EXECUTIVE AGGRANDIZEMENT IN FOREIGN AFFAIRS LAWMAKING

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Introduction*

The scope of the "executive Power" vested in the President by Article II of the 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 text, advocates of strong presidential power as early as Alexander Hamilton nonetheless have 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 inherent 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 a Supreme Court penchant for expansive rhetoric on the subject,⁶ some have argued that

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

² See U.S. CONST. art. II, § 2, cl. 1 (designating the President the "Commander in Chief of the Army and Navy of the United States"); id. art. II, § 2, cl. 2 and art. II, § 3 (delegating to the President the authority to appoint and receive ambassadors and other foreign ministers).

³ See 7 THE WORKS OF ALEXANDER HAMILTON 80-81 (John C. Hamilton ed., 1851)(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."). See also infra notes 165-172 and accompanying text (examining Hamilton's views in greater detail).

⁴ See, e.g., John C. Yoo, War and the Constitutional Text, 69 U. CHI. L. REV. 1639, 1677-78 (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"); H. Jefferson Powell, The President's Authority over Foreign Affairs: An Executive Branch Perspective, 67 GEO. WASH. L. REV. 527 (1999)(arguing that the structure of the Constitution confers on the President certain "autonomous" and "independent" powers). See also Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 NW. U. L. REV. 1377 (1994)(broadly examining the powers conferred on the President through the vesting clause of Article II).

⁵ See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 255 (2001)(developing a comprehensive historical and textual defense for implied executive powers in foreign affairs); Powell, *supra* note 5, at 541-44)(arguing that Article II impliedly confers on the President expansive powers over foreign affairs).

⁶ See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-19 (1936)(asserting that the President is the "sole organ" in foreign affairs); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) (observing that the President has "unique responsibility" in matters of "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").

in matters of foreign affairs the President possesses inherent, perhaps even extra-constitutional, powers.⁷ The recent expansive assertions of implied executive authority by the present Administration against the backdrop of national security considerations also have 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 Senate to transform treaty obligations into federal law is now beyond reasonable dispute.⁹ But some scholars¹⁰ have of late advanced a spirited challenge to the distilled modern wisdom that international law in general operates directly as an element of federal common law.¹¹

⁷ The theory of extra-constitutional executive powers in foreign affairs traces its lineage to Justice Sutherland's famous dicta in United States v. Curtiss-Wright Export Corp.. *See* 299 U.S. 304, 318-19 (1936)(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 were "vested in the federal government as necessary concomitants of nationality" and locating much of such authority in the President). *See also* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 5 (1999)(arguing that early 20th 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 claims of implied and inherent Article II authority for an assertion of a broad array of powers, including regarding the war in Iraq and the detainment of alleged supporters of international terrorism. See, e.g., Legal Authorities Supporting the Activities of the National Security Described by the President (U.S. Dept. of Justice)(Jan. 19, 2006), http://www.usdoj.gov/01whatsnew/01 1.html (asserting that the President has "inherent constitutional authority to conduct warrantless searches and surveillance in the United States for foreign intelligence purposes"); Application of Treaties and Laws to al Queda and Taliban Detainees, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense 11-15, 31-34 (Jan. 22, 2002)(supporting 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")[hereinafter, Bybee Memorandum); Authority for Use of Force to Combat Terrorist Activities in the United States, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense 14-16 (October 17, 2001)(supporting detention and use of force against alleged terrorists in the United States on the same ground) [hereinafter, Yoo/Delahunty Memorandum]. See also Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 MICH. L. REV. 545, 631-644 (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 Part I.A.2. (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, 849-70 (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, 1664-98 (1997)(same).

¹¹ See, e.g., Harold Hongju Koh, Is International Law Really State Law?, 111 HARV. L. REV. 1824, 1830-

Throughout constitutional history, advocates of executive authority have attempted to insert a presidential lawmaking power at the intersection of these debates. The specific claim here 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 President Washington's Neutrality Declaration on the national executive's supposed authority to enforce the existing state of international law. 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. Similar claims have come from nearly every President, including most prominently Madison, Tyler, McKinley, Wilson, Franklin Roosevelt, Truman, and Reagan.

A recent surprise "Determination" by President Bush has revived this enduring debate with particular controversy. In a simple two-paragraph memorandum to the Attorney General, ¹⁵ the Administration has claimed—amidst abundant ironies ¹⁶—that the implied executive powers of Article II include an authority to compel compliance with international law as determined solely by the President. ¹⁷ In specific, the Determination ordered state courts to implement a decision of the International Court of Justice, ¹⁸ even though the Administration has argued that neither the decision

60 (1998)(defending the majority view and reviewing extensive Supreme Court authority, beginning with the Marshall court, for the proposition that customary international law operates as federal law as an element of federal common law).

¹² See infra notes 65-67 and accompanying text (discussing this episode in greater detail).

¹³ See infra notes 68-70 and accompanying text (reviewing Marshall's arguments in their historical context).

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

¹⁵ George W. Bush, *Memorandum for the Attorney General* (Feb. 28, 2005), available at http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html. *See also infra* note 105 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 118 Finally, President Bush's actions directly conflicted with an earlier position of the Clinton Administration, which asserted that our federal system did not permit the national government so to intrude into state prerogatives. *See infra* note 255 (explaining that in an earlier proceeding on the same issue, the Clinton Administration declared that the President does not possess the power now claimed).

¹⁷ See Brief for the United States as Amicus Curiae Supporting Respondent, Medellin v. Dretke, No. 04-5928, at 48-60 (defending the President's authority to issue the Determination), available at http://www.usdoi.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.html.

¹⁸ See Determination, supra note 15.

itself nor the related treaty obligations are directly enforceable in domestic law.¹⁹ A core feature—and presumably a core purpose—of this assertion of executive power, moreover, is that it removes from the judicial branch any responsibility for the interpretation and application of the international law obligations of the United States.²⁰

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

In this article, I undertake a critical examination of the constitutional authority of the President both to create the formal foreign affairs obligations of the United States and then to compel compliance as a matter of federal law. Part I first sets the legal and factual context. After a brief review of President's constitutional powers in foreign affairs,²² it will review the historical assertions of executive lawmaking authority over foreign affairs lawmaking.²³ Part I will then examine 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 then turns to the first—and most controversial—of three core principles of executive lawmaking on the foundation of formal foreign affairs obligations of the United States. There, I examine the principal constitutional claims advanced by scholars and executive branch advocates to support executive lawmaking in the field. The first is founded on the Take Care Clause of Article II²⁵ and reasons that, because international law is part of federal law, the President has a discretionary power to see that it is "faithfully executed."²⁶ A broader and more abstract claim is premised on an essentialist understanding of the "executive Power" of Article II. This view holds that the Vesting Clause of Article II²⁷ represents an affirmative grant of "residual" powers which inhere in the President, and that among these is an authority to shape and domestically enforce the

¹⁹ See infra notes 104-113(examining the Administration's defense of the Determination).

²⁰ See infra notes 107-113(analyzing the claim that enforcement of international law is solely a matter for the "political branches").

²¹ See infra notes 124-123 and accompanying text.

²² See infra Part I.A.

²³ See infra Part I.B.

²⁴ See infra Part I.C.

²⁵ See U.S. CONST., art. II, § 3.

²⁶ See infra Part II.A.

²⁷ U.S. Const., art. II, § 1, cl. 1.

executive's formal foreign affairs policy.²⁸ Part II finally addresses a subtle, but potentially powerful, new claim which relates to the domestic effect of treaties. Although the most recent controversy focuses on a particular constellation of treaties, 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

Part II takes up, and refutes, each of these claims in turn. We will see that some are more compelling than others. I will argue, however, that none tells a convincing story that is faithful both to the separation of powers doctrine and to 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. The answer, rather, is found in fidelity to the separation of powers doctrine. This point is the subject of a second, and less controversial, principle of foreign affairs lawmaking.³⁰ 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. will explain, the President may obtain such a power through an express or implied delegation, whether from Congress as a whole via Article I legislation or from the Senate through the vehicle of a treaty.

A third principle of foreign affairs lawmaking, examined in Part IV, focuses a final, narrow field of powers expressly delegated to the President by the Constitution. Article II confers on the national executive certain independent powers in foreign affairs, including control over ambassadorial relations,³¹ Commander-in-Chief of the armed forces³², 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 in their domestic effects must in any event yield to the legislative powers of Congress.

²⁸ See infra Part II.B.

²⁹ See infra Part II.C.

³⁰ See infra Part III.

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

³² U.S. CONST., art. II, § 2.

³³ U.S. CONST., art. II, *§* 3.

"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." This observation has been particularly apt in the field of foreign affairs, where expansive Supreme Court rhetoric coupled with an absence of noteworthy federalism limits on national power have 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 inter-branch 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. The 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 super-majority 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.

Does the general "executive Power" of Article II also grant to the President the 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

³⁴ Edward S. Corwin, THE PRESIDENT: OFFICE AND POWERS, 1787-1984: HISTORY AND ANALYSIS OF PRACTICE AND OPINION (5th rev. ed., Randall W. Bland, Theodore T. Hindson, and Jack W. Peltason, eds., 1984).

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

³⁶ U.S. CONST., art. II, § 2.

³⁷ See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

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

focus the profound issues at stake in recognizing an independent 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 Supreme Court has emphasized that "foreign affairs and international relations [are] matters which the Constitution entrusts solely to the Federal Government" and that the "[t]he Constitution ... speaks with no uncertain sound upon this subject."

Unfortunately, the boundaries of national power in foreign affairs sometimes have been distorted precisely by a Supreme Court 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 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

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* Chae Chan Ping v. United States (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"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936)("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.").

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

⁴² See, e.g., Chicago & Southern 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"); First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (plurality opinion)(declaring that the President has "the lead role ... in foreign policy"); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993)(stating that the President has a "unique responsibility" in the field of foreign and military affairs).

^{43 299} U.S. 304 (1936).

⁴⁴ *Id.*, at 320.

⁴⁵ See, e.g., American Insurance 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 Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)); First Nat. 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");

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 foreign affairs, a point the Supreme 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 executive branch authority in the external realm, at least in absence of contrary congressional actions. 47 Thus, 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 relations 50 includes an authority to recognize governments, 51 direct external military conflicts, and in general manage our 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

Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993)(observing that the President has "unique responsibility" regarding matters of "foreign and military affairs").

⁴⁶ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)(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 Youngstown, 343 U.S. at 635-636 n.2 (Jackson, J., concurring) (observing that the President may "act in external affairs without congressional authority") (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). *Cf.* Restatement of Foreign Relations, *supra* note 37, §326(1), (2) (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 of the United States").

⁴⁸ U.S. CONST., art. II, § 2. (designating the President the Commander-in-Chief of the nation's armed forces).

 $^{^{49}}$ U.S. CONST., art. II, § 3 (granting the President the authority to "make treaties," provided a supermajority of the Senate concurs).

⁵⁰ U.S. CONST., art. II, § 3 (granting the President the authority, with the advice and consent of the Senate, both to appoint and 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)(same).

⁵² Part IV below examines the extent to which the express constitutional delegations of power in Article II represent an independent executive lawmaking power.

⁵³ See, e.g., American Insurance Ass'n v. Garamendi, 539 U.S. 396, 414 (2003)(observing that although 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 Export Corp., 299 U.S. 304, 320 (1936)(stating that in matters of foreign affairs the President has "a degree of discretion and freedom from statutory

"constitutional representative" in foreign legal affairs, the President controls, first, the expression of national consent to the distillation of customary international law. Moreover, executive branch officials serve as the formal representatives of the United States in a variety of international organizations, including the United Nations, nearly all of which either directly or indirectly participate in the generation of principles of international law.

To be sure, the executive power over treaty-making—the other principal source of international law⁵⁸—is constrained by a constitutional requirement of Senatorial consent. Beginning as early as Washington Administration, however, Presidents have made international law agreements with foreign powers without the advice and consent of the Senate.⁵⁹ And on the foundation of occasional, if ambiguous, Supreme Court approval (about which more below), recent occupants of the White House have concluded nearly 15,000 such "sole executive agreements" in the last 50 years alone⁶⁰

Of their nature, these foreign commitments by the President on behalf of the United States are creatures of international law and thus function as elements of that independent, external legal regime. The mere existence, however, of these obligations of international law also creates an important constitutional conflict in the domestic legal realm.⁶¹ Although not without controversy,

restriction which would not be admissible were domestic affairs alone involved"); *id.*, at 320 (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 See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).
- ⁵⁵ Binding rules of customary international law arise "from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement of Foreign Relations, *supra* note 37, § 102(2).
- ⁵⁶ See, e.g., 22 U.S.C. § 2021 (2000) (authorizing the President to appoint representatives to the International Atomic Energy Agency); 22 U.S.C. § 290(a) (2000) (authorizing the President to appoint representatives to the World Health Organization).
- 57 See 22 U.S.C. § 287 (2005) (authorizing the President to appoint representatives to the United Nations).
- ⁵⁸ See Restatement of Foreign Relations, *supra* note 37, § 102(3)("International agreements create law for the state parties thereto ...").
- ⁵⁹ See American 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 and 496 n. 163).
 - ⁶⁰ See Treaties and Other International Agreements, supra note 256, at 2.
- ⁶¹ 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 of Foreign Relations, *supra* note 37, § 311(3)(providing that a state "may not invoke a violation of its internal law to

the accepted wisdom, as most prominently declared by the Supreme Court over 100 years ago, is that "[i]nternational law is part of our law." 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. 63

Part II below will provided a broad critique of this reasoning. Before doing so, however, it will be profitable to recall briefly that Presidents have claimed a power to enforce domestic compliance with international law from the earliest days of the Constitution. As we shall see immediately below,⁶⁴ a recent assertion of executive authority by President Bush 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 power of the President to compel compliance with executive prerogatives with regard to 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 own Neutrality Proclamation. As part of a broader defense of executive control over foreign policy, ⁶⁵

vitiate its consent to be bound [to international agreements] unless the violation was manifest and concerned a rule of fundamental importance").

⁶² The Paquete Habana, 175 U.S. 677, 700 (1900). See also, e.g., Doe I v. Unocal Corp., 395 F.3d 932, (9th Cir. 2002)(observing that "it is 'well settled that the law of nations is part of federal common law")(quoting In re Estate of Ferdinand E. 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).

⁶³ 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, 870 (2001).

⁶⁴ See Part I.B. below.

⁶⁵ The thrust of Hamilton's broader Federalist defense of Washington's Neutrality Proclamation was that in matters of foreign affairs the executive power included all authority not textually allocated to another branch, an issue we will take up in more detail in Part II.B below. Nonetheless, Hamilton recognized that the war declaration and treaty-making powers, for example, were exceptions to his general theory. See also Prakash & Ramsey, supra note 5, at 329-331 (explaining that in Hamilton's view of the Neutrality Proclamation "[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

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." Because national executive had the power to determine that neutrality was the existing state of the nation under international law, Hamilton reasoned, "it becomes both its province and its duty to enforce the laws incident to that state of the Nation."

The issue also returned to prominence as part of the famous Robbins Affair during the administration of John Adams. In February 1799, Adams issued a warrant for the arrest of Jonathan Robbins, an alleged mutineer, on the foundation of certain extradition provisions in the so-called Jay Treaty with Great Britain.⁶⁸ Unfortunately for Adams, the treaty provisions at issue were ambiguous on the scope of extraditable offenses,⁶⁹ 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 his own initiative. It also provoked a famous defense of executive authority by then-Congressman John Marshall. The answer to the controversy, Marshall reasoned, was to be found in the executive authority to enforce the laws, including the implied international law obligations 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

extensive, and competing, reviews of Hamilton's views on the executive power over foreign affairs in connection with the Neutrality Proclamation see Prakash & Ramsey, supra note 5, at 328-331, and Bradley & Flaherty, supra note 8, at 678-82.

⁶⁶ A. Hamilton, *supra* note 3, at 38 (describing the national Executive "as the organ of intercourse between the Nation and foreign Nations[,] ... as that Power, which is charged with the Execution of the Laws, of which Treaties form a part"); *id.*, at 40 ("The Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws").

⁶⁷ See Alexander Hamilton, supra note 3, at 40. See also Bradley & Flaherty, supra note 8, at 682 (comprehensively examining the context of Hamilton's comments on the Neutrality Declaration).

⁶⁸ 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).

⁶⁹ 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." Although there was little doubt that Robbins was a crewmember, his involvement in the murders committed as party of the mutiny was substantially unclear. For more detail on the facts of the Robbins Affair see Wedgewood, supra note 68, at 235-248.

this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.⁷⁰

There are strong grounds to doubt the face value of Marshall's specific assertions here.⁷¹ Nonetheless, his reasoning has had particular historical traction. As much as a century and a half later, for example, the dissenters in the famous *Youngstown Sheet & Tube* case of 1952 attempted (unsuccessfully⁷²) to channel Marshall's message to justify President Truman's seizure of Steel mills to support the undeclared Korean War.⁷³

The validity of the broader proposition of executive authority to act on the foundation of international law nonetheless has remained unclear. Not long after the Robbins Affair, for example, President Madison's claimed the power to seize a non-combatant private ship of a foreign enemy on the foundation of accepted usages of international law.⁷⁴ Although the Supreme Court there rejected the claim,⁷⁵ throughout the nineteenth century Presidents took unilateral action without

⁷⁰ See 10 Annals of Cong., 6th Cong., 1st Sess. 613-14 (March 7, 1800).

Thirty years later, however, Marshall—now as Chief Justice of the Supreme Court—simply 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) (Marshall, C.J.) (drawing a distinction between a treaty that "operate [s] of the particular department").

⁷² See infra note 212 and accompanying text (reviewing the Supreme Court's rejection of President Truman's claimed authority based solely on foreign affairs policy).

⁷³ See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 684 (1952)(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).

⁷⁴ See Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814)(reviewing President Madison's assertion of authority).

⁷⁵ See id., at 128 (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, 19-20 (1996)(analyzing the Brown opinion in light of a recent executive branch assertion of authority)

effective challenge based on international law rights or obligations.⁷⁶ Prominent examples include Tyler's dispatch of troops to Texas in 1844 even before Senate approval of the treaty of annexation; Benjamin Harrison's 1882 authorization of foreign military units on United States' soil based on an international agreement with Mexico; McKinley's joining of a far-ranging international protocol with China at the conclusion of the Boxer Rebellion in 1901,⁷⁷ and 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.⁷⁸ 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.⁷⁹

The Supreme Court stoked the controversy considerably in the early twentieth century with its initial proclamations on the validity of executive agreements concluded on the authority of the President alone. Direct Supreme Court 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. The Court sustained Roosevelt's action in United States v. Belmont, amintaining, without supporting authority, that the President's power to conclude such a binding international agreement without Senate consent "may not be doubted." Relying solely on Belmont, the Court later reaffirmed the domestic enforceability of the Litvinov

⁷⁶ 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 36-42 (1920)(2003 reprint).

⁷⁷ See id., at 40-42. See also U.S. Dep't of State, Papers Relating to the Foreign Relations of the United States, App. 312-318 (1901).

⁷⁸ See Berdahl, supra note 76, at 68-70. At least one Congressional opponent expressly rejected the claimed right of Wilson to determine and then enforce the nation's obligations under international law. See 64 Cong. Rec., 53 Cong. 2d Sess., 4884 (1917)(statement of Senator Stone)(rejecting the claim that the President's authority to execute the law including 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").

⁷⁹ Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 491-98 (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").

⁸⁰ 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, 145-156 (1998).

^{81 301} U.S. 324 (1937).

⁸² *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").

Agreement in *United States v. Pink*⁸³ against a challenge by a private individual. Beyond formulaic citations to the President's status as "sole organ" in foreign affairs, ⁸⁴ 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. Three 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 Algiers Accords to resolve an international hostage crisis with Iran. One of these executive orders sought to implement a mandatory dispute resolution procedure for certain private claims as set forth in the Accords. The Supreme Court endorsed this domestic exercise of authority on the foundation of the sole executive agreements. But it also declared that it was "crucial" to its decision that Congress had "implicitly approved" of the executive actions.

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.⁸⁹ In *Garamendi v. American Insurance Association*,⁹⁰ 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." But in a substantially more questionable passage, the Court also broadly observed that such agreements "generally ... are fit to preempt state law, just as treaties are." It

^{83 315} U.S. 203, 222-223 (1942).

⁸⁴ See Belmont, 301 U.S. at 330; Pink, 315 U.S. at 223 (quoting Belmont, 301 U.S. at 331, for the proposition that "all international compacts and agreements" are entitled to "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 80, at 145-156.

⁸⁵ Dames & Moore v. Regan, 453 U.S. 654, 662-668 (1981)(reviewing the Accords).

⁸⁶ See Exec. Order No. 12294, 46 Fed. Reg. 14111 (February 24, 1981).

⁸⁷ Dames & Moore, 453 U.S. at 680.

⁸⁸ *Id*.

⁸⁹ See Agreement Concerning the Foundation "Remembrance, Responsibility and the Future" [U.S.-Ger.], 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, 402-09 (2003).

^{90 539} U.S. 396 (2003)

⁹¹ *Id.*, at 415.

⁹² Id., at 416.

then found that the executive agreements by President Clinton preempted a California insurance law specifically targeted at the subject of the international agreements.⁹³

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 serve to set an important context for the most recent iteration of this enduring constitutional controversy. As perhaps might have been predicted, the present Administration now has 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.

C. The Return of the Constitutional Controversy

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

The contemporary revival of the controversy over executive lawmaking in foreign affairs is founded on the remarkable circumstance of an authoritative decision by the International Court of Justice interpreting 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 (the Vienna Convention). Among other provisions, this treaty obligates the 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.

Following a variety of preliminary rulings,⁹⁶ including derivative actions in the Supreme Court of the United States,⁹⁷ the ICJ concluded in 2004 in *Case Concerning Avena and other Mexican Nationals*⁹⁸ that the Vienna Convention creates rights directly in favor of individuals.⁹⁹ It also found

⁹³ *Id.*, at 420-429.

⁹⁴ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. *See also* http://untreatv.un.org (listing the member states).

⁹⁵ *Id.*, art. 36(1)(a)-(c).

⁹⁶ See LaGrand Case (Germany vs. United States), 2001 I.C.J. 466 (Judgment of June 27, 1999); Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.), Order on Request for Indication of Provisional Measures, ¶ 41 (April 19, 1998).

⁹⁷ The Supreme Court rejected early attempts to enforce the preliminary rulings of the ICJ on the basis of procedural defaults by death row claimants. *See* Breard v. Greene, 523 U.S. 371, 377 (1998)(*per curiam*); Federal 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).

 $^{^{98}}$ See Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. No. 128 (Judgment of Mar. 31, 2004).

that the United States had violated these treaty obligations by failing to inform 51 Mexican nationals now on death row of their rights under the Vienna Convention. To vindicate those rights, the ICJ ordered that the United States 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. Although formally limited to those 51 individuals, *Avena* also called into doubt the convictions of literally tens of thousands of foreign nationals held in state prisons. 102

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

It is not surprising, then, that only a few months after *Avena* the Supreme Court quickly 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. Hopes for an authoritative resolution of this issue were dashed, however, 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" (the "Determination") regarding the ICJ's decision. 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 laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States

⁹⁹ *Id.*, at 33, ¶¶ 61, 63; *id.*, at 48-49, ¶¶ 121-123

 $^{^{100}}$ Id., at 53-54, ¶¶138-143; id., at 60, ¶ 153(9).

¹⁰¹ See id., at 48-49, ¶¶ 121-123; id., at 53-54, ¶¶138-143; id., at 60, ¶ 153(9).

¹⁰² In its Avena opinion, the ICJ took pains to emphasize that, while its decision strictly applied only 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. See Case Concerning Avena, supra note 98, at 57, ¶ 151 ("re-emphasiz[ing]" as a "point of importance ... the 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 U.S. Dept. of Justice, Bureau of Justice Statistics Bull., at. 5 Prison and Jail Inmates at Midyear 2004, http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf (noting that in 2004 over 90,000 non-citizens were held in federal and state prisons).

¹⁰³ Medellin v. Dretke, 543 U.S. 1032 (2004).

¹⁰⁴ See U.S. Amicus Brief, supra note 17, at 52.

of America), 2004 I.C.J. 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.¹⁰⁵

Distilled to its essence, the Determination purports to implement the ICJ's decision solely on the initiative of the President and through the use of state courts. Asserting discretion supposedly housed in the executive branch, the President also carefully limited the Determination to the 51 Mexican nationals within the strict scope of the ICJ's *Avena* holding.¹⁰⁶

But more important for present purposes is the breadth of the claimed authority on which the Determination is based. In its brief to the Supreme Court, the Solicitor General argued that neither the Vienna Convention¹⁰⁷ nor its Optional Protocol¹⁰⁸ on ICJ jurisdiction,¹⁰⁹ nor indeed the obligation in the U.N. Charter to comply with such binding decisions,¹¹⁰ creates a private right to enforce the ICJ's *Avena* decision in United States courts.¹¹¹ Rather, the Administration reasoned, these treaties merely reflect obligations under international law.¹¹² As a result, the enforcement agency is the "political branches," not domestic courts at the behest of individuals.¹¹³

¹⁰⁵ See Determination, supra note 15. See also U.S. Amicus Brief, supra note 17, at 52 (quoting the President's Memorandum in full).

¹⁰⁶ See U.S. Amicus Brief, supra note 17, at 58 ("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)).

¹⁰⁷ See id., at 23 (arguing that "Article 36 does not give a foreign national a judicially enforceable right to challenge his conviction or sentence"). See also id., at 42 (asserting that article 36 of the Vienna Convention "does not mention the possible effect of an ICJ decision" and thus "cannot be a source for private enforcement of an ICJ decision").

¹⁰⁸ See Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna, on 24 April 1963, 21 U.S.T. 326, 596 U.N.T.S. 488.

¹⁰⁹ U.S. Amicus Brief, *supra* note 17, at 42 (arguing that the Optional Protocol operates merely 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')

¹¹⁰ See Charter of the United Nations, art. 94(1), June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945 (obligating member states "to comply with the decision of the International Court of Justice in any case to which it is a party.")

¹¹¹ U.S. Amicus Brief, *supra* note 17, at 43 (arguing that article 94 of the UN Charter is not directly enforceable in domestic courts but rather merely "constitutes a <u>commitment</u> on the part of U.N. members to take <u>future</u> action" to comply with binding ICJ decisions) (emphasis in original).

¹¹² See id., at 44 (arguing that "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.").

¹¹³ See id., at 43 (asserting that the contemplated future compliance would occur through the member states' "political branches"); id., at 44 (citing the right of a prevailing party before the ICJ to seek redress

3. The Disarray in the Supreme Court

The peculiar legal circumstances occasioned by the presidential Determination produced substantial disarray in the Supreme Court. The best the Court as a whole could muster was a *per curiam* opinion dismissing Medellín's writ of certiorari as improvidently granted.¹¹⁴ This opinion concluded that "several threshold issues" could independently preclude the federal habeas relief Medellín sought.¹¹⁵ 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." About the core question of the constitutionality of the Determination itself, however, the Court (in the words of Justice O'Connor in dissent) "remain[ed] agnostic." ¹¹⁷

Beyond these generalities, there was little agreement among the members of the Court on the merits of the case. ¹¹⁸ Justice Ginsburg, joined oddly 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. ¹¹⁹ In a principal dissent joined by Justices Stevens, Souter, and Breyer, Justice O'Connor argued, in contrast, that the Court should have directly addressed the substantial constitutional issues raised by the ICJ's decision and the President's Determination. ¹²⁰

before the U.N. Security and arguing that this provision "envisions that the political branches of a Nation may choose not to comply with an ICJ decision")(citing U.N. Charter, supra note 110, art. 94(2)).

¹¹⁴ Medellin v. Dretke, __ U.S. __, 125 S.Ct. 2088, 2090 (2005)(per curiam).

¹¹⁵ See id., at 2090.

¹¹⁶ *Id*.

¹¹⁷ *Id.*, at 2096 (O'Connor, J., dissenting)(stating that on the issue of the constitutionality of the President's Determination "the Court remains rightfully agnostic").

¹¹⁸ In contrast to the Supreme Court, the response of the State of Texas to the President's Determination was unequivocal. The State Attorney General's brief to the Supreme Court described the President's assertion of a unilateral authority to implement international law as "utterly unprecedented." Brief for Respondent in Response to Petitioner's Motion to Stay, Medellin v. Dretke, U.S. Supreme Court Docket no. 04-5928, at 5 (March 15, 2005). 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." See Adam Liptak, U.S. Says It Has Withdrawn From World Judicial Body, N.Y. TIMES, March 10, 2005, at A16 (relating a statement by a spokesperson for the Attorney General of Texas.)

¹¹⁹ *Id.*, at 2093 (Ginsburg, J., concurring). *See also id.* (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).

¹²⁰ Id., 125 S.Ct. at 2096 (O'Connor, J., dissenting)(arguing that it was improvident of the Court "to avoid questions of national importance when they are bound to recur").

Justices Souter¹²¹ and Breyer¹²² (the latter joined by Stevens) then further confused the picture with separate dissenting opinions emphasizing aspects of the arguments advanced in Justice O'Connor's principal dissent. But Justice Breyer also left the decided impression that the President had the authority at least to preempt state law through the Determination.¹²³

By charitable description, the Supreme Courts splintered opinions in *Medellín* have left a substantial void in guidance on an issue at the very core of the Constitution's allocation of lawmaking authority.¹²⁴ 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? As we shall see in the next Part, 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. Contrary to the views of most scholars of international law, I will argue below, however, that none of these theories advances a convincing account that is faithful both to the separation of powers doctrine and to the constitutional limits on executive lawmaking. The result is a core principle that the President does not possess a general

¹²¹ *Id.*, 125 S.Ct. at 2106 (Souter, J., dissenting)(arguing that, in 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");

¹²² *Id.*, 125 S.Ct. at 2107 (Breyer, J., dissenting)(arguing that, in absence of a stay, the court should vacate the Fifth Circuit's in order to "remove from the books an erroneous legal Determination" that the United States courts are not at all bound by the ICJ's decision in Avena).

¹²³ See id., at 2107-2108 (Breyer, J., dissenting)(stating that the combined effect of the presidential Determination and the particular arrangement of treaties created "the very real possibility of [Medellin's] victory in state court").

¹²⁴ In contrast to the Supreme Court, the response of the State of Texas to the President's Determination was unequivocal. The State Attorney General's brief to the Supreme Court described the President's assertion of a unilateral authority to implement international law as "utterly unprecedented." Brief for Respondent in Response to Petitioner's Motion to Stay, Medellin v. Dretke, U.S. Supreme Court Docket no. 04-5928, at 5 (March 15, 2005). 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." *See* Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, March 10, 2005, at A16 (relating a statement by a spokesperson for the Attorney General of Texas.)

discretionary power both to 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, on this issue we find an odd alignment of perspective between strong international law advocates and the present Bush Administration, which one could describe with little risk of offense as unenthusiastic on the subject.

This Part will analyze the various theories advanced by these disparate interests in favor an executive authority to enforce international law. It will first address the view that the Take Care Clause of Article II, Section 3, of the Constitution alone empowers the President to enforce international obligations. ¹²⁵ Next, it will revisit the recurrent executive branch claim, first advanced by the Washington Administration, of broad authority over foreign affairs. It is this essentialist understanding of the "executive Power" of Article II that the present Administration now seeks to extend to the implementation of international law as a matter of domestic law. ¹²⁶ The final section examines the more specific argument that the President possesses a constitutionally grounded, discretionary power to define and enforce the nation's treaty obligations. ¹²⁷ Given the foundation of a formal international treaty, this claim would seem the most direct and least controversial. Careful review reveals, however, that more powerful forces are at work here; 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." As we have seen, ¹²⁹ this claim has played prominently in

¹²⁵ See infra Part II.A.

¹²⁶ See infra Part III.B.

¹²⁷ See infra Part III.C.

¹²⁸ See U.S. CONST., art. II, § 3.

¹²⁹ See supra notes 65-74 and accompanying text.

historical assertions of presidential power, including originalist assertions by Alexander Hamilton¹³⁰ and then-Congressman John Marshall.¹³¹

This claim is not merely of historical interest, however. To the contrary, the near consensus view among modern scholars holds that the President's Take Care Clause duties broadly extend to the domestic enforcement of international law in general. As Louis Henkin famously articulated this received wisdom, "[t]here 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." 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 International Court of Justice. 134

Ultimately, the claim of Take Care Clause advocates proceeds from a simple syllogism: Pursuant to Article VI of the Constitution, treaties and other international 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, in particular for treaties. A moment's scrutiny reveals, however, that there is a disconnect between the major and minor premises of the syllogism.

¹³⁰ A. Hamilton, *supra* note 3, at 40 (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 and well as the Municipal law, which recognizes and adopts those laws").

¹³¹ See 10 Annals of Cong., 6th Cong., 1st Sess. 613-14 (March 7, 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"). See also supra notes 68-70 and accompanying text (examining the context of this claim in more detail).

¹³² See Henkin, supra note 7, at 1567; Glennon, supra note 195, at 325; Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 VA. L. REV. 1071, 1179 (1985)(same); 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). See Restatement of Foreign Relations, supra note 37, § 111, cmt. c ("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.").

¹³³ See Henkin, supra note 7, at 1567.

¹³⁴ In the aftermath of the Supreme Court's decision in *Breard v. Greene*, 523 U.S. 371 (1998)(*per curiam*) 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. *See* Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 685 (1998). *But cf. id.*, at 689 (suggesting that the particular constellation of treaties at issue may have delegated enforcement authority to the President).

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

The mere existence of a ratified treaty thus does not mean that it inevitably falls within the Take Care Clause mandate. Instead, before the President's has an authority to execute the treaty form of federal law, one must first determine that the treaty at issue reflects immediately enforceable law. This principle applies even for the more prosaic form of federal law, Article I legislation. Consider as an illustration the Rules Enabling Act, which empowers the Supreme Court with assistance of the federal Judicial Conference to create procedural rules for federal litigation.

¹³⁵ See id. ("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.")

¹³⁶ The State Department lists nearly one thousand treaties to which the United States is a party. In contrast, there are only approximately 400 self-executing treaties currently in force, although this category is growing in both number and scope in recent years. *See* Van Alstine, *supra* note 272, at 921-927 (canvassing the self-executing treaties presently in force for the United States).

¹³⁷ Some treaties by their substance either are directed solely to the relations of sovereigns inter se, are merely aspirational, or otherwise are so indeterminate as to preclude judicial enforcement. See Restatement of Foreign Relations, supra note 37, § 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"). See also For a broad examination of the various forms of self-executing treaties see Carlos Manuel Vazquez, The Four Doctrines of Self-Executing Treaties, 89 AM. J. INT'L L. 695, 713-715 (1995).

¹³⁸ See Restatement of Foreign Relations, supra note 37, § 111(4)(providing that a treaty is non-self-executing "if the Senate in giving consent to a treaty ... requires implementing legislation").

 $^{^{139}}$ A treaty may not, for example, exercise a power, such as the appropriation 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").

¹⁴⁰ See supra Part I.A.2.b.

 $^{^{141}}$ As I analyze below, a particular treaty may delegate a discretionary enforcement power to the President. See infra Part III.

¹⁴² 28 U.S.C. §§ 2071-2077 (2004).

¹⁴³ 28 U.S.C. § 2072 (2004)(delegating to the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence" for the lower federal courts).

¹⁴⁴ 28 U.S.C. § 2072 (2004)(prescribing the procedures for the Judicial Conference in making recommendations to the Supreme Court regarding the promulgation of federal procedural and evidentiary rules).

¹⁴⁵ See also Sibbach v. Wilson & Co., 312 U.S. 1, (1941)(affirming the constitutionality of this delegation of rulemaking authority to the Supreme Court).

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 would not empower the President to assume the lawmaking authority specifically delegated by Congress to another entity.¹⁴⁶

The same is true of treaties. If a particular treaty does not create law cognizable in our domestic legal system, there is nothing—at least not yet—for the President to "execute" under the Take Care Clause. 147 Indeed, for some treaties the clear, sometimes explicitly declared, intent of the treaty-lawmakers at the time of adoption precludes a direct penetration of the international law obligations into domestic law. 148 Consider as an extreme illustration a treaty to which the Senate has given its consent only on the express condition that it does not create domestic law, now a common occurrence for human rights treaties. 149 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

¹⁴⁶ See Mistretta v. United States, 488 U.S. 361, 387 n.14 (1989)("[R]ulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch"); id. (observing that certain general language in an earlier opinion "[p]lainly ... was not intended to undermine our recognition in previous cases and in over 150 years of practice that rulemaking pursuant to a legislative delegation is not the exclusive prerogative of the Executive")(citing Buckley v. Valeo, 424 U.S. 1, 138 (1976)).

¹⁴⁷ See, e.g., Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001)("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 in original).

¹⁴⁸ 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." *See* U.S. Amicus Brief, *supra* note 17, at 27 (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")(*citing* S. Exec. Rep. No. 9, 91st Cong. 1st Sess. at 2 (1969))).

¹⁴⁹ 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)(stating that the Senate has attached such a declaration "to every major human rights treaty to which it has given its advice and consent since World War II"). See also infra note 207 (citing two prominent examples).

execution of so-called "self-executing" treaties.¹⁵⁰ But in its essence the Take Care Clause is a duty, not a power, as even some of the more aggressive proponents of executive authority have acknowledged.¹⁵¹ Its operative verb thus states that the President "shall" faithfully execute the laws.

At bottom, the defining word in the Take Care Clause is "faithfully." This adjectival 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.¹⁵² 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, may of course 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 will explore in more detail below. 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" 153

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" ¹⁵⁴

¹⁵⁰ 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 penetrate as domestic law. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions*, 90 CORNELL L. REV. 97, 158 (2004)(explaining that "[h]istorical materials support the view that the President's duty under the Take Care Clause includes a duty to execute treaties that are the law of the land").

¹⁵¹ See Steven G. Calabresi, supra note 4, at 1407 (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).

¹⁵² See Myers v. United States, 272 U.S. 52, 177 (1926)(Holmes, J., concurring)("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."). See also Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (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").

¹⁵³ The Paquete Habana, 175 U.S. 677, 700 (1900).

¹⁵⁴ See Bradley & Goldsmith, supra note 10, 816 and 849-73 (so describing the view that customary international law operates as supreme federal law).

holds that "[i]nternational law is part of our law"¹⁵⁵ of its own force through the vehicle of federal common law.¹⁵⁶ There is much to question in this basic proposition.¹⁵⁷ 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.¹⁵⁸ Because of this, the Take Care Clause syllogism only leads to an obligation of the President, not a discretionary power.¹⁵⁹ Although the national Executive over time clearly has a role in shaping sovereign obligations on the international plane,¹⁶⁰ 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.¹⁶¹

¹⁵⁵ The Paquete Habana, 175 U.S. 677, 700 (1900). *See also, e.g.,* Doe I v. Unocal Corp., 395 F.3d 932, (9th Cir. 2002)(observing that "it is 'well settled that the law of nations is part of federal common law")(*quoting* In re Estate of Ferdinand E. 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).

¹⁵⁶ See Koh, supra note 11, at 1825-26 (reviewing extensive Supreme Court authority holding that customary international law operates as federal law as an element of federal common law). See also, e.g., 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. 677, 700 (1900)(asserting the same basic proposition).

¹⁵⁷ See Bradley & Goldsmith, supra note 10, 816 and 849-73 (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").

¹⁵⁸ See Restatement of Foreign Relations, supra note 37, § 111(3)(asserting that "[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States"). See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964)(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").

¹⁵⁹ See Glennon, supra note 195, at 325 (describing the "obligation" of the President under the Take Care Clause to enforce international law); Lobel, supra note 133, at 1119-20 (same). See also Restatement of Foreign Relations, supra note 37, § 111, cmt. c (asserting in light of the Take Care Clause that the President has the "obligation" to enforce international law).

¹⁶⁰ See supra notes 47-60 and accompanying text.

¹⁶¹ Some have asserted (controversially) that the Executive may violate customary international law. See 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); Application of Treaties and Laws to al Qaeda and Taliban Detainees, supra note 8, at 32 (asserting that "[c]ustomary international law... cannot bind the executive

More fundamentally, the proposition that all international law is self-executing domestic law proves too much in a constitutional system founded on 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. If correct, then, the modern consensus view would mean that the President's unilateral power to shape international obligations would, under the force of the Take Care Clause, automatically carry with it a unilateral power to create supreme federal law. To illustrate the point, 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 supreme federal law without the immediate involvement of Congress, a point I will explore in more detail below.¹⁶⁴ 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 of the Constitution. Building (again) on expansive claims originally advanced by Alexander Hamilton, ¹⁶⁵ this view holds that Article II's Vesting

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.

¹⁶² See supra notes 53-60 and accompanying text.

agreement is binding even if the President exceeds his constitutional powers under domestic law. See Restatement of Foreign Relations, *supra* note 37, § 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"). *See also id.*, cmt. c. (concluding that because of the doubt about 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").

¹⁶⁴ See infra Parts III and IV.

¹⁶⁵ See 7 The Works of Alexander Hamilton 80-81 (John C. Hamilton ed., 1851) (advancing a Vesting Clause argument for implied executive powers). See also Myers v. United States, 272 U.S. 52, 118

Clause¹⁶⁶ represents not merely a self-evident preface, but rather an affirmative grant of power to the national Executive.¹⁶⁷ Moreover, the apparent contrast with the "herein granted" limitation on the legislative power in Article I¹⁶⁸ means that the unlimited Vesting Clause of Article II confers on the President a "residuum" of executive power.¹⁶⁹ Thus, the theory runs, all powers that an executive traditionally held in 1789 inhered in the United States President without the need for further textual elaboration.¹⁷⁰ These broad, implied executive powers exist unless limited by the more specific provisions of Article II, Sections 2 and 3,¹⁷¹ or express allocations to Congress in Article I.¹⁷²

(1926)(Taft, C.J.)(citing and agreeing with Hamilton's basic argument on the implied executive powers conferred by Article II).

¹⁶⁶ U.S. CONST., art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

167 See Calabresi, supra note 4, at 407 ("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."); See also id., at 1389-1400 (examining this claim in greater detail); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153, 1195 (1992)(arguing that the Vesting Clauses of both Articles II and III "confer somewhat nebulous grants of power on the executive and judicial departments" which the second sections of those articles "explicate and substantially qualify"); A. Michael Froomkin, The Imperial Presidency's New Vestments, 88 Nw. U. L. Rev. 1346 (1994)(examining the same contention).

168 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"); John C. Yoo, War and the Constitutional Text, 69 U. CHI. L. REV. 1639, 1677-78 (2002)(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").

¹⁶⁹ 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").

170 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 (advancing the same basic argument).

171 See Calabresi, supra note 151, at 1398 (asserting that it "seems absolutely clear to me that Section 2 of Article II defines, explicates, and substantially limits the Article II, Section 1 grant of the executive power"); Yoo, supra note 168, at 1678 (reasoning that "the 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").

¹⁷² See Monaghan, supra note 170, at 1398 (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 167, at 1165-68 (advancing the same argument). This was the principal argument of Alexander Hamilton. See 7 The Works of Alexander Hamilton 80-81 (John C. Hamilton ed., 1851) (arguing

The same basic reasoning applies to presidential authority over the special field of foreign affairs, but apparently with a greater force. As Prakash and Ramsey have argued in some detail, national executives in the founding period enjoyed substantial control over matters of foreign affairs. The more explicit grants of power to make treaties and appoint and receive ambassadors 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 Supreme Court's quotable declarations that the President is the "sole organ" in the field of foreign relations with the "vast share of responsibility for the conduct of our foreign relations." 176

This reasoning also is at the foundation of a whole range of claimed powers 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. Not surprisingly, the "Vesting Clause Thesis" also appears prominently in the most recent assertion that the President has a discretionary executive power to enforce domestic law compliance with international law. 179

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").

¹⁷³ 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").

¹⁷⁴ See U.S. CONST., art. II, §§ 2, 3.

¹⁷⁵ See United States v. Curtiss-Wright Export Corp., 299 U.S. 30, 319 (1936).

¹⁷⁶ See American Insurance Ass'n v. Garamendi, 539 U.S. 396, 414 (2003).

¹⁷⁷ The Bush Administration has relied on the Vesting Clause of Article II for an assertion of a broad array of powers, including regarding the war in Iraq and the detainment of alleged supporters of international terrorism. See, e.g., Bybee Memorandum, supra note 8, at 11-15 (supporting presidential detention of alleged foreign terrorists on the basis of implied executive powers in Article II); Yoo/Delahunty Memorandum, supra note 8, at 14-16 (asserting same foundation for use of force by 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).

¹⁷⁸ See Bradley & Flaherty, supra note 8, at 546-47 (so describing the claim of implied executive powers through the vesting clause of Article II).

¹⁷⁹ See U.S. Amicus Brief, supra note 17, at 55 (asserting 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").

The more specific argument—which in the end reflects no limitation¹⁸⁰—is that the executive power over foreign affairs permits the President to enforce settlements of international law disputes between the United States and foreign nations¹⁸¹ as a matter of supreme federal law.¹⁸² The exercise of this power, moreover, neither requires congressional approval¹⁸³ nor even a formal executive agreement under international law.¹⁸⁴

This section will demonstrate that, whatever the merit of the Vesting Clause claim in other contexts, it fails in an extension to foreign affairs lawmaking. From text, context, and foundational principles, the Constitution refutes any claim of an inherent, discretionary executive power to enforce international law on the sole initiative of the President.

b. Textual Allocations of Authority in Foreign Affairs and the Importance of Inter-Branch Cooperation

The received wisdom is that in the field of foreign affairs the Constitution's text in general is so opaque as to offer little for constructive scholarly analysis. This is not so for formal lawmaking. Following its essential theme, the Constitutional's textual distribution of powers in foreign affairs reflects a core principle of inter-branch cooperation for the creation of supreme federal law.

Although the instant executive Determination addresses only a binding judgment of the ICJ, the assertion of authority is not so limited. *See* U.S. Amicus Brief, *supra* note 17, at 56 (claiming an executive power to "determine[e] how the United States will comply with a decision reached after completion of formal dispute-resolution procedures"). The power also is not dependent on the specific source of the dispute. It extends as well to a presidential decision to comply with "international obligations" in general. *See id.*, at 53 (asserting an "authority of the President to determine the means by which the United States will implement its international legal obligations ...").

¹⁸¹ See id., at 56 (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").

¹⁸² See id., supra note 17, at 54 (asserting that the executive Determination has the full preemptive force of "the supreme Law of the Land" under Article VI)(quoting U.S. CONST. Art. VI, cl. 2).

¹⁸³ See id., at 52-53 (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) and Sanitary District v. United States, 266 U.S. 405 (1925)).

¹⁸⁴ *Id.*, at 53 (claiming that a requirement of a formal executive agreement would "hamstring the President in settling international controversies").

¹⁸⁵ 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").

Indeed, the delegations of foreign affairs lawmaking authority to Congress—and thus away from the executive—are numerous, explicit, and detailed. In foreign business and trade, for example, Article I, Section 8, reserves to Congress—with of course the acquiescence, or over the veto, of the President¹⁸⁶—the power regulate foreign commerce,¹⁸⁷ the value of foreign currency,¹⁸⁸ the amount of export and import duties,¹⁸⁹ and the naturalization of foreign nationals.¹⁹⁰ In addition, Congress, familiarly, has the power to declare war on behalf of the United States.¹⁹¹ But the Constitution also delegates to Congress the extensive related powers to provide for the external defense of the country,¹⁹² to raise and support an army and navy,¹⁹³ and to make rules for the regulation of both land and naval forces.¹⁹⁴

Although little noted in this context,¹⁹⁵ the Constitution also assigns to Congress an essential responsibility for the regulation of issues of international law. In addition to the power to declare war,¹⁹⁶ Article I, Section 8, grants to Congress the general authority over the definition and punishment of "Offences against the Law of Nations." The Constitution was equally explicit

 $^{^{186}}$ See U.S. Const., art. I, \S 7, cl. 2.

¹⁸⁷ *Id.*, art. I, § 8, cl. 3. (granting the power "[t]o regulate Commerce with foreign Nations").

¹⁸⁸ *Id.*, art. I, § 8, cl. 4 (conferring the power "[t]o establish an uniform Rule of Naturalization").

¹⁸⁹ See id., art. I, § 8, cl. 1 (delegating the power to impose "Duties, Imposts and Excises"). Section 10 of the same Article also prohibits Stats from imposing such charges except as is "absolutely necessary" for inspection purposes. See id. art. I, § 10, cl. 2.

¹⁹⁰ *Id.*, art. I, § 8, cl. 5 (granting the power to "regulate the Value . . . of foreign Coin").

¹⁹¹ *Id.*, art. I, § 8, cl. 5.

¹⁹² See id. (delegating authority to "provide for the common Defence ... of the United States").

¹⁹³ *Id.*, art. I, § 8, cl. 12 (delegating authority to "raise and support Armies"); *id.*, art. I, § 8, cl. 13 (conferring authority to "provide and maintain a Navy").

¹⁹⁴ *Id.*, art. I, § 8, cl. 14 (empowering Congress to "make Rules for the Government and Regulation of the land and naval Forces").

¹⁹⁵ For a positive example see Ingrid Brunk Wuerth, Authorizations for the Use of Force, International Lam, and the Charming Betsy Canon, 46 B.C. L. REV. 293, 346-47 (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"). Cf. Michael J. Glennon, Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 NW. U. L. REV. 321, 325 (1985)(arguing that the President may not violate customary international law because Article I, § 8, cl. 10, delegates exclusive authority over international law violations to Congress).

¹⁹⁶ U.S. CONST., art. I, § 8, cl. 11.

¹⁹⁷ See id., cl. 10.

where it addressed the most immediate and sensitive international law issues of its time: piracy,¹⁹⁸ reprisals for international offenses,¹⁹⁹ and captures of foreign ships and other property.²⁰⁰ 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 inter-branch cooperation contemplated for Article I lawmaking).

Article II of course expressly delegates certain independent powers to the President, including the status of Commander-in-Chief and substantial control over ambassadorial relations.²⁰¹ But beyond these specific fields, there is substantial amount of well-grounded controversy about even the basic the account that Article II's Vesting Clause reflects an implicit grant of other, general authority to the President.²⁰² Moreover, even the strong claim to implied executive powers acknowledges, as it must, that the President's Article II powers are "residual" only.²⁰³ 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.²⁰⁴

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

¹⁹⁸ See id. (granting Congress the power to "define and punish Piracies and Felonies committed on the high Seas").

¹⁹⁹ See id., cl. 11 (conferring on Congress the power to "grant Letters of Marque and Reprisal")

²⁰⁰ See id. (delegating to Congress the power to "make Rules concerning Captures on Land and Water").

 $^{^{201}}$ See U.S. CONST., art II, §§ 2, 3. See also infra Part IV (addressing the independent powers of the President).

²⁰² See Bradley & Flaherty, supra note 8, at 551 and passim (setting forth a comprehensive challenge to "the Vesting Clause Thesis on both textual and historical grounds"); Curtis A. Bradley, A New American Foreign Affairs Law?, 70 U. COLO. L. REV. 1089, 1104-07 (1999) (somewhat pejoratively referring to excessive claims of presidential power in the field as "foreign affairs exceptionalism").

²⁰³ See supra notes 165-172 and accompanying text (explaining the "residuum" argument and citing authority).

²⁰⁴ See Prakash & Ramsey, supra note 5, at 253 (concluding after a comprehensive historical and textual analysis that "[t]he President's executive foreign affairs power is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution's text").

Senate before a treaty can operate as "supreme Law of the Land."²⁰⁵ By express allocation of authority, therefore, the consent of the Senate 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, ²⁰⁶ including specifically regarding a treaty's effect in domestic law. ²⁰⁷

The Constitution likewise allocates away from the Executive the general power to transform an international treaty obligation into domestic law. Even when a treaty does not create 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 the national government, ²⁰⁸ including the article II treaty power. ²⁰⁹ Indeed, in perhaps its most famous rejection of a claim of executive lawmaking incident to foreign affairs, ²¹⁰ the Supreme Court properly declared that the Necessary and Proper Clause reflected an "exclusive constitutional authority" of Congress. ²¹¹

c. The Disconnect between Executive Power and Foreign Affairs Lawmaking

A textual analysis thus reveals compelling evidence that the Constitution allocates the authority to implement international law to the legislative branch. But there is also a more fundamental problem with a claim of a corresponding executive power. Whatever the proper scope

²⁰⁵ See Calabresi, supra note 151, 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").

²⁰⁶ See Restatement of Foreign Relations, *supra* note 37, § 314, and cmt. b ("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.").

²⁰⁷ 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* International Convention on Civil and Political Rights, S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-8071 (1992); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 30-31 (1990).

²⁰⁸ US const., art I, § 8, cl. 18 (emphasis supplied).

²⁰⁹ Missouri v. Holland, 252 U.S. 416, 431-32 (1920).

²¹⁰ See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)(rejecting a claim of President Truman that the President had an implied authority to seize steel mill to support the Korean War).

²¹¹ See id., at 588-89 (declaring in the face of claims that prior Presidents have 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."").

of the President's implied Article II authority, it remains in its essence a power to execute, not create, the law. The Supreme Court itself put to rest any contrary general argument in the *Steel Seizure Cases*: "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."²¹²

The mere presence of foreign policy implications does not alter this point. Even the strong claim of implied executive powers examined above holds that President impliedly retained only those unallocated powers held by an executive in the Framing Period.²¹³ As the most comprehensive support for the Vesting Clause Thesis itself acknowledges, however, 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."²¹⁴ 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 Senate for treaties, to transform this external policy into domestic law.²¹⁵

2. The Failure of the Sole Executive Agreement Analogy

The response to these specific textual allocations of authority is that the "historical gloss" on the Article II executive power nonetheless grants to the President a unilateral power to conclude sole executive agreements with foreign states.²¹⁶ As noted above²¹⁷ (and enthusiastically recounted by the present Administration²¹⁸), the Supreme Court's broad rhetoric in cases such as *United States v*.

²¹² See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952). In making this observation, the Court there 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.*

²¹³ See supra notes 169-172 and accompanying text.

²¹⁴ See 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").

²¹⁵ See also 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").

²¹⁶ See American Insurance 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 Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)).

²¹⁷ See supra Part I.A.3.c.

²¹⁸ U.S. Amicus Brief, supra note 17, at 45.

Curtiss-Wright Export Corp.²¹⁹ and its newer relation, American Insurance Ass'n v. Garamendi,²²⁰ holds that "the President has a degree of independent authority to act in foreign affairs"²²¹ which "does not require as a basis for its exercise an act of Congress."²²² More specifically, some general passages suggest that all executive agreements concluded by the President may preempt state law.²²³ Neither the rhetoric nor the holding in Garamendi, however, supports an extension beyond its factual context, for two interrelated reasons.

a. Confusing Congressional Authorization with Executive Authority

The first, and most important, reason for the failure of the executive agreement analogy is that the President concluded the agreements in *Garamendi* on a foundation of long-standing congressional approval of the specific type of executive settlement agreements at issue there.²²⁴ Although it was more than a bit generous in its application to the specific facts,²²⁵ the Court emphasized that the practice of executive settlement of private international claims is supported by nearly two hundred years of congressional acquiescence.²²⁶ In this light, the *Garamendi* line of authority is consistent with separation of powers restrictions on executive lawmaking.

²¹⁹ United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 332 (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").

American Insurance Ass'n v. Garamendi, 539 U.S. 396, 414 (2003)(stating that the President possesses the "vast share of responsibility for the conduct of our foreign relations")(quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611 (1952)(Frankfurter, J., concurring))). See also U.S. Amicus Brief, supra note 17, at 45 (relating these quotations as support for the Administration's position).

²²¹ American Ins. Assoc. v. Garamendi, 539 U.S. at 414. *See also id.* ("Nor is there any question generally that there is executive authority to decide what [foreign] policy should be.").

²²² U.S. Amicus Brief, *supra* note 17, at 45 (*quoting* Curtiss-Wright, 299 U.S. at 320. (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");

²²³ 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").

²²⁴ See American Insurance Ass'n v. Garamendi, 539 U.S. 396, 402-09 (2003).

²²⁵ See Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs, 46 WM. & MARY L. REV. 825, 886-890 (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").

²²⁶ 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").

Unfortunately, in certain passages the Court's rhetoric muddied this message of congressional authorization.²²⁷ Nonetheless, given the longstanding acquiescence by the constitutionally sanctioned lawmaking institution, Congress, 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 inter-branch cooperation, the presidential power to displace state law issued from the combined force of congressional consent and executive authority over foreign affairs.²²⁸

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.²²⁹ 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 Congress²³⁰) is a power to set and manage policy in the regular interaction with foreign states on the international stage. 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.²³¹

Later in its opinion in Garamendi, 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 (*citing* the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2005) and the Holocaust Assets Commission Act of 1998, 112 Stat. 611, *reprinted in note following* 22 U.S.C. § 1621). Taken alone, this discussion should not diminish the central point. Given the general long-standing acquiescence in private claims settlement the only question was whether Congress has 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 225, at 890 (faulting the Court for this discussion of independent presidential powers).

²²⁸ See also infra Part III.B. (examining executive lawmaking authority in foreign affairs on the foundation of Congressional delegation).

²²⁹ See U.S. Amicus Brief, supra note 17, at 56 (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")(citing Garamendi, 539 U.S. at 415, Dames & Moore v. Regan, 453 U.S. at 679, 682-683; United States v. Pink, 315 U.S. 203, 223 (1942); and United States v. Belmont, 310 U.S. 324, 330-331 (1937)).

²³⁰ See supra notes 56-57 and accompanying text.

²³¹ 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 foreign countries")(*quoting* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)); Chicago & Southern 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").

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, ²³² 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 authority 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.²³³ All that remains is any independent executive power. And as is demonstrated above,²³⁴ from text and structure the Constitution allocates the domestic authority to implement international obligations not the executive alone, but to the inter-branch cooperation prescribed for any other exercise of the national government's formal lawmaking powers.

b. The Prohibition on Affirmative State Interference with Foreign Affairs

A careful reading of *Garamendi* reveals that it also does not support a general presidential lawmaking power for a second, related reason. The Court there 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.²³⁵ The scope of this preemption in absence of federal foreign affairs lawmaking through a statute or treaty was uncertain before *Garamendi*, and the opinion there did little to clarify the situation.²³⁶ But whatever the precise contours of this "dormant" foreign

²³² See Vienna Convention on Treaties, supra note 271, art. 2.(1)(a)(defining a "treaty" as an "international agreement concluded between States in written form and governed by international law ... whatever its particular designation").

²³³ See supra notes 224-226 and accompanying text.

²³⁴ See supra Part II.B.1.b.

²³⁵ Garamendi, 539 U.S. at 413 ("There 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).

²³⁶ 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 Jack L. Goldsmith, Federal Courts, Foreign Affairs and Federalism, 83 Va. L. Rev. 1617, 1664 (1997); Michael D. Ramsey, The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism, 75 Notre Dame L. Rev. 341, 343 (1999); Bradley, supra note202, at 1104-07. 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. See 389 U.S. at 432. 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. See id., at 459 (Harlan, J., concurring in result). The Garamendi Court did not take a

affairs power, state lawmaking clearly wanes as it extends beyond matters of traditional state competence to regulate directly the external relations with foreign nations.

The state statute at issue in *Garamendi* presented a good example of this phenomenon. It involved a targeted attempt by California to regulate by state statute (The Holocaust Victim Insurance Relief Act²³⁷) 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 bring settle conflicts with foreign adversaries.²³⁸ That the states may not so affirmatively meddle in foreign affairs is the clear import of the prohibition on state treaty-making²³⁹ and the requirement that the states obtain congressional approval before concluding "any Agreement or Compact" with a foreign power.²⁴⁰ This specific constitutional text has a particular force even beyond the exclusive national power to control foreign affairs policy in general.²⁴¹

There is much to question in the majority opinion's analysis in *Garamendi*, in particular the penchant for expansive rhetoric over independent presidential powers unmoored from congressional authorization.²⁴² 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

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. *See* Garamendi, 539 U.S. at 418-20.

²³⁷ The California Holocaust Victim Insurance Relief Act of 1999, Assembly Bill No. 600, 1999 Cal. Stats. ch. 827.

²³⁸ See 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)). See also id. (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)).

²³⁹ U.S. CONST., art. I, § 10, cl. 1 (prohibiting the states from concluding "any Treaty, Alliance, or Confederation").

240 See id., art. I, § 10, cl. 3. (requiring the consent of Congress before a state may conclude "any Agreement or Compact with a foreign Power"). By analogy to inter-state 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." See Virginia v. Tennessee, 148 U.S. 503, 519 (1893). See also Restatement of Foreign Relations, supra note 37, § 320, cmt. f (discussing the constitutional limits on foreign "Agreements by States of the United States").

²⁴¹ See supra Part I.A.1.

²⁴² See Denning & Ramsey, supra note 225, at 925-43 (convincingly criticizing the majority opinion in Garamendi in this regard).

force to preclude affirmative state interference.²⁴³ But the President does not thereby obtain the general preemptive power to enforce his unilateral foreign affairs policy.²⁴⁴ The important distinction, rather, is between a prohibition on targeted state obstruction of external affairs and the ability of the national government to displace neutral state laws of general application in areas of traditional state competence.²⁴⁵ 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 in the Constitution.²⁴⁶

3. Executive Power and Compliance with Lawmaking Procedures

This latter point suggests an even more fundamental problem with a unilateral executive authority to implement international law. Whether for Article I statutes or Article II treaties, the Constitution requires compliance with "finely wrought and exhaustively considered" lawmaking procedures. This reflection of core separation of powers principles protects against intemperate or arbitrary governmental action by mandating cumbersome inter-branch collaboration for an exercise of federal lawmaking powers. And we do not put to fine a point on this by observing, as did Justice Kennedy in *Clinton v. City of New York*, ²⁴⁸ 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." ²⁴⁹

The claim of a unilateral executive authority to implement international law entirely disregards these structural protections. A review of the most recent assertion of executive authority

²⁴³ 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 examined these powers Part IV below.

²⁴⁴ See Youngstown, 343 U.S. at 588 (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").

²⁴⁵ 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, 1254-1278 (2000).

²⁴⁶ The Garamendi opinion ultimately suggests a form of balancing test which weighs the strength of the national foreign affairs policy against the state interest in regulating the subject matter. *See* Garamendi, 539 U.S. at 425 (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 California statute at issue). *See also* Denning & Ramsey, *supra* note 225, at 930-33 (noting the problems in applying such a balancing test).

²⁴⁷ 524 U.S. 417, 439-440 (1998)(*quoting* Internal Revenue Service v. Chadha, 462 U.S. 919, 951 (1983)).

²⁴⁸ *Id.*

²⁴⁹ See id., at 450 (Kennedy, J., concurring).

in this regard amply demonstrates the point. The President's Determination on the enforcement of the ICJ's *Avena* decision²⁵⁰ was merely set forth in a two-paragraph memorandum to the Attorney General.²⁵¹ 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 *Medellin*.²⁵² The principal effect—perhaps even the principal purpose—of the presidential action, moreover, was to avert a definitive Supreme 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 decide not to enforce even a binding judgment of the ICJ.²⁵³ And because the national Executive has the "lead role" managing foreign affairs, even the particular form and extent of domestic compliance supposedly lies within presidential discretion.²⁵⁴

Because of this, whether the law exists at all would be subject to the fleeting whims of the President from administration to administration. A unilateral lawmaking decision made by one may be unilaterally unmade by the next.²⁵⁵ Moreover, the practical consequences of recognizing such an executive lawmaking authority are substantial. Since 1945 alone, Presidents have concluded over

²⁵⁰ See Concerning Avena, supra notes 98-102 and accompanying text.

²⁵¹ See Determination, supra note 15.

²⁵² See U.S. Amicus Brief, supra note 17, at 52 (disclosing and quoting the President's Memorandum).

²⁵³ See id., at 51 (asserting that "[i]n particular circumstances, the President may decide that the United States will not comply with an ICJ decision").

²⁵⁴ See id. (stating that "once the President makes a decision to comply with an ICJ decision, the President must consider the appropriate means of compliance"). See also id., at 53 (claiming an "authority of the President to determine the means by which the United States will implement its international legal obligations"); id., at 51 (asserting that "in some cases, compliance may be achieved through unilateral Executive Branch action" but that "in other cases, the Executive Branch may seek implementing legislation").

²⁵⁵ This variability of the law is illustrated by the very issue that prompted the present Determination. The prior occupant of the executive office—no 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, Nos. 97-1390, 97-8214, 118 S.Ct. 1352 (1998)(asserting that "[o]ur 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.")(bracketed language in original).

15,000 formal executive agreements with foreign states.²⁵⁶ 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"²⁵⁷ of the separation of powers doctrine, finally, is not diluted merely because the claimed lawmaking authority seeks to displace state law. The present executive Determination carefully limits it scope to enforcement in state, not federal, courts.²⁵⁸ In doing so, it avoids a variety of potential conflicts with federal statutes that regulate federal court jurisdiction over habeas corpus petitions.²⁵⁹ 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."²⁶⁰

The premise of this reasoning is once again that foreign affairs and, derivatively, international law are matters entrusted solely to the national government.²⁶¹ Taken alone, this observation is correct.²⁶² It is also accurate that the federalism limitations on Article I legislation do not apply to Article II treaty-making.²⁶³ But the reference to the absence of federalism limits on

²⁵⁶ See Treaties and Other International Agreements Concluded During the Year, United States Department of State (March, 2005)(listing 15,550 such agreements concluded between 1946 and 2004)(internal State Department document on file with author).

²⁵⁷ See supra note 249 (quoting Clinton v. City of New York, 524 U.S. 417, 450 (1998)(Kennedy, J., concurring).

²⁵⁸ U.S. Amicus Brief, *supra* note 17, at 52 (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"). *See also id.*, at 52 (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).

²⁵⁹ In its amicus brief in Medellin, the Administration separately argued that the federal Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1997), bars claims by petitioners such as Jose Medellin who failed to assert Vienna Convention claims in lower courts in a timely matter. *See* U.S. Amicus Brief, *supra* note 17, at 12-23 (*citing* 28 U.S.C. § 2253 (2004)).

²⁶⁰ See Medellin v. Dretke, __ U.S. __, 125 S.Ct. 2088, 2107-2108 (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 [Medellin's] victory in state court").

²⁶¹ See U.S. Amicus Brief, supra note 17, at 53-54.

²⁶² See supra Part I.A.1.

²⁶³ As David Golove has convincingly explained, the treaty power of Article II represents a separate and independent delegation of law-making authority to the federal government. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98

foreign affairs powers merely leads the analysis back to the separation of powers constraints discussed above.²⁶⁴ In specific, 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" procedures for the exercise of the national government's power apply as well to the displacement of state law, including by the President. 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. 267

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, ²⁶⁸ makes clear that the requirement of Senate consent was imposed to prevent the national government from using treaties to displace state lawmaking prerogatives in the absence of sufficiently compelling national interests. ²⁶⁹ With this structure for the approval of treaties, it would be odd indeed if the

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 matters limitations on national legislative power as reflected Article I's specific enumeration of powers (and, in confirmation, the Tenth Amendment).

²⁶⁴ See supra notes 247-254 and accompanying text.

²⁶⁵ Clinton v. City of New York, 524 U.S. 417, 439-440 (1998)(*quoting* Internal Revenue Service v. Chadha, 462 U.S. 919, 951 (1983)).

²⁶⁶ See also Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 TEX. L. REV. 1321, 13993 (2001)(noting that Supreme 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").

²⁶⁷ See Denning & Ramsey, supra note 225, at 898-943 (examining the importance of separation of powers in foreign affairs); Clark, supra note 266, at 1445-1452 (emphasizing the importance of separation of powers as a safeguard of federalism with regard to sole executive agreements).

²⁶⁸ 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 included in the approval of treaties 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).

²⁶⁹ See Golove, supra note 263, 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....").

Constitution impliedly permitted the President first to create international law 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, for example, suggests it rests only on a narrow claim about the particular combination of treaties at issue.²⁷⁰ Closer examination also reveals, however, that more powerful forces are at work here. At issue is not merely the enforcement of a particular treaty, 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.²⁷¹ Nonetheless, many modern treaties also are designed to protect the rights of private individuals or otherwise are directed toward the internal, domestic law of the treaty partners.²⁷² Such is the case, for example, with the Vienna Convention on Consular Relations at the center of the most recent controversy over executive power.²⁷³

²⁷⁰ 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 104-113 and accompanying text. Citing the executive's role as representative of the United States in both the U.N. 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, *supra* note 17, at 50. 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." *See id.*, at 52-53.

²⁷¹ See Michael P. Van Alstine, The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection, 93 GEO. L.J. 1, 17-18 (2005)(examining the international law foundations of treaties). See also Vienna Convention on the Law of Treaties, arts. 9-18, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969)(setting forth the international law rules governing the negotiation of and state consent to treaties)[hereinafter, Vienna Convention on Treaties].

²⁷² For a comprehensive review of the existing treaties that are directly enforceable as domestic law in the United States *see* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 917-27 (2004).

²⁷³ See supra notes 94-95 and accompanying text.

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,²⁷⁴ and even without legislative implementation.²⁷⁵ It is nonetheless important to emphasize in this connection that whether a treaty in general is "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.²⁷⁶

As we have seen, however, not all treaties, indeed not even a majority, are of this nature.²⁷⁷ Commonly referred to as "non-self-executing,"²⁷⁸ these treaties do not of their own force penetrate to create directly applicable rights or obligations. Where a treaty in this way solely "imports a contract"²⁷⁹ 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.²⁸⁰ 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.²⁸¹

2. Executive Appropriation of Control over "Self'-Executing Treaties

The recent expansive claims of executive authority in foreign affairs do not challenge the core principles of treaties. Rather, the campaign for executive control over the treaty form of

²⁷⁴ See The Head Money Cases, 112 U.S. 580, 598 (1884)(describing what are now known as self-executing treaties as one 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").

²⁷⁵ See id. ("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."). See also 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); Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889)(stating that courts may enforce a treaty if it "operates by its own force").

²⁷⁶ See Restatement of Foreign Relations, supra note 37, § 111 cmt. h (making the same observation).

²⁷⁷ See supra notes 136-140 and accompanying text.

²⁷⁸ See, e.g., Restatement of Foreign Relations, supra note 37, § 111(4).

²⁷⁹ See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

²⁸⁰ 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] ... "its *infra*ction 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.").

²⁸¹ 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"). See also Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)(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").

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 the recent Determination by President Bush. This defense first asserts that there should be a presumption against direct enforcement of treaties in domestic courts.²⁸² Even where a treaty addresses private rights, therefore, private individuals presumptively should not have standing to enforce them.²⁸³ The next step in reasoning, however, is the significant one: Because a treaty nonetheless reflects an international "obligation," the Administration reasons, the President has the authority to require compliance as a matter of federal law.²⁸⁴ The idiom of a "self-executing" treaty remains,²⁸⁵ 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.²⁸⁶

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 lawmaking. All treaties reflect a commitment of some nature

²⁸² See U.S. Amicus Brief, supra note 17, at 24.

²⁸³ See id. In a passage that does not make clear whether its reference point is historical or legal, the comments to the Restatement of Foreign Relations 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." See Restatement of Foreign Relations, supra note 37, § 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, __ F.3d __ , 2005 WL 1653046 at *4 (D.C. Cir. 2005); United States v. Emuegbunam, 268 F.3d 377, 389-390 (6th Cir. 2001); United States v. Jimenez-Nava, 243 F.3d 192, 195-196 (5th Cir. 2001)).

²⁸⁴ See U.S. Amicus Brief, supra note 17, at 33-34 (asserting that the executive branch has the authority to bring a claim "to vindicate a treaty right in the event of its denial."); id. (founding this executive power on 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.").

²⁸⁵ See id, at 47 (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").

²⁸⁶ 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 in Hamdan v. Rumsfeld, No. 04-5393, at 11 (D.C. Cir. 2005), *available at* 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 supplied).

under international law.²⁸⁷ Under our constitutional system, however, not all treaties penetrate of their own force to create domestic law powers or obligations. 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 the responsibility for transforming the international law obligation into domestic rule of law falls to Congress as a whole. Chief Justice Marshall could hardly have been clearer in his foundational 1829 opinion in Foster v. Neilson. Where a treaty merely represents a promise of the United States under international law, he declared there, "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." And, of course, the Constitution expressly grants to Congress as a whole the authority to do so in the Necessary and Proper Clause of Article I. 291

This is not to deny the existence of an international obligation to comply with treaty commitments, including as appropriate through changes to domestic law. Nor am I suggesting that the states of the United States have the discretion not to comply with self-executing treaties. Rather, the important distinction here is between treaties that create domestic law and those that do not. The national government may of course create directly applicable federal law through treaties. In parallel with Article I legislation, however, the Constitution once again mandates inter-branch cooperation (in this context between the President and the Senate) to achieve that end. 292

²⁸⁷ 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.,* Igartua-De La Rosa v. United States, __ F.3d __, 2005 WL 1819318, at *3 (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).

²⁸⁸ See 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."); Islamic Ogbudimkpa v. Ashcroft, 342 F.3d 207, 218 (3rd 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); Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001)("Non-self-executing" means that absent any further actions by the Congress to incorporate them into domestic law, the courts may not enforce them.")(quoting Jama v. I.N.S., 22 F.Supp.2d 353, 365 (D.N.J. 1998) (emphasis added by appellate court).

²⁸⁹ 27 U.S. (2 Pet.) 253 (1829).

²⁹⁰ Foster, 27 U.S. at 315 (emphasis supplied).

²⁹¹ US 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).

²⁹² A particularly powerful recognition of this point is found in the recent case of Igartua-De La Rosa v. United States, 417 F.3d 145, 149 (1st Cir. 2005). There, an *en banc* First Circuit declared that even though

This requirement of inter-branch cooperation before treaties operate as domestic law reflects an important constitutional allocation of authority. Just like that of the President, the Senate's involvement is essential to the process. Where a treaty does not "by its own force" 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 will develop in detail.²⁹⁴ But the longstanding tradition has been of Senate consent on a binary basis: Treaties either directly implement international into supreme federal law of their own force or require implementing legislation by Congress.²⁹⁵ 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 issue²⁹⁶—the proper course of action is for the courts is to enforce the treaty itself, not leave the decision to executive discretion according to the prevailing political winds from time to time.

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 the point. That article is but one of a variety of Charter obligations accepted by member states to comply with decisions of U.N. institutions.²⁹⁷ The most noteworthy of these is the general

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." 2005 WL 1819318, at *3. *See also id.* (observing that "[t]he law to this effect is longstanding")(citing Whitney v. Robertson, 124 U.S. 190, 194 (1888); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)).

²⁹³ Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600 (1889)(so describing a treaty that is directly enforceable in domestic courts).

²⁹⁴ See infra Part III.

²⁹⁵ See supra notes 288-290 and accompanying text. (examining both Supreme Court precedent and executive branch understandings that non-self-executing treaties require implementation by Congress). See also supra Part I.A.2.a., b. (examining the distinction in greater detail).

²⁹⁶ See supra notes 137-139 and accompanying text.

²⁹⁷ See UN Charter, supra note 110, art. 25 (obligating member states "to accept and carry out the decisions of the Security Council in accordance with the present Charter"); id., art. 41 (obligating member

commitment in article 25 to carry out decisions of the Security Council.²⁹⁸ 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.²⁹⁹

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. There of course 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 properly should be housed in the executive branch.

This Part will explain 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.

A. Executive Power and the Non-Delegation Doctrine

From both text and structure, as we have noted, ³⁰⁰ the Constitution is founded on a model of enumerated powers allocated to specific federal institutions. With this premise, the Supreme Court has long emphasized that the Constitution vests federal legislative powers in Congress

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).

²⁹⁸ Cf. Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976)(holding that article 25 of the UN Charter is not self-executing, at least in the sense that it authorizes individual enforcement of Security Council resolutions in domestic courts).

The general obligation in article 25 of the Charter is to be contrasted with the specific obligation in article 41. The latter relates to compliance with Security Council decisions under Chapter VII, which addresses "threats to the peace, breaches of the peace, and acts of aggression." The Congress of the United States, 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. See United Nations Participation Act, codified at 22 U.S.C. § 287c (2004). 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. 11322 (Jan. 5, 1967)(ordering certain sanctions against Rhodesia); Exec. Order No. 13312 (ordering certain sanctions against Iraq). If the President has an independent Article II power to implement treaty obligations, however, this delegation of authority would be superfluous.

³⁰⁰ See supra note 39 and accompanying text.

alone.³⁰¹ Indeed, "the integrity and maintenance of the system of government ordained by the Constitution," the Court has reasoned, "mandate that Congress generally cannot delegate its legislative power to another Branch."³⁰²

This "non-delegation" 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." 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." 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. 305

The traditional vehicle for such delegations of authority has been an Article I statute, and the traditional recipient an executive branch agency.³⁰⁶ Nonetheless, although little analyzed in the legal

³⁰¹ 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.").

³⁰² Mistretta v. United States, 488 U.S. 361, 371-72 (1989)(quoting Field v. Clark, 143 U.S. 649, 692 (1892)). See also Whitman v. Am. Trucking Assns, 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 v. United States, 517 U.S. 748, 758 (1996)("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."); Field v. Clark, 143 U.S. 649, 692 (1892)("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.").

³⁰³ Loving v. United States, 517 U.S. 748, 757 (1996).

³⁰⁴ 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. 424 U.S. 1, 121 (1976) (per curiam)).

³⁰⁵ See, e.g., Loving v. United States, 517 U.S. 748, 758 (1996) (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.")

³⁰⁶ The Supreme 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 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

literature, 307 there is nothing in principle to preclude such delegations through treaties as well. 308 The Supreme Court obliquely recognized this point a century ago. 309

The limited strictures of the non-delegation 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. Nonetheless, the federal power to make treaties, like Article I legislation, is also subject to a specific lawmaking procedure, which includes, significantly, the consent of a super-majority of the Senate. Because Article II nowhere expressly authorizes such a transfer, therefore, any delegation of discretionary powers likewise must conform to the separation of powers limitations implied in the structure of the Constitution.

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

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).

³⁰⁷ See, e.g., Curtis A. Bradley, International Delegations, the Structural Constitution, and Non-Self-Execution, 55 STAN. L. REV. 1557, 1562 (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 272, at 944-967 (analyzing the power of the treaty-lawmakers to delegate discretionary powers to the federal courts).

³⁰⁸ See Wilson v. Girard, 354 U.S. 524, 530 (1927)(concluding that there was "no constitutional ... barrier" to the enforcement of an executive agreement authorized by a treaty). See also Restatement of Foreign Relations, supra note 37, § 303(3)(providing that the President may conclude international agreements "as authorized by treaty"). See also Treaties and Other International Agreements: The Role of the United States Senate, S. Rep. No. 106-71, 106th Cong, 2d Sess 5 (2001)(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)[hereinafter, Treaties and the Senate].

³⁰⁹ See Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893)("It is no new thing for the lawmaking 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[.]"). See also Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 329 (1994)(noting, but not addressing, the possibility of the President obtaining "authority delegated by ... a ratified treaty").

³¹⁰ In particular in recent years, the Supreme Court has emphasized in its non-delegation 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 v. United States, 517 U.S. 748, 771 (1996)). See also Mistretta v. United States, 488 U.S. 361, 371-72 (1989)(likewise citing Article I's vesting clause in analyzing a statutory delegation).

³¹¹ See U.S. CONST., art. II, § 2.

³¹² See also Bradley, supra note 307, 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.").

In its essence, the non-delegation doctrine functions to ensure that each branch of government fulfills its essential constitutional responsibilities. The doctrine accordingly mandates that delegations of authority from one branch to another 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).³¹³ In addition, the constitutional lawmaker must reasonably mark out for the recipient (and reviewing courts) the boundaries of the delegated authority.³¹⁴

In the instant context, however, one can largely dispense with the latter element. Already weak as a general proposition,³¹⁵ the requirement of circumscribed authority diminishes almost to non-existence in the field foreign affairs. In over a century of delegation jurisprudence, the Supreme 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."³¹⁶ This enhanced latitude arises precisely because the delegations build on a foundation of existing presidential power in the field.³¹⁷

³¹³ 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))).

³¹⁴ In the Supreme 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 v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001)(*quoting* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). *See also* American 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.").

³¹⁵ Historically, the Supreme Court has only twice invalidated statutory delegations as granting excessive decision-making authority. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

³¹⁶ See Clinton v. City of New York, 524 U.S. 417, 445 (1998)(quoting United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 320 (1936)). See also Crosby v. National Foreign Trade Council, 530 U.S. 363, 374-376 (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)("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.").

³¹⁷ 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)); Chicago & Southern Air Lines, Inc. v. 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").

Sound reasons exist for similar flexibility on the second element—an intent to delegate—where the subject of congressional action is foreign affairs. Precisely because of the institutional advantages the executive branch enjoys in foreign affairs, the Supreme Court properly has recognized that Congress may be accommodative on executive lawmaking authority when it legislates in the field. Thus, even a longstanding history of clear congressional acquiescence may reflect an implied intent to delegate lawmaking authority, in particular where Congress has adopted related legislation without expressing its disapproval of consistent executive foreign affairs practices in the past. The same reasoning should apply for delegations through treaties, whose very purpose is to regulate relations with foreign states. The Supreme Court thus has recognized that a treaty may reflect the implied intent of the Senate to delegate the authority to conclude and enforce related executive agreements. See the second element in the second element intent of the Senate to delegate the authority to conclude and enforce related executive agreements.

An endorsement of implied delegations in foreign affairs does not entirely dispense with the core requirement of legislative intent,³²³ as Presidents have periodically discovered in a variety of

³¹⁸ See Dames & Moore v. Regan, 453 U.S. 654, 678-79 (1981)(observing that a "failure of Congress specifically to 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).

³¹⁹ 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 United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 320 (1936)).

³²⁰ See supra notes 224-228 and accompanying text (discussing Supreme Court endorsement of sole executive agreements concluded on the foundation of a history of Congressional acquiescence). See also Dames & Moore, 453 U.S. at 679 (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).

³²¹ See id., (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)).

³²² 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)(citing Security Treaty, U.S.-Japan, 3 U.S.T.A. 3329; T.I.A.S. No. 2491 (signed September 8, 1951)).

³²³ The Supreme Court forcefully emphasized this point even for treaties in *Valentine v. United States ex rel. Neidecker* early in the last century. *See* 299 U.S. 5 (1936). There, the Court rejected a presidential claim of implied authority to extradite a person simply because a corresponding treaty with France failed expressly to preclude such an executive power. *Id.*, at 9 (holding regarding a claimed executive power to extradite that

internationally embarrassing incidents in the past.³²⁴ Nonetheless, where executive action finds a 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 inter-branch cooperation for the creation of supreme federal law. Indeed, as Justice Jackson reasoned in his famous concurring opinion in the *Steel Seizure Cases*, executive authority is at its apex when the President acts in such a field at the core of foreign affairs and with the express or implied consent of the legislative branch.³²⁵

C. Delegated Power and International Law

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, ³²⁶ perhaps most prominently in the enforcement of U.N. Security Council resolutions on economic sanctions under article 41 of the U.N. Charter. ³²⁷ These situational examples, however, serve more to undermine

[&]quot;it 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, 189-190 (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").

³²⁴ 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 20th century to prosecute, without congressional authorization, criminal acts perpetrated against foreign nationals in violation of treaty obligations); Ku, supra note 79, at 491-498 (examining the same events).

³²⁵ See 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").

³²⁶ See, e.g., 19 U.S.C. § 1351(a)(2005)(granting the President the authority to conclude trade agreements with foreign instrumentalities countries to assist in the opening of foreign markets to U.S. goods and services); 22 U.S.C. § 2767 (2005)(granting the President the authority to enter into "cooperative project agreements" with NATO or its member countries); 39 U.S.C. §407(a)(authorizing the Postal Service, with the consent of the President, to enter into "postal treaties or conventions"); 19 U.S.C. § 1629(a)(2005)(granting a power to station customs officials in foreign countries "[w]hen authorized by treaty or executive agreement").

³²⁷ See 22 U.S.C. § 287c (2004)(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").

than to support a claim of a general congressional acquiescence. 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.³²⁸

Similar difficulties confront implied delegations in the treaty context. A treaty may authorize subsequent implementation by executive agreement,³²⁹ and a number of such treaties addressing external relations exist.³³⁰ With regard to penetration into domestic law, however, the longstanding tradition, as we have seen,³³¹ 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 Senate intent upon its consent to a treaty. No such general tradition supports some intermediate form of treaty which 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 recur³³²—at the foundation of the ICJ's *Avena* decision may well represent an example of such an implied delegation.³³³ This case

³²⁸ Cf. 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).

³²⁹ See also Restatement of Foreign Relations, supra note 37, § 303(3)("[T]he President may make an international agreement as authorized by treaty of the United States."); Treaties and the Senate, supra note 308, at 5 (noting that the President's authority to conclude executive agreements on the foundation of prior treaties "seems well-established")[hereinafter, Treaties and the Senate].

³³⁰ Perhaps the most prominent example of this is the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. 1964, 34 U.N.T.S. 243, for which there are many dozens of formal implementing executive agreements. See U.S. DEPT. OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES 444-47 (Jan. 1, 2004)(listing implementing executive agreements). See also Treaties and the Senate, supra note 308, at 5 (identifying "the North Atlantic Treaty and other security treaties" as examples of authorizations to the President to conclude implementing executive agreements).

³³¹ See supra Part I.A.2.a., b. (examining the traditional distinction between self- and non-self-executing treaties in greater detail). See also supra notes 288-290 and accompanying text (examining Supreme Court precedent based on the premise that non-self-executing treaties require implementation by Congress).

³³² The United States withdrew from the Optional Protocol to the Vienna Convention in the aftermath of the Avena decision. See Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)(giving notice of the withdrawal). The Reagan administration also withdrew the United States from the general compulsory jurisdiction of the ICJ in 1985. See Letter and Statement From U.S. Dep't of State 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 the enforcement of ICJ decisions is unlikely to recur for the United States.

³³³ The more compelling argument is that the either the Vienna Convention itself or a binding ICJ

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 enforce (or not enforce, or later "unenforce" international obligations in its sole discretion.

IV. PRINCIPLE THREE: FOREIGN AFFAIRS LAWMAKING AND CONSTITUTIONAL DELEGATION

The final principle of executive lawmaking in foreign affairs returns the analysis to Constitutional text. We 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 in specific that the Supreme Court rejected presidential attempts to take domestic actions even to support a war expressly sanctioned by the United Nations Security Council under international law.³³⁵

The Constitution nonetheless delegates to the President certain express powers in foreign affairs whose exercise may have domestic law effects. These are found in three principal delegations in Article II: The control over ambassadorial relations;³³⁶ the designation as Commander-in-Chief of the armed forces³³⁷; and the power to "make Treaties."³³⁸ It is of these powers that the Supreme Court speaks in its—unfortunately casual—statements, as most recently in *American Ins. Assoc. v.*

decision applying that Convention on the basis of the Optional Protocol 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 134, at 684-690 (examining this argument).

³³⁴ See supra notes 253-254 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).

³³⁵ See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (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").

³³⁶ U.S. CONST., art. II, § 3 (granting the President the authority, with the advice and consent of the Senate, both to appoint and receive ambassadors and other public ministers).

³³⁷ U.S. CONST., art. II, § 2.

³³⁸ U.S. CONST., art. II, § 3.

Garamendi,³³⁹ that "in foreign affairs the President has a degree of independent authority to act" without the involvement of Congress.³⁴⁰

The domestic law incidents of these delegated powers, however, are both few and narrow in scope. As we have seen, the executive authority over international treaty making does not, in absence of senatorial consent, include a power to create domestic law solely on the President's initiative.³⁴¹ The most prominent affirmative power instead flows from the authority to receive ambassadors. The Supreme Court has properly recognized that this constitutional delegation implies exclusive executive control over the recognition of foreign governments.³⁴² Although founded in an act under international law, the exercise of this power may carry direct effects in domestic law, including with regard to the sovereign immunity of the recognized government in judicial proceedings.³⁴³

The role of international law in enhancing the President's Commander-in-chief power, in contrast, is substantially more circumscribed. The domestic authority conferred by this power has, of course, generated extreme controversy, in particular in recent years.³⁴⁴ In the external realm, however, the principal debate here focuses not on internal effects,³⁴⁵ but rather on the extent of presidential power to initiate and wage foreign conflicts.³⁴⁶ Moreover, and more important for

³³⁹ 539 U.S. 396 (2003).

³⁴⁰ *Id.*, at 414. See also See, e.g., Chicago & Southern 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").

³⁴¹ See supra notes 135-140 and 282-299 and accompanying text.

³⁴² See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); National City Bank of New York v. Republic of China, 348 U.S. 356 (1955)(same).

³⁴³ 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 with regard to the issue of foreign sovereign immunity in domestic courts); Ex Parte Peru, 318 U.S. 578 (1943)(same). There also should 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).

³⁴⁴ See supra note 8 and accompanying text (reviewing the broad assertions of executive authority by the Bush Administration).

³⁴⁵ See Restatement of Foreign Relations, supra note 37, § 303, Reporters' Note 11 (observing that "most sole executive agreements have involved military and foreign relations matters having no direct impact on private interests in the United States").

³⁴⁶ 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); and

present purposes, the core controversy in this context is over whether international law *limits* presidential power, not over whether it enhances it.³⁴⁷ Thus, in the earliest days of the Constitution the Supreme Court made clear that the right to create domestic law on the foundation of powers recognized under the international law of war falls to Congress, not the President.³⁴⁸ All that remains is a limited power to prevent affirmative interference with the essential aspects of the disposition of the armed forces,³⁴⁹ the conduct of war once declared,³⁵⁰ and the resolution of armed conflicts.³⁵¹ The result is that, while the Commander-in-chief power has substantial relevance in the external realm, the existence of international law obligations will serve only to limit, but certainly not increase, the domestic law effects of the President's foreign affairs powers.

In their narrow fields, each of the constitutionally delegated presidential powers—whether formally "legislative" in nature or not³⁵²— has "as much legal validity and obligation as if [it] had proceeded from the legislature."³⁵³ Nonetheless, because the executive branch of its nature is a law enforcer not a lawmaker, the domestic law incidents of presidential action in foreign affairs must yield to the powers of Congress. As we have seen, Article I expressly delegates to Congress the legislative powers over foreign commerce and the domestic effects of international law.³⁵⁴ As a

John C. Yoo, War and the Constitutional Text, 69 U. CHI. L. REV. 1639 (2002)(disagreeing with Professor Ramsey and contending that the President has an independent authority to initiate foreign conflicts).

³⁴⁷ See Jinks & Sloss, supra note 150, at 146-180 (examining whether international law, and in particular the Geneva Convention on Prisoners of War, is binding on the president);

³⁴⁸ See Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814)(rejecting a claim of President Madison 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").

³⁴⁹ See Tucker v. Alexandroff, 183 U.S. 424, 432 -436 (1902)(affirming the power of the President to permit the introduction of foreign forces into the United States without Congressional approval). *Cf.* Arrangement with Great Britain Respecting Naval and Air Bases, 54 Stat. 2405 (1940(reflecting an agreement by President Roosevelt to exchange destroyers for leases of military bases).

³⁵⁰ See Fleming v. Page, 50 U.S. 603, 9 How. 603, 13 L. Ed. 276 (1850)(observing that the President has authority over the disposition of the military forces placed by law at his command); Madsen v. Kinsella, 43 U.S. 341, 348-349 (1952)(upholding the power of the President as Commander-in-Chief of the armed forces in wartime to establish military commissions in occupied territories).

³⁵¹ See Restatement of Foreign Relations, supra note 37, § 303(4), cmt. g ("It is established that the President can make agreements as commander in chief during declared wars, including armistice agreements.")

³⁵² 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").

³⁵³ United States v. Pink, 315 U.S. 203, 230 (1942)(quoting Federalist No. 64).

³⁵⁴ See supra notes 186-188 and accompanying text.

result, any international law obligations created by the President will not—at least in absence of congressional consent³⁵⁵—displace any contrary federal legislation.³⁵⁶

More flexibility may be appropriate, in contrast, 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.³⁵⁷ It is nonetheless a fair implication of the express Constitutional prohibitions on state treaty-making³⁵⁸ 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.³⁵⁹

CONCLUSION

The President of the United States fulfills important responsibilities as the nation's "constitutional representative" in relations with foreign states. There are also, of course, 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 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. By operation of a binding judgment of the International Court of Justice within its jurisdiction, the United States has violated its ratified treaty obligations owed directly to individuals under international law.

³⁵⁵ See supra Part III.B., C.

³⁵⁶ Thus, Congress may not, say, 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, e.g.*, Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief Power*, 80 VA. L. REV. 833, 899-941 (1984)(examining the power of Congress to limit presidential activity regarding national security through specific limits on funding).

³⁵⁷ See supra notes 235-246 and accompanying text..

³⁵⁸ U.S. CONST., art. I, § 10, cl. 1 (prohibiting the states from concluding "any Treaty, Alliance, or Confederation"). *See also id.*, art. I, § 10, cl. 3 (requiring the consent of Congress before a state may conclude "any Agreement or Compact with a foreign Power").

³⁵⁹ See supra Part III (examining presidential enforcement of international law on the foundation of Congressional approval).

³⁶⁰ See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

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." My argument here has not been about the cause of faithful compliance with international law. It has been, rather, that the executive branch is not the constitutionally prescribed agency for ensuring such compliance in domestic law. Rather, the Constitution designates the Congress—or, more carefully, the inter-branch cooperation prescribed in Article I for federal legislation—as the institution with lawmaking authority in general and with the specific power to "carry[] into Execution ... all other Powers" vested in the national government. 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." The nearly 1000 treaties and 15,000 formal executive agreements concluded in the last 50 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.

³⁶¹ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952)(Jackson, J., concurring).

³⁶² US CONST., art I, § 8, cl. 18 (emphasis supplied).

³⁶³ Youngstown Sheet & Tube, 343 U.S. at 634 (Jackson, J., concurring).