power of the president to permit the introduction of foreign forces into the United States without congressional approval); cf. *Arrangement Respecting Naval and Air Bases*, U.S.-Gr. Brit., Sept. 2, 1940, in 54 Stat. 2405 (reflecting an agreement by President Franklin Roosevelt to exchange destroyers for leases of military bases).

a time of war,³⁸⁷ and conclude agreements to resolve armed conflicts.³⁸⁸ The result is that, while the commander-in-chief power has substantial relevance in the external realm and in the narrow field of the armed forces, the existence of international law obligations can serve only to limit, not increase, the president's domestic law powers.

In their narrow fields, each of the constitutionally delegated presidential powers—whether one describes them as “legislative” in nature or otherwise³⁸⁹—has “as much legal validity and obligation as if [it] proceeded from the legislature.”³⁹⁰ Thus, in the narrow silos of executive power expressly identified in Article II, the president may make legally binding decisions—such as the disposition of armed forces personnel—without the involvement of Congress. Nonetheless, because the executive branch of its nature is a law enforcer and not a lawmaker, the domestic law incidents of presidential action in foreign affairs must yield to the powers of Congress.

Just last term, the Court emphatically affirmed this proposition. The core constitutional message of *Hamdan* was that, at least in the absence of “controlling necessity,”³⁹¹ the president's authority to convene penal judicial tribunals even on the foundation of the commander-in-chief power is subject to the legislative powers of Congress.³⁹² Indeed, the Court also took the occasion to reaffirm Justice Jackson's insight in *Youngstown* that, even if there are circumstances that would justify independent executive powers on the subject, the president “may not disregard limitations that Congress has, in proper exercise of

387. See *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (observing that the president has authority over the disposition of the country's armed forces and may “employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy”); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority.”).

388. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) cmt. g (1987) (“It is established that the President can make agreements . . . as commander in chief during declared wars, including armistice agreements.”).

389. See *INS v. Chadha*, 462 U.S. 919, 952 (1983) (stating that whether particular actions “are, in law and fact, an exercise of legislative power depends not on their form” but on whether they “had the purpose and effect of altering the legal rights, duties, and relations of persons”).

390. *United States v. Pink*, 315 U.S. 203, 230 (1942) (quoting *THE FEDERALIST* NO. 64 (John Jay)).

391. In the landmark opinion of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), Chief Justice Chase suggested that the president has a power to convene military commissions “without the sanction of Congress” in cases of “controlling necessity.” *Id.* 139–40. Although the *Hamdan* court quoted the related passage at length, it observed that the issue raised by Chase's suggestion is one “this Court has not answered definitively, and need not answer today.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006).

392. *Hamdan*, 126 S. Ct. at 2773–74.

its own war powers, placed on his powers.”³⁹³ In doing so, the Court relied decisively on a point I have separately emphasized above³⁹⁴: that the Constitution delegates to Congress express legislative powers in the field of foreign affairs, including the definition and punishment of “offences against the law of nations.”³⁹⁵ In short, beyond the exigencies of war or national emergency, the domestic law incidents of even the president’s commander-in-chief powers must yield to the legislative authority of Congress.

In contrast, more flexibility may be appropriate regarding the preemption of some state law. As I have argued above, the president does not possess a general preemptive power to enforce his unilateral foreign affairs preferences as against neutral state laws of general application.³⁹⁶ It is nonetheless a fair implication of the express constitutional prohibitions on state treaty-making³⁹⁷ that individual states may not engage in targeted interference with the foreign policy of the nation as a whole. In such rare cases, state lawmaking powers must yield to the constitutionally grounded powers of the president in foreign affairs, even if doubt exists about the extent of congressional approval of the presidential policy.³⁹⁸

CONCLUSION

The president of the United States fulfills important responsibilities as the nation’s “constitutional representative”³⁹⁹ in our relations with foreign states. There are also sound reasons, both instrumental and normative, for the United States to adhere to the formal commitments made in its sovereign interaction with foreign states under international law. The desire of a president to compel domestic compliance with such international obligations would

393. *Id.* at 2774 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). This does not mean that Congress may usurp express constitutional delegations of authority to the president. For example, Congress may not direct that a particular general undertake a specific military maneuver in a battle. It may, however, limit presidential action through exercise of its general legislative authority, such as the appropriation power. See Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 899 (1994) (examining the power of Congress to limit presidential activity regarding national security through specific limits on funding).

394. See *supra* notes 205–207 and accompanying text.

395. *Hamdan*, 126 S. Ct. at 2773; see also U.S. CONST. art. I, § 8, cl. 10.

396. See *supra* notes 265–275 and accompanying text.

397. See U.S. CONST. art. I, § 10, cl. 1 (prohibiting the states from concluding “any Treaty, Alliance, or Confederation”); *id.* art. I, § 10, cl. 3 (requiring the consent of Congress before a state may conclude “any Agreement or Compact with a . . . foreign Power”).

398. See *supra* Part III (examining presidential enforcement of international law on the foundation of congressional approval).

399. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

seem, therefore, to implicate few, if any, issues of constitutional significance. Indeed, the most recent assertion of executive authority by the present administration proceeds from an unusually clear foundation in this regard. Acting within its binding jurisdiction, the ICJ has declared that the United States violated its ratified treaty obligations owed directly to individuals under international law.

It is precisely for such circumstances, however, that Justice Jackson offered his famous admonition about presidential authority a half century ago: "The opinions of judges, no less than executives and publicists," he observed, "often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote."⁴⁰⁰ My argument here has not been about the cause of faithful compliance with international law. Rather, it has been that the executive branch is not the constitutionally prescribed agency for both creating international law and then ensuring domestic compliance in its sole discretion from time to time. The Constitution designates Congress—or, more carefully, the interbranch cooperation prescribed in Article I for federal legislation—as the institution with general lawmaking authority and with the specific power to "carry[] into Execution . . . all other Powers" vested in the national government.⁴⁰¹ For treaties as well, Article II assigns an essential role to the Senate before international law may function as supreme federal law.

"The tendency is strong," Justice Jackson insightfully concluded, "to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic."⁴⁰² The nearly 1000 treaties and 15,000 formal executive agreements concluded in the last fifty years alone amply demonstrate the risk of such enduring consequences from a casual recognition of a unilateral, discretionary executive power to act as a general domestic lawmaker in the field of foreign affairs.

400. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

401. U.S. CONST. art I, § 8, cl. 18.

402. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).
