

FEDERAL COMMON LAW IN AN AGE OF TREATIES

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MICHAEL P. VAN ALSTINE*

INTRODUCTION

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.¹

This declaration in *Erie Railroad Co. v. Tompkins* established one of the most profound and enduring principles of the constitutional system of the United States. Initiating “something of a constitutional revolution,”² the Supreme Court in *Erie* reasoned that the courts of the United States must apply state substantive law unless it is displaced by the Constitution or by Congress acting pursuant to specific, enumerated grants of lawmaking authority.³ What is striking about the declaration itself, however, is that it is, and was even at the time, patently incomplete.

Missing from the core holding in *Erie*—indeed from the entire opinion—is any mention of treaties as a valid source of federal law. Article VI of the Constitution expressly includes treaties as the “supreme Law of the Land.”⁴ From this, the Supreme Court

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¹ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

² See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1256 (1996).

³ *Erie*, 304 U.S. at 78 (“Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”).

⁴ See art. U.S. CONST. VI, § 2 (providing that “all Treaties made, or what shall be made, under the authority of the United States, shall be the supreme Law of the Land”).

established well over a century before *Erie* that, beyond the “Constitution or ... acts of Congress,”⁵ treaties of the United States also may operate as directly applicable federal law.⁶ Indeed, these “self-executing” treaties represent a particularly powerful vehicle for legal change; for the combined effect of the Supremacy Clause and the treaty power⁷ is that the President and the Senate may create federal law without the involvement of the House of Representatives—and even though Article I otherwise provides that “all legislative powers herein granted” are vested in Congress as a whole.⁸

For most of this country’s legal history, the potential power of treaties triggered only episodic controversies over parochial concerns.⁹ But just as the maturation of the nation’s legal culture and economy led to broader exercises of federal statutory power in the

⁵ *Erie*, 304 U.S. at 78. *See also* *Reid v. Covert*, 354 U.S. 1, 18 (1957)(noting the distinction between a treaty and “an Act of Congress” with regard to the proposition that the later in time of the two will prevail). The core federal enactment on the law federal courts must apply, the Rules of Decision Act, draws the same distinction. *See* 28 U.S.C. § 1652 (2003)(providing that federal courts must apply state law except where the Constitution or “treaties of the United States or Acts of Congress” otherwise require or provide). Because of its obvious importance for the powers of federal courts, I analyze this important legislation in significant detail below. *See infra* notes 203-206, 375-377, and 409-410 and accompanying text.

⁶ *See Foster v. Neilson*, 27 U.S. 253, 314 (1829)(holding that a treaty is “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 infra* Part I.A. 2. (analyzing this doctrine of “self-execution” in greater detail).

⁷ U.S. CONST. art. II, § 2, cl. 1 (providing that the President “shall have the Power” to make treaties “by and with the Advice and Consent of the Senate ..., provided two thirds of the Senators present concur”).

⁸ *See id.*, art. I, § 1.

⁹ Prominent examples of these episodic controversies include the protection of British creditors by treaties after the revolutionary war, *see* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1115-1127 (2000)(discussing the debates that arose out of the treaty of peace with Great Britain), *id.*, at 1157-1193 (analyzing the “Jay Treaty” with Great Britain in the late 1790s); states rights arguments seeking to discriminate against Chinese immigrants notwithstanding protected treaty rights, *see id.*, 1238-1243 (examining such debates after the civil war); and a similarly directed controversy in the middle of the twentieth century, which even led to a failed attempt to amend the Constitution to protect states rights (the so-called “Bricker Amendment”). *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 411-416 (2000)(discussing how human

twentieth century, so too in recent years has the expansion of cross-border legal interaction spawned a greater need for broad international solutions. The result is that treaties now cover a broad and growing field of substantive law in our modern legal landscape.¹⁰

This expanding influence of treaty law in recent years has propelled the subject into one of the most animated themes of modern scholarly debate.¹¹ One prominent line of attack argues, for instance, that the constitutional premise of federalism places significant substantive limits on the operation of treaties as domestic law.¹² A leading scholar even has mounted an aggressive challenge to the very constitutionality of self-executing treaties.¹³ This, in turn, has provoked an equally forceful response by other scholars,¹⁴ with some

rights treaties provoked the proposed amendment); Golove, *supra*, at 1273-1278 (analyzing the same controversy).

¹⁰ See *infra* Part I.C.2 (analyzing the modern influence of self-executing treaties).

¹¹ On a separated track, the approval of the WTO and NAFTA trade agreements by standard Article I legislation led to a heated debate between this country's leading constitutional law scholars over the propriety of that alternative to the Article II treaty process. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 820-32 (1995) (arguing that the "congressional-executive agreements" that led to the approval of the WTO agreements and NAFTA are constitutional); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1228-35 (1995) (suggesting that such alternative means of consent to treaties are unconstitutional).

¹² See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (arguing that federalism limitations reflected in the enumerated powers doctrine place substantive limits on the scope of the treaty power) [hereinafter Bradley, *Treaty Power*]. But see Golove, *supra* note 9, at 1278-1313 (challenging Professor Bradley's arguments based on historical, structural, and textual analyses of the treaty power). See also Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) (responding that recent Supreme Court federalism decisions are contrary Professor Golove's criticisms); Edward T. Swaine, *Does Federalism Constrain the Treaty Power*, 103 COLUM. L. REV. 403 (2003) (examining the competing claims in detail).

¹³ See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Non-Self-Execution*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*].

¹⁴ See Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095, 2118-19 (1999); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) [hereinafter Vazquez, *Laughing at Treaties*]. See also *infra* Part. I.B. (examining the debate over the constitutionality of self-executing treaties in greater detail).

arguing that the Constitution in fact requires judicial enforcement of *all* ratified treaties as federal law.¹⁵ Recent exchanges also have reinvigorated the dormant controversy¹⁶ over the power of the President to reinterpret treaties without the involvement of the Senate¹⁷ or indeed even the Supreme Court.¹⁸

These heated disputes over the domestic force of treaty law have proceeded in seeming parallel with a separate, yet equally contentious, debate over the role of federal courts in our modern regulatory state. On the international plane, revisionist scholars have criticized the accepted view that international law may operate directly as federal common law.¹⁹ A profound conservative distrust of the discretionary powers of federal courts

¹⁵ See David Sloss, *Non-Self Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002)(arguing that an unlimited notion of non-self-execution “is at odds with fundamental precepts concerning the role of an independent judiciary in preserving the rule of law”); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988)(arguing that “[t]he distinction found in certain cases between ‘self-executing’ and ‘non-self-executing’ treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that ‘all Treaties...shall be the supreme Law of the Land’”).

¹⁶ A contention by the Reagan administration in the 1980s that it had the right to reinterpret the Anti-Ballistic Missile Treaty with the Soviet Union provoked a heated debate in both political circles and legal scholarship. For an introduction to the scholarly debate on this score see Lawrence J. Block et al., *The Senate’s Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PA. L. REV. 1481 (1989); David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353 (1989); Eugene V. Rostow, *The Reinterpretation Debate and Constitutional Law*, 137 U. PA. L. REV. 1451 (1989).

¹⁷ John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851 (2001) [hereinafter Yoo, *Politics as Law*].

¹⁸ See John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1314-1328 (2002)(disagreeing with the proposition that final interpretive authority over treaties is vested in the Supreme Court)[hereinafter Yoo, *Treaty Interpretation*]. But see Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263 (2002)(rejecting the contention that the President has “unilateral authority” to reinterpret treaties)[hereinafter Van Alstine, *Treaty Delegation*].

¹⁹ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997)(criticizing the “nationalist” view that federal courts have the power to apply norms of customary international law as an element of federal common law). But see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998)(disagreeing with this critique). See also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997)(challenging the view that federal courts may apply international law as an element of the foreign affairs category of federal common law)[hereinafter Goldsmith, *Federalism*].

likewise has led to the advance of “new textualist” approaches to statutory interpretation,²⁰ the advent of the “Chevron Doctrine” to limit federal court review of executive branch interpretations of statutes,²¹ and aggressive policing of the “presumption against preemption” to protect against overly liberal judicial displacements of state law with federal statutory or (in particular) common law.²²

With the progressive growth of treaties as judicially enforceable federal law, these two major strains of modern scholarly debate converge. Unfortunately, surprisingly little is known about the proper role of federal courts in the interpretation and application of treaty law. Indeed, no reliable comprehensive studies exist even on the number and substantive subjects of extant self-executing treaties.²³ For its part, Supreme Court precedent on the interpretation of treaties, though often consistent in rhetoric, has failed to provide a coherent approach for the substantive diversity of modern treaties.²⁴

²⁰ See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990)(comprehensively reviewing the emergence of textualist approaches to statutory interpretation). See also Antonin Scalia, A MATTER OF INTERPRETATION 30-35 (1997)(supporting an interpretive approach which adheres closely to statutory text and criticizing the use of legislative history by federal courts on this score); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POLY 61, 68-70 (1994)(same).

²¹ *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)(holding that federal courts must defer to an agency’s interpretation of a statute if it is not contrary to the unambiguously expressed intent of Congress). See also *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)(observing that “[d]eference under Chevron to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps”).

²² See, e.g., *Pharmaceutical Research and Mfrs. of America v. Walsh*, ___ U.S. ___, 123 S.Ct. 1855, 1869 (2003); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494 (1996). See also *infra* notes 437-441 and accompanying text (analyzing this presumption in detail).

²³ The goal of Part I.C. below is to address this significant gap in knowledge.

²⁴ Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 705-710 (1998)(questioning the utility of Supreme Court precedent on treaty interpretation for many categories of modern private law treaties)[hereinafter Van Alstine, *Treaty Interpretation*]; David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994)(advancing another critical review on this subject).

Substantial uncertainty also reigns in the Court over the preemptive force of treaties.²⁵ This subject recently even provoked a spirited exchange between the otherwise philosophical allies of Justices Ginsburg and Stevens.²⁶ What little guidance exists from the Court on federal common law under treaties likewise is cryptic at best.²⁷ And even the most thoughtful scholars of general federal common law either have failed to address the subject of treaty law at all or have mentioned it only in passing.²⁸

The pervasive uncertainty over the relationship between the “judicial Power” of federal courts and the treaty power of the President and Senate provides the foundation for this article. The initial two Parts below set, respectively, the general and specific contexts for the analysis which follows. Part I first reviews the constitutional foundation for the operation of treaties as directly applicable federal law.²⁹ But the more important function of

²⁵ See *infra* notes 444-450 and accompanying text (analyzing the conflicting pronouncements of the Supreme Court on this score).

²⁶ See *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999) (Ginsburg, J.) (concluding arguing that “[o]ur home-centered preemption analysis should not be applied, mechanically, in construing our international obligations”); *id.*, at 177 (Stevens, J., dissenting) (criticizing the “novel premise that preemption analysis should be applied differently to treaties than to other kinds of federal law”). See also *infra* notes 451-453 and accompanying text (analyzing this issue as well as the dispute between Justices Ginsburg and Stevens in greater detail).

²⁷ See *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 230 (1996) (holding that a particular treaty did not “empower [the Court] to develop some common-law rule,” but expressing no discernible doubt about the legal premise for such an authorization).

²⁸ See Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 889 (1986) (arguing without analysis of the specific point that “the process and standards for making federal common law are the same when a treaty ... is the source of authority”); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 786 (1989) (only mentioning the inclusion of treaties in the Rules of Decision Act as part of a comprehensive analysis of the propriety of federal common law); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975) (observing that federal courts “must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law”); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 6, 28 (1985) (noting that federal common law includes “all federal rules of decision not mandated on the face of a federal text—that is, a federal statute or treaty or the Constitution” as well as that the Rules of Decision Act contains a reference to “treaties,” but otherwise not analyzing federal common law under treaties).

²⁹ See *infra* Parts I.A., B.

that Part is to fill the substantial gap in knowledge over the substantive influence of self-executing treaties. We will see there that treaties now regulate a wide range of domestic law subjects, from public to private law, commercial to criminal law, family to tax law, and even aspects of administrative law and civil procedure.³⁰

Part II then provides the legal framework for understanding the lawmaking powers of federal courts. It first examines the premise of *Erie* and its progeny that the Constitution generally prohibits federal court lawmaking; as a result, any particular rule of federal common law must find a foundation in a specific, independent grant of authority.³¹ In the statutory context, the Supreme Court nonetheless has long held in this vein that federal courts may obtain lawmaking powers from an express or implied delegation by Congress.³² But Part II also explains that the Constitution itself authorizes federal common law in certain areas of “uniquely federal interest,” including, significantly, in matters of foreign affairs and in the definition of the sovereign obligations of the federal government.³³

With this foundation, the remainder of the article is devoted to an analysis of the common law powers of federal courts within the scope of treaties. To set the context for this analysis, Part III first demonstrates that the judicial relationship with self-executing treaty law in principle proceeds from the same source of authority as that for Article I legislation.³⁴ No less than in the statutory context, therefore, a deliberate and circumscribed delegation of lawmaking powers by treaty—such as already exists in one comprehensive

³⁰ See *infra* Part I.C.2. See also *infra* Part I.C.1 (analyzing the functions of self-executing treaties).

³¹ See *infra* Part II.A.

³² See *infra* Part II.B.1.

³³ See *infra* Part II.B.2. See also *infra* Part II.C. (examining the interaction between federal common law and the preemption doctrine).

³⁴ See *infra* Part III.A.

commercial law convention³⁵—does not run afoul of federalism or separation of powers limitations on federal common law.³⁶ With such an express delegation of authority, in other words, interstitial lawmaking does not represent “an unconstitutional assumption of powers by the courts of the United States.”³⁷

Even beyond an express authorization, much of the confusion over the powers of federal courts dissipates upon examination of the special character and functions of treaties. As Part IV explains, treaties of their nature represent a formal exercise of the federal government’s exclusive authority over the creation of international obligations of the United States.³⁸ This fundamental difference with the shared legislative powers of Article I substantially undermines the traditional presumption against preemption of state law for the treaty context. Indeed, the more compelling arguments favor a background assumption of federal law solutions for unresolved issues within the scope of self-executing treaties.³⁹

More broadly, the special constitutional nature of treaties also profoundly affects the analysis of the lawmaking powers of federal courts. As a formal expression both of national foreign affairs policy and of the international law obligations of the United States, treaty law, as Part IV finally demonstrates, operates at the intersection of the two most prominent fields of recognized federal common law.⁴⁰ This, to be sure, does not alone sanction federal court

³⁵ See *infra* notes 387-394 and accompanying text (describing the delegation of enhanced developmental powers in the UN Convention on Contracts for the International Sale of Goods).

³⁶ See *infra* Parts II.B., C.

³⁷ See *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

³⁸ See *infra* notes 464-481 and accompanying text. See also *infra* Part IV.B.1. (analyzing the broader relationship of treaty law with preexisting state law).

³⁹ See *infra* Part IV.B.1.

⁴⁰ See *infra* Part IV.B.2.

lawmaking for all issues of treaty law.⁴¹ And separation of powers may counsel special caution by federal courts for some categories of treaties.⁴² But the decisive interests of national uniformity which arise in the context of formal treaty obligations—and which animate the two noted fields of established federal common law—mandate a different, and ultimately more accommodating, calculus for the interstitial lawmaking powers of federal courts within the scope of self-executing treaties.⁴³

The rapid expansion of federal legislative law in the twentieth century forced a fundamental reexamination, as Judge Guido Calabresi famously observed, of common law in “an age of statutes.”⁴⁴ Now, however, with the continuing transition from inter-state to inter-national integration the law is increasingly entering a new phase in its maturation. As the perspective of federal lawmaking thus changes from internal competition with state authority to external uniformity for the nation’s international treaty obligations, we face a new moment for a fundamental reexamination of the role of federal courts in applying federal law as the “supreme Law of the Land.”

I. THE FORCE AND SIGNIFICANCE OF THE MODERN TREATY POWER

A. Constitutional Background and Text: The Role of Treaties as Directly Applicable Federal Law

1. Federal Power, Foreign Affairs, and Treaties

The authority over foreign affairs in general and treaty-making in specific is perhaps the most explicit, detailed, and expansive of all of the powers delegated by the Constitution to the federal government. Article II, section 2, expressly grants to the national executive

⁴¹ See *infra* notes 358-365 and accompanying text.

⁴² See *infra* Part IV.C.

⁴³ See *infra* Part I.B.2(a), (b). See also *infra* Part IV.B.3. (analyzing the relative error costs associated with decisions over the displacement of state law by federal common law under treaties).

the power to make treaties, “by and with the Advice and Consent of the Senate.”⁴⁵ The Constitution then elsewhere confirms the significance of this delegated power both by granting treaties the preemptive force of federal law⁴⁶ and by expressly denying to the states any authority in the field.⁴⁷

The preemptive force of treaties follows directly from their inclusion within the Supremacy Clause of Article VI.⁴⁸ By designating treaties the “supreme Law of the Land,” this Article thus ensures that the paramount interests of the nation as a whole in matters of international commerce, peace, and diplomacy cannot be frustrated by the parochial interests of the individual states. Indeed, the express reference to treaties in the Supremacy Clause was an immediate result of the international embarrassment which flowed from the failure of the states to adhere to national treaty obligations—is particular those under the 1783 Treaty of Peace with Great Britain—under the Articles of Confederation.⁴⁹ And to ensure that there would be no misunderstanding, the Framers expressly declared in Article VI that “the

⁴⁴ Guido Calabresi, *A COMMON LAW FOR THE AGE OF STATUTES* 163 (1982).

⁴⁵ U.S. CONST. art. II, § 2 (providing that the President “shall have the Power, by and with the Advice and Consent of the Senate to make Treaties, provided two-thirds of the Senators present concur”).

⁴⁶ *See* U.S. CONST. art. VI, § 2 (providing that “all Treaties made, or what shall be made, under the authority of the United States, shall be the Supreme Law of the Land”). *Id.*,

⁴⁷ *Id.*, art. I, § 10, cl. 1 (prohibiting the states from entering into “any Treaty, Alliance, or Confederation”).

⁴⁸ *See id.*, art. VI, § 2 (providing that “all Treaties made, or what shall be made, under the authority of the United States, shall be the Supreme Law of the Land”).

⁴⁹ *See* Flaherty, *supra* note 14, at 2118-19 (explaining that the embarrassment caused by the refusal of states to give domestic effect to treaty obligations was a prime motivating force for the inclusion of treaties in the Supremacy Clause); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1199-1200 (2000)(arguing that in light of the “embarrassment” and “material consequences” caused by the failure of states to adhere to the terms 1783 Treaty of Paris, “[t]he Supremacy Clause, together with the Necessary and Proper Clause, was intended to allow the federal government to ensure U.S. compliance with its international obligations”).

Judges in every State shall be bound” by the terms of treaties notwithstanding the laws and even the constitutions of the several states.⁵⁰

In a departure from the basic model of enumerated federal powers, the Constitution in rare fashion also contains an express prohibition on state power in the field. Article I, section 10, provides that “[n]o State shall enter into any Treaty, Alliance, or Confederation.”⁵¹ And lest there be any doubt about terminology, the same section then later prohibits the states, without the consent of Congress, from concluding “any Agreement or Compact” with a foreign power.⁵²

The exclusive federal authority over international treaty making is bolstered by a variety of broader delegated powers over foreign affairs in general. Article I, section 8, for example, grants to Congress the power “to regulate Commerce with Foreign Nations,”⁵³ “to establish an uniform Rule of Naturalization,”⁵⁴ and to “regulate the Value ... of Foreign Coin.”⁵⁵ The same section delegates to Congress authority over, among others, the external

⁵⁰ U.S. CONST. art. VI, § 2 (providing with regard to the Constitution Laws and Treaties of the United States that “the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding”).

⁵¹ *Id.*, art. I, § 10, cl. 1.

⁵² *Id.*, art. I, § 10, cl. 3.

⁵³ *Id.*, art. I, § 8, cl. 3.

⁵⁴ *Id.*, art. I, § 8, cl. 4.

⁵⁵ *Id.*, art. I, § 8, cl. 5.

defense of the country,⁵⁶ the definition and punishment of crimes against international law,⁵⁷ and the declaration of war and other reprisals for international offenses.⁵⁸

Similarly, the Constitution grants to the President, incident to his general executive powers, expansive authority as the international representative of the United States. In addition to the power to make treaties,⁵⁹ Article II, section 2, designates the President the Commander in Chief of the Armed Forces,⁶⁰ and delegates to the President the authority to appoint ambassadors (again with the advice and consent of the Senate)⁶¹ and “receive Ambassadors and other Public Ministers.”⁶² Moreover, implicit in the President’s “vast share of responsibility for the conduct of our foreign relations”⁶³ is a power to create

⁵⁶ *See id.*, art. I, § 8, cl. 1 (granting to Congress the Power “to...provide for the Common Defense...of the United States”); *id.*, cl. 12 (delegating authority to “raise and support Armies”); *id.*, cl. 13 (granting authority to “provide and maintain a Navy”); *id.*, cl. 14 (conferring authority to “make Rules for the Government and Regulation of the Land and Naval Forces”).

⁵⁷ *Id.*, art. I, § 8, cl. 10 (granting to Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”).

⁵⁸ *Id.*, art. I, § 8, cl. 11 (granting to Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”). Article I, section 8 also grants to Congress the power to impose “Duties, Imposts and Excises,” *id.*, art. I, § 8, cl. 1, and clause 2 of the same section then expressly forbids the states from doing so, except as “absolutely necessary” for inspection purposes. *Id.*, art. I, § 10, cl. 2.

⁵⁹ *See supra* note 45 and accompanying text.

⁶⁰ U.S. CONST. art. II, § 2, cl. 1 (“the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”).

⁶¹ U.S. CONST. art. II, § 2, cl. 2.

⁶² U.S. CONST. art. II, § 2, cl. 3.

⁶³ *See American Insurance Ass’n v. Garamendi*, ___ U.S. ___, 123 S.Ct. 2374, 2386 (2003)(*quoting* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)). *See also* *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”); *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”).

preemptive federal law through so-called sole executive agreements,⁶⁴ as Supreme Court emphatically reaffirmed only last term.⁶⁵

The combined effect of these various delegations of power over foreign affairs is that the federal government enjoys a breadth of authority in this field which is far beyond the standard constitutional model of shared lawmaking powers. Indeed, in a variety of rhetorical flourishes throughout its history the Supreme Court has declared that “foreign affairs and international relations [are] matters which the Constitution entrusts solely to the federal government,”⁶⁶ and that “[f]or local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”⁶⁷ Thus, although the precise scope of “dormant” federal powers in the field is subject to some controversy,⁶⁸ the Court has made clear that where the federal government has affirmatively exercised its authority to regulate matters of

⁶⁴ See *Garamendi*, 123 S.Ct. at 2386 (holding that “the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress”)(citing *Dames & Moore v. Regan*, 453 U.S. 654, 679, 682-683 (1981); *United States v. Pink*, 315 U.S. 203, 223, 230 (1942); and *United States v. Belmont*, 301 U.S. 324, 330-331 (1937).

⁶⁵ *Id.*

⁶⁶ *Zschernig v. Miller*, 389 U.S. 429, 436, 441 (1968).

⁶⁷ *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889)). See also *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979)(observing that the Constitution proceeded from “the Framers’ overriding concern that ‘the Federal Government must speak with one voice when regulating commercial relations with foreign governments’”)(quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)); *United States v. California*, 332 U.S. 19, 35 (1947)(“[P]eace and world commerce are the paramount responsibilities of the nation, rather than an individual state....”); *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.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893)(“The only government of this country, which other nations recognize or treat with, is the government of the Union.... The Constitution of the United States speaks with no uncertain sound upon this subject”).

⁶⁸ See *infra* notes 489-491 and accompanying text (discussing the notions of a “dormant foreign affairs power” and a “dormant foreign commerce clause”).

international affairs the federal policy “is not and cannot be subject to any curtailment or interference on the part of the several states.”⁶⁹

The description of the “judicial Power” in Article III of the Constitution completes the circle on the force of treaties as federal law. Section 2 of that Article provides that “[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under...Treaties made, or which shall be made” under the authority of the United States.⁷⁰ When, then, a treaty from its substance passes directly into federal law—about which more immediately below⁷¹—it becomes the formal responsibility of the federal courts to interpret and give effect to its terms in actual cases and controversies.⁷²

2. Treaties and the Self-Execution Doctrine

The inclusion of treaties in the Supremacy Clause of the Constitution also represented a subtle, but significant departure from pre-existing international practice. In the international dimension, a treaty reflects merely an external contract between sovereigns. The legal character of these contracts derives not from domestic law sources, but rather from the general requirement that nations faithfully adhere to their international obligations (so-called *pacta sunt servanda*).⁷³ In other words, treaties obtain their force as law from the reciprocal international obligation of “good faith” performance, and irrespective of their

⁶⁹ United States v. Belmont, 304 U.S. 324, 331 (1937) (*citing* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936)).

⁷⁰ U.S. CONST. art. III, § 2, cl. 1.

⁷¹ See *infra* notes 76-86 and accompanying text.

⁷² See *infra* notes 81-92 and accompanying text (analyzing the interpretive authority of federal courts over treaties in greater detail).

⁷³ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §321 and cmt. a (1987)(referring to the binding force of international law agreements in light of the doctrine of *pacta sunt servanda*)[hereinafter Restatement of Foreign Relations]. See also Louis Henkin, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 62 (1990)(opining that the doctrine of *pacta sunt servanda* is “most important principle of international law”).

effect within the domestic law of the treaty partners.⁷⁴ In many countries, to this day the transformation of international treaty obligations into local law then requires a further legislative act by domestic lawmaking institutions.⁷⁵

In this country, however, “a different principle is established.”⁷⁶ As the Supreme Court declared in *Foster v. Neilson*, under our Constitution treaties may take effect as directly applicable federal law without legislative transformation:

Our Constitution declares a treaty to be the law of the land. It is, consequentially, 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.⁷⁷

By virtue of the Supremacy Clause, therefore, the President and a super-majority of the Senate—which I have referred to elsewhere as the “treaty-lawmakers”⁷⁸—have the power to promulgate federal law as an incident of the treaty power of Article II.⁷⁹ All that is required is that the substance of the treaty reflect an intent that it shall take direct effect without Article I implementing legislation.⁸⁰ The powerful aspect of such a “self-executing treaty,” in other

⁷⁴ See Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969)(providing that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”)[hereinafter Vienna Convention on Treaties]; Restatement of Foreign Relations, *supra* note 73, § 321 (same).

⁷⁵ As I have noted elsewhere, the more common international approach is that treaties must ratified through standard legislation before they may take effect as domestic law. See Van Alstine, *Treaty Delegation*, *supra* note 18, at 1265. See also Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 373 (1985)(stating that “relatively few countries have adopted the doctrine of self-executing treaties”); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI-KENT L. REV. 571, 575 (1991)(observing that in some countries, “such as the United Kingdom, treaties ... require parliamentary action before the courts will recognize individual rights”).

⁷⁶ *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

⁷⁷ 27 U.S. at 314.

⁷⁸ See Van Alstine, *Treaty Delegation*, *supra* note 18, at 1286.

⁷⁹ See Golove, *supra* note 9, at 1286 (“The treaty power empowers the President and Senate, incident to making agreements with foreign states, to promulgate laws.”).

⁸⁰ See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984)(describing a self-executing treaty as one in which “no domestic legislation is required to give [it] the force of law

words, is that it operates as federal law even without the involvement of the House of Representatives. Moreover, in confirmation of *Foster v. Neilson*'s description of a treaty as "equivalent to an act of the legislature,"⁸¹ the Supreme Court repeatedly has observed that the Constitution places the provisions of self-executing treaties "in the same category as other laws of Congress,"⁸² with the same "force and effect of a legislative enactment."⁸³ Just like any other form of newly enacted federal law, therefore, a self-executing treaty will broadly preempt contrary state law.⁸⁴

As an aspect of federal law under the Supremacy Clause, federal courts have not only the right but the obligation to enforce the provisions of self-executing treaties. Indeed, as the Supreme Court recently confirmed in a controversial case involving a kidnapping by federal officials in a foreign country, if a treaty is self-executing a court must enforce it on behalf of an individual "regardless of the offensiveness of the practice of one nation to the other."⁸⁵

in the United States"); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that treaty provisions are self-executing when they "require no legislation to make them operative"); *Dianese v. Hale*, 91 U.S. 13, 18-19 (1875) ("For as treaties made under the authority of the United States are, by the Constitution, declared to be part of the supreme law of the land, when they are complete in themselves, and need no supplemental legislation to carry them into effect, such legislation is not necessary for the purpose of giving them force and validity.") *See also* Restatement of Foreign Relations, *supra* note 73, §111(4) (stating that if otherwise constitutional and the Senate does not attach a corresponding reservation, an international agreement is deemed "non-self-executing" if it "manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation").

⁸¹ 27 U.S. at 314.

⁸² *The Head Money Cases*, 112 U.S. 580, 598 (1884).

⁸³ *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

⁸⁴ *See Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) ("When the national government by treaty ... has established rules and regulations ... the treaty ... is the supreme law of the land. No state can add to or take from the force and effect of such treaty."); *Decanas v. Bica*, 424 U.S. 351, 358 n. 5 (1976) (concluding that even in absence of an intent to 'occupy the field,' "the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any ... treaties.").

⁸⁵ *See United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992).

And this applies as well to actions in state courts as it does to other federal institutions, as has been clear since at least the famous case of *Martin v. Hunter's Lessee*.⁸⁶

The doctrine of self-execution does not mean that every provision of every treaty automatically creates federal rights or obligations. Similar to other forms of federal law,⁸⁷ the treaty-lawmakers expressly may provide that a particular treaty is not self-executing—a circumstance that has become quite common in the special category of aspirational human rights treaties.⁸⁸ The effect of such a provision is that the decision on transformation into enforceable federal law is left to Congress as a whole. Similarly, other treaties, as Carlos Vazquez has explained, may be merely precatory⁸⁹ or otherwise touch so closely on political

⁸⁶ 14 U.S. 304, 347-360 (1816). Although easily overlooked, *Martin v. Hunter's Lessee* involved the application of individual rights created by a treaty. The case arose after the Supreme Court of Virginia refused to follow the federal Supreme Court's enforcement of treaty rights in an earlier case. See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1812) (holding in a land dispute that a treaty "being the Supreme Law of the Land, confirmed the Title to [Fairfax], his heirs and assigns, and protected [Fairfax] from any forfeiture by reason of alienage" under state law). In declaring that it was the final authority on the interpretation and application of federal law, the Supreme Court in *Martin v. Hunter's Lessee* famously observed:

Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself: if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.

14 U.S. at 348.

⁸⁷ For instance, Congress often delegates to administrative agencies the discretion to adopt implementing regulations. Although the statutory authorization qualifies as federal law for purposes of the Supremacy Clause, it does not directly create rights that are enforceable by individuals. Rather, the discretion concerning the timing and precise content of the rights is delegated to the administrative agency.

⁸⁸ See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (describing the role of such reservations and defending their constitutionality).

⁸⁹ See Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 713-15 (1995) [hereinafter Vazquez, *Four Doctrines*]; Carlos Manuel Vazquez, *Treaty-based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1130-33 (1992) [hereinafter Vazquez, *Treaty Rights*]. See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) (observing that provisions in the United

issues that courts properly refrain from exercising jurisdiction in absence of particularly clear guidance.⁹⁰ Still others may not be amenable to affirmative enforcement by individuals because of an absence of a private right of action.⁹¹

When a treaty reflects an intent to create rights or obligations of its own accord, however, Article III mandates that federal courts apply it as a federal rule of decision just as they would a statute or any other form of enforceable federal law. The scope of this “judicial Power” of federal courts in relation to treaties will of course be a core concern in our analysis below.⁹² But before we can examine the common law powers of federal courts under treaties, it is first necessary to clear away some of the remaining underbrush of scholarly controversy over the very constitutionality of self-executing treaties. I turn to this controversy immediately below.

B. Responding to the Criticism of Self-Executing Treaties

1. The Challenge and the Historical Debate

As the significance of treaties has expanded both in substantive scope and in our political consciousness, virtually every aspect of treaty law has become the subject of heated scholarly debates.⁹³ So too has the very notion of a self-executing treaty. Because it admits of a power by the President and the Senate to create federal law without the involvement of the

Nations protocol relating to the status of refugees are merely precatory); *Sei Fujii v. California*, 38 Cal. 2d 718, 721-25 (1952) (concluding that provisions in the United Nations Charter were too vague to be self-executing).

⁹⁰ See Vazquez *Four Doctrines*, *supra* note 89, at 717 (citing arms control agreements as examples of treaties that may not be “judicially enforceable under our Constitution because they bear too closely on national security or are otherwise too sensitive for judicial involvement”).

⁹¹ See Van Alstine, *Treaty Delegation*, *supra* note 18, at 1273; Vazquez, *Four Doctrines*, *supra* note 89, at 719-21.

⁹² See *infra* Part III.A.

⁹³ See *supra* notes 11-18 and accompanying text (describing the variety of controversies over the treaty power).

House of Representatives, the scope and validity of the self-execution doctrine in recent years has spawned intense criticism.⁹⁴

The principal critic in this regard has been Professor John Yoo. As a foundation for his attack on self-executing treaties Professor Yoo cites the pre-framing international understanding (especially in Great Britain) on the effect of treaties, scattered statements during the Constitutional Convention, and in particular various arguments advanced in the ratification debates in some states.⁹⁵ Principally from these historical sources, he concludes that the Constitution prohibits judicial enforcement of a treaty within the scope of Congress's Article I legislative powers without implementing legislation by Congress.⁹⁶

This account of some hidden, extra-textual limitation on the treaty power fails to convince. From a simple textual perspective, the Supremacy Clause contains no ambiguity: “[A]ll Treaties ... shall be the supreme Law of the Land.”⁹⁷ Moreover, as Professor Carlos Vazquez has persuasively argued, this reference to treaties appears in the same sentence that defines the effect of other well-accepted and uncontroversial forms of direct federal law: the

⁹⁴ See *supra* notes 13-15 and accompanying text (analyzing the controversy over self-executing treaties).

⁹⁵ See Yoo, *Non-Self-Execution*, *supra* note 13, at 2057-2073.

⁹⁶ See *id.*, at 2092 (setting forth the conclusion of his historical analysis). See also Yoo, *Treaties and Public Lawmaking*, *supra* note 13, at 2220 (describing the approach as a “hard” rule under which “[t]reaties cannot receive judicial enforcement in areas that fall within Congress’s Article I, section 8, powers, without statutory implementation by Congress”). This conclusion, ironically, in large measure is the direct logical opposite of the other principal critic of an expansive treaty power, Professor Curtis Bradley. Relying principally on federalism concerns, Professor Bradley argues that self-executing treaties are subject to the same substantive limitations as those for Congress’s Article I legislative powers. See Bradley, *Treaty Power*, *supra* note 12, at 1593. Professor Yoo in contrast, argues that a self-executing treaty may not regulate matters within Congress’s Article I legislative powers at all. See Yoo, *Non-Self-Execution*, *supra* note 13, at 2059-2073.

⁹⁷ U.S. CONST. art. VI, § 2 (providing that “all Treaties made or which shall be made, under the authority of the United States, shall be the supreme Law of the Land”).

“Constitution and the laws of the United States.”⁹⁸ Article VI, section 2, thus leaves no textual room for an argument that treaties are any less the “supreme Law of the Land” than these other forms of federal law.⁹⁹

In addition, Article III’s core description of the constitutional role of federal courts is in direct conflict with any challenge to self-executing treaties. Article II, section 2, expressly provides that the judicial power of the federal courts extends to all cases “arising under ... Treaties.”¹⁰⁰ If Professor Yoo’s account is correct, the reference to treaties in this constitutional provision would be entirely superfluous. For if Article I legislation is required to give a treaty domestic law effect in any event, then no case could “aris[e] under” a treaty itself.

The attack on the self-execution doctrine thus reduces to the assertion that historical sources somehow create a lasting interpretive radiation that dissolves the explicit text of Article VI, section 2, and Article III, section 2. But even here, Professor Martin Flaherty has comprehensively and convincingly demonstrated that historical sources are entirely consistent

⁹⁸ Vazquez, *Laughing at Treaties*, *supra* note 14, at 2170 (arguing in response to the contention that treaties require a further legislative act before they may operate as federal law that “[t]he words ‘shall be’ in the Supremacy Clause apply equally to the Constitution and federal statutes, yet the clause has always been read to make the Constitution and federal statutes the supreme law of the land immediately upon their coming into force”).

⁹⁹ As an alternative to an absolute prohibition of self-executing treaties Professor Yoo has suggested a “soft rule” pursuant to which courts must apply a presumption against self-execution. *See* Yoo, *Non-Self-Execution*, *supra* note 13, at 2092 (suggesting this approach); Yoo, *Treaties and Public Lawmaking*, *supra* note 13, at 2220 (describing the approach as a rule in which “courts can remain true to the text, structure, and original understanding of the Constitution by requiring the treaty-makers to issue a clear statement if they want a treaty to be self-executing”). One court in fact has embraced a similar approach, although it nowhere explains the constitutional foundation for such a presumption with respect to formal private causes of action. *See* *United States v. Li*, 256 F.3d 56, 60-61 (2000) (holding that there is a “presumption against private rights of action under international treaties”). *But see* Vazquez, *Laughing at Treaties*, *supra* note 14, at 2157-58 (rejecting even this “soft rule” approach as contrary to the text of the Supremacy Clause as well as Supreme Court precedent on self-executing treaties).

with the notion of self-executing treaties.¹⁰¹ Professor Flaherty’s analysis reveals that the framers intended the Constitution to mark a departure from prior eighteenth century thought and practice on treaties,¹⁰² and that the clear weight of historical evidence from the Constitutional Convention¹⁰³ and from the “critical period” immediately preceding and succeeding ratification confirms the intent to grant treaties direct effect as federal law.¹⁰⁴ In other words, this analysis demonstrates that—not surprisingly—the historical sources confirm what the text of Articles III and VI unambiguously provide.¹⁰⁵ In short, the thin collection of

¹⁰⁰ U.S. CONST. art. III, § 2, cl. 1 (“the judicial Power shall extend to all cases, in Law and Equity, arising under...Treaties made or which shall be made,” under the authority of the United States).

¹⁰¹ See Flaherty, *supra* note 14.

¹⁰² See *id.*, at 2105-12. Indeed, the power of the federal government to conclude treaties with direct effect as federal law preceded even the Constitution. The Articles of Confederation granted this power—although subject to a different process and in a more limited form—to the federal congress. See Golove, *supra* note 9, at 1108-15 (concluding that, although ambiguity existed about their precise effect on state law, the Articles of Confederation granted to the federal congress the power to conclude treaties that directly regulated private rights and obligations).

¹⁰³ See Flaherty, *supra* note 14, at 2120-50.

¹⁰⁴ See *id.*, at 2126-51. As Professor Flaherty also points out, we need not even speculate about any hidden desires of the framers of the Constitution. During the drafting of the Convention, one delegate, Gouverneur Morris, proposed an amendment that would have expressly required that all treaties be “ratified by a Law” pursuant to Article I. The records reveal that this amendment was decisively defeated. See Flaherty, *supra* note 14, at 2124. See also Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 PERSP. AM. HIST. 233, 241 (1984) (observing that after the defeat of a broader motion to postpone debate on the treaty clause, “the Convention immediately rejected Morris’s amendment decisively”). A similarly directed proposal by James Wilson two weeks later to include the House of Representatives in the treaty approval process met the same fate. See Flaherty, *supra* note 14, at 2124 (recounting the overwhelming defeat of both the Morris and the Wilson proposals during the Constitutional Convention and observing “we do not need to rely on inference” with regard to the intent of the framers on this score); Rakove, *supra*, at 246 (observing that Wilson’s proposal “was decisively rejected”). Professor Yoo himself acknowledges the significance of the defeat of these proposed constitutional limitations on the domestic law effect of treaties. See Yoo, *Non-Self-Execution*, *supra* note 13, at 2033-34. See also Golove, *supra* note 9, at 1134-36 (describing in detail the rejection during the Constitutional Convention of attempts to limit the domestic law effect of treaties based on states rights).

¹⁰⁵ As summarized by the leading historical scholar on the treaty power, the historical evidence leaves little room for doubt about the conclusion regarding self-executing treaties: “Whatever uncertainty might have persisted about the precise allocation of authority to make treaties, the framers were virtually of one mind when it came to giving treaties the status of law.” See Rakove, *supra* note 104, at 264. See also *id.* (observing that “[t]he major consequence” of the need to make

historical references gathered by Professor Yoo, although seemingly comprehensive in scope, does not support the weighty conclusion he draws against self-executing treaties—in particular in the face of clear constitutional text to the contrary.

But even were the constitutional text ambiguous, we would not need to leave the resolution of the issue to a weighing and sifting of the residue of distant rhetorical debates. The immediate post-ratification actions of the constitutional institutions brought into being in 1789 speak with significantly greater force and clarity. These formal actions of the Congress and the President leave little doubt about the collective contemporaneous understanding on the direct effect of treaties as federal law. Because these actions have not yet been subject to detailed exploration, I analyze them immediately below as a necessary backdrop to the role of self-executing treaties in our domestic legal landscape.

2. Confirmation through Action: The Post-Ratification Conduct of the Political Branches

From its first exercises of the powers granted by the new Constitution, the Congress expressly recognized the force of treaties as directly applicable federal law. Indeed, the most significant piece of legislation by the First Congress, the Judiciary Act of 1789,¹⁰⁶ repeatedly acknowledged that treaties could create rights that were cognizable before federal courts. Section 25 of that Act, for instance, provided that the review jurisdiction of the Supreme Court extended to cases involving “the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to ... treaties ... of the United States.”¹⁰⁷

treaties legally binding on the states “was the ready adoption of the supremacy clause, which gave treaties the status of law and made them judicially enforceable through the federal courts”). *See also* Flaherty, *supra* note 14, at 2120-23 (discussing these observations of Professor Rakove and the contextual historical evidence in greater detail).

¹⁰⁶ The Judiciary Act of 1789, § 25, 1 Stat. 73 (1789).

¹⁰⁷ *Id.*

In a later clause of the same provision the First Congress could hardly have been clearer on the power of treaties to create individual rights. Section 25 continues on to provide that whenever a lower court’s “construction of clause...of a treaty” is against “the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said ... treaty” the lower court’s decision “may be re-examined and reversed or affirmed in the Supreme Court of the United States.”¹⁰⁸ Underlying this jurisdictional statute is thus the unambiguous recognition that a treaty could create an individual “title, right, privilege or exemption” in the first place.

The First Congress was equally clear in its identification of the substantive law to be applied in federal courts. In the first “Rules of Decision Act”—which separately will play a prominent role in our analysis of federal common law below ¹⁰⁹—, Congress provided that the substantive law of the States would apply “except where the Constitution, treaties or statutes of the United States shall otherwise require or provide.”¹¹⁰ Here again, we see the nation’s first legislature affirming that federal law may come into being through treaties just as through the Constitution and Article I laws. Similarly, in the first version of the (now highly controversial¹¹¹) Alien Tort Claims Act in 1789, the First Congress provided that the jurisdiction of the new district courts would extend to “all causes where an alien sues for a tort only in violation of ... a treaty of the United States.”¹¹²

¹⁰⁸ *Id.*, §25.

¹⁰⁹ See *infra* notes 203-206, 375-377, and 409-410 and accompanying text.

¹¹⁰ The Judiciary Act 1789, § 34.

¹¹¹ See Terry Collingsworth, *Separating Fact from Fiction in the Debate over the Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563 (2003); Justin Lu, *Jurisdiction over Non-State Activity under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT’L L. 531 (1997); Peter Schuyler Black, *Kadic v. Karadzic, Misinterpreting the Alien Tort Claims Act*, 31 GA. L. REV. 281 (1996).

¹¹² Judiciary Act of 1789, § 9.

The first legislators under the new Constitution continued to reaffirm the principle of self-executing treaties throughout the first decade of its existence. In a 1790 Act “to Regulate Trade and Commerce with the Indian Tribes,” for example, Congress prohibited the sale of native American land within the United States “unless the same shall be made and duly executed at some public treaty” under the authority of the United States.¹¹³ Note that here again there is no mention of any requirement that such a treaty receive statutory confirmation before it could take effect as federal law. Congress passed similar legislation in 1793,¹¹⁴ 1796,¹¹⁵ and 1799.¹¹⁶ A recognition that treaties could create federal law rights also emerges from legislation adopted in 1797 with reference to a specific treaty. In that legislation, Congress made appointments to a commission whose sole purpose was to adjudicate claims based on individual rights protected by a 1794 treaty with Great Britain.¹¹⁷

All of these legislative acts occurred of course with the involvement of a Senate. At the time, significantly, this body was (and until 1913 remained) a directly appointed representative of the state legislatures.¹¹⁸ Likewise, from the first exercises of its “Advice and Consent” power in Article II section 2, the Senate repeatedly approved of treaties with self-

¹¹³ An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790).

¹¹⁴ *See* An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 8, 1 Stat. 330 (1793) (invalidating any “purchase or grant of lands or of any title or claim thereto” unless “made by a treaty or convention entered into pursuant to the Constitution”).

¹¹⁵ *See* Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontier, ch. 30, § 12, 1 Stat. 469 (1796) (providing that native Americans may dispose of their land only through a treaty).

¹¹⁶ *See* An Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontier, ch. 46, § 12, 1 Stat. 743 (1799) (same).

¹¹⁷ *See* An Act Directing the Appointment of Agents in Relation to the 6th Article of the Treaty of Amity, Commerce and Navigation between the United States and Britain, 5th Cong., sess. I, ch. 6 (1797).

¹¹⁸ Until the Seventeenth Amendment, which took effect in 1913, United States senators were chosen by the legislature of each of the States, not by direct election by the people of the States. *See* U.S. CONST. art. I, § 3, cl. 1.

executing provisions—including after the Supreme Court itself repeatedly confirmed the force of treaties as federal law (about which more below¹¹⁹). In July 1789, for example, the Senate gave its consent to a Consular Treaty with France—negotiated even before the ratification of the Constitution¹²⁰—which, among other self-executing provisions, directly gave individual French citizens the right to assert claims in State courts.¹²¹ Other treaties endorsed by the Senate in the first decade of its existence contained like terms.¹²² The Senate even gave its consent in 1796 to the highly controversial “Jay Treaty” with Great Britain.¹²³ That treaty precipitated substantial and impassioned rhetoric—but ultimate acquiescence by states rights critics in the House of Representatives—precisely because of its self-executing provisions on the rights of British subjects in the United States.¹²⁴

¹¹⁹ See *infra* notes 127-136 and accompanying text.

¹²⁰ The Supremacy Clause makes clear that treaties concluded before the Constitution likewise operate as the “supreme Law of the Land.” See U.S. CONST. art. VI, § 2 (using the past tense in providing that “all treaties made...under the authority of the United States” shall be the supreme law of the land). See also *Chirac v. Chirac’s Lessee*, 15 U.S. 259 (1817) (holding with regard to a 1778 treaty with France that “[i]t is unnecessary to inquire into the effect of this treaty under the confederation, because...the confederation had yielded to our present constitution, and this treaty had become the supreme law of the land”).

¹²¹ See *Convention Defining and Establishing the Functions and Privileges of Counsels and Vice Counsels*, Nov. 14, 1788, in 2 *Treaties and Other International Acts of the United States of America* 228 (Hunter Miller ed., 1931).

¹²² A 1795 treaty with Spain, for instance, expressly protected the right of Spanish citizens “to dispose of their personal goods” in the United States. See *Treaty of Friendship, Limits and Navigation, Between the United States of America, and the King of Spain*, Oct. 27, 1795, U.S.-Sp., 8 Stat 138. A series of similar treaties with the so-called Barbary States of northern Africa also protected the navigation rights of citizens of the treaty partners. See *Treaty of Peace and Amity Between the Dey of Algiers and the United States of America*, Sept. 5, 1795, 8 Stat 133; *Treaty of Peace and Friendship Between the United States of America and the Bey and Subjects of Tripoli, of Barbary*, Nov. 4, 1796, 8 Stat 154; *Treaty of Peace and Friendship Between the United States of America and the Kingdom of Tunis*, March 26, 1799, 8 Stat 157.

¹²³ See *Treaty of Amity, Commerce and Navigation Between the United States and Great Britain*, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116.

¹²⁴ For a detailed and convincing historical review of the debates over the Jay Treaty, including the acquiescence by republican opponents in the House of Representatives see Golove, *supra* note 9, at 1157-78.

The immediate post-ratification actions of the President, too, confirmed the understanding of the constitutional effect of treaties. Each of the above-noted legislative acts in the first decade of the Constitution became federal law with the approval of President Washington.¹²⁵ Moreover, from their nature each of the self-executing treaties of the same period the negotiations were conducted, and the post-consent instruments of ratification deposited, by the executive branch.¹²⁶ Like the initial Houses of Representatives and Senates created under the Constitution, in short, the actions of the executive branch in the years immediately succeeding ratification confirmed that treaties could take direct effect as federal law without implementing legislation.

3. Confirmation through Jurisprudence: Supreme Court Precedent and Self-Execution

Even if one were to leave aside the acts of the political branches, any challenge to the doctrine of self-execution faces another formidable obstacle: From its first confrontations with the issue, the Supreme Court has shown no discernible doubt about the proposition that, when their substance so directs, treaties operate of their own force as federal law. What has not yet been sufficiently appreciated, however, is the clarity, consistency, and sheer volume of Supreme Court jurisprudence on this score.

The 1829 opinion in *Foster v. Neilson* is often taken as the prime declaration by the Supreme Court on the legal character of treaties. A careful review of even earlier Supreme Court opinions nonetheless reveals that the doctrine of self-execution already had solidified long before that important decision. Within a few short years after the ratification of the Constitution the Court, following the mandate of the Supremacy Clause, applied treaties as

¹²⁵ None of the noted legislation of the First Congress was adopted over the veto of President Washington.

directly applicable federal law. Its 1796 observation in *Ware v. Hylton*¹²⁷ that the 1783 Treaty of Peace with Great Britain of its own force “nullified” contrary state laws¹²⁸ is well known.¹²⁹ But even as early as 1794, *Georgia v. Brailsford* had already established the same proposition. There, the Court observed—interestingly, in instructing a jury in the only case of its kind¹³⁰—that state legislation would be invalid to the extent it was “in direct opposition” to rights protected in the 1783 treaty with Great Britain.¹³¹

In nearly two dozen opinions in the early 1800s the Court likewise repeatedly analyzed treaties as directly applicable federal law.¹³² Indeed, by 1801—only twelve years after ratification of the Constitution and over a quarter century before *Foster v. Neilson*—the Court

¹²⁶ It became established practice shortly after the ratification of the Constitution that all treaty negotiations were conducted by the executive branch without formal participation by representatives of Congress. See Yoo, *Politics as Law*, *supra* note 17, at 895-901.

¹²⁷ 3 U.S. (3 Dall) 199 (1796).

¹²⁸ *Id.*, at 239.

¹²⁹ See Yoo, *Non-Self-Execution*, *supra* note 13, at 2075-2080 (noting, but attempting to discount the effect of, *Ware v. Hylton*); Vazquez, *Laughing at Treaties*, *supra* note 14, at 2196-98 (analyzing the force of *Ware v. Hylton* both generally and in response to Professor Yoo’s arguments).

¹³⁰ See Daniel Blinka, *This Germ of Rottedness, Federal Trials in the New Republic, 1789- 1807*, 36 CREIGHTON L. REV. 135, 163-64 (2003)(discussing this interesting aspect of the Brailsford opinion).

¹³¹ 3 U.S. 1, 4 (1794)(observing that even if an act of the State of Georgia could be construed to confiscate a debt, the Treaty of Peace with Great Britain nonetheless directly restored the related rights to the original British creditor, because the state legislation would then be “in direct opposition to the 4th Article of that Treaty”). See also *The Betsey*, 3 U.S. (3 Dall) 6, 16 (1794)(observing with regard to a treaty between France and the United States that no foreign power could establish a court within the United States except “as may be warranted by, and be in pursuance of treaties ...”).

¹³² See *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454 (1806); *Fitzsimmons v. Newport Ins. Co.*, 8 U.S. (4 Cranch) 185 (1808); *Higginson v. Mein*, 8 U.S. (4 Cranch) 415 (1808); *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344 (1809); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603 (1812); *The Nerieide*, 13 U.S. (9 Cranch) 388 (1815); *Harden v. Fisher*, 14 U.S. (1 Wheat.) 300 (1816); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *The Pizarro*, 15 U.S. (2 Wheat.) 227 (1817); *Chirac v. Chirac’s Lessee*, 15 U.S. (2 Wheat.) 259 (1817); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453 (1819); *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822); *Blight’s Lessee v. Rochester*, 20 U.S. (7 Wheat.) 535 (1822); *Society for Propagation of Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489 (1824); *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181 (1825); *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828).

in *The Schooner Peggy* already spoke of the “obligation” of federal courts to give effect to the individual rights established by treaty:

The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. ... [W]here a treaty is the law of the land, and as such effects the rights of the parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress[.]¹³³

Considered in this light, *Foster v. Neilson* merely represents a concise summary of what was already established precedent. In any event, in the over one hundred and seventy five years since the Supreme Court never discernibly has wavered from the proposition recognized in *Foster* that treaties may operate of their force as supreme federal law. Indeed, comprehensive research reveals well over two hundred and fifty opinions in which the Supreme Court alone has interpreted and applied treaties as directly applicable federal law.¹³⁴ Dozens of these opinions expressly confirm that self-executing treaties represent the rule of decision for individual rights in federal courts just like Article I legislation.¹³⁵ Carrying

¹³³ 5 U.S. (1 Cranch) 103, 109-110 (1801).

¹³⁴ A list of these Supreme Court opinions is on file with the author.

¹³⁵ *See, e.g.*, *Chirac v. Chirac’s Lessee*, 15 U.S. 259, 271 (1817) (observing that because of the Supremacy Clause even a treaty concluded under the Articles of Confederation “had become the supreme law of the land”); *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828)(holding with regard to the treaty that ceded Florida from Spain to the United States that “[t]his treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States”); *Foster v. Neilson*, 27 U.S. 253, 314 (1829)(observing that a treaty “is 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”); *Strother v. Lucas*, 37 U.S. 410, 439 (1838) (“Treaties are the law of the land and a rule of decision in all courts “); *Haver v. Yanker*, 76 U.S. 32. 34-35 (1869)(“In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land.”); *The Head Money Cases*, 112 U.S. 580, 598 (1884)(holding that self-executing provisions of treaties “partake of the nature of municipal law ... [and] the Constitution of the United States places such provisions as these in the same category as other laws of Congress. ... And, when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)(declaring that that where treaty provisions “are self-executing, that is, require no legislation to make them operative ... they have the force and effect of a legislative enactment”); *Chae Chan Ping v. United States*, 130 U.S. 581, 627-28 (1889)(“By the constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be the supreme law of the land ... If the treaty operates by its

forward its pronouncement in *The Schooner Peggy* the court likewise consistently has affirmed that it courts have not only the right, but the “obligation” to give direct effect to individual rights established by a self-executing treaty.¹³⁶

It is appropriate to conclude here with a modern day application of this over two hundred years of established precedent. In the 2000 case of *Cheung v. United States*, the Second Circuit confronted the argument that enforcement of an extradition treaty would “threaten our system of separation of powers.”¹³⁷ Because it takes effect as law without the participation of the House of Representatives, the petitioner argued, such a self-executing treaty “amount[s] to usurpation of Congress’s constitutionally vested legislative authority.”¹³⁸ The Second Circuit responded with a wonderfully concise summary of the import of *Ware v. Hylton*, *The Schooner Peggy*, *Foster v. Neilson*, and their progeny:

[T]his contention fundamentally miscomprehends the status of treaties in our constitutional scheme. The Supremacy Clause declares the Constitution, federal law, and treaties to be “the supreme Law of the Land.” It is well-established that under the Supremacy Clause a self-executing treaty—one that operates of itself without the aid of legislation—is to be regarded in the courts as equivalent to an act of the legislature ...

own force, and relates to a subject within the power of congress, it can be deemed in that particular only the equivalent of a legislative act.”).

¹³⁶ See, e.g., *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109-110 (1801) (“The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted.”); *United States v. Wiggins*, 39 U.S. 334, 349 (1840) (holding that because titles to land “stood confirmed” by a treaty between the United States and Spain, the individual rights “must be so recognised ... in our Courts”); *United States v. Rauscher*, 119 U.S. 407, 419 (1886) (holding that if a treaty is self-executing, “courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of th[e] treaty”); *United States v. Alvarez-Machain*, 504 U.S. 655, 655-667 (1992) (observing that if a treaty is self-executing “it would appear a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other”).

¹³⁷ 213 F.3rd 82 (2000).

¹³⁸ *Id.*, at 95.

Thus, contrary to the position of ... the petitioner, the Constitution not only allows, but in fact requires, the courts to treat the [treaty] as equal to the federal extradition statute.¹³⁹

But perhaps no other fact is as compelling on the force of treaties as federal law as the simple recognition that our modern legal system is subject to the influence of many hundreds of self-executing treaties. As we shall see in the next section, building on over two hundred years of precedent established by the President and the Senate, recognized by Congress as a whole, and confirmed by the Supreme Court, such treaties now extend across nearly the full substantive breadth of domestic law. Moreover, like other forms of federal law, treaties may function in a variety of ways to create, limit, or otherwise regulate rights in our domestic legal system.

C. The Pervasive Role of Treaties in Our Modern Legal Landscape

1. The Attributes and Functions of Self-Executing Treaties

Under the traditional formulation, a self-executing treaty is one that “operates of itself without the aid of any legislative provision.”¹⁴⁰ The full force of self-executing treaties in our domestic legal system, however, is broader and more significant than this familiar phrase might suggest.

The most prominent form of a self-executing treaty is one that creates an affirmative federal cause of action that may be asserted directly by individuals in court.¹⁴¹ In a similar

¹³⁹ *Id.*

¹⁴⁰ *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

¹⁴¹ Restatement of Foreign Relations, *supra* note 73, § 111, cmt e (noting the circumstances under which a federal court has jurisdiction because a cause of action arises under an international agreement such as a treaty); Vazquez, *Four Doctrines*, *supra* note 89, at 719-722 (discussing the prime “doctrine” of self-executing treaties that such treaties may create a private right of action). For a prominent example see *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1147-52 (2001) (holding that the United Nations Sales Convention creates a private right of action in federal courts and preempts state law causes of action within its scope)(*citing* *Delchi Carrier SpA v. Rotorex*

vein, a treaty (or portion of a treaty¹⁴²) may merely create rights of a defensive nature, in that it protects individuals from defined governmental or private actions.¹⁴³ A common goal of self-executing treaties, for example, is the protection of property and similar rights of foreign citizens in the United States.¹⁴⁴ But a treaty also may create rights enforceable against individuals,¹⁴⁵ including in favor of governmental institutions.¹⁴⁶ Even foreign governments may be the beneficiaries of self-executing treaty rights.¹⁴⁷

Corp., 71 F.3d 1024, 1027-28 (2d Cir. 1995); *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992)).

¹⁴² See *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080-1081 (9th Cir. 2001)(holding that “it is far from uncommon for a treaty to contain both self-executing and non-self-executing provisions”); *United States v. Postal*, 589 F.2d 862, 884 n.35 (5th Cir.1979)(“A treaty need not be wholly self-executory or wholly executory.”); Restatement of Foreign Relations, *supra* note 73, §111 cmt. h (“Some provisions of an international agreement may be self-executing and others non-self-executing.”).

¹⁴³ See *Vazquez, Four Doctrines, supra* note 89, at 720 (discussing the notion that self-executing treaties may create rights of a defensive nature). See also Thomas Michael McDonnell, *Defensively Invoking Treaties in the American Courts—Jurisdictional Challenges under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401 (1996)(same).

¹⁴⁴ The protection foreign citizens set the context for some of the most influential early Supreme Court cases on the force of self-executing treaties. See, e.g., *Ware v. Hylton*, 3 U.S. 199 (1796)(analyzing the rights of British subjects protected by the 1783 Treaty of Peace with Great Britain); *Chirac v. Chirac’s Lessee*, 15 U.S. 259 (1817)(discussing the legal effect of a 1778 treaty between France and the U.S. that “enabled the subjects of France to hold lands in the United States”); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. 603 (1812)(upholding the rights of British subjects protected by the 1794 Treaty of Peace with Great Britain). It subsequently has become quite common for the United States to conclude treaties of “Friendship, Commerce and Navigation” whose express purpose was to secure reciprocal individual rights within the territory of the treaty partners. For more on these treaties see *infra* notes 176-178 and accompanying text.

¹⁴⁵ Most private law treaties, for example, create both rights and obligations of individuals for the transactions within their scope. See, e.g., *infra* notes 165-172 and accompanying text (describing the examples of private law treaties in the field of commercial law).

¹⁴⁶ See *Lidas, Inc. v. U.S.* 238 F.3d 1076, 1080-1081 (9th Cir. 2001)(holding that because the information exchange provisions of the U.S.-France Double Taxation Treaty were self-executing, the treaty alone created the legal authority for the issuance of an IRS summons against individual taxpayers); *In re Request from Canada Pursuant to Treaty Between the U.S. and Canada on Mutual Legal Assistance in Criminal Matters*, 155 F.Supp.2d 515, 517 (M.D.N.C. 2001)(holding that because the Treaty Between the United States of America and Canada on Mutual Legal Assistance in Criminal Matters was self-executing, the treaty could be enforced by the government against individuals).

¹⁴⁷ See, e.g., *767 Third Ave. Associates v. Permanent Mission of Republic of Zaire to United Nations*, 988 F.2d 295 (2nd Cir.)(holding that rights secured by the Vienna Convention on Consular Relations in favor of foreign governments precluded the forced eviction of a country’s permanent

The multiplicity of attributes that make a treaty self-executing has led to substantial definitional problems. Some courts, for instance, have erroneously defined self-execution to include only those treaties that create affirmative private rights of action.¹⁴⁸ Others have been more careful.¹⁴⁹ When distilled to its essence, the true touchstone of a self-executing treaty is an institutional one: That rights secured by the treaty are cognizable—whether by way of governmental power or private right of action or defense—in domestic courts.¹⁵⁰ Consistent with this observation, a variety of statutes and judicially recognized principles create a formal legal framework for the exercise or protection of treaty rights in federal courts. For instance, the familiar general federal jurisdictional statute, 28 U.S.C. §1331, provides that District Court jurisdiction extends to all cases “arising under the Constitution, laws or treaties of the United States.”¹⁵¹ The federal habeas corpus statute likewise

mission to the United Nations for non-payment of rent), cert. denied, 510 U.S. 319 (1993); In re Request from Canada Pursuant to Treaty Between the U.S. and Canada on Mutual Legal Assistance in Criminal Matters, 155 F.Supp.2d 515, 517 (M.D.N.C. 2001)(holding that because the Treaty Between the United States of America and Canada on Mutual Legal Assistance in Criminal Matters was self-executing, a right of Canada to request certain information of individuals in the United States could be enforced via an IRS summons).

¹⁴⁸ See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003)(“Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.”)(quoting *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir.1992).

¹⁴⁹ See, e.g., *International Cafe, S.A.L. v. Hard Rock Cafe Intern. (U.S.A.), Inc.*, 252 F.3d 1274, 1277 n.5 (11th Cir. 2001)(observing that a treaty is self-executing if it “directly affords enforceable rights to persons without the benefit of Congressional implementation”)(quoting *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991)). See also Restatement of Foreign Relations, *supra* note 73, § 111, cmt. h (“Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.”).

¹⁵⁰ It is also possible that a treaty may create rights enforceable in administrative bodies, including through administrative hearings. See Restatement of Foreign Relations, *supra* note 73, §325, cmt. d (observing that treaties may “lay down rules to be enforced by the parties through their internal courts or administrative agencies”).

¹⁵¹ 28 U.S.C. § 1331 (2003). For similar statutory recognitions of the direct force of self-executing treaties as federal law see 28 U.S.C. § 1362 (2003)(providing that District Courts shall have original jurisdiction of all civil actions brought by recognized Indian tribes “wherein the matter in controversy arises under ... treaties of the United States”); 28 U.S.C. § 1505 (2003)(providing that the United States Court of Federal Claims shall have jurisdiction of any claim against the United States in favor of recognized Indian tribes “whenever such claim is one arising under ... treaties of the United

authorizes U.S. District Courts to entertain petitions when the petitioner is “in custody in violation of ... treaties of the United States.”¹⁵² Compelling authority also supports the proposition that violations of self-executing treaty rights can create the foundation for a private right of action for damages in a Section 1983 action.¹⁵³ Even a waiver of federal sovereign immunity may arise from the particular way in which individual rights are secured in a self-executing treaty.¹⁵⁴

With the preemptive force of federal law, a self-executing treaty also displaces any inconsistent rights or obligations created under state law, whether constitutional, statutory, administrative or otherwise.¹⁵⁵ Even an implied provision of a treaty may be self-

States”); 33 U.S.C. § 1518 (providing that “treaties of the United States shall apply to a deepwater port licensed under this chapter and to activities connected, associated, or potentially interfering with the use or operation of any such port” and that “[n]othing in this chapter shall be construed to relieve, exempt, or immunize any person from any other requirement imposed by ... treaty”); 42 U.S.C. § 9163 (2003)(providing that “treaties of the United States shall apply to an ocean thermal energy conversion facility or plantship” meeting certain criteria).

¹⁵² See 28 U.S.C. § 2254(a)(2003). See also 28 U.S.C. §2241(c)(3)(2003)(same for certain other courts). The reference to treaties in the habeas statute has a long lineage. As early as 1867, the congressional statute authorizing habeas relief provided that federal district courts “shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States...” See Act of February 5, 1867, ch. 28, §1, 14 Stat. 385. For early applications of the principle see *Mali v. Keeper of the Common Jail of Hudson County, New Jersey* (Wildenhus’ case), 120 U.S. 1, 17 (1887); *United States v. Rauscher*, 119 U.S. 407, 430-31 (1886).

¹⁵³ See 42 U.S.C. §1983 (2003) (creating a private right of action for violations of rights secured by federal law). See also *Standt v. City of New York*, 153 F.2d 417, 422-31 (S.D.N.Y. 2001) (holding that the plain language of Article 36 of the Vienna Convention on Consular Relations, coupled with its implement regulations, compel the conclusion that that Article creates a private right enforceable in an action for damages under section 1983).

¹⁵⁴ See *Telesat De Panama, S.A. v. U.S. Department of Defense*, 1992 WL 188153 (Fed. Cir. August 7, 1992) (holding that if it creates a private cause of action against the federal government, a treaty may form the basis for a waiver of its sovereign immunity).

¹⁵⁵ See U.S. CONST. art. VI, § 2 (providing that treaties are the supreme law of the land which even state law judges must apply “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *Mali v. Keeper of the Common Jail of Hudson County, New Jersey* (Wildenhus’ case) 120 U.S., 17 (1887)(“[A] treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere.”).

executing¹⁵⁶ and thus have this preemptive effect.¹⁵⁷ Because it is of equal constitutional dignity with statutes, a treaty even will displace earlier inconsistent federal statutes,¹⁵⁸ although under the “later-in-time rule” the reverse is true as well.¹⁵⁹ Nonetheless, the particular force of the international obligation that attends a treaty¹⁶⁰ requires courts to apply a strong presumption against a finding congressional intent to violate a treaty.¹⁶¹ And federal courts have been particularly clear in declaring that mere procedural legislation designed to ease the application of a self-executing treaty should not be interpreted to limit or otherwise modify the substantive treaty rights.¹⁶²

¹⁵⁶ See *United States v. Rauscher*, 119 U.S. 407, 419-23 (1886) (holding that an extradition treaty included an implied provision prohibiting extradition on any other than the defined bases). *But cf.* *United States v. Alvarez-Machain*, 504 U.S. 655, 667-68 (1992) (accepting that “[i]n *Rauscher*, we implied a term in [an extradition treaty] because of the practice of nations with regard to extradition treaties,” but holding that the different extradition treaty as issue did not bear such an interpretation).

¹⁵⁷ The power of federal courts to fill gaps in self-executing treaties is of course central to the issue of the federal common law powers of courts for the law within the scope of treaties. I thus analyze this issue in much greater detail below. See *infra* Parts IV.B., C.

¹⁵⁸ See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation . . . [B]ut if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty . . . is self-executing.”).

¹⁵⁹ See *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889) (finding that an earlier treaty must yield to a later statute excluding aliens); *Reid v. Covert*, 354 U.S. 1, 18 (1957) (stating that “when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of the conflict renders the treaty null”).

¹⁶⁰ I examine the implications of the international obligation aspect of a treaty in substantially greater detail below. See *infra* notes 464-476 and accompanying text.

¹⁶¹ See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (“There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”) (*citing, inter alia*, *Cook v. United States*, 288 U.S. 102, 120 (1933) and *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979)). See also *id.* (observing that “[l]egislative silence is not sufficient to abrogate a treaty”) (*citing* *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)).

¹⁶² *Bishop v. Reno*, 210 F.3d 1295, 1299 (11th Cir. 2000) (holding that “[p]rocedural legislation which makes operation of a treaty more convenient cannot amend or abrogate a self-executing treaty”) (*quoting* *Cannon v. United States Dep’t of Justice*, 973 F.2d 1190, 1197 (5th Cir. 1992)). See also *In re Commissioner’s Subpoenas*, 2003 WL 1645236 (11th Cir. 2003) (same).

2. Examining the Broad Substantive Influence of Self-Executing Treaties

Although in recent years the subject of treaties has excited substantial, sometimes heated, scholarly debate, surprisingly little is known about their cumulative impact on our domestic legal system. This significant gap in knowledge in large measure may be explained by the absence of any comprehensive system—including within the structure of the United States Code—in which self-executing treaties are collected, organized, and systematized by subject matter. Moreover, the factual analysis of whether a particular treaty creates domestically enforceable rights is a notoriously difficult one.¹⁶³ To provide the necessary backdrop for our subsequent analysis of federal common law, this section examines the depth and breadth of the influence of self-executing treaties in our modern legal system.

Perhaps the most striking observation that emerges from comprehensive examination is the sheer number of existing self-executing treaties. As discussed immediately below, the number of treaties that contain self-executing provisions is now over four hundred (even if one does not include treaties with Native American tribes¹⁶⁴). Moreover, many of these treaties are multi-lateral and thus may apply for many dozens of countries. Equally remarkable is their substantive law coverage. Self-executing treaties now

¹⁶³ Professor Vazquez aptly has described the issue of whether a treaty is self-executing treaty as among “the most confounding” distinctions in the law of treaties. *See* Vazquez, *Four Doctrines*, supra note 89, at 695 (*quoting* *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.1979)).

¹⁶⁴ A substantial part of the law governing the rights of Native Americans and Native American tribes is covered by what are in effect self-executing treaties. Because of the unique status of Native American tribes, treaties with such entities are not formally international law treaties. Nonetheless, before it ceased the practice in the late 1800s, the United States concluded nearly four hundred treaties with Native American tribes. *See* 2 INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler, ed., 1904)(listing 389 such treaties concluded prior to 1883, when the United States ceased recognizing the formal sovereignty of such entities). Federal courts have repeatedly held that such treaties operate as federal law and thus establish rights and otherwise directly protect the interests of both tribes and individuals. *See* *Tsosie v. United States*, 11 Cl. Ct. 62, 73 (Cl. Ct. 1986)(agreeing with the contention that treaties with Native American tribes “are virtually always self-executing in nature” and observing that courts have consistently so found)(*citing* *Francis v. Francis*, 203 U.S. 233 (1906),

range from such diverse substantive fields as commercial and criminal law, property and tax law, civil procedure and administrative law, and family law and Native American rights.

The field of commercial law represents among the most prominent examples of the influence of self-executing treaties. The United States has already ratified over a half dozen such treaties in the field, some of which are the most detailed and extensive self-executing treaties in existence. Included among these are the United Nations Sale of Goods Convention¹⁶⁵ (in force for over sixty countries¹⁶⁶), which comprehensively displaces the domestic Uniform Commercial Code for international sales transactions;¹⁶⁷ a companion treaty on the limitation period for international sale of goods transactions;¹⁶⁸ and the carriage of goods provisions of the Warsaw Convention on International Air Transportation.¹⁶⁹

Jones v. Meehan, 175 U.S. 1 (1899), Ward v. Race Horse, 163 U.S. 504 (1896), and United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876)).

¹⁶⁵ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3. [hereinafter CISG]. The English language text of the treaty is also available at 52 Fed. Reg. 6264 (1987).

¹⁶⁶ A complete list of the member states of the CISG can be found at www.uncitral.org/en-index.htm.

¹⁶⁷ See *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d, 1142, 1147-52 (2001)(holding that the United Nations Sales Convention creates a private right of action in federal courts and preempts state law causes of action within its scope)(*citing* *Delchi Carrier v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995) and *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992)).

¹⁶⁸ Convention on the Limitation Period in the International Sale of Goods, *reprinted in* 13 I.L.M. 952 (1974), as amended by Protocol Amending the Convention, *reprinted in* 19 I.L.M. 696 (1980), S. Treaty Doc. No. 103-10.

¹⁶⁹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. § 40105. Among numerous other self-executing provisions, the Warsaw Convention regulates certain aspects of the international air transportation of commercial cargo. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252-254 (1984)(analyzing the Convention with regard to goods lost in air transportation). For applications of the Warsaw Convention by the Supreme Court on other private law issues see, *e.g.*, *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999)(interpreting and applying the Warsaw Convention in a suit for personal injuries); *Zicherman v. Korean Airlines Co.*, 516 U.S. 217 (1996)(same).

Beyond these already ratified treaties,¹⁷⁰ the potential for future expansion in the field of commercial law is substantial. The United States has participated in the completion of a variety of similarly directed treaties on subjects as diverse as financial leasing, factoring, bills of exchange and promissory notes, secured transactions, and receivables financing.¹⁷¹ Taken together, these treaties form what I have referred to elsewhere as a “proto-International Uniform Commercial Code.”¹⁷²

Self-executing treaties also play a prominent role in the field of tax law. Nearly sixty tax treaties are now in force which either by express statement or of their nature contain of self-executing provisions.¹⁷³ Among other things, these treaties create individual rights

¹⁷⁰ Other examples of self-executing commercial law treaties the United States has already ratified include: The Convention on the International Recognition of Rights in Aircraft, June 19, 1948, 4 U.S.T. 1830. *See also* *Triad International Maintenance Corp. v. Guernsey Air Leasing, Ltd.*, 178 F. Supp. 2d 547, 553 (M.D.N.C. 2001)(recognizing that this treaty created enforceable individual rights); the 1956 Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301, T.I.A.S. No. 6634; and the 1972 Customs Convention on Containers, Dec. 2, 1972, 988 U.N.T.S. 43. *See also* *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979)(analyzing the latter two treaties as federal law); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983)(same).

¹⁷¹ *See* Convention on International Financial Leasing, May 28, 1988, *reprinted in* 27 I.L.M. 931; Convention on International Factoring, May 28, 1988, *reprinted in* 27 I.L.M. 943; Convention on International Bills of Exchange and International Promissory Notes, Dec. 9, 1988, *reprinted in* 28 I.L.M. 170; Convention on Independent Guarantees and Stand-by Letters of Credit, Dec. 11, 1995, *reprinted in* 35 I.L.M. 735; Convention on International Interests in Mobile Equipment, Nov. 16, 2001, *reprinted in* 39 I.L.M. 966 (2001); United Nations Convention on the Assignment of Receivables in International Trade, Dec. 12, 2001, *reprinted in* 39 I.L.M. 966. *See also* Convention on Agency in the International Sale of Goods, Feb. 17, 1983, *reprinted in* 22 I.L.M. 249.

¹⁷² *See* Van Alstine, *Treaty Interpretation*, *supra* note 24, at 699.

¹⁷³ According to the Internal Revenue Service, the United States has tax treaties with fifty-six countries. *See* <www.irs.gov/businesses/corporations/article/0,,id=96739,00.html> Indeed, the “technical explanations” appended to thirty of these treaties contain an express statement of self-execution. *See also* *Lidas, Inc., v. United States*, 238 F.3d 1076, 1080 (9th Cir 2001)(holding that the U.S.-France double taxation treaty was self-executing); *Columbia Marine Servs. v. Reffet, Ltd.*, 861 F.2d 18, 22 (2d Cir. 1988)(holding that the double taxation treaty with the United Kingdom was self-executing); *Estate of Avrom A. Silver v. Comm’r*, 120 T.C. No. 14 2003 WL 21089082 (2003) (holding that the U.S.-Canada tax treaty was self-executing).

against governmental action¹⁷⁴ and government rights against individuals with regard to the determination and investigation of tax liability.¹⁷⁵

The most distinguished tradition for self-executing treaties is found in the protection of the rights of foreign citizens in the United States. From the first years of the new Constitution—indeed even before—the United States began concluding treaties of “amity, commerce and navigation”¹⁷⁶ whose very purpose was to secure reciprocal property and procedural rights of foreign citizens.¹⁷⁷ These self-executing treaties now protect the rights of citizens of sixty-three countries¹⁷⁸ with regard to their personal and commercial interests in the United States.

¹⁷⁴ See Robert Thornton Smith, *Tax Treaty Interpretation by the Judiciary*, 49 TAX. LAW. 845, 847-849 (1996) (observing that “[i]ncome tax treaties generally are viewed as self-executing, requiring no further legislation to implement their provisions” and noting the variety of ways in which such treaties have been found to protect individual taxpayer rights).

¹⁷⁵ *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080-81 (9th Cir. 2001) (holding that the information exchange provisions in the U.S.-France Double Taxation Treaty are self-executing and thus formed a valid basis for the issuance of an IRS summons against individual taxpayers).

¹⁷⁶ Example include the 1794 Treaty of Amity, Commerce and Navigation between the United States and Great Britain, June 30, 1797, 5th Cong., sess. I, ch. 6, and the Treaty of Friendship, Limits and Navigation, Between the United States of America, and the King of Spain, Oct. 27, 1795, 8 Stat 138.

¹⁷⁷ See *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107-08 (DC Cir. 2001) (holding that the treaty of amity, economic relations and consular rights with Iran was a self-executing treaty); See also *Spieß v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981) (holding that “FCN treaties ... are self-executing treaties, that is, they are binding domestic law of their own accord, without the need for implementing legislation”)

¹⁷⁸ See note following 8 U.S.C. 1101 (2003) (listing such treaties). Another more controversial treaty in this vein is the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77. Whether this treaty is self-executing at all has been the subject of substantial debate. See, e.g., *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (“[T]he language of the VCCR, coupled with its ‘legislative history’ and subsequent operation, suggest that Article 36 of the Vienna Convention was intended to provide a private right of action to individuals detained by foreign officials.”); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999) (same). But see *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.) (holding that the Convention is not self-executing), *cert. denied*, 533 U.S. 962 (2001); *United States v. Emuegbunam*, 268 F.3d 377, 392, 394 (6th Cir. 2001) (same), *cert. denied*, 535 U.S. 977 (2002).

Even the international aspects of the general fields of civil procedure and family law now are subject to the influence of self-executing treaties. The United States already has ratified, for example, two prominent civil procedure treaties designed to facilitate, respectively, international service of process¹⁷⁹ and the taking of evidence abroad.¹⁸⁰ In family law as well the United States has ratified a treaty that creates directly enforceable rights for custodial parents and guardians in the case of international child abductions.¹⁸¹

The most common subject of self-executing treaties is the international aspects of criminal law. With regard to extradition, for example, the United States now has in force treaties with nearly one hundred and ten countries.¹⁸² Federal courts have repeatedly recognized that this category of treaties creates rights that are directly enforceable by the individuals who are subject to extradition proceedings.¹⁸³ In a similar vein, the United States

¹⁷⁹ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, opened for signature Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. *See also* Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 533 (1987)(concluding that “the Hague Convention [is] the law of the United States,” although construing the Convention as not precluding resort to discovery under domestic law).

¹⁸⁰ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. *See also* Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 533 (1987)(concluding that “the Hague Convention [is] the law of the United States,” but construing the Convention as not precluding resort to discovery under domestic law).

¹⁸¹ The Hague Convention on the Civil Aspects of International Child Abduction, concluded Oct. 25, 1980, 23 T.A.I.S. 11,670, 1343 U.N.T.S. 89. *See also* 42 U.S.C. §11601(a)(4) (2003) (setting forth a Congressional finding that the Hague Convention “establishes legal rights ... for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights”); *id.*, §11601(b)(setting forth a Congressional declaration that the provisions of the legislation “are in addition to and not in lieu of the provisions of the [Hague] Convention”). In 1998 the Senate also gave its advice and consent to the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, concluded May 29, 1993, S. Treaty Doc. 105-51, at III (1998).

¹⁸² *See* note following 18 U.S.C. § 3181 (listing existing extradition treaties).

¹⁸³ *See, e.g.*, United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995) (holding that the extradition treaty between the United States and Uruguay could be enforced directly by the person extradited); Cheung v. U.S. 213 F.3d 82, 95 (2nd Cir. 2000)(holding that the Hong-Kong extradition “agreement is self-executing” and that “the Constitution not only allows, but in fact requires, the courts to treat the Agreement as equal to the federal extradition statute”). *See also* United States v.

has concluded over a dozen prisoner exchange treaties covering nearly seventy countries.¹⁸⁴ Such treaties create both the legal infrastructure for the transfer of prisoners to their respective home countries and certain enforceable rights for those transferred.¹⁸⁵ The United States also increasingly has relied on self-executing treaties to facilitate the investigation and prosecution of international criminal activity. Over fifty such “mutual legal assistance treaties” are now in force for the United States. The purpose of these treaties is to create reciprocal rights of government agencies to issue subpoenas and employ similar investigative vehicles with regard to international crimes.¹⁸⁶

Alvarez-Machain, 504 U.S. 655, 667 (1992)(applying an extradition treaty as directly applicable federal law); *Terlinden v. Ames*, 184, U.S. 270, 288 (1902) (“Treaties of extradition are executory in their character[.]”). The United States is also a party to the Multi-lateral Convention on Extradition, December 26, 1933, T.S. No. 882, 49 Stat. 3111.

¹⁸⁴ These treaties are variously referred to as Treaties on the Execution of Penal Sentences and Conventions on the Transfer of Sentenced Persons. The list of such treaties includes the following: Bolivia, entered into force August 17, 1978, 30 U.S.T. 796, T.I.A.S. No. 9219; Canada, entered into force July 19, 1978, 30 U.S.T. 6263, T.I.A.S. No. 9552; France, entered into force February 1, 1985, 35 U.S.T. 2847, T.I.A.S. No. 10,823; Mexico, entered into force November 30, 1977, 28 U.S.T. 7399, T.I.A.S. No. 8718; Panama, entered into force June 27, 1980, 32 UST 1565, T.I.A.S. No. 9787; Peru, entered into force July 21, 1980, 32 U.S.T. 1471, T.I.A.S. No. 9784; Thailand, entered into force December 7, 1988, T.I.A.S. No. 2002; Turkey, entered into force January 1, 1981, 32 U.S.T. 3187, T.I.A.S. No. 9892. State Department records also state that similar treaties are in force with the Marshall Islands, Micronesia, Palau, and Hong Kong. *See* <<http://travel.state.gov/transfer.html>>. In addition, the United States is a party to two multilateral prisoner transfer treaties. *See* Council of Europe Convention on the Transfer of Sentenced Persons, done at Strasbourg March 21, 1983, entered into force July 1, 1985, 35 U.S.T. 2867, T.I.A.S. No. 10824 (in effect for over fifty countries); Inter-American Convention on Serving Criminal Sentences Abroad, done at Managua June 9, 1993, S. Treaty Doc. No. 104-35 (1996), entered into force for the United States June 24, 2001 (in effect for nine countries).

¹⁸⁵ *See Cannon v. United States Department of Justice*, 973 F.2d 1190, 1192 (5th Cir. 1992)(holding that the treaty on the execution of penal sentences between the United States and Mexico was self-executing and thus imposed directly enforceable limitations on the United States parole commissions discretion is granting parole to a prisoner transferred from Mexico).

¹⁸⁶ *See In re Commissioner’s Subpoenas*, 325 F.3d 1287, 1290-91 (11th Cir. 2003)(describing the operation of mutual legal assistance treaties). *See also id.*, 1291 (holding that the MLAT with Canada was self-executing and thus upon its entry into force it “became a law of this land on par with a federal statute”); *United Kingdom v. United States*, 238 F.3d 1312, 1317 (11th Cir. 2001)(holding that the MLAT with the United Kingdom was self-executing); *In re Erato*, 2 F.3d 11, 15 (2nd Cir. 1993)(same regarding the MLAT with the Netherlands).

In cumulative effect, self-executing treaties thus now exert a broad and expanding influence on our domestic legal system. Nonetheless, the existence of a self-executing treaty does not mean that the treaty lawmakers have provided every answer to every question within its scope. That is, just like other forms of law, the treaty-lawmakers often will be unable to achieve precise consensus on all issues or otherwise to articulate precisely how the courts are to resolve all related disputes. And the rapid pace of social and technological advancement will mean that the treaty drafters will be unable to foresee some issues entirely. The result is that treaties routinely will have ambiguities or unintended gaps in their regulatory scheme. The risk of this indeterminacy in legal standards in fact may be even greater with international treaties.¹⁸⁷

Unfortunately, judicial doctrine and scholarly analysis have not kept pace with the developments in the field of treaty law. In the purely domestic law arena, extensive authority provides guidance on the proper scope of federal common law, in particular with reference to the role of separation of powers and federalism concerns in judicial application of federal statutes.¹⁸⁸ But there is effectively no intense scholarly analysis or judicial guidance on the proper force of these core constitutional values in federal court exercises of their Article III judicial power to apply treaty law as the “supreme Law of the Land.”

To set the context for the analysis to follow, Part II below examines the limits imposed on judicial lawmaking through the general prohibition of federal common law as influenced by the non-delegation doctrine. I then turn, in Parts III and IV, to an analysis of the force of these doctrines for the law within the scope of self-executing treaties. We will

¹⁸⁷ See Van Alstine, *Treaty Interpretation*, *supra* note 24, at 702-03 (describing how cultural and language differences increase the likelihood of interpretive difficulties regarding transnational legal standards).

see in these latter Parts that a self-executing treaty ultimately reflects a determination by properly empowered federal institutions that a particular matter should be removed from state lawmaking competence and replaced by federal rules of decision, including as appropriate of a content constructed by the federal courts.

II. THE CONSTITUTIONAL LIMITS ON FEDERAL JUDICIAL LAWMAKING

A. The Boundaries of Federal Common Law

It is now nearly a constitutional article of faith, in particular for the modern Supreme Court,¹⁸⁹ that “federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.”¹⁹⁰ This proposition traces its lineage to one of the most famous (and vexatious) opinions of the 20th century, *Erie Railroad Co. v. Tompkins*.¹⁹¹ The Supreme Court in *Erie* reasoned that the constitutional premise of a federal government of specific, enumerated powers prohibits federal courts from exercising general lawmaking authority,¹⁹² and nothing in the mere grant of diversity

¹⁸⁸ See *supra* notes 214-251 and accompanying text (discussing the debates over federal common law under statutes).

¹⁸⁹ See, e.g., *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (“Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts”)(quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)); *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994) (observing that the “[c]ases in which judicial creation of a special federal rule would be justified” are “few and restricted”)(quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

¹⁹⁰ *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95 (1981).

¹⁹¹ 304 U.S. 64 (1938).

¹⁹² *Erie*, 304 U.S. 78 (“Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”). See also *Merrill*, *supra* note 28, at 13 (asserting that “[a]s the general structure of the Constitution and the tenth amendment make clear, the framers anticipated that the federal government would exercise only specifically enumerated powers”). For a much earlier recognition of the same proposition see *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) (“It is clear, there can be no common law of the United States.”).

jurisdiction by Congress changes this result.¹⁹³ It thus held that the long-standing contrary view of *Swift v. Tyson* represented “an unconstitutional assumption of powers by the courts of the United States.”¹⁹⁴

Erie proceeded primarily from structural constitutional concerns of federalism.¹⁹⁵ In concise summary, the court there reasoned that through the Constitution the states delegated only specific lawmaking powers to specific federal institutions—notably Congress and the President—and not to politically insulated federal courts.¹⁹⁶ Thus, although subsequent developments have substantially undermined its premise about the extent of federal

¹⁹³ *Erie*, 304 U.S. at 73-78 (1938) (holding that “the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written... (e)xcept in matters governed by the Federal Constitution or by Acts of Congress”). *See also* *Gasperini v. Center for Humanities, Inc.* 518 U.S. 415, 426 (1996) (“Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law”).

¹⁹⁴ *Erie*, 304 U.S. at 79 (*quoting* *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928)(Holmes, J., dissenting)). Interestingly, the *Swift* doctrine did not purport to apply a “federal” law in the modern sense of a body distinct from state law. As Bradford Clark has carefully explained, the courts at the time of *Swift v. Tyson* would not have viewed the common law as applied by federal courts to be different from state common law. *See* Clark, *Federal Common Law*, *supra* note 2, at 1276-92. Rather, the judge-made law of the time was truly “common,” in that federal would have viewed their task as one of cooperation with state courts in the identification of the same body of law (in the specific case of commercial law, the international law merchant). Thus, federal courts were not purporting to create federal common law in competition with, and thus in derogation of, any lawmaking authority reserved to the states by the Constitution. *Id.*

¹⁹⁵ *See Erie*, 304 U.S. at 81 (declaring that in applying the rule of *Swift v. Tyson* “this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states”). *See also* Clark, *Federal Common Law*, *supra* note 2, at 1259 (observing that the grounds articulated in the opinion reveal that “*Erie* is best understood as resting on principles of judicial federalism” but also noting that this and the doctrine of separation of powers were “mutually reinforcing” in this regard); Merrill, *supra* note 28, at 13 (observing that federalism “was the key principle invoked in *Erie Railroad v. Tompkins*”). *See also* *Boyle v. United Technologies*, 487 U.S. 501, 517 (1988)(Brennan, J., dissenting)(arguing that “*Erie* was deeply rooted in notions of federalism”).

¹⁹⁶ *See Erie*, 304 U.S. at 78 (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”); *id.*, at 78-79 (“Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States”).

lawmaking power in general,¹⁹⁷ the Court concluded that “no clause in the Constitution purports to confer such a power upon the federal courts.”¹⁹⁸

As other scholars have observed, this reasoning also finds support in the separation of powers doctrine,¹⁹⁹ together with its reinforcing value of compliance with constitutionally prescribed law-making procedures.²⁰⁰ In its modern manifestation, the doctrine functions principally as “a self-executing safeguard against the encroachment or aggrandizement of

¹⁹⁷ The *Eric* court reasoned at the time that even “Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or ‘general,’ be they commercial law or a part of the law of torts.” *Id.*, at 78. Supreme Court jurisprudence in the last three-quarters of a century, however, has led to a greatly expanded understanding of the scope of Congress’s commerce clause powers. *See, e.g.*, *United States v. Darby*, 312 U.S. 100 (1941)(concluding that the commerce clause allows congress to exclude articles from interstate commerce which they may “conceive to be injurious to the public health, morals or welfare”); *Wickard v. Filburn*, 317 U.S. 111 (1942)(concluding that Congress may regulate even individual activities if in the aggregate they affect interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)(holding that Congress has the power to regulate local activities that could reasonably be seen as having any substantial effect on interstate commerce); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)(concluding that States are not immune from federal regulation under the commerce clause unless the requirements are “destructive of state sovereignty”). *But see* *United States v. Morrison*, 529 U.S. 598 (2000)(finding that Congress cannot regulate local activity on the basis that in aggregate it has a substantial effect on interstate commerce); *United States v. Lopez*, 514 U.S. 549 (1995) (concluding that congressional powers under the commerce clause do not extend to the regulation of activities having only a “potentially attenuated effect” on interstate commerce).

¹⁹⁸ *Eric*, 304 U.S. at 78.

¹⁹⁹ *See* Merrill, *supra* note 28, at 19-24 (analyzing the role of the separation of powers doctrine for the legitimacy of federal common law); Clark, *Federal Common Law*, *supra* note 2, at 1259 (observing that federalism and separation of powers were “mutually reinforcing” with regard to the propriety of federal common law). *See also* Redish, *supra* note 28, at 767 (arguing that with regard to federal common law not sanctioned by Congress the “two structural political values” of federalism and separation of powers “are inextricably intertwined”). *But see* Field, *supra* note 28, at 931 (arguing that “the[] federalism issues that a system of broad federal common law raises are significant and are far more serious than are any separation of powers issues. The issue of the proper scope of federal common law is not primarily a separation of powers issue, in which Congress and the courts are pitted against each other. It would reduce states’ sphere of influence if federal common law were very broadly made, but it would not detract significantly from Congress’s power”).

²⁰⁰ *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1403-1458 (2001)(analyzing how the separation of powers doctrine functions “to prevent federal courts from displacing state law in the absence of federal law adopted according to constitutionally prescribed procedures”)[hereinafter Clark, *Safeguarding Federalism*]; Merrill, *supra* note 200, at 24-27 (analyzing an “electoral accountability principle” as a separate limit on federal common law but observing that this principle “is important insofar as it reinforces the separation-of-powers principle”).

one branch at the expense of the other.”²⁰¹ With specific reference to federal common law, the Supreme Court thus has emphasized in the progeny of *Erie* that “the federal lawmaking power is vested in the legislative, not the judicial, branch of government.”²⁰²

Beyond these Constitutional values, federal common law also faces a legislative obstacle. Beginning as early as 1789, the Judicial Code of the United States has contained an express prescription of the substantive law federal courts must apply in civil actions.²⁰³ In its present form, this Rules of Decision Act provides that “[t]he laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”²⁰⁴ The constitutional premise of *Erie* well may mean that, in cases based solely on diversity jurisdiction, this legislative Act adds little to our understanding of the limits on federal court lawmaking.²⁰⁵ As we shall see in more detail below,²⁰⁶ however, the “require or provide” language may carry a more potent, positive message when federal courts act within the scope of an existing federal enactment.

²⁰¹ *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam). *See also* *Mistretta v. United States*, 488 U.S. 361, 382 (1989)(restating this observation with approval); *INS v. Chadha*, 462 U.S. 919, 951 (1983)(emphasizing the same function of the separation of powers doctrine)

²⁰² *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95 (1981). *See also* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 614 (1997)(noting that as a general proposition “since the watershed case of *Erie R. Co. v. Tompkins*, this Court has rejected the notion that it can create a federal common law to fill in great silences left by Congress”).

²⁰³ *See* 28 U.S.C. § 1652 (2003).

²⁰⁴ *Id.*

²⁰⁵ *See Erie*, 304 U.S. at 72 (suggesting that because of the constitutional limits on federal court lawmaking, the Rules of Decision Act may be “merely declarative of the rule which would exist in [its] absence”)(*quoting* *Mason v. United States*, 260 U.S. 545, 559 (1923)). *See also* *Guaranty Trust Co. v. York*, 326 U.S. 99, 103-04 (1945)(observing with regard to actions in equity that the Rules of Decision Act “was deemed, consistently for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts and therefore was equally applicable to equity suits”).

²⁰⁶ *See infra* notes 375-377 and 409-410 and accompanying text.

We are nonetheless left with the core proposition that federal courts “do not possess a general power to develop and apply their own rules of decision.”²⁰⁷ Where a rule of decision flows from the content of a formal federal enactment, federal court interpretation and application, following standard techniques, raises no serious constitutional concerns. The field of questionable “federal common law”²⁰⁸ or (more precisely) “federal judge-made law”²⁰⁹ instead begins when a federal court creates a rule of decision whose content is not mandated by an authoritative norm of positive federal law.²¹⁰ Beyond this, any valid exercise of lawmaking powers by the federal judiciary must find a foundation in some other, independent source of authority.²¹¹

We will see immediately below that federal courts may find such a source of authority in a delegation from Congress or even in the Constitution itself. In categories

²⁰⁷ *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981).

²⁰⁸ *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)(observing that “the Court has recognized the need and authority in some limited areas to formulate what has come to be known as “federal common law”); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988)(observing that in certain instances “state law is pre-empted and replaced ... by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called ‘federal common law’”).

²⁰⁹ *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)(employing this term).

²¹⁰ *See Clark, Federal Common Law, supra* note 2, at 1248 (describing federal common law as “rules of decision adopted and applied by federal courts that have the force and effect of positive federal law, but ‘whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command.’”)(quoting Paul M. Bator et al., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 863 (3d ed. 1988)); *id.*, at 1248 (“By hypothesis, at least, federal common lawmaking begins where interpretation ends.”); Field, *supra* note 28, at 890 (defining federal common law as “any rule of federal law created by a court (usually but not invariably a federal court) when the substance of that rule is not clearly suggested by federal enactments[.]”). Professor Thomas Merrill is more expansive. He would identify federal common law as encompassing “any federal rule of decision that is not mandated on the face of some authoritative federal text” even if the rule “can be described as the product of ‘interpretation’ in either a conventional or an unconventional sense”). *See Merrill, supra* note 28, at 5.

²¹¹ *See Field, supra* note 28, at 928 (arguing that “there must be a source of authority for any given federal common law rule”); Monaghan, *supra* note 28, at 31 (stating that federal courts “must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law”).

roughly corresponding to these sources, the Supreme Court has concluded that federal common law comports with the Constitution where “Congress has given the courts the power to develop substantive law”²¹² or where “a federal rule of decision is ‘necessary to protect uniquely federal interests.’”²¹³

B. Jurisprudence on Permitted Federal Common Law

1. Delegated Lawmaking

Article I, section 1 of the Constitution vests “[a]ll legislative Powers herein granted ... in a Congress of the United States.” This text, as the Supreme Court has emphasized in particular in recent years, “permits no delegation of those powers.”²¹⁴ Nonetheless, the separation of powers doctrine which animates this observation functions within the context of a need for a “workable government.”²¹⁵ The Constitution thus does not require a

²¹² *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)(*citing* *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963)).

²¹³ *Texas Indus.*, 451 U.S. at 640 (*quoting* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)).

²¹⁴ *Whitman v. Am. Trucking Ass’ns, Inc.*, 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)(observing that in light of article 1, § 1 of the Constitution, “we long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’” mandate that Congress generally cannot delegate its legislative power to another Branch.)(*citing* *Field v. Clark*, 143 U.S. 649, 692 (1892)).

²¹⁵ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). *See also* *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (“[W]e have never held that the Constitution requires that the three branches of Government ‘operate with absolute independence.’” (*quoting* *United States v. Nixon*, 418 U.S. 683, 707 (1974))); *Buckley v. Vallejo*, 424 U.S. 1, 121 (1976) (per curiam) (observing that the Framers believed that a “hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively”); *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989)(*quoting* James Madison to the effect that separation of powers “d[oes] not mean that these [three] departments ought to have no partial agency in, or no controul over the acts of each other,’ but rather ‘that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted.”)(*quoting* *The Federalist No. 47*, pp. 325-326 (J. Cooke ed. 1961) (emphasis in original)))).

“hermetic division among the Branches”²¹⁶ or that the legislative, executive, and judicial branches each may exercise only its own specific and unique powers.²¹⁷ Rather, “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.’”²¹⁸

With these principles in mind, the Supreme Court has long recognized that the Constitution permits Congress to delegate to its coordinate branches of government certain lawmaking powers that it otherwise could exercise itself.²¹⁹ Echoing the broader observations above, the Court has explained that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad directives.”²²⁰ The “non-delegation doctrine” which arises from the narrow text of Article I, section 1, in other words, is not absolute.²²¹ Rather, Congress is permitted to delegate what are in substance lawmaking

²¹⁶ See *Mistretta*, 488 U.S. at 381.

²¹⁷ *Id.* (observing that the separation of powers doctrine reflects only “a carefully crafted system of checked and balanced power within each Branch”).

²¹⁸ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)).

²¹⁹ See *Loving v. United States*, 517 U.S. 748, 758 (1996) (stating 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”);

²²⁰ *Mistretta v. United States*, 488 U.S. 361, 372 (1989). See also *Opp Cotton Mills, Inc. v. Administrator, Wage and Hour Div. of Dept. of Labor*, 312 U.S. 126, 145 (1941) (observing that “[i]n an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy”).

²²¹ See Peter H. Aranson, et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 12-15 (1982) (discussing the rise and eventual weakening of the non-delegation doctrine); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1988) (analyzing the limits of the non-delegation doctrine).

powers as long as it “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”²²²

The most common recipients of such delegated powers have been administrative agencies. It is nonetheless now established jurisprudence that Congress also may delegate independent decision-making authority to the federal courts.²²³ For over a half century the Supreme Court has held that Congress may authorize federal common law for unresolved issues within the scope of a statute. This jurisprudence, as I have explained elsewhere,²²⁴ traces its formal lineage to the Supreme Court’s opinion in *Textile Workers Union v. Lincoln Mills*.²²⁵ There, the court concluded that the legislative history of Section 301(a) of the Labor Management Relations Act²²⁶ reflected an implied congressional authorization to federal courts “to fashion a body of federal law” regarding the enforcement of collective bargaining agreements.²²⁷ With this foundation, federal courts have now developed an extensive body of wholly federal common law in the field.²²⁸

²²² *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* *Mistretta*, 488 U.S. at 379 (observing that the non-delegation doctrine requires only that Congress provide sufficient guidance to 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)).

²²³ *See, e.g.*, *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)(observing that one category of permissible federal common law involves instances “in which Congress has given the courts the power to develop substantive law”)(*citing* *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *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.”). *See also* *Merrill*, *supra* note 28, at 40 (describing congressional authorizations of federal common law as “delegated lawmaking”).

²²⁴ *See* Van Alstine, *Treaty Delegation*, *supra* note 18, at 1282-1285.

²²⁵ 353 U.S. 448 (1957).

²²⁶ 29 U.S.C. § 185(a) (1947).

²²⁷ *Lincoln Mills*, 353 U.S. at 451.

²²⁸ *See, e.g.*, *Livadas v. Bradshaw*, 512 U.S. 107, 121-122 (1994)(“We have read the text of §301 not only to grant federal courts jurisdiction over claims asserting breach of collective-bargaining

Congress since has exercised its constitutional authority to delegate common law powers to federal courts on a number of occasions. In some cases, the delegation has been express. A prominent example is Rule 501 of the Federal Rules of Evidence,²²⁹ which directly provides that testimonial privileges are to be “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”²³⁰

There are also abundant examples of implied statutory delegation. Included within the range of federal legislation that impliedly authorizes federal common law are the well-known cases of the Sherman Anti-Trust Act²³¹ (acknowledged even by Justice Scalia²³²); the Labor Management Relations Act discussed above;²³³ the Employee Retirement Income Security Act (ERISA);²³⁴ and Section 10(b) of the Securities Exchange Act of 1934.²³⁵ Other

agreements but also to authorize the development of federal common law rules of decision”); *International Brotherhood of Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)(same).

²²⁹ See Fed. R. Evid. 501 (2003).

²³⁰ *Id.* See also *Trammel v. United States*, 445 U.S. 40, 47 (1980) (noting that in the drafting of Rule 501 Congress rejected a more detailed proposal in favor of a general mandate to federal courts to develop the law based on common-law principles); *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (observing that Rule 501 “did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to ‘continue the evolutionary development of testimonial privileges’”)(*quoting* *Trammel v. United States*, 445 U.S. 40, 47 (1980)); *Merrill*, *supra* note 28, at 42 (observing that the “intent to delegate [in Rule 501] is unmistakable”).

²³¹ See 15 U.S.C. § 1 (2003). See also *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978)(holding that in the Sherman Act Congress authorized the federal courts to create federal common law “by drawing on common-law tradition”). See also *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997) (observing that “the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress ‘expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition’”)(*quoting* *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 688)).

²³² *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”).

²³³ 29 U.S.C. § 185(a) (2003). See also *supra* notes 224-228 and accompanying text.

less familiar examples include certain aspects of the Federal Employers' Liability Act ("FELA");²³⁶ private causes of action under 42 U.S.C. §1983;²³⁷ the United States Housing Act of 1937;²³⁸ the Federal Fair Housing Act;²³⁹ and (most recently) the Tort Victim Protection Act of 1991.²⁴⁰

²³⁴ 29 U.S.C. §§ 1101-14 (2003). *See also* *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (observing that in light of the text and legislative history of ERISA, "we have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans'")(quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)).

²³⁵ 15 U.S.C. § 78j(b) (2003). *See also* *Blue Chip Stamps v. Manor Drugstores*, 421 U.S. 723, 737 (1975)(observing that with private actions under Rule 10b-5 "we deal with a judicial oak which has grown from little more than a legislative acorn" and that "it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5"); *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 293-98 (1993)(holding that the formulation of the contours of Rule 10b-5 actions is a "task [that] Congress has left to us"). *See also* *Merrill*, *supra* note 28, at 45 n.198 (observing that "[a]nother prominent example of implied delegated lawmaking is the jurisprudence of 'deceptive and manipulative' practices that has emerged under section 10(b) of the Securities Exchange Act of 1934").

²³⁶ *See* 45 U.S.C. § 51 (2003). *See also* *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 558 (1994) (Souter, J., concurring) (observing that the duty of federal courts "in interpreting FELA...is to develop a federal common law of negligence...informed by reference to the evolving common law"). *Cf.* *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 429 (1997) (citing this observation of Justice Souter).

²³⁷ *Graham v. Satkoski*, 51 F.3d 710, 713 (7th Cir. 1995)(holding that "[f]ederal common law governs the recovery of damages for complaints filed under 42 U.S.C. § 1983")(citing *Carey v. Piphus*, 435 U.S. 247, 257-59 (1978)). *See also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 441-42 (1989)(concluding that because "Section 1983 is silent on many important questions" to that extent "the statute delegates power to make common law").

²³⁸ 42 U.S.C. § 1437f(b)(2) (2003). *See also* *Price v. Pierce*, 823 F.2d 1114, 1120 (7th Cir. 1987)(holding with regard to certain aspects of contracts entered into by the Department of Housing and Urban Development "the nature and feasibility of those contracts may depend in part on who can sue in the event of a breach. The issue is potentially so important to the success of the program ... that we believe that Congress, had it thought about the matter, would have wanted the question to be decided by federal courts applying a uniform principle.")

²³⁹ *See* 42 U.S.C. § 3601 (2003). *See also* *Louisiana Acorn Fair Housing v. LeBlanc*, 211 F.3d 298, 301 (5th Cir. 2000)(holding with regard to a gap in the Federal Fair Housing Act that "we must apply the federal common law to fill this gap in the FHA which Congress has left unanswered. Courts create federal common law when it is necessary to effectuate the intent behind a federal statute.").

²⁴⁰ *See* 28 U.S.C. § 1350 (2003). *See also* *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1469 (D. Hawai'i 1995)("Because Congress in the TVPA offered no methodology as to how damages should be determined, federal courts are free to and should create federal common law to provide justice for any injury contemplated by the Alien Tort Statute and the TVPA or treaties

Moreover, from their very nature broad, open-textured legislative standards imply a delegation of policy-making discretion to federal courts.²⁴¹ As the Supreme Court observed in *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*,²⁴² “[b]roadly worded ... statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common law tradition.”²⁴³ The flexible, open-ended term “restraint of trade” in the Sherman Anti-Trust Act²⁴⁴ represents a paradigmatic example of this phenomenon.²⁴⁵

Congress of course may not delegate the entirety of its legislative powers on a given subject. A naked legislative instruction that the federal courts create a “national uniform

dealing with the protection of human rights”), *aff’d*, 103 F.3d 767 (9th Cir 1996); *Chiminya Tachiona v. Mugabe*, 216 F.Supp.2d 262, 267 (S.D.N.Y. 2002)(same).

²⁴¹ *McNally v. United States*, 483 U.S. 350, 373 (1987)(Stevens, J. dissenting)(“The wide open spaces in statutes such as [The Sherman Act, The Civil Rights Acts, and the mail fraud statute] are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication.”). *See also* Merrill, *supra* note 28, at 43-46 (arguing that when Congress legislates in the form of broad standards or adopts a legal standard that is borrowed from the common law, there should be a “rebuttable presumption” of “delegated lawmaking”).

²⁴² 451 U.S. 77 (1981).

²⁴³ *Id.*, at 95. *See also* *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.”); *Mistretta v. United States*, 488 U.S. 361, 415 (1989)(Scalia, J., dissenting)(“Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to ... the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.”).

²⁴⁴ *See supra* note 231 and accompanying text.

²⁴⁵ *See* Sunstein, *supra* note 237, at 421 (observing that the Supreme Court has interpreted the Sherman Act “as a delegation of policymaking power pursuant to quite open-ended criteria”); Merrill, *supra* note 28, at 44-46 (analyzing the Sherman Act as a prime example of “implied delegated lawmaking” because of its open-ended provisions and the common law tradition on which it was based). Other prominent examples include the protection of “personal privacy” under the Freedom of Information Act and the requirement of “reasonable accommodations” under the Age Discrimination in Employment Act. *See* Harold J. Kent, *The Failed Promise of Regulatory Variables*, 73 WASH. U.L.Q. 1117, 1123 (1995)(citing these terms and arguing that “Congress in such statutes may be viewed as delegating authority to the courts to develop legislative principles through the common law”).

commercial code,” for example, would certainly raise substantial constitutional concerns. Nor does the mere existence of a relevant federal statute in a particular field of law authorize federal common lawmaking.²⁴⁶ Indeed, because of the institutional advantages Congress enjoys over the federal courts in creating national policy, the Supreme Court has counseled a special “vigilance” in reviewing claims of delegated lawmaking powers.²⁴⁷

But a legislative enactment that both authorizes federal common law (whether expressly or implicitly) and marks the boundaries for the judicial exercise of that power does not contravene the Constitution.²⁴⁸ Because it represents a determination to create federal law by the federal institution constitutionally empowered to do so, a congressional delegation properly overcomes federalism concerns.²⁴⁹ And by reasonably defining the substantive

²⁴⁶ See *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (“[T]he existence of related federal statutes” does not “automatically show that Congress intended courts to create federal common-law rules”) (citing *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

²⁴⁷ *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (“In cases specifically involving the Judicial Branch, we have expressed our vigilance against [the] danger[] ... that the Judicial Branch neither be assigned nor allowed ‘tasks that are more properly accomplished by [other] branches.’”) (quoting *Morrison v. Olson*, 487 U.S., 654, 680-681 (1988)). See also *Milwaukee v. Illinois*, 451 U.S. 304, 312-313 (1981) (“The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.”). For a comprehensive analysis of this issue see Field, *supra* note 28, at 933-34 (analyzing the claim that because of its institutional advantages with regard to fact-finding and the determination of broad national policies, Congress “is generally better equipped to generate a new scheme of rules than are the courts”).

²⁴⁸ See *Mistretta v. United States*, 488 U.S. 361, 373 (1989) (holding with regard to delegation in general that “this Court has deemed it ‘constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.’”) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

²⁴⁹ Perhaps the clearest expression of the propriety of federal court lawmaking to fulfill the intent of Congress comes from *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973):

[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. ‘At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or ‘judicial legislation,’ rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress.’

limits of discretion, such a delegation satisfies separation of powers concerns over unbridled judicial exercises of powers constitutionally allocated to Congress.²⁵⁰ Indeed, once Congress has settled upon delegation as the best means of exercising federal lawmaking powers the Supreme Court has “almost never felt qualified to second-guess [it] regarding the permissible degree of policy judgment that can be left to those ... applying the law.”²⁵¹

2. The “Enclaves” of Federal Common Law

The second principal field of permitted federal common law derives directly from the structure and core principles of the Constitution. Just as the premise of *Erie Railroad v. Tompkins* protects the reserved lawmaking authority of the states, the Supreme Court has reasoned that our federal system recognizes that certain matters are of “uniquely federal interest.”²⁵² Indeed, in the same term as *Erie* the Court adopted its own rule of federal common law to an inter-state dispute over the apportionment of water in an interstate stream.²⁵³ And in the following decade it likewise emphatically declared that

Id., at 593 (quoting Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957)).

²⁵⁰ See Merrill, *supra* note 28, at 41 (arguing that a congressional delegation of lawmaking powers to federal courts does not violate the separation of powers doctrine if it is “specifically intended and the area of delegation is reasonably circumscribed”); Van Alstine, *Treaty Delegation*, *supra* note 18, at 1285-1286 (agreeing with Professor Merrill’s conclusion).

²⁵¹ Whitman, 531 U.S. at 474 (quoting Mistretta, 488 U.S. at 416)(Scalia, J., dissenting)).

²⁵² Boyle v. United Technologies, 487 U.S. 500, 504 (1988)(observing that certain matters of “uniquely federal interest” are so committed by the Constitution to federal law that state law is preempted, as needed by rules of federal common law)(citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981); United States v. Kimbell Foods, Inc., 440 U.S. 715, 726-729 (1979); Banco Nacional v. Sabbatino, 376 U.S. 398, 426-427 (1964); Howard v. Lyons, 360 U.S. 593, 597 (1959); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-367 (1943); and D’Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 457-458 (1942)).

²⁵³ See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938)(citing in part the Court’s jurisdiction over “Controversies between two or more States” granted by Article III, § 2 of the Constitution); Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972)(holding that federal common law properly applied to an interstate dispute over air and water rights); City of Milwaukee v. Illinois, 451 U.S. 304, 305 (1981)(same).

notwithstanding *Erie* there was “no purpose or effect for broadening state power over matters essentially of federal character.”²⁵⁴

The Court famously has described this form of federal common law as the “enclaves of federal judge-made law.”²⁵⁵ As explained in *Texas Industries, Inc. v. Radcliff Materials*,²⁵⁶ these enclaves generally distill into four categories: disputes “concerned with the rights and obligations of the United States”;²⁵⁷ interstate disputes “implicating the conflicting rights of States”²⁵⁸ such as the water rights matters noted above;²⁵⁹ controversies touching on the nation’s “relations with foreign nations”;²⁶⁰ and admiralty cases.²⁶¹

The common theme among these categories is that some matters “so vitally affect[] interests, powers and relations of the Federal Government” that they “require[] uniform application to be properly effected.”²⁶² The Supreme Court thus has reasoned that the

²⁵⁴ *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947).

²⁵⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964).

²⁵⁶ 451 U.S. 630 (1981).

²⁵⁷ *See* *Texas Indus.*, 451 U.S. at 641 (*citing* *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943); *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457-458 (1942); and *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973)). *See also* *Boyle v. United Technologies*, 487 U.S. 500 (1988)(observing that “obligations to and rights of the United States under its contracts are governed exclusively by federal law”); *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)(same).

²⁵⁸ *See* *Texas Indus.*, 451 U.S. at 641 (*citing* *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)).

²⁵⁹ *See supra* note 253 and accompanying text.

²⁶⁰ *See* *Texas Indus.*, 451 U.S. at 641 (*citing* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

²⁶¹ *See id.* (*citing* *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963)). *See also* *The Lottawana*, 88 U.S. 558, 572-75 (1875)(noting that art. III, section 2 of the Constitution extends the Court’s jurisdiction “to all cases of admiralty and maritime jurisdiction” and concluding that federal common law is appropriate in this field because “to place the rules and limits of maritime law under the disposal and regulation of the several States ... would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states”).

²⁶² *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947).

Constitution disables states from exerting lawmaking authority over the “enclaves” either because the matters from their nature involve the sovereign dignity of the United States “or because the interstate or international nature of the controversy makes it inappropriate for state law to control.”²⁶³ Because such matters are “so committed by the Constitution and laws of the United States to federal control that state law is pre-empted,”²⁶⁴ it is the constitutional responsibility of the federal courts to supply their own federal common law rule, absent contrary directives from Congress.²⁶⁵ And where this is the case, the Supreme Court has made clear that federal common law is appropriate even where the particular dispute is solely between private parties.²⁶⁶

A strong federal interest in a particular subject is not alone sufficient to sanction federal common law.²⁶⁷ Rather, there must also be a significant conflict between a federal policy or interest and the operation of state law.²⁶⁸ Nonetheless, where a particular field of law is one of uniquely federal concern, “[t]he conflict with federal policy need not be as

²⁶³ *See* *Texas Indus.*, 451 U.S. at 641.

²⁶⁴ *Boyle v. United Technologies*, 487 U.S. 500, 504 (1988)(*citing* *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-729 (1979); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-427 (1964); *Howard v. Lyons*, 360 U.S. 593, 597 (1959); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943); *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457-458 (1942).

²⁶⁵ *Boyle*, 487 U.S. at 504. *See also* Clark, *Safeguarding Federalism*, *supra* note 200, at 1453-1458 (analyzing the four enclaves and concluding that, with the possible exception of admiralty law, those areas of federal common law are consistent with the constitutional structure and federal lawmaking procedures)

²⁶⁶ *See Boyle*, 487 U.S. at 506. *See also* *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 97 (2001)(same); *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341, 348 (2001)(same).

²⁶⁷ *See Miree v. DeKalb County Georgia*, 433 U.S. 25, 31 (1977)(holding that simply because the federal government “has substantial interest in regulating air travel and promoting air safety” did not require application of federal common law to a contract dispute relating to the use of land adjacent to an airport).

²⁶⁸ *See Atherton v. FDIC*, 519 U.S. 213, 218 (1997)(“[N]ormally, when courts decide to fashion rules of federal common law, ‘the guiding principle is that a significant conflict between some federal policy or interest and the use of state law ... must first be specifically shown’”(quoting *Wallis v.*

sharp as that which must exist for ordinary pre-emption when Congress legislates ‘in a field which the States have traditionally occupied.’”²⁶⁹ And where the federal interest requires a uniform rule, such as with the contractual obligations of the United States, “the entire body of state law applicable to the area conflicts and is replaced by federal rules.”²⁷⁰

Disputes implicating matters of foreign affairs present perhaps the best—and for present purposes certainly the most important²⁷¹—illustration of this reasoning.²⁷² As the Supreme Court explained in its foundational pronouncement in *Banco Nacional de Cuba v. Sabbatino*,²⁷³ the very nature of core issues of foreign affairs requires the displacement of state law with a uniform federal law solution:

[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.²⁷⁴

On the specific issue in dispute, the *Sabbatino* court concluded that the force of sovereign acts of foreign nations in disputes before United States courts (the so-called “the

Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)). See also *Boyle v. United Technologies*, 487 U.S. 501, 507 (1988)(same).

²⁶⁹ *Boyle*, 487 U.S. at 507-08 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S., 218, 230 (1947)). I will have more to say about the interaction of the statutory preemption doctrine and federal common law below. See *infra* Part II.C.

²⁷⁰ *Boyle*, 487 U.S. at 508 (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943), for the proposition that the uniquely federal interest in the contractual rights and obligations of the United States require uniform federal rules).

²⁷¹ See *infra* notes 507-520 and accompanying text (analyzing the significance of the foreign affairs enclave of federal common law for the corresponding powers of federal courts with regard to the law within the scope of treaties).

²⁷² See also Clark, *Federal Common Law*, *supra* note 2, at 1292 (describing the foreign affairs enclave as “[o]ne of the more prominent modern enclaves of federal common law ...”); Goldsmith, *Federalism*, *supra* note 19, at 1632 (asserting that there is “a remarkable consensus about the legitimacy of the federal common law of foreign relations”).

²⁷³ 376 U.S. 398 (1964).

²⁷⁴ *Id.*, at 425.

act of state doctrine”) was a matter of federal common law.²⁷⁵ In doing so, it also specifically addressed the standard concerns about the limits on federal court lawmaking: “It seems fair to assume,” the Supreme Court declared, “that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*.”²⁷⁶ From this foundation, lower federal courts have determined that federal common law is appropriate for a whole range of issues implicating the foreign affairs of the United States.²⁷⁷

C. Federal Common Law and the Preemption Doctrine

A full understanding of the lawmaking powers of federal courts finally requires an appreciation of the subtle interaction between federal common law and the notion of federal preemption. It is of course the very premise of the Supremacy Clause that Congress has the

²⁷⁵ *Id.*, at 426-27.

²⁷⁶ *Id.*, at 425.

²⁷⁷ See *Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 895, 898 (S.D. Tex. 1995) (holding in an action by citizens of Peru against a Delaware corporation whose principal place of business was in Peru alleging environmental waste in Peru “arose under federal common law of international relations” because the “international structure of controversy makes it inappropriate for state law to control”); *Sequihua v. Texaco, Inc.* 847 F. Supp. 61, 61-63 (S.D. Tex. 1994) (holding in a similar action by Ecuadorean citizens that “[c]learly, such issues of international relations are incorporated into federal common law” and that “there are essential elements of Plaintiffs’ claims which, if “well-pleaded”, require the application and resolution of the federal common law regarding foreign relations”); *United States v. Schofield*, 197 F.R.D. 6, 9 (D.D.C. 2000) (holding in an action brought by the United States Office of Foreign Missions for unpaid rent on a leased site of foreign embassy that “[a]lthough the congressional regulation of foreign missions is silent on the issue of leasing, this Court has little hesitation in finding federal common law to be applicable” because of the foreign affairs implications of the case); *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 943 (N.D. Cal. 2000) (citing *Sabbatino* and holding with regard to a claim by a United States soldier against Japan for World War II era imprisonment that “plaintiffs’ claims implicated federal common law of foreign relations and, thus, gave rise to federal jurisdiction”); *Republic of the Philippines v. Marcos*, 806 F.2d 344, 352-54 (2d Cir.1986) (holding in an action by the Republic of Philippines against former president Ferdinand Marcos that “an action brought by a foreign government against its former head of state arises under federal common law because of the necessary implications of such an action for United States foreign relations”); *Grynberg v. British Gas plc.*, 817 F. Supp. 1338, 1355-59 (E.D. Tex. 1993) (citing *Sabbatino* and holding in a purely private dispute over rights to oil in the country of Kazakhstan that “it is now apparent that claims raising questions of foreign relations are incorporated into federal common law...a well-pleaded complaint for specific performance would require the nullification of and interference with the relationship between Kazakhstan and its resources. Claims of right to title in foreign lands present questions of international relations governed exclusively by federal law.”).

authority to displace state law through an express exercise of its Article I delegated powers,²⁷⁸ as do the treaty-lawmakers under their Article II powers.²⁷⁹ Where the related federal law interests so require, such an exercise of federal power also may create the federal law foundation for interstitial lawmaking by federal courts.²⁸⁰

Often the effect of preemption is merely “negative” in form: a determination by a federal court that state law rules of decision are displaced where they conflict with formal norms of federal law. The full preemptive force of federal law is much more expansive, however, than this narrow notion of “conflict preemption.”²⁸¹ Even in absence of a direct conflict, a federal court may invalidate state law if it stands as an “obstacle” to the fulfillment of federal law purposes.²⁸² In what might be viewed as a mild form of federal common law, in other words, a federal court again extends the reach of the express terms of positive

²⁷⁸ *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000)(citing the Supremacy Clause and observing that “[a] fundamental principle of the Constitution is that Congress has the power to preempt state law”); *Boyle*, 487 U.S. at 504 (noting that state law is preempted in the case of a “clear statutory prescription”)(citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

²⁷⁹ *See supra* note 84 and accompanying text. The Supreme Court confirmed this proposition most recently in *American Insurance Ass’n v. Garamendi*, ___ U.S. ___, 123 S. Ct. 2374, 2377-78 (2003)(observing that treaties “are fit to preempt state law”). This case also recognized that the President alone has the power to displace state law through sole executive agreements. *See id.* (concluding that sole executive agreements likewise are fit to preempt state law). *See also infra* notes 498-501 and accompanying text (discussing this point in more detail).

²⁸⁰ *Cf. Merrill, supra* note 28, at 36 (describing a class of proper federal common law as “preemptive lawmaking” in which a court effectuates “the original intentions of the enacting body . . . by asking what collateral or subsidiary rules are necessary in order to effectuate or to avoid frustrating the specific intentions of the draftsmen”).

²⁸¹ *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000)(employing this term and examining statutory preemption in general). *See also Boyle*, 487 U.S. at 504 (observing that state law is preempted where there is a “direct conflict between federal and state law”)(citing, *inter alia*, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)).

²⁸² *See Crosby*, 530 U.S. at 372 (observing that state law is preempted when “under the circumstances of [a] particular case, [it] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”)(quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See also Burks v. Lasker*, 441 U.S. 471, 479 (1979)(“Federal courts must be ever vigilant to insure that application of state law poses ‘no significant threat to any identifiable federal policy or interest.’”)(quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

federal law to displace state law. In this case, however, it does so based on its independent judgment that a state law poses an improper obstacle²⁸³ to the broader, unarticulated purposes or intended effects of federal law.²⁸⁴

Moving along the spectrum of preemption, federal courts may find a foundation even for a formal exercise of lawmaking powers in the case of so-called “field preemption.”²⁸⁵ The legislative and derivative administrative regulation of a particular field of law may be so pervasive—or Congress otherwise may have an intent so to “occupy the field”²⁸⁶—as to leave the conclusion that “Congress left no room for the States to supplement it.”²⁸⁷ When, then, a disputed issue lacks a legislative solution in the field, the

²⁸³ As the Supreme Court emphasized only this past term, this “obstacle preemption” is particularly powerful in field of foreign affairs. *See American Insurance Ass’n v. Garamendi*, ___ U.S. ___, 123 S. Ct. 2374 (2003). For obvious reasons, the Court’s opinion in *Garamendi* will be of value in our analysis below. *See infra* notes 498-501 and accompanying text.

²⁸⁴ *See Crosby*, 530 U.S. at 373 (observing that “[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects”). *See also Merrill*, *supra* note 28, at 36 (arguing that a federal court engages in “preemptive lawmaking” not on the basis of “the specific intentions of the draftsmen, but by asking what collateral or subsidiary rules are necessary in order to effectuate or to avoid frustrating the specific intentions of the draftsmen”).

²⁸⁵ *See Crosby*, 530 U.S. at 372-73 (employing this term and examining statutory preemption in general). The traditional presumption against preemption applies as well to assertions of “field preemption.” *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)(stating that congressional occupation of the field is not to be presumed “in a field which the States have traditionally occupied”); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 206 (1983)(same). For more on the “presumption against preemption” see *infra* notes 437-441 and accompanying text.

²⁸⁶ *See Crosby*, 530 U.S. at 372 (“When Congress intends federal law to ‘occupy the field,’ state law in that area is preempted.”)(*citing California v. ARC America Corp.*, 490 U.S. 93, 100 (1989)).

²⁸⁷ *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). *See also, e.g., California v. ARC America Corp.*, 490 U.S. 93, 101 (1989)(discussing situations in which state law is entirely preempted because Congress intended federal law to “occupy the field”); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)(holding with regard to the issue of immigration that “the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation” and thus the “states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations”).

federal law interests commonly will require that federal courts—absent contrary positive law guidance—fill the breach with a rule of federal common law.²⁸⁸

The message here is that federal law interests reflected by a formal exercise of federal power may create the foundation for interstitial federal court lawmaking. This foundation, interestingly, also may reflect a noteworthy overlap with the notion of implied delegation. In some cases, as we have seen, federal common law powers may arise from a corresponding, if imperfectly expressed, authorizing intent of Congress.²⁸⁹ But the same conclusion often may issue from the broader federal interests reflected by federal legislation, together with the conflict that would arise from the operation of state law. In parallel with those areas of “uniquely federal interests” founded in the Constitution,²⁹⁰ in other words, Congress may create federal law interests of such a predominant force that a coordinate federal institution, the federal judiciary, has the implied authority to fill gaps in the regulatory scheme as they emerge over time.

A final note is appropriate here concerning the special role of federal courts in protecting federal interests in the field of foreign affairs. At various times in the last half-century, the Supreme Court has cautiously embraced the notion of “dormant” federal

²⁸⁸ A good example is the field of employee pension plans as preempted by ERISA. *See* *McGurl v. Trucking Employees of North Jersey Welfare Fund, Inc.*, 124 F.3d 471, 481 (3rd Cir. 1997)(observing in connection with the law preempted by ERISA that “[i]f state law is preempted and no specific federal provision governs, a court is forced to make law or leave a void where neither state nor federal law applies; in such a situation it is a reasonable inference that Congress intended some law, and therefore federal law, to apply”)(*quoting* *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.*, 426 F. Supp. 316, 322 (N.D. Ind. 1977)). This quotation most likely derives from an even earlier law review article. *See* Note, *Federal Common Law*, 82 HARV. L. REV. 1512, 1522 (1969)(arguing that “when a case in federal court turns on a point of law which the state is thus precluded from deciding, the court is forced to make law or leave a void where neither state nor federal law applies. In such a situation it is a reasonable inference that Congress intended some law, and therefore federal law, to apply”).

²⁸⁹ *See supra* notes 231-245 and accompanying text.

²⁹⁰ *See supra* Part II.B.2 and accompanying text (analyzing the recognized “enclaves” of federal common law).

foreign affairs powers as a justification for preemption of state law.²⁹¹ In recent years, however, the proposition has been the subject of controversy,²⁹² and the Court's present disposition is open to question.²⁹³

We shall more to say about some of this controversy below.²⁹⁴ It nonetheless will suffice at this point to remind that treaties reflect a formal exercise of federal lawmaking power.²⁹⁵ As a result, the common law powers of federal courts under treaties will not depend decisively on notions of "dormant" constitutional powers.²⁹⁶

III. THE TREATY POWER, THE JUDICIAL POWER, AND DELEGATED FEDERAL COMMON LAW

A. The Relationship of the Treaty Power and the Judicial Power

The analysis in Part I above revealed that self-executing treaties now regulate broad and expanding fields of our legal landscape. On a seemingly isolated path, Supreme Court

²⁹¹ See *infra* notes 489-491 and accompanying text (discussing Supreme Court precedent on the notion of a "dormant foreign affairs" power and a "dormant foreign commerce clause" and citing authority).

²⁹² See, e.g., Bradley & Goldsmith, *supra* note 9, at 864-65; Koh, *supra* note 19 at 1848; Goldsmith, *Federalism*, *supra* note 19, at 1649-50. See generally Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999).

²⁹³ The principal case which recognizes the dormant powers of the federal government in the field of foreign affairs is *Zschernig v. Miller*. See 389 U.S. 429, 432 (1968)(holding that any state action that has more than an "incidental effect" on the nation's foreign affairs is preempted even if it does not conflict with any formal articulations of federal policy). *But cf.* *Barclays Bank Plc. v. Franchise Tax Board*, 512 U.S. 298 (1994)(failing to follow the notion of a "dormant foreign affairs" as articulated in *Zschernig*); *American Insurance Ass'n v. Garamendi*, ___ U.S. ___, 123 S. Ct. 2374, 2377-2278 (2003)(observing that it is a "fair question" whether the field preemption approach of *Zschernig v. Miller* regarding the dormant foreign affairs power is appropriate). See also *id.*, at 2399-2400 (2003)(Ginsburg, J., dissenting)(observing that "[w]e have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here").

²⁹⁴ See *infra* notes 489-494 and accompanying text.

²⁹⁵ See *supra* notes 322-331 and accompanying text.

²⁹⁶ For an argument in favor of a more nuanced understanding of the "dormant treaty power" see Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000).

jurisprudence—as we learned in Part II immediately above—has continued to emphasize in the progeny of *Erie Railroad Co. v. Tompkins*²⁹⁷ the limits on the lawmaking powers of federal courts. As an increasing share of lawmaking activity occurs within the shadow of our nation’s international relations, however, the context for an analysis of the lawmaking powers of federal courts is changing. In other words, as federal law increasingly flows into an area of uniquely federal concern²⁹⁸ we face increasing strains on the accepted wisdom about the boundaries of federal common law. This mounting tension provides the setting for the core subject of our analysis here: The common law powers of federal courts in relation to the law within the scope of treaties.

1. The Judicial Power and the Treaty Power

The first step in the analysis is to understand in detail the relationship between the “Treaty Power” of Article II and the “judicial Power” of Article III. Recall as an initial matter that the Supremacy Clause in Article VI formally designates treaties, along with other forms of federal law, as the “supreme Law of the Land.”²⁹⁹ From this, the Supreme Court has long reasoned that, when their substance so directs,³⁰⁰ treaties take direct effect as federal law, even without Article I implementing legislation.³⁰¹ We have also seen that Article III,

²⁹⁷ 304 U.S. 64 (1938).

²⁹⁸ See *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398, 425 (1964) (declaring that issues “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”). See also *supra* notes 271-277 and accompanying text (analyzing the “foreign affairs enclave” of federal common law).

²⁹⁹ U.S. CONST. art. VI, § 2. See also *supra* notes 48-50 and accompanying text (analyzing this clause of the Constitution with regard to treaties).

³⁰⁰ See *supra* notes 87-91 and accompanying text (analyzing the circumstances under which a treaty may not be self-executing).

³⁰¹ See *supra* notes 76-86 and accompanying text (analyzing Supreme Court precedent, especially *Foster v. Neilson*, 27 U.S. 253 (1829), on the direct effect of self-executing treaties).

section 2, affirms that the “judicial Power” of federal courts extends to treaties as well.³⁰² In combined effect, the express inclusion of treaties within both Article III and Article VI “altered—or made irrelevant—for domestic purposes those attributes of treaties that distinguished them from laws: it made them operative on individuals and enforceable in the courts by individuals.”³⁰³

The result of these constitutional principles is that treaties proceed from the essentially the same federal law foundation as Article I legislation.³⁰⁴ It is for this reason that the Supreme Court consistently has described a self-executing treaty as “equivalent to an act of the legislature”³⁰⁵ and as a legal vehicle that “partake[s] of the nature of municipal law . . . in the same category as other laws of Congress.”³⁰⁶

³⁰² U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made” under the authority of the United States”). Because they represent the “law of the land,” such treaties must also fall within the President’s Article II, Section 3 obligation to “take care” that federal laws are “faithfully executed.” See U.S. CONST. art. II, § 3 (providing that the President “shall take Care that the Laws be faithfully executed”). See also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 655 (2000) [hereinafter Bradley, *Chevron Deference*](observing that self-executing treaties “presumably are also part of the ‘Laws’ referred to in Article II’s Take Care Clause”).

³⁰³ See Vazquez, *Treaty Rights*, *supra* note 89, at 1108-09.

³⁰⁴ See *supra* notes 81-83 and accompanying text (analyzing Supreme Court authority based on the Supremacy Clause that treaties take effect as federal law just like Article I legislation). See also, e.g., *Foster v. Neilson*, 27 U.S. 253, 314 (1829)(observing that a treaty “is 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”); *Strother v. Lucas*, 37 U.S. 410, 439 (1838) (“Treaties are the law of the land and a rule of decision in all courts ”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)(declaring that that where treaty provisions “are self-executing, that is, require no legislation to make them operative . . . they have the force and effect of a legislative enactment”).

³⁰⁵ *Foster v. Neilson*, 27 U.S. at 314. See also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)(concluding that a self-executing treaty has the “force and effect of . . . a legislative enactment”); *Chae Chan Ping v. United States*, 130 U.S. 581, 627-28 (1889)(“By the constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be the supreme law of the land . . . If the treaty operates by its own force, and relates to a subject within the power of congress, it can be deemed in that particular only the equivalent of a legislative act.”).

³⁰⁶ *The Head Money Cases*, 112 U.S. 580, 598 (1884).

This does not mean that treaties have precisely the same constitutional status and function as statutes, only that they have no less force as federal law than does a statute. When a treaty “addresses itself”³⁰⁷ to the federal courts, therefore, Article III requires that they apply it as a federal rule of decision just as they would a statute or any other form of enforceable federal law. Indeed, as we have seen,³⁰⁸ from its earliest confrontation with the subject the Supreme Court has confirmed the “obligation” of federal courts to apply treaties in cases properly before them; for when a treaty creates individual rights it “as much binds those rights and is as much to be regarded by the court as an act of congress.”³⁰⁹

Because self-executing treaties fall within the judicial power of Article III, federal courts likewise have the final authority over their interpretation and application.³¹⁰ Even the issue of whether a treaty is designed to be self-executing at all is a judicial question.³¹¹ Thus,

³⁰⁷ See *Foster*, 27 U.S. at 314 (suggesting this phrase as means of expressing whether a treaty is self-executing).

³⁰⁸ See *supra* note 136 and accompanying text.

³⁰⁹ *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109-110 (1801).

³¹⁰ See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (holding that “the courts have the authority to construe treaties”)(*citing* *Baker v. Carr*, 369 U.S. 1986 (1969)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)(observing that “courts interpret treaties for themselves”); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239 (1796)(holding with regard to the interpretation of a disputed provision of a self-executing treaty that “the Courts, in which the cases arose, were the only proper authority to decide, whether the case was within the article of the treaty, and the operation and effect of it”); *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981)(“In general, courts in the United States have exclusive authority to interpret an international agreement to which the United States is a party for the purpose of applying it in litigation as the domestic law of the United States.”). See also *Restatement of Foreign Relations, supra* note 73, § 112(2) (1987) (“The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States.”). Nothing prevents a state court from interpreting a treaty of the United States as an issue of federal law. See *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952) (interpreting a provision in the Charter of the United Nations). Instances of this are rare, however, for the simple reason federal courts have original jurisdiction over treaty cases (see 28 U.S.C. § 1331 (2003)), and defendants have an automatic right of removal from state courts in any event. See 28 U.S.C. § 1441(b) (2003).

³¹¹ See *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981)(holding that “whether a given treaty is self-executing or requires special implementing legislation to give force and effect to its provisions is primarily a domestic question of construction for the courts”); *Diggs v. Richardson*, 555 F.2d 848, 851 (1976)(same).

just like Article I legislation, once proposed legal standards have passed into formal federal law it becomes the province of the courts, as *Marbury v. Madison* famously declared, “to say what the law is,”³¹² which of its nature includes the power to “expound and interpret” the elements of positive law.³¹³

With regard to statutes, this recognition leads directly to the accepted principle that even the interpretive opinions of a later Congress are of “very little, if any, significance.”³¹⁴ The same applies for treaties. Although foreign affairs considerations may require respect for the interpretive views of the executive branch,³¹⁵ the Supreme Court repeatedly has declared that it is the final arbiter of the meaning of self-executing treaties.³¹⁶ Even the

³¹² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³¹³ *Id.*

³¹⁴ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (*quoting* *Rainwater v. United States*, 356 U.S. 590, 593 (1958)). *See also* *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) (“[W]e have observed on more than one occasion that the interpretation given by one Congress ... to an earlier statute is of little assistance in discerning the meaning of that statute.”) (*quoting* *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 168 (1989)); *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (“We have often observed ... that ‘the views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one.’”) (*quoting* *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 348-49 (1963)); *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (same); *United States v. Price*, 361 U.S. 304, 313 (1960) (same).

³¹⁵ *See* *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* 525 U.S. 155, 168 (1999) (observing that respect is “ordinarily” due to the “reasonable” views of the executive branch concerning the meaning of a treaty). *See also id.*, at 168 (noting prior formulations of this notion to the effect that the interpretive views of executive agencies charged with the enforcement of a treaty are entitled to great weight) (*citing* *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982)).

³¹⁶ *See* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239 (1796) (opinion of Chase, J.) (concluding with regard to the interpretation of a treaty provision that the courts “were the only proper authority to decide, whether the case was within this article of the treaty, and the operation and effect of it”); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (observing that although the interpretive views of the executive branch are entitled to deference “courts interpret treaties for themselves”); *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (observing that if a treaty is self-executing “it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other”). The Court also has declared in a broader sense that the simple presence of foreign affairs considerations does not mean that a matter is a political question beyond the competence of courts. *See* *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

political branches have acknowledged this principle from their earliest jurisdictional statutes,³¹⁷ and to this day.³¹⁸

2. The Constitutional Nature of Treaties

It is nonetheless critical here to understand the unique nature of the treaty power in our constitutional design. The constitutional products of statutes and treaties may find the same source for their status as federal law.³¹⁹ But the power to promulgate Article I laws and the power to make treaties proceed from different constitutional sources of authority. Article I, section 8, in familiar language provides the Congress “shall have the Power” to exercise legislative authority over a broad array of subjects.³²⁰ But in a near exact textual parallel, Article II, section 2, provides that the President separately “shall have the Power” to make treaties, provided a super-majority of the Senate concurs.³²¹

The constitutional message of this structural distinction, as David Golove has convincingly explained, is that the treaty power represents a separate and independent

³¹⁷ The first jurisdictional statute adopted by Congress and signed by President Washington in 1789 provided that the review jurisdiction of the Supreme Court extended to any “a final judgment or decree in any suit, in the highest court of law or equity of a State ... where is drawn in question the construction of any clause ... of a treaty... and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said ... treaty ...” See The Judiciary Act of 1789, § 25, 1 Stat. 73.

³¹⁸ The statutes on the certiorari jurisdiction of the Supreme Court for cases decided by the supreme courts of the States, the District of Columbia, and Puerto Rico still make reference to the application of treaty law. See 28 U.S.C. § 1257(a) (2003)(providing that such review jurisdiction extends to cases “where the validity of a treaty ... of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to ... treaties ... of the United States, or where any title right, privilege or immunity is specially set up or claimed under ... the treaties ... of ... the United States”); *id.*, § 1257(b)(including the District of Columbia in the definition of a “State” for such purposes); *id.*, § 1258 (extending similar jurisdiction for final judgments or decrees by the Supreme Court of the Commonwealth of Puerto Rico).

³¹⁹ U.S. CONST. art. VI, § 2.

³²⁰ See U.S. CONST. art. I, § 8, cl. 1 (stating that Congress “shall have the Power” to collect taxes, borrow money, regulate interstate commerce, etc.).

delegated power to create federal law.³²² To state the proposition differently, the treaty power is not merely another vehicle for exercising the specific legislative powers granted to Congress in Article I.³²³ Rather, “treaties are alternative modes of promulgating laws.”³²⁴

It is also this premise that animated the Supreme Court’s foundational pronouncement on the treaty power in *Missouri v. Holland*.³²⁵ As a delegated power in its own right, the treaty power overcomes the general federalism limitation—which finds its most prominent expression in the Tenth Amendment³²⁶—that all powers not delegated to the federal government are reserved to the states.³²⁷ Thus, although—like many other aspects of treaty law in recent years³²⁸—the proposition is not without controversy,³²⁹ the

³²¹ U.S. CONST. art. II, § 2, cl. 1 (providing that the President “shall have the Power” to make treaties “by and with the Advice and Consent of the Senate . . . , provided two thirds of the Senators present concur”).

³²² See Golove, *supra* note 9, at 1284 (arguing that the treaty power is an independent delegated power, not merely “secondary mode for exercising the legislative powers delegated to Congress”). See also *id.*, at 1286 n.717 (stating that legislation and treaties “are alternative modes of promulgating laws”).

³²³ See Golove, *supra* note 9, at 1284.

³²⁴ See *id.*, at 1286, n.717.

³²⁵ 252 U.S. 416 (1920).

³²⁶ U.S. CONST. amend. X (providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”). Indeed, as the Supreme Court likewise concluded in *Missouri v. Holland*, even a non-self-executing treaty may establish the constitutional authority for Article I legislation beyond the limits of the interstate commerce clause based on the authority granted by the necessary and proper clause. See 252 U.S. at 431-32. See also U.S. CONST. art. I, § 8, cl. 18 (granting to Congress the power “to make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

³²⁷ See *Missouri v. Holland*, 252 U.S. at 432 (observing that in ascertaining the scope of the treaty power “it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly”). See also Golove, *supra* note 9, at 1286 (arguing that “whenever a treaty makes a stipulation on a subject falling within the exclusive legislative competence of the states, the ‘federalism’ subject matter restrictions which would apply to acts of Congress are not applicable,” but noting that this does not necessarily override other manifestations of the federalism principle).

³²⁸ See *supra* notes 11-18 and accompanying text (describing the extant controversies over the scope of the treaty power).

substantive scope of the treaty power is not subject to the specific federalism limits imposed on Congress's Article I legislative powers.³³⁰ Because it is a lawmaking authority independent of that delegated in Article I, the treaty power in the similar way is not subject to the general separation of powers principle that "[a]ll legislative Powers" described in Article I are vested in Congress as a whole.³³¹

This division of the legislative power of Congress and the lawmaking power of the Treaty Clause reflects an important insight of the Framers. Quite apart from its impact as domestic law, a treaty may accomplish a legal act that statutes from their nature may not: It may create an international obligation of the United States as part of a reciprocal obligation of a foreign sovereign.³³² In the process, a treaty may found rights and benefits for the United States (and, significantly, its individual citizens) which may be enforceable in a foreign jurisdiction and which otherwise likely would be beyond the legislative powers of United

³²⁹ See Bradley, *Treaty Power*, *supra* note 12, at 451-458 (arguing that interests of federalism and the enumerated powers doctrine require that there are substantive limits on the scope of the treaty power); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000)(arguing that criticisms of his position overlook the force of recent Supreme Court federalism decisions).

³³⁰ In recent years, the Supreme Court has famously reanimated the limits of the interstate commerce clause. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000)(finding that Congress cannot regulate local activity on the basis that in aggregate it has a substantial effect on interstate commerce); *United States v. Lopez*, 514 U.S. 549 (1995) (concluding that congressional powers under the commerce clause do not extend to the regulation of activities having only a "potentially attenuated effect" on interstate commerce).

³³¹ See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). See also Golove, *supra* note 9, at 1286 (explaining that because the treaty power represents an independent mode for the creation of federal law "whenever a treaty makes stipulations on subjects falling within the scope of Congress's legislative authorities, the treaty overrides the general separation of powers principle that legislative authority is vested in Congress").

³³² As noted earlier, the precise substantive requirements for the conclusion of a constitutionally valid treaty are subject to a substantial scholarly debate. See *supra* note 12 and accompanying text.

States acting alone.³³³ The price for this benefit of course is the return international obligation of the United States.³³⁴ In the case of self-execution, it is this reciprocal international obligation that differentiates a treaty from standard article I lawmaking. It is also precisely this aspect of a self-executing treaty that creates a significantly different context for understanding the relationship of the treaty power with other structural aspects of the Constitution—notably federalism and separation of powers.³³⁵

This does not mean that an exercise of the treaty power somehow is detached from the express limitations of the Constitution. To the contrary, it both well-settled and largely uncontroversial that treaties remain subject to constitutionally guaranteed individual rights, as the Supreme Court reminded only a few months ago.³³⁶ Thus, a treaty may not, for instance, abridge the freedom of speech or of the press.³³⁷ More generally, a treaty may not contravene affirmative grants of rights to the States,³³⁸ or otherwise compromise essential

³³³ There is considerable controversy over whether the Constitution permits the ratification of a treaty based on standard Article I legislation (so-called “Congressional-Executive Agreements”) and without compliance with the Article II, section 2, Senate consent procedure. *See* Ackerman & Golove, *supra* note 11, at 820-32 (arguing that the “congressional-executive agreements” are constitutional); Tribe, *supra* note 11, at 1228-35 (suggesting that such alternative means of consent to treaties violate the Constitution).

³³⁴ *See* Golove, *supra* note 9, at 1093-1096 (arguing that “[t]he national government enters into treaties in order to protect the rights of United States citizens abroad and to further our foreign policy interests more generally” and that the creation of reciprocal domestic law is the “price” for the achievement of those aims).

³³⁵ *See infra* Part III.B.2. (analyzing the relationship of the treaty power with constitutional federalism limitations); *infra* Part III.B.3. (analyzing the relationship of the treaty power with the separation of powers doctrine).

³³⁶ *See* Garamendi, 123 S. Ct. at 2387 n.5 (reaffirming that treaties are “subject ... to the Constitution’s guarantee of individual rights”)(*citing* Reid v. Covert, 354 U.S. 1, 15-19 (1957) and Boos v. Barry, 485 U.S. 312, 324 (1988)).

³³⁷ U.S. CONST. Amend. I. *But cf.* Boos v. Berry, 485 U.S. 312, 324 (1988)(noting that it may be appropriate to apply a more flexible First Amendment analysis in the specific field of diplomacy, but expressly declining to opine on the issue).

³³⁸ An attempt by treaty, for instance, to change the geographic boundaries of a state, abridge the right to a republican form of government in the States, or deny equal suffrage of the States in the Senate would run afoul of the corresponding affirmative protections in the Constitution. *See* U.S.

aspects of their sovereignty.³³⁹ For parallel reasons, the treaty-makers may not arrogate to themselves a power that is textually allocated to another constitutional institution.³⁴⁰ The power to make federal appropriations of money provides a good example here.³⁴¹ These manifestations, respectively, of federalism protections and the separation of powers doctrine, in short, remain equally applicable to treaties as they do to statutory exercises of federal power.

3. The Judicial Power and the Executive Power

On the other hand, and of equal moment for present purposes, the difference between the constitutional sources of authority for statutes and treaties does not mean that

CONST. art. IV, § 3, cl. 1 (providing that “no new State shall be formed or erected within the jurisdiction of any other State; nor may any State be formed by the Junction of two or more States, or Parts of States” without the consent of the states involved and of Congress); *id.*, art. IV, § 4 (requiring that the United States “guarantee to every State in this Union a Republican Form of Government”); *id.*, art. V (providing that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”).

³³⁹ A strong argument can be made, for instance, that the structural and historical protections against the federal government “commandeering” state institutions in implementing federal policy apply as well to exercises of federal power through the vehicle of treaties. *Cf.* *New York v. United States*, 505 U.S. 144 (1992) (holding that the Constitution prohibits Congress from “commandeering” that state legislatures into fulfilling regulatory programs at the federal level); *Printz v. United States*, 521 U.S. 898 (1997) (applying the same principle to the commandeering of executive branch officials of the states).

³⁴⁰ Alexander Hamilton provided an example of this proposition as early as 1796:

A treaty ... cannot transfer the legislative power to the Executive Department nor the power of this last Department to the Judiciary; in other words it can not stipulate that the President and not Congress shall make laws for the U[nited] States; that the Judges and not the President shall command the national forces &c.

Alexander Hamilton, *The Defence* No. XXXVI (Jan. 2, 1796), *reprinted in* 20 *The Papers of Alexander Hamilton* 3, 6-7 (Harold C. Syrett ed., 1974). *See also* Golove, *supra* note 9, at 1083-1084 and n. 21 (providing this quotation of Hamilton and describing the related separation of power limitations on the treaty power in more detail). Hamilton’s observation does not reflect, however, an absolute and inflexible constitutional precept. *See supra* Part II.B.1. (discussing the accepted proposition that Congress may delegate to other federal institutions certain powers it could otherwise exercise itself); *infra* Part III.B. (analyzing the same proposition in the treaty context).

³⁴¹ *See* U.S. CONST. art. I, § 9 (providing that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”). For more detail on this point see Golove, *supra* note 9, at 1084 and n.23 (making the same point and providing historical support).

the latter for some reason is insulated from the judicial power of Article III. Professor John Yoo has argued, for instance, that a hidden message can be extracted from the mere situation of the Treaty Clause in Article II.³⁴² This structural distinction in his view transforms the treaty category of federal law into an “executive power” solely within the authority of the President.³⁴³ From this, as well as a citation to the respective vesting clauses of Article I and Article II,³⁴⁴ Professor Yoo then concludes that the President has the “unilateral authority”³⁴⁵ to interpret and apply treaties as federal law,³⁴⁶ even to the exclusion of the Supreme Court.³⁴⁷

³⁴² See Yoo, *Politics as Law*, *supra* note 17, at 869-875.

³⁴³ *Id.*, at 870 (contending that the placement of the treaty clause in Article II “indicates that the power to make treaties, and by extension to interpret them, remains an executive one”). See also *id.* at 869 (arguing that “[a] textual examination of the Constitution indicates that the treaty power is fundamentally executive in nature”); *id.*, at 853-54 (arguing that “the framing generation likely understood the treaty power as an exclusively executive power, and hence that those who established our constitutional system believed the President should have the power to interpret treaties”).

³⁴⁴ U.S. CONST. art. I, § 1 (providing that “[a]ll legislative Powers herein granted” are vested in the Congress”); *id.*, art. II, § 1, cl. 1 (providing that “[t]he executive Power” is vested in the President). See also Yoo, *Politics as Law*, *supra* note 17, at 869-870 (citing both of these provisions for support).

³⁴⁵ See *id.*, at 868 (arguing that the President should have “unilateral authority to reinterpret treaties”); *id.*, at 878 (same). Indeed, as the reference to “reinterpretation” in this passage makes clear Professor Yoo even contends that each president has the authority to change the substantive meaning of a treaty ascribed by earlier administrations. Thus, the very content of federal law in the form of a treaty would remain subject to the flexible (even situation-specific) desires of executive branch officials.

³⁴⁶ See *id.*, at 869 (“In order to give every word in the Constitution meaning, we should construe th[e] ‘herein granted’ language as limiting Congress’s legislative powers to the list enumerated in Article I, Section 8, while Article II’s Vesting Clause must refer to inherent Executive and judicial powers unenumerated elsewhere in the document.”). Likewise, in Professor Yoo’s view the mandatory involvement of the Senate in the creation of federal law through a treaty merely suggests that in this rare instance the Senate is permitted to participate in the exercise of an executive power. *Id.* (“[T]he Senate’s participation in treaty making and appointments merely indicates the dilution of the unitary nature of the executive branch, rather than the transformation of these functions into legislative powers.”). See also *id.*, at 870 (“The Senate’s advice and consent power does not transform the treaty power into a legislative function; instead, it makes the Senate part of the Executive branch for purposes of making international agreements.”).

³⁴⁷ Yoo, *Treaty Interpretation*, *supra* note 18, at 1314-1328.

Such a hyper-structuralist reading of the treaty power is misguided on a number of levels. First, as I have explained in more detail elsewhere, the suggestion that the president has the exclusive authority to interpret treaties disregards the express description of the “judicial Power” in Article III of the Constitution.³⁴⁸ In parallel language with the Article II’s Vesting Clause, Article III, section 1, provides that “[t]he judicial Power of the United States, shall be vested” in the federal courts.³⁴⁹ The following section, as should now be clear, then provides that this judicial power extends to treaties as well.³⁵⁰

Moreover, the mere fact that the treaty power is situated in Article II does not mean that this judicial power somehow is transferred to the executive—any more than Congress would have the exclusive power to interpret statutes merely because the authority to create this form of federal is found in Article I.³⁵¹ Nor, more generally, are powers expressly allocated to other constitutional institutions somehow reassigned to executive control if they should somehow affect foreign affairs.³⁵²

To be sure, the treaty power does not fit neatly into either the legislative or the executive power; indeed, the combination of self-execution and international obligation

³⁴⁸ See Van Alstine, *Treaty Delegation*, *supra* note 18, at 1275-1280 (responding to the argument that because the treaty power is located in Article II, the interpretation of treaties falls within the exclusive authority of the executive branch).

³⁴⁹ U.S. CONST. art. III, § 1 (providing that the judicial power shall be vested “in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish”).

³⁵⁰ U *Id.*, art. III, § 2, cl. 1. (“The Judicial Power shall extend to ... Treaties made, or which shall be made” under the authority of the United States.).

³⁵¹ See *supra* note 314 and accompanying text (noting established Supreme Court jurisprudence that the interpretive views of a later Congress have “little, if any, significance”)(*citing, inter alia*, *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater v. United States*, 356 U.S. 590, 593 (1958); and *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994)).

³⁵² See *Baker v. Carr*, 369 U.S. 186, 211 (1962)(“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”). See also *infra* note 553 and accompanying text (citing additional authority for the proposition that foreign affairs concerns alone do not remove a matter from the judicial power).

means that it partakes of a bit of both.³⁵³ And an attempt by the judiciary to bind the executive branch regarding the force of treaties that are not self-executing, such as most in the arms control and defense arenas, certainly would raise serious separation of powers concerns.³⁵⁴ But the inclusion of treaties in both the Supremacy Clause of Article VI and the judicial power of Article III makes clear that, where their substance so directs, the constitutional product of treaties is fundamentally the same as Article I legislation: judicially enforceable supreme federal law.

Finally, although it comes into being through a constitutional process formally initiated by the President, Article II also requires the consent of a legislative institution, the Senate, before a treaty can obtain the force of domestic law.³⁵⁵ To suggest that the President has exclusive authority to reinterpret the force of treaties would render irrelevant the Senate's mandatory participation in the creation of Article II treaty law.³⁵⁶ It is in light of all of these considerations that the Supreme Court throughout its history has confirmed that the

³⁵³ For a thoughtful historical analysis of the nature of treaties under the Constitution see Rakove, *supra* note 104, at 236-67 (examining the debates over the treaty power in the constitutional convention, in the ratification debates, and among other contemporary authorities). *See also* Flaherty, *supra* note 14, at 2105-2112 (analyzing pre-constitutional thought on the nature of the treaty power); *id.*, at 2137-2138 (discussing the views of Alexander Hamilton in Federalist 75 to the effect that the treaty-making power is neither solely executive nor solely legislative in nature, but it “will be found to partake more of the legislative than of the executive character”)(*citing* The Federalist No. 75, at 449-50 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

³⁵⁴ It is in this respect, in particular, that Professor Yoo mistakenly conflates the separation of powers concerns related to self-executing treaties with those which would arise from judicial interpretation of treaties that do not operate as domestic law under the Supremacy Clause. *See* Yoo, *Treaty Interpretation*, *supra* note 18, at 1315-3128 (arguing that the separation of powers and political question doctrines preclude federal courts from interpreting any treaties as federal law).

³⁵⁵ U.S. CONST. art. II, § 2 (requiring that two thirds of the present Senators concur in the making of a treaty by the President).

³⁵⁶ *See also* Van Alstine, *Treaty Delegation*, *supra* note 18, at 1275-1280 (analyzing this argument in greater detail).

determination of individual rights under a self-executing treaty is fundamentally a judicial, not an executive, responsibility.³⁵⁷

In sum, the relationship of the Article III judicial power with self-executing treaties under Article II proceeds from a constitutional source of authority that is at least as powerful as that for Article I laws. With this foundation, we thus turn to an analysis of whether, like its statutory counterpart, a self-executing treaty properly may serve as a vehicle for an express delegation of lawmaking powers to federal courts.

B. The Constitutionality of an Express Delegation of Common Law Powers through Treaties

1. Background

One might properly conceive of a treaty as the quintessential means by which a nation formally conducts its foreign relations. In this country, it is now established jurisprudence that matters of foreign affairs also represent a constitutionally sanctioned field of federal common law.³⁵⁸ It is appealing to assume from this foundation that federal courts always are vested with the lawmaking powers for those subject matters within the scope of treaties.

This simple syllogism overlooks, however, the important distinction between the existence of a power and the exercise that power. Some core issues of the nation's foreign relations of their essence are federal in nature; even in absence of guidance from express forms of positive federal law, therefore, federal courts have the constitutional responsibility

³⁵⁷ See *supra* notes 310-313 and accompanying text (citing and analyzing Supreme Court precedent on this point). See also Van Alstine, *Treaty Delegation*, *supra* note 18, at 1287-1288 (analyzing this point in more detail).

³⁵⁸ See *supra* notes 273-277 and accompanying text (analyzing the foreign affairs enclave of federal common law).

to resolve such matters through federal law rules of their own making. But at the risk of stating the obvious, not all issues with peripheral foreign affairs effects are of this nature.³⁵⁹

Where, in contrast, a treaty is the assumed foundation for federal common lawmaking powers, that foundation has only a bounded federal law footprint. To be more succinct, the treaty-lawmakers have the constitutional power to create federal law, but the exercise of that power in any given case has its limits. It is thus only to those limits that a self-executing treaty both elevates a particular subject matter to federal law and includes it within the international obligations of the United States.

This point is all the more important as treaty law continues to expand from conventional matters of arms control and peaceful relations into more traditional subjects of domestic legislation.³⁶⁰ To pick a topical example, the mere existence of a self-executing treaty on international child abduction³⁶¹ does not (without more) transform all related state

³⁵⁹ Not even in its most expansive pronouncements on the subject has the Supreme Court suggested that all state laws with tangential foreign affairs implications are preempted by federal law, to say nothing of the authority of federal courts to create federal common law on the subject. *See, e.g.,* *Zschernig v. Miller*, 389 U.S. 429, 458 (1968)(observing that state law is not preempted merely because it might have “some incidental or indirect effect” on foreign commerce)(*citing* *Clark v. Allen*, 331 U.S. 503, 517 (1947)); *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 456 n.20 (1979)(noting that state law is not preempted “when risk that foreign commerce would be burdened by inconsistent international regulation was ‘remote’”)(*citing* *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948)).

³⁶⁰ *See supra* Part I.C. (describing the expansion of self-executing treaties into numerous traditional domestic law subjects).

³⁶¹ *See* Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 23 T.A.I.S. 11,670, 1343 U.N.T.S. 89. *See also* 42 U.S.C. § 11601(a)(4)(setting forth a Congressional finding that the Hague Convention “establishes legal rights ... for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights”). For recent applications of the Convention see, *e.g.,* *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800 (N.D. Iowa 2003)(upholding the rights of a father under the Hague Convention after his children were removed from France to the United States); *Delvoe v. Lee*, 329 F.3d 300 (3rd Cir. 2003)(upholding the custody rights of a mother under the Convention in the face claims by a father seeking the return of a child to Belgium).

law parental rights—or for that matter prior federal law rights³⁶²—into matters of federal treaty law.³⁶³ The nature of such a treaty may require that federal courts exercise common law powers for narrow subject matters in order to uphold the exclusive constitutional grant to the federal government of authority over foreign affairs.³⁶⁴ But such a conclusion is not one that can be extracted from an analysis of constitutional first principles alone.

This is merely another way of saying that for treaty law as well there must be an identifiable source of authority for any valid exercise of common law powers.³⁶⁵ For matters of uniquely federal concern, that source is the Constitution. But beyond this field, the lawmaking powers of federal courts must derive from a mandate by those constitutional institutions empowered to create federal law on their own (for statutes, the Legislature, in interaction with the Executive; for treaties, the reverse).

Recall that for Article I legislation an express delegation by Congress does not contravene constitutional limitations on lawmaking by federal courts.³⁶⁶ As we shall see

³⁶² As explained above, under the “last-in-time rule” a treaty may displace even earlier federal statutes to the extent of any conflict between the two. *See supra* notes 158-161 and accompanying text (analyzing this rule). *See also, e.g.,* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that when an act of legislation conflicts with the self-executing provisions of a treaty, “the one last in date will control the other”); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (observing that “when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null”) (*quoting Reid v. Covert*, 354 U.S. 1, 18 (1957)).

³⁶³ *See, e.g., Egervary v. Young*, 159 F.Supp.2d 132, 138 (E.D. Pa., 2001)(applying the Convention but noting that courts may rely on other “Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child’s further removal or concealment before the final disposition of the petition”).

³⁶⁴ *See supra* notes 45-72 and accompanying text (examining the notion that the Constitution vests exclusive authority over foreign affairs in federal institutions). *See also* U.S. CONST. art. II, § 2 (conferring the treaty making power on the President); *id.*, art. I, § 10 (prohibiting the states from entering into any “Treaty, Alliance, or Confederation”).

³⁶⁵ *See supra* notes 207-211 and accompanying text (discussing the principle that because federal courts do not have independent lawmaking powers there must be a source of authority for federal common lawmaking).

³⁶⁶ *See supra* notes 223-245 and accompanying text (describing Supreme Court approval of congressional delegations of lawmaking authority to the federal courts).

below, the arguments in favor of the same proposition are at least as powerful in the context of a delegation by treaty.³⁶⁷ An express authorization of federal common law by the treaty-lawmakers does not run afoul of federalism protections (section B.2 below). For parallel reasons, such a delegation of circumscribed powers to the federal courts remains faithful to the limits imposed by the doctrine of separation of powers (section B.3. below).

2. Vertical Allocations of Power: Express Treaty Delegation and Federalism

The limitations on federal common law, forcefully articulated as we have seen in *Erie Railroad v. Tompkins*,³⁶⁸ find their most compelling justification in structural constitutional protections of federalism.³⁶⁹ As a general proposition, these limitations on exercises of federal power apply to treaties³⁷⁰ just as they do to other forms of federal lawmaking.³⁷¹ An express delegation of lawmaking authority through the vehicle of a treaty, however, overcomes the federalism constraints on lawmaking by the federal courts.

³⁶⁷ Thus far there has been only limited scholarly recognition of this issue. See Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 470 n.83 (2d ed. 1996) (concluding that “[i]t has been assumed that constitutional limitations on delegation of legislative power apply as well to delegation by treaty”); Golove, *supra* note 9, at 1286 n.717 (observing that because treaties “are alternative modes of promulgating laws” they “ought presumptively to be subject to the same restrictions on delegations to which the identical laws would be subject”). See also Field, *supra* note 28, at 889 (arguing that “the process and standards for making federal common law are the same when a treaty ... is the source of authority”). For an analysis of treaty delegation to international institutions see Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-self-execution*, 55 STAN. L. REV. 1557 (2003); David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1557 (2003).

³⁶⁸ 304 U.S. 64 (1938).

³⁶⁹ See *supra* notes 195-198 and accompanying text (analyzing this point).

³⁷⁰ See Golove, *supra* note 9, at 1085 (observing that “treaties are not immune from federalism limitations and nothing in Missouri [v. Holland] suggests the contrary,” but arguing that a “differential treatment” may be appropriate for treaties)(citing *Missouri v. Holland*, 252 U.S. 416 (1920)). See also Bradley, *Treaty Power*, *supra* note 12, at 451-56 (advancing a broad defense of federalism limitations on the permitted subject matters of treaties).

³⁷¹ As I explain below, however, the particular nature of treaties creates a different context for examining the force of federalism and similar limitations on implied delegations of federal common law authority. See *infra* Parts IV.B., C.

An authorization of federal common law is itself an exercise by the treaty-lawmakers of their power to displace state law with federal law rules. In the first instance, the treaty power itself represents a constitutional delegation by the states to the President and a supermajority of the Senate of authority to create federal law through the prescribed Article II process.³⁷² Like any other treaty provision, an express delegation to the federal courts, in turn, reflects a determination by these treaty-lawmakers that a particular rule of decision should have a federal, not state, source. Although discretion is conferred on a coordinate branch of the federal government (here, the judiciary), the core decision for federalism purposes is made by those federal institutions with the constitutional authority to make such judgments.

With such a foundation, federal common law within the scope of a treaty does not represent “an unconstitutional assumption of powers by the courts of the United States.”³⁷³ In other words, the creation of federal law does not flow from an arrogation of power by federal courts, but rather from a decision in the first instance by the President and the Senate to displace state law through the vehicle of a treaty. An express delegation by the treaty-lawmakers, in short, represents an identifiable source of authority for federal common law, as is required for any valid exercise of lawmaking powers by the federal courts.³⁷⁴

Nor does the Rules of Decision Act represent an independent concern here. Recall that apart from formal rules “require[d]” by federal law, that legislative Act also permits

³⁷² See *supra* notes 322-331 and accompanying text.

³⁷³ *Erie*, 304 U.S. at 79 (*quoting* *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

³⁷⁴ See *supra* notes 207-211 and accompanying text (citing authority for the proposition the federal courts must trace common law powers to an identifiable source of authority).

federal courts to apply a federal rule of decision when a statute or treaty so “provide[s].”³⁷⁵ Properly understood, this latter option reveals that a treaty may provide a means for the creation of a federal rule of decision, including through a delegation of decision-making authority to another federal institution.³⁷⁶ When accomplished in accordance with constitutionally prescribed procedures, therefore, an express delegation of federal common law powers through a treaty also properly surmounts this legislative hurdle.³⁷⁷

Indeed, compelling arguments support the conclusion that federalism concerns over federal lawmaking are less convincing in the treaty context. First, in contrast to most areas of Article I legislation, the entirety of the power to make treaties, as we have seen,³⁷⁸ is delegated to the federal government and expressly prohibited to the States.³⁷⁹ Moreover, and again in contrast to federal statutes, the power to create federal law through treaties is plenary in substantive terms, as *Missouri v. Holland*³⁸⁰ definitely declared.³⁸¹ The *Erie* court’s

³⁷⁵ 28 U.S.C. § 1652 (2003). *See also supra* notes 203-204 and accompanying text (discussing the role of the Rules of Decision Act for purposes of federal common law).

³⁷⁶ *See* Redish, *supra* note 28, at 790 (noting that “the terms of the Rules of Decision Act do not require that the particular cases actually involve statutory interpretation” and concluding that the Act creates an exception where an Act of Congress “provide[s]” for “federal judicial power to create common law”). *Cf.* Merrill, *supra* note 28, at 31-32 (observing that “[t]he phrase ‘require or provide’ is broad enough to embrace at least some interpretation of federal texts, and thus to support the creation of some federal common law,” but emphasizing the limits on this notion).

³⁷⁷ As discussed below, the Rules of Decision Act also plays a significant role in allaying separation of powers concerns about a delegation of lawmaking powers through a treaty. *See infra* notes 409-410 and accompanying text.

³⁷⁸ *See supra* notes 51-52 and accompanying text.

³⁷⁹ *See* U.S. CONST. art. I, § 10 (providing that “[n]o State shall enter into any Treaty, Alliance, or Confederation”). *See also* Golove, *supra* note 9, at 1082 (concluding with reference to this provision that “[i]t is clear ... that the whole treaty power is ‘delegated’ to the federal government and specifically ‘prohibited’ to the states”).

³⁸⁰ 252 U.S. 416 (1920).

³⁸¹ As noted above, this proposition has become increasingly controversial in recent years. *See supra* note 12 and accompanying text (examining the scholarly controversy over whether there are any substantive limits on the scope of the treaty power). Nonetheless, whatever the merits of the respective positions, the Supreme Court has shown no inclination at all to reexamine its holding in *Missouri v. Holland*.

concern about federal courts circumventing the substantive limits on federal statutory powers³⁸² thus simply is not present for the law within the scope of treaties.

Of equal importance, the Constitution incorporates greater procedural federalism protections for treaties than for Article I legislation. Before it can become preemptive federal law, a treaty requires the consent of two-thirds of the Senators present.³⁸³ Both this threshold and this institution were carefully chosen by the Framers for federal lawmaking through treaties. As reflected in the basic right of equal representation, the Senate was designed specifically to defend the interests of the States in the national legislature.³⁸⁴ This, together the power of a minority veto, had as its purpose to ensure that treaties may not be used to create federal law in absence of sufficiently overriding national benefits.³⁸⁵ Substantially more than is the case with statutes, therefore, the Constitution incorporates political process impediments to treaty-making as a principal means to protect state interests.³⁸⁶

³⁸² See *supra* note 197 and accompanying text (*quoting* *Erie Railroad v. Tompkins* to the effect that “Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or ‘general,’ and no clause in the Constitution purports to confer such a power upon the federal courts”)

³⁸³ U.S. CONST. art. II, § 2.

³⁸⁴ See Eugene W. Hickok, Jr., *The Framers Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217, 256-57 (1986); Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 U.S.D. L. REV. 671, 718 (1999).

³⁸⁵ See Golove, *supra* note 9, at 1098-99 (arguing that because the states are equally represented in the Senate and because of the requirement of a two-thirds vote for the approval of a treaty, “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 ...”).

³⁸⁶ Recent Supreme Court precedent in the statutory context has rejected the notion that the political process alone protects the federalism interests of the states. See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). As I will discuss separately below, however, there is an important distinction between treaties and statutes in this regard. See *infra* notes 504-505 and accompanying text.

In short, although they do not disappear entirely, federalism concerns over judicial lawmaking diminish considerably for federal law created through treaties. When the treaty-lawmakers overcome the substantial procedural and political barriers to doing so, therefore, the case for the constitutionality of an express delegation of federal common law powers is even more compelling than in the statutory context.

Indeed, one comprehensive self-executing treaty already incorporates such an express delegation of developmental powers for federal courts. The United Nations Convention on Contracts for the International Sale of Goods³⁸⁷—a treaty which broadly displaces the state law Uniform Commercial Code for international sales transactions³⁸⁸—contains an express instruction for courts confronted with gaps in its regulatory scheme. Article 7(2) empowers courts in such situations to construct a rule of decision “in conformity with the general principles” of the Convention.³⁸⁹ As I have explained in considerable detail elsewhere,³⁹⁰ however, neither the treaty itself nor its drafting history anywhere identifies these “general principles;” nor are the courts tied to any specific intent of the drafters in exercising their gap-filling powers under this scheme.³⁹¹ Thus, like the

³⁸⁷ See CISG, *supra* note 165.

³⁸⁸ For a review of the general sphere of application of the UN Sales Convention see Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT’L L. 1, 9-12 (1996).

³⁸⁹ See CISG, *supra* note 165, art. 7(2). It is only if a court is unable to discern any such general principle that this provision permits resort to otherwise-applicable domestic law. *See id.*

³⁹⁰ See Van Alstine, *Treaty Interpretation*, *supra* note 24, at 761-91.

³⁹¹ See Van Alstine, *Treaty Interpretation*, *supra* note 24, at 761-785. This essential fact illustrates that the Convention does not merely grant enhanced interpretive powers to federal courts. Because it is not tied to any specific intent of the drafters, the power of the courts to construct a rule of decision for gaps in the treaty is properly conceived of as delegated lawmaking and not mere interpretation. *See* in this regard Clark, *Federal Common Law*, *supra* note 2, at 1248 (“By hypothesis, at least, federal common lawmaking begins where interpretation ends.”); Field, *supra* note 28, at 890 (defining federal common law as “any rule of federal law created by a court ... when the substance of that rule is not clearly suggested by federal enactments”).

statutory delegations analyzed above,³⁹² by endorsing this gap-filling methodology the treaty-lawmakers have determined to give “the courts the power to develop substantive law”³⁹³ within the scope of this treaty. And, significantly, this delegation approach since has become the paradigm for a whole class of other private law treaties.³⁹⁴

Finally, and relatedly, there also can be little doubt that an express delegation through a treaty requires common law of a single, uniform federal content. In the statutory context the Supreme Court on occasion has found it appropriate to round out a federal regulatory scheme by “borrowing” kindred rules of state law.³⁹⁵ This line of authority clearly is inappropriate for gaps in treaties. As we will see in much greater detail below,³⁹⁶ a basic principle of international law precludes the recognition of the law of municipal subunits in

³⁹² See *supra* notes 229-230 and accompanying text (citing the express statutory delegation in Rule 501 of the Federal Rules of Evidence and the implied delegations in the Sherman Anti-Trust Act, Section 301(a) of the Labor Management Relations Act, and other legislative enactments).

³⁹³ *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). See also Arthur Rosett, *Critical Reflections on the United Nations Conventions on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 299 (1984) (observing that article 7(2) of the UN Sales Convention “seems to express the wish that the broad terms of the Convention be filled in over time by a world common law, a shared body of interpretation that would supply a gloss on the text,” but suggesting that the Convention fails to provide sufficient guidance on this score).

³⁹⁴ See Convention on Factoring, *supra* note 171, art. 4(2); Convention on Receivables Financing, *supra* note 171, art. 8(2); Convention on Security Interests, *supra* note 171, art. 6(2); Convention on Agency in the International Sale of Goods, *supra* note 171, art. 6(2); Convention on International Financial Leasing, *supra* note 171, art. 6(2).

³⁹⁵ See, e.g., *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 97-98 (1991) (observing that in absence of a distinct need for national uniformity or an analogous rule from a related statute “federal courts should “‘incorporat[e] [state law] as the federal rule of decision,’ unless ‘application of [the particular] state law [in question] would frustrate specific objectives of the federal programs’”)(quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)). See also Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895 (1996) (discussing cases in which federal courts have referred to state common law to resolve federal law questions). See also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (holding that “Congress has directed federal courts to interpret Title VII based on agency principles,” but stating that “[t]his is not federal common law in ‘the strictest sense, i.e., a rule of decision that amounts, not simply to an interpretation of a federal statute, but rather, to the judicial ‘creation’ of a special federal rule of decision’”)(quoting *Atherton v. FDIC*, 519 U.S. 213, 218 (1997))).

³⁹⁶ See *infra* notes 466-470 and accompanying text.

defining a nation's treaty obligations.³⁹⁷ Our domestic law adopts essentially the same approach;³⁹⁸ for article I, section 10, of the Constitution prohibits state lawmaking institutions from creating international treaty obligations.³⁹⁹ The result is that our nation's treaty commitments of necessity are defined without reference to the law of any particular state of the Union.⁴⁰⁰

3. Horizontal Allocations of Power: Express Treaty Delegation and the Separation of Powers doctrine

Arguments against federal common law within the scope of treaties extend beyond federalism. Because it reflects a determination in the first instance by the President and the Senate to displace state law, an express delegation of common law powers would resolve

³⁹⁷ See Restatement of Foreign Relations, *supra* note 73, § 311, cmt. a (observing with regard to international agreements that “[a] State of the United States or a subdivision of another state is not a state having capacity to conclude an international agreement”); Vienna Convention on Treaties, *supra* note 74, art. 27 (“A party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.”). Only an express reservation to a treaty can overcome this presumption. For an examination of the import of the absence of such a reservation for purposes of the preemption of state law see *infra* notes 504-505 and accompanying text.

³⁹⁸ See *United States v. Belmont*, 301 U.S. 324, 331 (1937) (declaring that “in respect of our foreign relations generally, state lines disappear. As to such purpose the State ... does not exist.”); *Chae Chan Ping v. United States (the Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (“For 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.”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“[T]he interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”); Restatement of Foreign Relations, *supra* note 73, §201 cmt. g (observing that “[a] State of the United States is not a state under international law since under the Constitution of the United States foreign relations are the exclusive responsibility of the Federal Government.”).

³⁹⁹ U.S. CONST. art. I, § 10 (“No State shall enter into any Treaty, Alliance, or Confederation ...”). See also *supra* notes 51-70 and accompanying text (discussing this provision in its context with the federal government's broader powers over foreign affairs).

⁴⁰⁰ See also *infra* notes 506-527 and accompanying text (analyzing the force of uniformity concerns as a justification for broader assumption of the displacement of state law by treaties).

federalism concerns.⁴⁰¹ The separation of powers doctrine nonetheless represents a separate set of constraints on the exercise of lawmaking powers by federal courts.

(a) Potential Conflicts with Congress’s Legislative Powers

“It has always been accepted,” as David Golove has correctly observed, “that treaties are limited by separation of powers principles.”⁴⁰² In the context of a delegation of developmental powers to federal courts, separation of powers concerns essentially distill into two categories. The first emanates from a potential conflict with the legislative power of Congress defined in Article I. The second, which I will analyze separately in section (b) below, is founded on the non-delegation doctrine and its extension to the Article II treaty context.

Because a treaty does not involve the most representative legislative body (the House of Representatives) a delegation of common law powers through the vehicle of a treaty first raises concerns about trenching on the legislative authority of Congress as a whole.⁴⁰³ These concerns quickly dissolve, however, upon a review of the fundamental nature of the treaty power. Through the doctrine of self-execution, Article II establishes an alternative process for creating federal law.⁴⁰⁴ This lawmaking power exists, as described above,⁴⁰⁵ independent of that in Article I and thus notwithstanding the language in its section 1 that “all legislative

⁴⁰¹ See *supra* Part II.B.2.

⁴⁰² See Golove, *supra* note 9, at 1083.

⁴⁰³ See U.S. Const. art. I, § 1. Recall also that Article I, section 8, clause 3, specifically grants legislative authority to Congress concerning the regulation of “Commerce with foreign nations.” See *supra* note 53. See also Yoo, *Treaty Interpretation*, *supra* note 18, at 1315-1316 (advancing this argument against federal common law under treaties).

⁴⁰⁴ See *supra* notes 76-86 and accompanying text (analyzing the doctrine of self-executing treaties).

⁴⁰⁵ See *supra* notes 322-331 and accompanying text.

powers herein granted” are vested in Congress as a whole.⁴⁰⁶ Indeed, in contrast to the careful list of expressly delegated subject matters in that article, the lawmaking power in Article II is plenary.⁴⁰⁷ As a result, the notion that Congress as a whole possesses “all legislative powers” does not represent a separate impediment to a delegation of the independent powers that are vested in the treaty-lawmakers by Article II.⁴⁰⁸

This is also a context in which the Rules of Decision Act plays a significant, positive role. When carefully considered, the Act directly addresses separation of powers concerns about the lack the House of Representatives involvement in treaty delegations. As we have just seen, the Act authorizes federal courts to apply federal rules of decision when a statute or treaty so “provide[s].”⁴⁰⁹ Because the Act represents standard federal legislation adopted in accordance with the Article I lawmaking procedure, this authorization is a product of Congress as a whole. When, then, a treaty so “provide[s]” for the creation of federal rules of decision in common law fashion,⁴¹⁰ the Rules of Decision Act reflects the consent of the entire Congress (including of course the House of Representatives) for federal courts to apply those rules in the place of otherwise applicable state law.

(b) The Non-Delegation Doctrine

⁴⁰⁶ See U.S. CONST. art. I, § 1.

⁴⁰⁷ See *supra* notes 325-341 and accompanying text (examining the point that the treaty power is plenary, subject only to specific textual rights and prohibitions in the Constitution).

⁴⁰⁸ Cf. Golove, *supra* note 9, at 1286 (observing that the treaty power authorizes the President and Senate “to promulgate laws” and thus concluding that “whenever a treaty makes stipulations on subjects falling within the scope of Congress’s legislative authorities, the treaty overrides the general separation of powers principle that legislative authority is vested in Congress”).

⁴⁰⁹ *Id.* (permitting application of federal law where the Constitution, federal statutes, or treaties so “require or provide”).

⁴¹⁰ See *supra* notes 375-377 and accompanying text (analyzing how the Rules of Decision Act permits the application of federal rules of decision adopted pursuant to a delegation of common law powers to federal courts).

The separation of powers concerns reflected in the non-delegation doctrine represent a more challenging problem. Like the statutory context, the issue here is the propriety of a delegation from constitutionally recognized federal lawmakers to an institution (the federal judiciary) which fundamentally does not possess such a power.

Recall from our analysis of the statutory context the general proposition that Congress may not delegate the entirety of its legislative powers on a given subject to its coordinate branches (whether executive or judicial).⁴¹¹ Presumably, the Supreme Court's generalized observation with regard to Congress's legislative powers that Article I "permits no delegation of those powers"⁴¹² would apply as well to the treaty power. For the strict text of Article II, too, contains no formal indication that the treaty-makers may delegate powers to other constitutional institutions.⁴¹³ Bolstered by the related constitutional values of electoral accountability and adherence to prescribed lawmaking procedures,⁴¹⁴ the question that arises here thus is whether the Constitution at all permits the treaty-lawmakers to delegate developmental powers to federal courts.

The formal and functional arguments in favor of the constitutionality of a treaty delegation, however, are at least as compelling as those for the statutory form of federal law. In the latter context the Supreme Court has long held that the Constitution permits Congress delegate to the courts certain decision-making powers that it otherwise could

⁴¹¹ See *supra* Part III.B.3(b)(analyzing the non-delegation doctrine with regard to federal common law).

⁴¹² *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001)(*citing* *Loving v. United States*, 517 U.S. 748, 771 (1996)).

⁴¹³ See art. II, § 2 (providing that the President "shall have the Power, by and with the Advice and Consent of the Senate to make Treaties, provided two-thirds of the Senators present concur").

⁴¹⁴ See *supra* notes 200-202 and accompanying text (noting the influence of these related principles on the analysis of the propriety of federal common law).

exercise itself.⁴¹⁵ In reasoning equally applicable to the treaty context, the Court has maintained that in light of the diversity and complexity of modern society “Congress simply cannot do its job absent an ability to delegate power under broad directives.”⁴¹⁶ Some degree of policy-making discretion, moreover, is inherent in the judicial enterprise.⁴¹⁷

More important, for some legal subject matters the public interest may be best served by permitting flexibility in, or gradual supplementation of, the law to permit adjustment to future developments. In the context of treaties, decisions about the proper degree of flexibility in the development of the law are vested in the President and the Senate. For treaties that adopt this approach, then, the very judgment that our international interests are best served through a flexible exercise of common law powers reflects an important policy determination by the treaty-lawmakers. One need only consider here as an example the important role of such open-ended notions as good faith, estoppel, and waiver for the law of contracts. It is for these reasons that the Supreme Court traditionally—and properly—has given wide latitude to its coordinate branches of government in their delegation of policy-making discretion to administrative agencies and the judiciary.⁴¹⁸

⁴¹⁵ See *supra* notes 219-220 and accompanying text (*citing, inter alia*, *Loving v. United States*, 517 U.S. 748, 758 (1996) (“We established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself”).

⁴¹⁶ *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

⁴¹⁷ See *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (“Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to ... the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.”).

⁴¹⁸ See *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474 (2001) (observing that throughout its history the Court has overturned the judgments of Congress on delegation issues on only two occasions); *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 executive or judicial actors.”). See also *INS v. Chadha*, 462 U.S. 919, 951 (1983) (holding that “when any Branch acts, it is presumptively exercising the power the Constitution has delegated to it”).

The treaty-lawmakers nonetheless may not delegate wholly unguided power over an entire subject matter. No more than with a statute, a treaty may not simply direct federal courts, say, to create a new body of federal family law.⁴¹⁹ Rather, separation of powers considerations will require that a treaty delegation reasonably mark the boundaries of the lawmaking authority conferred on federal courts.⁴²⁰ In parallel with statutes, a delegation of common law powers thus must at a minimum reasonably set the outer guideposts for the exercise of the delegated discretion.⁴²¹ This condition—which further secures faithfulness to federalism protections⁴²²—ensures that those empowered to create federal law through the vehicle of a treaty must make the core determinations on substantive contours both of the treaty and the discretion delegated under it.

Consider as an illustration the developmental powers conferred by the UN Sales Convention discussed above.⁴²³ Express provisions of the Convention first mark out its overall substantive sphere of application.⁴²⁴ The delegation in article 7(2) then also describes the boundaries within which courts may exercise their lawmaking discretion. It does so by

⁴¹⁹ See *supra* notes 246-247 and accompanying text (discussing this notion in the statutory context).

⁴²⁰ See Merrill, *supra* note 28, at 41 (arguing that, in addition to an intent requirement, a constitutional delegation must circumscribe the allowed field of judicial lawmaking “with reasonable specificity”); Field, *supra* note 28, at 933 (articulating the argument with regard to federal common law that the constitutionally empowered lawmakers must also reasonable set the content for the law to be applied by federal courts).

⁴²¹ See *supra* notes 219-222 and accompanying text (discussing the requirement that a delegation lay down “intelligible principle” to guide the exercise of delegated lawmaking authority). See also, e.g., *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁴²² See *supra* notes 195-198 and accompanying text.

⁴²³ See *supra* notes 387-393 and accompanying text.

⁴²⁴ See CISG, *supra* note 165, art. 1(1) (stating that the Convention applies to only transactions for the sale of goods that also satisfy certain internationality requirements). See also *id.* arts. 2, 4 (excluding certain classes of transactions and issues that otherwise would fall within the scope of the treaty).

expressly authorizing the courts to fill only those regulatory gaps within the outer scope of the treaty and only as guided by the values reflected in its text, context, and drafting history.⁴²⁵

Indeed, separation of powers considerations in the context of treaties, far from being constraints, in fact weigh strongly in favor of federal courts carrying into effect such an express and circumscribed delegation of authority. The Constitution formally entrusts the power to conduct foreign affairs through a treaty to the President and the Senate.⁴²⁶ In some cases—such as the UN Sales Convention⁴²⁷—these treaty-lawmakers may determine that the interests of the United States and its citizens are best advanced by a flexible, casuistic development by the courts to accommodate technological and social advancements in the subject field of law. This flexibility thus itself may be part of the international obligation which the treaty embodies.⁴²⁸ Interestingly, then, the functional consideration that the President and a super-majority of the Senate are best situated to make policy determinations regarding our international treaty obligations is the very principle that requires federal courts to exercise common law powers when directed to do so—or in the words of the Rules of Decision Act, when a treaty so “provide[s].”

⁴²⁵ See *id.* art. 7(2) (providing that the authority to fill gaps only extends to matters “governed by the Convention”).

⁴²⁶ See *supra* notes 45-46 and accompanying text.

⁴²⁷ See *supra* notes 387-393 and accompanying text (analyzing the example of an express delegation provided by the UN Sales Convention).

⁴²⁸ Thus, although the substantive provisions of a private law treaty such as the UN Sales Convention do not involve continuing obligations on the United States in its formal international conduct as a sovereign entity, they reflect international obligations nonetheless. It is simply that the obligations are fulfilled by federal courts giving effect to the substantive provisions of the treaty in private disputes—including the requirement that federal courts fill gaps in the treaty with reference to its unarticulated and unformed “general principles.” See *supra* notes 387-391 and accompanying text (describing the general principles methodology).

Nothing in the mere situation of the Treaty Clause in Article II changes this conclusion. Like Article I legislation, the inclusion of treaties within the federal “judicial Power” means that the final authority over the application of treaty law falls to the federal courts. That the President has the initial authority (with, significantly, the Senate’s consent⁴²⁹) to make treaties does not mean that the executive branch interests automatically preclude the judicial branch from fulfilling an express mandate of interpretive discretion—any more than Congress’s primary authority over Article I lawmaking prohibits all delegations of such authority through that form of federal law.⁴³⁰ The preeminent role of the President in matters of foreign affairs, as we have seen, will justify respect for the interpretive views of the executive branch regarding treaties.⁴³¹ But once a treaty has passed into federal law, the combined power of the Supremacy Clause and Article III means that the judicial enforcement of a treaty proceeds from the same constitutional foundation as that for Article I legislation.⁴³²

C. Conclusion: Express Delegation and Federal Common Law under Treaties

⁴²⁹ See *supra* note 45 and accompanying text.

⁴³⁰ See *supra* Part II.B.1.

⁴³¹ See *supra* note 315 and accompanying text (*citing, inter alia*, *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* 525 U.S. 155, 168 (1999)). See also Van Alstine, *Treaty Delegation*, *supra* note 18, at 1298-1302 (arguing that courts should give only calibrated deference to the interpretive views of the executive branch according to the degree to which a matter affects foreign affairs and the continuing enforcement of the treaty is entrusted to executive branch agencies); Bradley, *Chevron Deference*, *supra* note 99, at 701-07 (suggesting with regard to treaties that courts should apply a form of the “Chevron Doctrine,” which grants deference to the views of executive branch agencies regarding the interpretation of statutes whose administration is entrusted to them by Congress).

⁴³² In absence of an express instruction, separation of powers concerns may counsel increased caution in recognizing implied delegations of common law powers as subject of a treaty moves closer to sensitive matters of international diplomacy. See *infra* notes 546-554 and accompanying text.

In parallel with statutes,⁴³³ an express and delimited delegation of common law powers through a treaty thus does not contravene constitutional limits on federal court lawmaking. As an exercise of an independent power to displace state law, an express delegation by the treaty-lawmakers does not run afoul of federalism limits. If it also reasonably marks the boundaries for the judicial exercise of its lawmaking discretion, such a delegation likewise satisfies concerns based in the separation of powers doctrine about judicial exercises of lawmaking powers vested by Article II in the President and the Senate.

A due respect for the policy judgments of the treaty-lawmakers in fact militates strongly in favor of enforcing a decision that a delegation of flexible developmental powers best furthers the international interests of the United States. Indeed, precisely this kind of appropriate respect animates the Supreme Court’s declaration for statutory delegations—which applies with no less force in the treaty context—that it has “almost never felt qualified to second-guess” its coordinate branches of government “regarding the permissible degree of policy judgment that can be left to those ... applying the law.”⁴³⁴

IV. PRESUMPTIVE FEDERAL LAW IN AN AGE OF TREATIES

A. The Present State of Confusion

Much of the controversy over the lawmaking powers of federal courts arises from the simple fact that, however carefully articulated, the formal content of federal law often suffers from substantial indeterminacy. To put it differently, while the Constitution formally grants federal lawmaking powers to Congress and the President, they frequently fail to provide sufficient guidance to the courts on the application of the law to actual disputes. We

⁴³³ See *supra* Part II.B.1.

⁴³⁴ *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474 (2001)(*quoting* *Mistretta v. United States*, 488 U.S. 361, 416 (1989)(Scalia, J., dissenting)).

have seen above that an express authorization of federal common law by these formal lawmaking institutions—whether through statute⁴³⁵ or treaty⁴³⁶—fully conforms to the Constitution. The friction arises, however, in the more common case in which the degree of authorized judicial discretion does not benefit from such clarity. And in no area is this problem more acute than in the judicial interpretation and application of self-executing treaties.

The Supreme Court often has managed the uncertainty over the scope of federal law by resorting to meta-rules of interpretation. The most familiar, and perhaps most potent, of these is the “presumption against preemption” of state law by federal statutes. In its standard formulation, this background rule of interpretation instructs courts to “start with the assumption” that congressional legislation does not displace state law in a field of traditional state responsibility “unless that was the clear and manifest purpose of Congress.”⁴³⁷ Such a presumption, the Court has reasoned, upholds “the historic primacy of state regulation of matters of health and safety.”⁴³⁸ The validity of this limited view of federal preemption, even in the purely domestic context, is far from clear.⁴³⁹ Nonetheless,

⁴³⁵ See *supra* Part II.B.1.

⁴³⁶ See *supra* Part III.B.

⁴³⁷ *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁴³⁸ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (observing that the presumption against preemption “provides assurance that ‘the federal-state balance’ will not be disturbed unintentionally by Congress or unnecessarily by the courts”) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

⁴³⁹ As Viet Dinh has explained, “the constitutional structure of federalism does not admit to a general presumption against federal preemption of state law.” Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087 (2000). When Congress adopts legislation within the scope of its constitutionally delegated powers, he argues, the proper question is only one of statutory interpretation and not of “the vertical distribution of powers between federal and state governments.” *Id.*, at 2087. Indeed, “the logic of and the principles animating the Supremacy Clause would seem to suggest, if anything, a bias in favor of preemption, not against.” *Id.*, at 2094. See also Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. CT. REV. 175, 181-187 (likewise criticizing the presumption against preemption) [hereinafter Goldsmith, *Preemption*]. But see Clark, *Safeguarding*

the Court has trotted out the presumption with regularity,⁴⁴⁰ and most recently has made clear that it applies both to whether Congress intended “any preemption at all” and to “the scope of its intended invalidation of state law.”⁴⁴¹

Similar, though less explicit, expressions exist for the broader issue of the common law powers of federal courts under statutes.⁴⁴² The reasoning here, with reference to federalism concerns, is that in general Congress possesses only concurrent lawmaking authority with the states. When it legislates in a field of traditional state competence, therefore, courts are directed not to assume an authorization of common law powers; rather, in such cases Congress is presumed to act “against the background of the total *corpus juris* of the states.”⁴⁴³

While these propositions may be well-settled for domestic legislation, the law for self-executing treaties, by a charitable description, suffers from significant incoherence. The Supreme Court at various times in its history—and without any apparent recognition of any conflict—has accepted what are simply incompatible background assumptions about the

Federalism, *supra* note 200, at 1428-30 (disagreeing with Professor Dinh’s argument regarding the presumption).

⁴⁴⁰ See, e.g., *Pharmaceutical Research and Mfrs. of America v. Walsh*, ___ U.S. ___, 123 S.Ct. 1855, 1869 (2003); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494 (1996); *New York State conf. of Blue Cross and Blue Shield Plans v. Travellers Ins. Co.*, 514 U.S. 645, 655 (1995); *BFB v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 206 (1983).

⁴⁴¹ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494 (1996).

⁴⁴² See *Atherton v. FDIC*, 519 U.S. 213, 218 (1997)(observing that the mere existence of a related federal statute does not “automatically show that Congress intended courts to create federal common-law rules”)(*citing* *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)). See also *Bell South Telecommunications, Inc. v. MCImetro Access Transmission Services*, 317 F.3d 1270, 1291 (11th Cir. 2003)(apparently embracing a “clear congressional intent” requirement for federal common law powers under statutes)(*citing* Erwin Chemerinsky, *Federal Jurisdiction* § 6.1, at 350 (3d ed. 1999)(suggesting that there is a “strong presumption” against a power to create federal common law))).

preemptive force of treaties. Consider the following short examples. In *Nielson v. Johnson*,⁴⁴⁴ the Court observed that “as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions ... is not restricted by any necessity of avoiding possible conflict with state legislation.”⁴⁴⁵

Less than a decade later, however, it seemingly adopted the opposite view. In *Guaranty Trust Co. v. United States*,⁴⁴⁶ the Court declared that “[e]ven the language of a treaty wherever reasonably possible will be construed so as not to override state laws,”⁴⁴⁷ inexplicably citing *Nielson* for support.⁴⁴⁸ And shortly thereafter, in *United States v. Pink*⁴⁴⁹ the Court observed in dicta that “[i]t is of course true” that treaties “will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.”⁴⁵⁰ Why such a proposition “of course” is true for a treaty the Court failed to explain.

Most recently, the uncertainty over this issue even provoked a spirited exchange between otherwise philosophical allies on the Court. In *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*,⁴⁵¹ Justice Ginsburg, speaking for the majority, returned to view advanced in *Nielson* on the greater preemptive force of treaties: “Our home-centered preemption analysis,” she

⁴⁴³ *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)(quoting H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 435 (1953)). See also *Atherton v. FDIC*, 519 U.S. 213, 218 (1997)(restating this quote with approval).

⁴⁴⁴ 279 U.S. 47 (1929).

⁴⁴⁵ *Id.*, at 52.

⁴⁴⁶ 304 U.S. 126 (1938).

⁴⁴⁷ *Id.*, at 143 (citing, *inter alia*, *United States v. De la Maza Arredondo*, 31 U.S. (6 Pet.) 691, 748 (1832); *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 34 (1869); *Dooley v. United States*, 182 U.S. 222, 230 (1901)).

⁴⁴⁸ *Id.* (citing *Nielson v. Johnson*, 279 U.S. 47, 52 (1929)).

⁴⁴⁹ *United States v. Pink*, 315 U.S. 203 (1942).

⁴⁵⁰ *Id.*, at 230-31.

opined, “should not be applied, mechanically, in construing our international obligations.”⁴⁵² This provoked a spirited defense by Justice Stevens echoing the earlier views of the Court in *Guaranty Trust* and *U.S. v. Pink*. In his view, Justice Ginsburg’s approach proceeded from a “novel premise,” namely “that preemption analysis should be applied differently to treaties than to other kinds of federal law.”⁴⁵³

Swirling among these contradictory views is a broader uncertainty over the preemptive force of other forms of positive federal law in the foreign affairs arena. Some federal courts have indicated, for instance, that the traditional presumption against preemption should not apply even to federal statutes if they regulate matters of foreign affairs.⁴⁵⁴ And only a few months ago the Supreme Court felt competent in *American Insurance Ass’n v. Garamendi*⁴⁵⁵ to discern an implied preemptive force even from a sole executive agreement.⁴⁵⁶ This notion of implied preemption from such a source triggered a strong dissent from the odd alliance of Justices Ginsburg, Stevens, Scalia, and Thomas.⁴⁵⁷

⁴⁵¹ 525 U.S. 155 (1999).

⁴⁵² *Id.*, at 175.

⁴⁵³ *Id.*, at 177 (Stevens, J., dissenting).

⁴⁵⁴ See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)(stating that when Congress legislates in the foreign affairs arena “[a]ny concurrent state power that may exist is restricted to the narrowest of limits”); *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 97 (1st Cir. 1999)(observing that “preemption is more easily found when Congress has passed legislation relating to foreign relations”), *aff’d*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). The Supreme Court in *Crosby* nonetheless expressly declined to address the presumption issue for foreign affairs statutes. See *Crosby*, 520 U.S. at 362 n. 8. For a broader analysis of the propriety of a presumption for or against preemption with regard to foreign affairs statutes see Goldsmith, *Preemption*, *supra* note 439, at 181-214. See also *id.*, at 197 (arguing that when a federal foreign affairs statute also implicates traditional state prerogatives “the competing presumptions for and against preemption lose coherence and usefulness”).

⁴⁵⁵ ___ U.S. ___, 123 S. Ct. 2374 (2003).

⁴⁵⁶ *Id.*, 123 S. Ct. at 2387-88.

⁴⁵⁷ *Id.*, at 2394-2400 (Ginsburg, J., dissenting).

It is likewise difficult to discern any coherence on the specific issue of the common law powers of federal courts under treaties. The scant guidance from the Supreme Court on this score is at best ambiguous. On the one hand, it long acknowledged that federal courts may identify and give effect to implied provisions of self-executing treaties.⁴⁵⁸ A recent formalist opinion by Justice Scalia nonetheless declared that federal courts are not permitted to “supply a *casus omissus* in a treaty, any more than in a law.”⁴⁵⁹ To do so, he opined, would represent a “usurpation of power.”⁴⁶⁰ Yet the same Justice later penned a majority opinion which clearly assumed that a treaty could confer common law powers on the federal courts, although it concluded that the specific treaty at issue did not do so.⁴⁶¹

The short of the matter is that substantial uncertainty reigns over the powers of federal courts in relation to the self-executing treaty form of supreme federal law. The goal of this Part is to address this uncertainty. We shall see that the existing confusion arises from a failure to appreciate the special nature and functions of self-executing treaties. These attributes substantially undermine the traditional presumptions against federal displacement of state authority in the treaty law context.

B. Treaties and a Presumption of Federal Law

1. Dismantling the Presumption against Preemption

⁴⁵⁸ See *supra* note 156, and accompanying text. See also *United States v. Rauscher*, 119 U.S. 407, 419-23 (1886)(enforcing an implied provision of an extradition treaty); *United States v. Alvarez-Machain*, 504 U.S. 655, 667-68 (1992) (accepting the proposition but finding that it did not apply in the specific treaty at issue).

⁴⁵⁹ *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989)(*quoting* *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821)).

⁴⁶⁰ *Id.* (*quoting* *The Amiable Isabella*, 19 U.S. at 71).

⁴⁶¹ *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 230 (1996)(holding that the Warsaw Convention on International Air Transportation did not “empower [the Court] to develop some common-law rule,” although expressing no doubt about the legal premise for such an authorization).

For statutory exercises of concurrent federal powers, the presumption against preemption proceeds, as we have just seen,⁴⁶² from the premise that Congress legislates with respect for the historical police powers of the States. Manifold and substantial reasons support the conclusion that this background assumption—a “clear statement rule” of judicial origin⁴⁶³—should not obtain for exercises by the President and Senate of the federal treaty-making power.

The first two of these reasons are the most significant, and issue from the unique dual nature of treaties as international law obligation and exclusive federal power. Externally, treaties are creatures of international law; by their very definition they involve the creation of international obligations between the United States and its treaty partners.⁴⁶⁴ In conformance with this, the Supreme Court repeatedly has declared that the point of departure for treaty interpretation is the mutual intent of the treaty parties.⁴⁶⁵

The international law which governs the formation of these “contractual”⁴⁶⁶ obligations—and provides the perspective for our treaty partners⁴⁶⁷—does not recognize any

⁴⁶² See *supra* notes 437-441 and accompanying text.

⁴⁶³ See *United States v. Bass*, 404 U.S. 336, 349 (1971)(referring to the presumption against preemption in these terms).

⁴⁶⁴ See Vienna Convention on the Law of Treaties, *supra* note 74, art. 26 (stating that agreements under international law are binding obligations of the treaty partners); Restatement Foreign Relations, *supra* note 73, §321 (same); *id.*, § 301 (defining an international agreement as “an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law”).

⁴⁶⁵ See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)(observing that in interpreting a treaty a court’s “role is limited to giving effect to the intent of the treaty parties”); *United States v. Stewart*, 489 U.S. 353, 365-66 (1989)(same); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929)(“Treaties are to be liberally construed, so as to effect the apparent intention of the parties.”). See also *Maximov v. United States*, 299 F.2d 565, 568 (2d Cir. 1962)(observing that treaties should be interpreted “to give the specific words ... a meaning consistent with the genuine shared expectations of the contracting parties”), *aff’d*, 373 U.S. 49 (1963).

⁴⁶⁶ The Supreme Court has often observed the “contractual” nature of an international treaty. See *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 533 (1987) (“In interpreting an international treaty, we are mindful that it is ‘in the nature of a contract between

concurrent authority of municipal subunits such the states of the United States.⁴⁶⁸ Nor may the United States (absent an express reservation⁴⁶⁹) rely on the law of such sub-national units to influence the content of its international treaty commitments.⁴⁷⁰ From its very international birth, therefore, treaty law arises with the background not of state law, but rather solely of a single, uniform, national law.

nations.”)(*quoting* *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984)); *Washington v. Wash. Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979) (“A treaty ... is essentially a contract between two sovereign nations.”); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (explaining that “treaties are contracts between independent nations”). *See also* *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (stating that treaties reflect “an agreement among sovereign powers”).

⁴⁶⁷ *See* *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 172-173 (1999) (observing with regard one treaty that “the nation-state, not subdivisions within one nation, is the focus of the [treaty] and the perspective of our treaty partners”); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893)(“The only government of this country, which other nations recognize or treat with, is the government of the Union.... The Constitution of the United States speaks with no uncertain sound upon this subject”).

⁴⁶⁸ *See* *Restatement of Foreign Relations*, *supra* note 73, § 311, cmt. a (observing with regard to international agreements “[a] State of the United States or a subdivision of another state is not a state having capacity to conclude an international agreement”).

⁴⁶⁹ *See id.*, § 313 (stating that a state may attach a reservation to a multi-lateral treaty subject to certain limitations). *Cf. id.*, cmt. f (noting that reservations are rare for bilateral treaties and most often amount to a request for renegotiation of the treaty). Most often, such reservations are attached by the Senate upon its consent to a treaty. *See* *Haver v. Yanker*, 76 US (9 Wall.) 32, 34-35 (1869)(observing that “the Senate are not required to adopt or reject [a treaty] as a whole, but may modify or amend it ...”). An example of an express authorization of a federalism reservation is the United Nations Sales Convention analyzed above, which permits a ratifying nation to declare that the treaty shall not extend to one or more of political subdivisions (although the United States did not make use of this reservation). *See* *CISG*, *supra* note 165, art. 93.

⁴⁷⁰ *See* *Vienna Convention on Treaties*, *supra* note 74, art. 27 (“A party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.”). *See also* *Restatement of Foreign Relations*, *supra* note 73, § 311(3) (“A state may not invoke a violation of its internal law to vitiate its consent to be bound unless the violation was manifest and concerned a rule of fundamental importance.”). The obligation of the United States under international law is not itself a proper subject for adjudication by the federal judiciary. A federal court does not have the authority, for instance, to declare the United States in breach of a treaty for purposes of the international law claims of a foreign treaty partner. The point here is, rather, that the international law perspective of the treaty makers in the creation of a treaty in the first place provides the context for interpreting the content of a treaty when it operates directly as domestic law under the self-execution doctrine.

This is precisely the premise that animated the recent subtle transition in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*.⁴⁷¹ At issue there was whether the self-executing Warsaw Convention on International Air Transportation⁴⁷² displaced certain types of state law personal injury claims.⁴⁷³ Given this substantive background, the Supreme Court not surprisingly confronted the argument that for treaties as well “federal preemption of state law is disfavored generally, and particularly when matters of health and safety are at stake.”⁴⁷⁴ The Court convincingly replied, however, that this view “overlooks ... that the nation-state, not subdivisions within one nation, is the focus of the Convention and the perspective of our treaty partners.”⁴⁷⁵ It thus rejected the view, advanced by Justice Stevens in dissent, that “a treaty, like an Act of Congress, should not be construed to preempt state law unless its intent to do so is clear.”⁴⁷⁶

From a domestic law perspective as well, treaties arise in a context that is markedly different than that for statutes. Recall that the entirety of the treaty power is vested in the federal government and expressly denied to the states.⁴⁷⁷ As a result, the treaty-lawmakers do not act in “competition” with state lawmaking authority.⁴⁷⁸ Moreover, exercises of the

⁴⁷¹ 525 U.S. 155 (1999).

⁴⁷² Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. § 40105.

⁴⁷³ 525 U.S. 172-173.

⁴⁷⁴ *Id.*, at 175.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* (*quoting* Tsui Yuan Tseng, 525 U.S. at 177 (Stevens, J., dissenting)).

⁴⁷⁷ *See supra* notes 51-52 and accompanying text (citing and discussing in particular the prohibition on state treaty making in Article I, section 10, of the Constitution).

⁴⁷⁸ *See* Goldsmith, *Preemption*, *supra* note 439, at 188-189 (drawing a distinction between Congress’s concurrent legislative powers in Article I and the prohibition of treaty-making by the States, and observing that “Article I, Section 10 reflects a decided preference for federal over state regulation with respect to some of the traditional ‘high’-agenda foreign relations issues concerning war, peace, and diplomacy”).

self-executing treaty power—again unlike federal statutes—are not subject to substantive limits.⁴⁷⁹ These fundamental differences with Article I legislation mean that in creating treaty law the President and the Senate operate, from a legal perspective at least,⁴⁸⁰ free of concerns over exceeding their lawmaking powers or otherwise encroaching on the reserved powers of the States.⁴⁸¹

Although not yet fully appreciated in this context, a variety of existing meta-rules of interpretation are consistent with the premise that treaties should be accorded greater deference in relation to other forms of domestic law. For instance, the Supreme Court has long applied a strong presumption that federal statutes should be interpreted to avoid violations of treaties.⁴⁸² A similar presumption obtains regarding the extra-territorial application of federal statutes,⁴⁸³ precisely because of a concern about unintentional

⁴⁷⁹ See *supra* notes 322-331 and accompanying text (examining this point in greater detail).

⁴⁸⁰ As a political matter, the close institutional alliance with the States will mean that the Senate will often act to protect their interests in the treaty-making process. For more on this point see *infra* notes 504-505 and accompanying text.

⁴⁸¹ Even Justice Scalia has emphasized the important distinction with regard to treaties that the Constitution expressly denies such a power to the states. See *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60, 85 (1993)(Scalia, J., concurring)(emphasizing with regard to both the domestic and the foreign commerce clause “the basic point that the Commerce Clause is a power conferred upon Congress (and not a power denied to the States)”); *Tyler Pipe Indus. v. State Dep’t of Revenue*, 483 U.S. 232, 261 (1987)(Scalia, J., concurring in part and dissenting in part) (observing in a spirited criticism of the dormant commerce clause that there is “no correlative denial of power over commerce to the States in art. I, §10, as there is, for example, with the power to . . . make treaties”). Justice Scalia of course is one of the foremost critics of judicial interference with state regulatory powers. See, e.g., *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 263 (1987)(Scalia, J., concurring in part and dissenting in part); *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 202-203 (1990)(Scalia, J., concurring in judgment).

⁴⁸² See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984)(“There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”)(*citing, inter alia*, *Cook v. United States*, 288 U.S. 102, 120 (1933) and *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979)). See also *id.* (observing that “[l]egislative silence is not sufficient to abrogate a treaty”)(*citing* *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)).

⁴⁸³ See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)(“Congress legislates against the backdrop of the presumption against extraterritoriality.”).

interference with matters of foreign affairs.⁴⁸⁴ More broadly, the Supreme Court has concluded that federal statutes should be interpreted to avoid interference with the international law obligations of the United States in general.⁴⁸⁵

This framework for understanding the preemptive force of treaty law also sits comfortably on the broader foundation of the exclusivity of federal power in shaping our foreign relations. As examined in detail above, the Supreme Court throughout its history has emphasized the primacy of federal power over the nation's foreign relations.⁴⁸⁶ Flipping the federalism equation, it likewise has stressed the correlative displacement of state lawmaking authority in the field.⁴⁸⁷ Indeed, as one commentator has observed, the proposition of exclusive federal lawmaking power over foreign relations is so clear and has been reaffirmed so many times "that citations to establish the point seem hardly necessary."⁴⁸⁸

⁴⁸⁴ See Jason Jarvis, *A New Paradigm for the Alien Tort Statute under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 699-700 (2003)(noting that the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord"); Jeffrey E. Gonzalez-Perez & Douglas A. Klein, *The International Reach of the Environmental Impact Statement Requirement of the National Environmental Policy Act*, 62 GEO. WASH. L. REV. 757, 775-86 (1994)(observing that the presumption against extra-territorial application also advances the interests of international comity).

⁴⁸⁵ See, e.g., *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)"[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains"). *But see* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998)(questioning the propriety of this interpretive rule). There is also strong sense in applying a parallel notion to state law. See Clark, *Federal Common Law*, *supra* note 2, at 1357 (citing *The Schooner Charming Betsy* and arguing that "the constitutional structure suggests that states generally lack legislative competence to prescribe binding rules of decision in situations in which federal courts would interpret a federal statute narrowly to avoid violations of international law").

⁴⁸⁶ See *supra* notes 66-69 and accompanying text.

⁴⁸⁷ See *supra* note 67 and accompanying text.

⁴⁸⁸ Golove, *supra* note 9, at 1300. For other scholarly observations to the same effect see Louis Henkin, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 150 (2d ed. 1996) ("At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states "do not exist."); Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* § 4-5, at 656 (3d ed. 2000) ("[S]tate action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void ...").

The precise “negative” force of this exclusive power over foreign affairs in the absence of formal federal lawmaking is the subject of substantial controversy.⁴⁸⁹ It is not necessary for our purposes here, however, to wade into the specifics of the heated debates over a “dormant foreign commerce clause”⁴⁹⁰ or a “dormant foreign affairs power.”⁴⁹¹ Nonetheless, the very existence of such arguments over unused federal powers sets a valuable context for understanding the preemptive force of formal exercises of federal lawmaking authority in the field.

When the federal government exercises its exclusive authority over treaty-making, it acts at the apex of its power to displace state law.⁴⁹² The essence of a treaty is that it addresses a matter, as Justice Holmes famously observed in *Missouri v. Holland*, that is of “national interest.”⁴⁹³ Regardless of the substantive subject, in other words, by incorporating

⁴⁸⁹ See *supra* notes 292-293 and accompanying text (describing this controversy).

⁴⁹⁰ See *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (concluding that the risk of multiple state law rules and the need of the country to “speak[] with one voice when regulating commercial relations with foreign governments” meant that the dormant foreign commerce clause preempted state taxation of international containers). See also *Buttfield v. Stranahan*, 192 U.S. 470, 492-493 (1904) (suggesting that Congress has “exclusive and absolute” control over foreign commerce); *Bowman v. Chicago & N. R. Co.*, 125 U.S. 465, 482 (1888) (“It may be argued [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation”). *But see* *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983) (declining to follow *Japan Line* with regard to the dormant foreign commerce clause); *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60 (1993) (same).

⁴⁹¹ See *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (holding that any state action that has more than an “incidental effect” on the nation’s foreign affairs is preempted even if it does not conflict with any affirmative federal activity in the field). *Cf.* *American Ins. Ass’n v. Garamendi*, ___ U.S. ___, 123 S. Ct. 2374, 2377 (2003) (“State action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict.”).

⁴⁹² See *United States v. Pink*, 315 U.S. 203, 230-231 (1942) (declaring that “state law must yield when it is inconsistent with, or impairs ... the superior Federal policy evidenced by a treaty or international compact or agreement”).

⁴⁹³ 252 U.S. at 433-35. For a broader examination of the background and meaning of *Missouri v. Holland* see Golove, *supra* note 9, at 1257-1266. See also *Geofroy v. Riggs*, 133 U.S. 258,

a matter within the country’s international “contractual” obligations, the federal government transforms it into a matter of national concern. And because it is achieved through negotiation with a foreign power, a treaty of its nature reflects an exercise of federal power that is beyond the “traditional competence” of the states.⁴⁹⁴

To be sure, a self-executing treaty may regulate a substantive subject—such as commercial law⁴⁹⁵—that historically has been addressed by the states. But by including the subject in our nation’s formal international obligations, the treaty-lawmakers elevate it in a unique way to a matter of national concern. That is, in contrast to the internal focus of a standard federal statute, the reference point for a treaty is the external relationship with a foreign power. And it is with reference to this external relationship that even the domestic law incidents of the treaty (through the self-execution doctrine) must be weighed and measured. Almost from its very nature, therefore, state law regulation of a matter within the

266-67 (1889)(“That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear.”)(*citing* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817); and *Hauenstein v. Lynham*, 100 U.S. 483 (1879)). *See also* *In re Ross*, 140 U.S. 453, 463 (1891)(“The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments.”); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924)(“The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend ‘so far as to authorize what the Constitution forbids,’ it does extend to all proper subjects of negotiation between our government and other nations.”); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931)(“The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations”).

⁴⁹⁴ *See* U.S. CONST. art. I, § 10 (forbidding state from concluding treaties). *See also supra* notes 437-441 and accompanying text (noting that the presumption against preemption applies where Congress legislates in areas of traditional state competence). *Cf.* *United States v. Locke*, 529 U.S. 89, 108 (2000)(observing that the “‘assumption’ of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence”)(*citing* *Rice v. Santa Fe Elevator Corp.*, 331 U.S., 218, 230 (1947)). In a cryptic footnote in *American Ins. Assn’s v. Garamendi*, the Supreme Court hinted that whether a subject matter is one of “traditional state competence” may remain of relevance for purposes of “dormant foreign affairs” preemption. *See* 123 S.Ct. at 2389, n.11. It declined, however, to address the force of the competing federal interests even when the subject is one of traditional state competence. *See id.*

⁴⁹⁵ *See supra* notes 165-172 and accompanying text (describing the variety of self-executing treaties in the field of commercial law).

outer boundaries⁴⁹⁶ of a treaty are prone to “stand[] as an obstacle” to foreign affairs purposes of a treaty.⁴⁹⁷

Indeed, only this past term the Supreme Court emphasized the preemptive force of even a sole executive agreement, which (lacking any legislative imprimatur at all) reflects perhaps the weakest form of federal foreign affairs law.⁴⁹⁸ The Court in *American Insurance Ass’n v. Garamendi* found that the President, acting alone, had the power to create a foreign affairs policy through such a vehicle;⁴⁹⁹ and it concluded that even the President’s unarticulated purposes behind the executive agreement had the power to displace state law.⁵⁰⁰ The preemptive force of a formal treaty of its nature is even broader, for it is founded on express (rather than implied⁵⁰¹) constitutional authority and involves the cooperation of both the executive and legislative branches in creating federal law.

In some cases, the treaty-lawmakers will clear away any doubt over the interests of uniformity through a formal treaty provision. With such an express uniformity directive—

⁴⁹⁶ By “outer boundaries” I mean here a treaty’s general subject matter. To pick an absurd example, a self-executing treaty on, say, international sales of goods does not create a presumption in favor of preemption of state law for international marriages. The presumption would only operate for internal gaps in the treaty and in defining the immediate edges of a treaty’s scope. See, e.g., CISG, *supra* note 165, art. 1 (defining the “sphere of application” of the UN Sales Convention).

⁴⁹⁷ See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (concluding that state law is preempted when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). See also *supra* notes 282-284 and accompanying text (describing “obstacle preemption”).

⁴⁹⁸ ___ U.S. ___, 123 S. Ct. 2374 (2003). See also *id.*, at 2378 n.14 (observing that when acting through a sole executive agreement the President “does not have the ‘plenitude of Executive authority’” that exists when it is supported by an express congressional authorization) (quoting *Crosby*, 530 U.S. at 376)).

⁴⁹⁹ *Id.*, at 2380-2381.

⁵⁰⁰ *Id.*, at 2378-2379.

⁵⁰¹ See *id.*, at 2386 (holding that “the source of the President’s power to act in foreign affairs does not enjoy any textual detail” but observing that “our cases have recognized that the President has authority to make ‘executive agreements’ with other countries”) (citing, *inter alia*, *Dames & Moore v. Regan*, 453 U.S. 654, 679, 682-683 (1981)).

similar to the one in a separate provision of the U.N. Sales Convention and its progeny⁵⁰²—the operation of diverse state law rules directly would conflict with an “identifiable federal policy or interest.”⁵⁰³ In such cases, the arguments for federal court interstitial lawmaking to fulfill the interests of national uniformity are at their most compelling.

Finally, any lingering doubts about unintended displacements of state law are addressed when one considers the special procedural protections of state interests in the treaty-making process. With the fortifying force of a minority veto, the Senate’s role as a representative of the states in the treaty-making process is significantly more powerful than in standard Article I lawmaking.⁵⁰⁴ There is also strong evidence that the Senate aggressively makes use of this power, in particular in the increasingly common practice of attaching federalism and non-self-execution reservations to certain categories of treaties.⁵⁰⁵ In light of this power and practice, silence by the Senate regarding relationship of a treaty with state law should mean more than in the common case of congressional silence in the statutory context.

The result of all of these considerations is that the traditional “presumption against preemption” of state law should have no place in the application of treaty law. To the

⁵⁰² See, e.g., CISG, *supra* note 165, art. 7(1) (providing that interpreters of the convention must have regard for “the need to promote uniformity in its application”); Convention on Factoring, *supra* note 171, art. 4(1)(same); Convention on Receivables Financing, *supra* note 171, art. 8(1)(same); Convention on Security Interests, *supra* note 171, art. 6(1) (same). See also *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F.Supp.2d 1142 (N.D. Cal. 2001)(concluding that the UN Sales Convention’s uniformity directive reflected an intent by the treaty-lawmakers to preempt state law claims within the scope of the Convention).

⁵⁰³ See *Boyle v. United Technologies*, 487 U.S. 501, 507 (1988)(*quoting* *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

⁵⁰⁴ See *supra* notes 383-386 and accompanying text (describing the Senate’s special role as protector of state interests in the treaty-making process).

⁵⁰⁵ For an examination of such reservations with regard to human rights treaties see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

contrary, the external, international perspective of treaty-making; the exclusivity of the federal treaty-making power, which is both substantively unlimited and does not operate in competition with state law; and the force of the formal expression of a national interest through a treaty militate for a background assumption in favor of federal law for matters within the scope of a self-executing treaty.

2. Treaties and Interstitial Judicial Lawmaking

(a) The Uniquely Federal Interest in the Contractual Obligations of a Treaty

A determination that treaties presumptively should have a broad preemptive scope does not resolve the distinct and weightier issue of federal common law powers in the same context. Careful analysis nonetheless reveals that, as compared to implied authorizations in purely domestic law statutes,⁵⁰⁶ a more accommodating approach toward interstitial federal court lawmaking is appropriate for self-executing treaties.

The analysis here properly begins with background provided by *Banco Nacional de Cuba v. Sabbatino*.⁵⁰⁷ Recall that in *Sabbatino* the Supreme Court recognized that core issues “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.”⁵⁰⁸ It likewise emphasized that, in combined effect, a variety of constitutional and statutory provisions “reflect[] a concern for uniformity

⁵⁰⁶ In this section I expand significantly on my earlier observations on the subject. See Van Alstine, *Treaty Delegation*, *supra* note 18, at 1286-1294 (arguing with specific reference to express delegations of common law powers under treaties that such delegations satisfy constitutional concerns if they reflect a specific intent of the treaty-lawmakers). As I will explain in the text that follows, the necessary intent for implied delegations is merely that a specific matter is included within the scope of a self-executing treaty, subject to any special separation of powers concerns.

⁵⁰⁷ 376 U.S. 398 (1964).

⁵⁰⁸ *Id.*, at 425. See also *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)(observing that one “enclave” of federal common law covers “international disputes implicating ... relations with foreign nations”).

in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions."⁵⁰⁹ Even in absence of formal guidance from Congress and the President, therefore, the federal courts are empowered to resolve such issues as a matter of federal common law.⁵¹⁰

We have seen above that a strong federal interest in a particular subject does not alone authorize federal common lawmaking.⁵¹¹ But as should now be clear, the exclusive federal power over the nation's international relations also represents perhaps the most prominent field of "uniquely federal interests."⁵¹² In such cases, the Supreme Court has emphasized, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption."⁵¹³ And where federal exercises of lawmaking powers "by their nature are and must be uniform in character throughout the Nation" they likewise "necessitate formulation of controlling federal rules" by federal courts.⁵¹⁴

For formal exercises of the federal foreign affairs powers through treaties, the requisite conflict with the operation of state law arises from the vital interests of

⁵⁰⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)(*citing* U.S. CONST. Art, I, § 8, cls. 3, 10; art. II, §§ 2, 3; art. III, § 2; 28 U.S.C. §§ 1251(a)(2), (b)(1), (b)(3); 1332(a)(2); 1333; 1350; 1351 (1964)). *See also* *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933)("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.").

⁵¹⁰ *Id.*, at 425-27.

⁵¹¹ *See supra* notes 267-268 and accompanying text.

⁵¹² *See supra* Part II.B.2. (analyzing the recognized enclaves of federal common law).

⁵¹³ *Id.*, at 507-08 (*quoting* *Rice v. Santa Fe Elevator Corp.*, 331 U.S., 218, 230 (1947)).

⁵¹⁴ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)(*quoting* *United States v. Yazell*, 383 U.S. 341, 354 (1966)). *See also* *Boyle*, 487 U.S. at 508 (holding that where the federal interests in a field require a uniform federal rule "the entire body of state law applicable to the area conflicts and is replaced by federal rules"). (*citing* *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943)).

uniformity.⁵¹⁵ From their very nature, the international “contractual” obligations represented by a treaty have only one content.⁵¹⁶ A conflict from the operation of state law in such a context springs from the simple fact that the nation’s treaty obligations otherwise may be defined by 50-plus different state law rules. The Supreme Court’s observation about the rights and obligations of the federal government on commercial paper it issues thus is equally apt here:

The application of state law ... would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.⁵¹⁷

If a matter is presumptively within the scope of a treaty, then, the resolution of related disputes over content and application equally presumptively requires a uniform rule.⁵¹⁸ When unintended gaps emerge within the intended scope of a treaty federal courts

⁵¹⁵ See *Boyle*, 487 U.S. at 508 (“In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules.”)(citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943)).

⁵¹⁶ See *supra* note 465 and accompanying text (citing authority for the proposition that the primary rule of treaty interpretation is to give effect to the mutual intent of the treaty parties).

⁵¹⁷ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

⁵¹⁸ As some courts have recognized, this point may be equally applicable to federal common law under legislation that directly implements a treaty. See *In re Estate of Marcos*, 910 F. Supp. 1460, 1469 (D.Haw.1995)(observing with regard to the implementing legislation for the Torture Convention, the Torture Victims Protection Act, that “[b]ecause Congress in the TVPA offered no methodology as to how damages should be determined, federal courts are free to and should create federal common law to provide justice for any injury contemplated by the Alien Tort Statute and the TVPA or treaties dealing with the protection of human rights”), *aff’d*, 103 F.3d 767 (9th Cir 1996); *Chiminya Tachiona v. Mugabe*, 216 F.Supp.2d 262, 267 (S.D.N.Y. 2002)(same).

thus must as necessary supply a uniform, federal law solution,⁵¹⁹ in absence of more formal guidance in the treaty’s text, context, and drafting history.⁵²⁰

Indeed, a compelling analogy already exists in a well-established “enclave” of federal common law. It is now established jurisprudence that the “obligations to and rights of the United States under its contracts are governed exclusively by federal law.”⁵²¹ Where, then, a disputed issue arises for which a legislative solution is lacking, it is the constitutional responsibility of the federal courts to supply a consistent, uniform rule of federal common law.⁵²² And as the Supreme Court made clear in *Boyle*, where the contractual rights or obligations of the United States are implicated, federal courts have such a responsibility and power even if such issues arise in disputes solely between private parties.⁵²³

⁵¹⁹ *Cf. McGurl v. Trucking Employees of North Jersey Welfare Fund, Inc.*, 124 F.3d 471, 481 (3rd Cir. 1997) (“If state law is preempted and no specific federal provision governs, a court is forced to make law or leave a void where neither state nor federal law applies; in such a situation it is a reasonable inference that Congress intended some law, and therefore federal law, to apply”) (quoting *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.*, 426 F. Supp. 316, 322 (N.D. Ind. 1977)).

⁵²⁰ For a comprehensive analysis of the accepted means of treaty interpretation see David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994); Van Alstine, *Treaty Interpretation*, *supra* note 24, at 738-761; James C. Wolf, *Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023 (1988).

⁵²¹ *Boyle*, 487 U.S. at 504-05 (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-594 (1973), *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456 (1945), and *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943)). It is also interesting to note here that the *Boyle* court recognized the propriety of federal common law in such a private disputes even in the face of a spirited dissent by Justice Brennan based on the power of *Erie*. See *Boyle*, 487 U.S. at 515, 517 (Brennan, J., dissenting) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and arguing that “*Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law”).

⁵²² See, e.g., *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594 (1973) (“[T]he right of the United States to seek redress for duly authorized proprietary transactions ‘is a federal right, so that the courts of the United States may formulate a rule of decision.’”) (quoting Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.L. REV. 383, 410 (1964)). See also *Boyle*, 487 U.S. at 504-08 (holding that in absence of congressional guidance federal courts may exercise lawmaking powers regarding the contractual obligations of the United States) (citing, *inter alia*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943)).

⁵²³ *Id.*, at 506 (holding that “it is plain that the Federal Government’s interest in the [contractual] procurement of equipment is implicated by suits such as the present one—even though

An international treaty likewise represents the contractual obligations of the United States, although this time in relation to a foreign nation.⁵²⁴ Like its domestic law counterpart, therefore, the identification of the federal government's sovereign obligations under a treaty is a matter of uniquely federal interest which of its nature requires uniform national rules.⁵²⁵ It emerges from a mere statement of the proposition that the possible application of multiple, potentially inconsistent, state law rules directly conflicts with the national interest in a uniform definition of our treaty obligations with foreign states.

In addition, and again like the parallel proposition recognized in *Boyle*, because the obligations of the United States are implicated, federal common law is appropriate even with regard to the rights of private parties derived from self-executing treaties.⁵²⁶ Indeed, the

the dispute is one between private parties"). Perhaps the clearest statement of the propriety of federal common law in this area comes from *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973):

Since *Erie*, and as a corollary of that decision, we have consistently acted on the assumption that dealings which may be 'ordinary' or 'local' as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision; particularly is this so when transactions undertaken by the Federal Government are involved ... In such cases, the Constitution or Acts of Congress 'require' otherwise than state law govern of its own force. *Id.*, at 592-94.

⁵²⁴ See *supra* notes 466-470 and accompanying text.

⁵²⁵) See also Restatement of Foreign Relations, *supra* note 73, § 325, cmt. d ("Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems.").

⁵²⁶ This is true even though for purely private law treaties the international obligations are fulfilled not through executive branch conduct, but rather by judicial enforcement in private disputes. This aspect even of private treaties once again emphasizes the differences between self-executing treaties and standard Article I legislation. Through such a treaty, the United States obtains benefits for its internationally active citizens. It could, of course, simply pass domestic legislation that is substantially similar in content to an international treaty. But if it does not formally ratify the treaty in accordance with constitutionally prescribed procedures and if the legislation does not fully conform to the limitations of the treaty, the United States would not be a "Contracting State" for purposes of other nations. See, e.g., CISG, *supra* note 165, art. 1(1)(describing the scope of the treaty with reference to which nations are "Contracting States"). As a result, the putative "treaty partners" would not be obligated to grant the substantive benefits of the treaty to citizens of the United States.

argument for such interstitial judicial lawmaking is even more compelling in the treaty context. The private rights under self-executing treaties exist solely because of the contractual obligations of the United States first established in the treaty. By definition, therefore, these private rights derive from, and are limited by the content of, the treaty obligations of the United States. And, significantly, those international obligations exist in relation to a sovereign entity that is external to our national polity.⁵²⁷

Finally, a variety of existing interpretive institutions already function to prefer uniform national solutions for unresolved treaty issues. First, from its earliest treaty cases the Supreme Court has declared that federal courts should be open to a liberal, purposive interpretation of treaties.⁵²⁸ Thus, in a recent formulation, “a treaty should generally be ‘construe[d] ... liberally to give effect to the purpose which animates it’” and “[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.”⁵²⁹

⁵²⁷ This is not to say that all contractual obligations under treaties are of the same nature. As I have explained in detail elsewhere, some treaties do not involve any continuing obligations for the executive branch of the United States in its international conduct as a sovereign entity. *See* Van Alstine, *Treaty Delegation*, *supra* note 18, at 1279-1280. Prominent examples include commercial law treaties such as the United Nations Sales Convention, whose operative provisions create only rights and obligations between private parties and impose no continuing substantive obligations on the United States. *See* Van Alstine, *Treaty Interpretation*, *supra* note 24, at 700-01. As a result, a different interpretive approach is required for the application of such treaties to private disputes. Even these treaties nonetheless involve sovereign obligations of the United States, although those obligations are fulfilled through a faithful application by domestic courts. *See also infra* notes 542-543 and accompanying text (noting that even private law treaties may be the subject of international law disputes).

⁵²⁸ *See* *Shanks v. Dupont*, 28 U.S. 242, 249 (1830)(rejecting a narrow interpretation of individual rights under a treaty and concluding, “[i]f the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?”); *Nielson v. Johnson*, 279 U.S. 47, 52 (1929)(“When a treaty provision fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.”).

⁵²⁹ *United States v. Stuart*, 489 U.S. 353, 368 (1989)(*quoting* *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940)). As I have noted elsewhere, however, it is open to doubt

In addition, the Court has found that interests of national uniformity require federal courts to accord “considerable weight” to interpretive opinions by the courts of our treaty partners.⁵³⁰ This again confirms the external, international perspective required for the interpretation of our nation’s treaty obligations. Considerations of uniformity in our foreign policy likewise make it appropriate for federal courts to give calibrated respect to reasonable interpretive opinions of the President,⁵³¹ although no such deference applies for Congress with regard to Article I legislation.⁵³²

(b) Differentiating Gaps *Intra Legem* from Gaps *Praeter Legem*

The mere existence of a treaty does not mean of course that all potentially related issues are transformed into matters of federal common law. Rather, a proper appreciation of the judicial role requires a careful understanding of the difference between so-called gaps *intra legem* and gaps *praeter legem*. The former involve matters which are logically within the outer boundaries of a treaty, but which the drafters nonetheless intentionally excluded from its scope.⁵³³ In such cases, the gaps in the treaty reflect an express determination by the treaty-makers not to include certain issues within the international obligations of the United

whether this rhetoric has influenced the practical outcome of treaty interpretation cases in the Supreme Court. *See* Van Alstine, *Treaty Interpretation*, *supra* note 24, at 725 n.153.

⁵³⁰ *See* *Air France v. Saks*, 470 U.S. 392, 404 (1985) (stating with regard to treaty interpretation that “the opinions of our sister signatories are to be entitled to considerable weight”)(*quoting* *Benjamins v. British European Airways*, 572 F.2d 913, 919 (1978), cert. denied, 439 U.S. 1114 (1979)); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999) (citing to “decisions of the courts of other Convention signatories” to “corroborate” the Court’s interpretation of the Warsaw Convention on air transportation).

⁵³¹ *See* in this regard *supra* note 315 (citing Supreme Court authority for the principle that respect is ordinarily due the reasonable interpretive views of the Executive Branch on the meaning of treaties).

⁵³² *See supra* note 314 and accompanying text (describing this proposition and citing authority).

⁵³³ Consider again the UN Sales Convention as an example. Although that treaty broadly governs the rights and obligations under international sales transactions, its article 2 expressly excludes a variety of transaction categories from its scope. *See* CISG, *supra* note 165, art. 2.

States. For these issues, therefore, it is entirely appropriate to apply the otherwise-applicable domestic rules of decision, including in the proper case state law.⁵³⁴

Gaps *praeter legem*, on the other hand, involve substantive issues that remain within the regulatory scope of a treaty. In this case, however, although a matter is within the treaty's intended scope, the treaty-makers—through oversight, inadvertence, or otherwise—unintentionally have failed to provide formal guidance on its resolution. In other words, the unresolved issue remains subject to the substantive reach of the treaty. For such gaps *praeter legem*, then, the treaty-lawmakers have determined for federalism purposes that state law is to be displaced by rules of a federal origin. Because this is so, the paramount interests of national uniformity discussed above properly will militate—absent guidance from the treaty's text, context, or drafting history⁵³⁵—in favor of the application of a federal rule of decision supplied by federal courts.⁵³⁶

Of course, the determination of the character of a particular gap often will be a difficult enterprise. Separation of powers concerns also may counsel special discretion for

⁵³⁴ It is nonetheless possible that federal common law would be appropriate even for such issues. The justification for doing so, however, would have to emanate from a source other than the treaty power. An example would be a treaty that addresses the liability of a state for expropriation, but does not do so comprehensively. If a matter intentionally excluded from the scope of the treaty—say, an expropriation of assets concerning a state's natural resources—comes before a court, the basic proposition established in *Sabbatino* would require resolution as a matter of federal common law irrespective of the delegation argument advanced in the text.

⁵³⁵ Federal courts need not supply a rule of their own making, of course, if the text and drafting history of a treaty reflect an intent of the drafters in favor of a particular solution to a disputed issue.

⁵³⁶ The foundation of a formal treaty also dissipates the concerns of some critics about unbridled exercises of federal common law powers solely because of the international law context. See Bradley & Goldsmith, *supra* note 9 (criticizing the “modern position” that federal courts have the power to apply norms of customary international law as an element of federal common law). For the law within the scope of a treaty, federal courts do not derive their lawmaking authority from the general foreign affairs “enclave” of federal common law. Rather, the exercise of such powers is appropriate only when the substantive content of the treaty expressly or impliedly so requires or provides.

some treaties, a subject I address in the final section below.⁵³⁷ But it is also precisely for resolution of such doubtful issues that the background assumption of treaty preemption of state law operates to favor the latter category for gaps in a treaty's regulatory scheme.⁵³⁸

(c) Interstitial Lawmaking and Error Costs

Consideration of the costs of interpretive error, finally, also supports a more accommodating approach to interstitial lawmaking powers under treaties. Consider first an erroneous decision by a federal court not to provide a uniform federal law solution. If treaty-lawmakers nonetheless intended the matter to fall within the scope of a treaty, the result of such an erroneous determination is that fifty-plus (potentially inconsistent) state law rules will give content to a matter of federal law—a proposition the Supreme Court has rejected since at least *Martin v. Hunter's Lessee* in 1816.⁵³⁹

In the process, the error also would amount to a breach of our international treaty obligations. That is, if a treaty was designed to govern an issue, but due to inadvertence or otherwise did so only imperfectly, a decision to allow diverse state law solutions greatly enhances the risk of international discord with the nation's treaty partners. Judicial determinations may violate treaty obligations just as actions of any other governmental institution.⁵⁴⁰ To cure the error also would require the cooperation of sovereign entities

⁵³⁷ See *infra* Part IV.C.

⁵³⁸ See *supra* Part IB.1. (analyzing the case for a broader assumption that self-executing treaties displace state law).

⁵³⁹ 14 U.S. 304, 347-360 (1816)(warning that if federal courts could not supervise state court interpretations of federal law, “and harmonize them into uniformity, ... the treaties ... of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states”).

⁵⁴⁰ See *Loewen Group v. United States*, at 14 (ICSID opinion of June 26, 2003)(holding in a NAFTA arbitration that the United States was “responsible” for the failure of a Mississippi trial judge to conduct a fair trial for a Canadian company contrary to the protections afforded by the NAFTA treaty); *id.*, at 42 (holding that under international law “[a] decision of a court of a State is imputable to the State because the court is an organ of the state”).

external to our polity (namely, the treaty partners). Such a renegotiation may be difficult in some cases, and practically impossible for broad multi-lateral treaties.⁵⁴¹

Even for purely private law treaties judicial interpretive errors may engender significant international disputes. Witness, for instance, the controversies provoked by alleged failures of German courts faithfully to apply the Hague Child Abduction Treaty.⁵⁴² Although they arose solely between private litigants asserting treaty rights, the disputes led to negotiations between the United States and Germany at the highest levels of government.⁵⁴³

On the other hand, an error in favor of federal law will have significantly less serious implications. In this case, the premise is that a disputed issue was not intended to be within the scope of the treaty in the first place. If a court erroneously decided otherwise, however, a simple federal statute could restore the matter to state law control.⁵⁴⁴ The original error, moreover, would not involve a breach of the treaty itself. And, unlike the reverse proposition, because the matter was not within the scope of treaty obligations in the first place, the later statutory correction would not be a matter of international concern. In short, the relative impact of error in the application of international treaties suggests that federal courts should err on the side of resolving doubtful issues through the application of a uniform rule of federal law.

⁵⁴¹ See Van Alstine, *Treaty Interpretation*, *supra* note 24, at 777 (observing that “legal and logistical obstacles effectively make a formal amendment of [a multi-lateral] international commercial law convention impossible”).

⁵⁴² The Hague Convention on the Civil Aspects of International Child Abduction, concluded Oct. 25, 1980, 23 T.A.I.S. 11,670, 1343 U.N.T.S. 89.

⁵⁴³ See *Germany Bows to U.S. on Custody Disputes*, THE WASHINGTON POST, section A, p. A1 (May 30, 2000); *German Promise of Visitation Applauded; U.S. Parents of Abducted Children Caution Limited Access Is Only “First Step,”* THE WASHINGTON POST, section A, p. A22 (May 31, 2000).

⁵⁴⁴ There would be no separation of powers concerns if Congress were to overturn an erroneous federal court decision that resolved a treaty issue as a matter of federal common law. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that when an act of legislation conflicts with

C. Treaties and Separation of Powers Concerns over Federal Common Law

The analysis above demonstrates that the “uniquely federal interest” in the definition of the nation’s treaty obligations militates in favor of accepting federal court authority to displace state law. The principal effect of this is to address the paramount concern of federalism regarding federal court lawmaking. This is by no means the whole story, however. Interstitial lawmaking by federal courts in sensitive issues of international treaty law also may raise distinct separation of powers issues. Although the special constitutional role of treaties recommends a more flexible approach in this context,⁵⁴⁵ it is appropriate as a final stage in our analysis to address the concerns which animate the separation of powers doctrine with regard to the judicial application of self-executing treaties.

The most potent of these concerns relates to institutional competence. The expansive federal power to create self-executing treaty law is of course vested by the Constitution in the President and the Senate.⁵⁴⁶ These formal lawmaking bodies possess important institutional advantages over the judiciary in fact-finding and setting national policy, and no more so than the President in sensitive issues of international diplomacy.⁵⁴⁷

the self-executing provisions of a treaty, “the one last in date will control the other”); *Beard v. Greene*, 523 U.S. 371, 376 (1998)(same).

⁵⁴⁵ See Golove, *supra* note 9, at 1086 (arguing that “the requirements of the separation of powers may ... sometimes require a somewhat more forgiving construction when applied to treaties”). See also *id.*, at 1286 n.717 (observing with specific regard to delegation by treaty that “given the different contexts to which treaties and laws apply, ...separation of powers principles may sometimes apply differently to treaties”).

⁵⁴⁶ See *supra* note 46 and accompanying text.

⁵⁴⁷ See *American Ins. Assn’s v. Garamendi* ___ U.S. ___, 123 S. Ct. 2374, 2386 (2003)(asserting that “the historical gloss on the ‘executive Power’ of the President ‘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”); *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”). Cf. *Mistretta v. United States*, 488 U.S. 361, 383 (1989)(noting with regard to delegation that “we have expressed our vigilance against [the] danger[] ... that the Judicial Branch

The Supreme Court itself has highlighted these advantages over the federal courts regarding foreign affairs matters.⁵⁴⁸

Nonetheless, the application of self-executing treaties, like other forms of federal law, falls within the formal province of the federal judiciary.⁵⁴⁹ Moreover, foreign affairs implications can differ substantially from treaty to treaty. Some may directly regulate the rights and obligations of the United States in its international conduct as a sovereign entity or otherwise touch on delicate subjects of international diplomacy. The Geneva Convention Relative to the Treatment of Prisoners of War might provide a good example here.⁵⁵⁰ For treaties of this nature, the impact from the judicial application of a treaty on the nation's foreign affairs and in relation to the executive branch's international conduct may be substantial.⁵⁵¹

neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches'")(*quoting* Morrison v. Olson, 487 U.S., 654, 680-681 (1988)).

⁵⁴⁸ See, e.g., Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1953)(stating that for the Court to "run interference" in a "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."); Chicago & S Air Lines Inc. v Waterman SS Corp., 333 US 103, 111 (1948)(affirming that delicate issues of foreign policy are matters "for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry").

⁵⁴⁹ See *supra* notes 310-313 and accompanying text (examining this point in detail).

⁵⁵⁰ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 20 U.S.T. 3316, 75 U.N.T.S. 135. Some courts have held that this Geneva Convention is self-executing. See *United States v. Noriega*, 808 F. Supp. 791, 797 n.8 (S.D. Fla. 1992)(holding that "it is inconsistent with both the language and spirit of the [Geneva Convention] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of law"); *U.S. v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002)(holding that certain provisions of the Geneva Convention on Prisoners of War are self-executing and thus "are a part of American law and ... binding in federal courts under the Supremacy Clause" and noting that this point "[was] essentially conceded by the [U.S.] government").

⁵⁵¹ See Van Alstine, *Treaty Delegation*, *supra* note 18, at 1298-1299 (arguing that federal courts should accord only calibrated deference to executive branch interpretations of treaties, but that this deference should be greatest for diplomatic, national defense, and related treaties as to which the foreign affairs implications and executive branch expertise are the greatest).

But not all treaties implicate such issues equally. As the Supreme Court insightfully recognized in *Sabbatino*, such differences play an important role in assessing the propriety of judicial action:

It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.⁵⁵²

This suggests a form of interpretive spectrum for the discretionary powers of federal courts. As the substantive subject of a treaty moves closer to the regulation of the international conduct of the United States as a sovereign entity, separation of powers concerns may counsel for increased caution by federal courts. This does not mean, of course, that courts may not accept an express (or even implied) delegation in such circumstances. Nor does the mere existence of potential foreign affairs implications transform all related issues into political questions beyond the competence of the courts.⁵⁵³ But the fact that a treaty creates obligations for the executive branch in its international conduct on behalf of the United States provides an important interpretive context. For such treaties, it is appropriate for federal courts to be circumspect in accepting that the President

⁵⁵² *Sabbatino*, 376 U.S. at 428.

⁵⁵³ See, e.g., *Baker v. Carr*, 369 U.S. 186, 211 (1962) (observing that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”); *Hopson v. Kreps*, 622 F.2d 1375, 1380-1382 (9th Cir. 1980) (rejecting an argument by the executive branch with regard to the validity of Commerce Department regulations under the 1946 International Whaling Convention that the “interpretation of the Convention [was so] intertwined with foreign policy considerations that a court has no jurisdiction to consider the validity of the regulations”); *Planned Parenthood Federation of America, Inc. v. Agency for Intern. Development*, 838 F.2d 649 (2nd Cir. 1988) (stating with regard to a First Amendment challenge to international family planning grants that “[t]he fact that this case involves foreign affairs, an area constitutionally committed to the executive and legislative branches, does not end the court’s inquiry as to whether the action presents a political question”).

and Senate impliedly delegated the authority to affect those obligations, at least in absence of specific guidance in the treaty itself.⁵⁵⁴

At the other end of the interpretive spectrum, however, are private law treaties that define no continuing formal obligations for the executive branch. A variety of self-executing (often multi-lateral) treaties solely regulate the relations between private parties.⁵⁵⁵ Recall again as a prominent example here the UN Sales Convention, which solely defines rights and obligations as between private parties involved in defined international commercial law transactions.⁵⁵⁶ With such treaties, the separation of powers concerns are at their lowest; for interstitial lawmaking by federal courts in the definition of private rights and obligations in such a context does not interfere with the international conduct of the executive branch.

Correspondingly, then, when unresolved issues arise within the scope of these private law treaties⁵⁵⁷ the premise of a federal law solution, supplied as necessary by federal

⁵⁵⁴ The Supreme Court's opinion in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), represents a possible illustration of this approach. There, the Court refused to recognize an implied rule in an extradition treaty that would have prohibited forced abductions by executive branch officials. *Id.*, at 667-68. Admittedly, the Court did not analyze the issue as one of implied interstitial lawmaking powers, and there is much otherwise to criticize in the opinion. See Bederman, *supra* note 24, at 1014 (criticizing the opinion as contrary to accepted principles of treaty interpretation). The Supreme Court's analysis is nonetheless consistent with the idea that federal courts should exercise greater discretion before concluding that a treaty authorizes the creation of implied limitations on the rights of the United States in its international conduct as a sovereign entity.

⁵⁵⁵ See, e.g., *supra* notes 165-171 and accompanying text (citing international commercial law conventions); *supra* notes 179-181 and accompanying text (citing civil procedure conventions).

⁵⁵⁶ See *supra* notes 165, 387-392 and accompanying text (analyzing this self-executing commercial law treaty).

⁵⁵⁷ I have elsewhere referred to these treaties as "legislative treaties." See Van Alstine, *Treaty Interpretation*, *supra* note 24, at 705-06. As emphasized in the text above, Article I legislation and self-executing treaties of course are distinct forms of federal law which arise from distinct sources of authority. See *supra* notes 319-335 and accompanying text. The point with the label "legislative treaties" is that self-executing treaties that solely regulate private rights and obligations arise in a different interpretive context and require different interpretive principles as compared to ones that regulate the sovereign powers of the United States. See Van Alstine, *Treaty Delegation*, *supra* note 18, at 1278-1280 (explaining this important difference between the substantive subjects of treaties).

courts, should be strongest. Moreover, even without an express uniformity directive,⁵⁵⁸ a presumption of implied developmental authority also should arise, similar to domestic law statutes, when the treaty-lawmakers adopt broad, open-textured provisions.⁵⁵⁹ A like conclusion may emerge from the unambiguous purpose of a treaty.⁵⁶⁰

Nonetheless, it is important to note for all of these cases that the exercise of discretion by federal courts is of an interstitial nature only. Faithful to the separation of powers doctrine, federal courts must in all cases first look to the text, purpose, and drafting history of the treaty for guidance even in the exercise of their implied gap-filling authority. It is only when these more direct sources of guidance fail that it will fall to the federal courts to fulfill the needs of national uniformity through a rule of federal common law origin.

General interests of uniformity of course will not be sufficient for issues beyond the scope of a particular treaty. Rather, a necessary prerequisite is that—as fortified by the federal law premise discussed above⁵⁶¹—the unresolved issue must reflect an unintended gap (a gap *praeter legem*) in a treaty.⁵⁶² This in essence was the factual conclusion of the Supreme

⁵⁵⁸ See *supra* notes 502-503 and accompanying text.

⁵⁵⁹ See *supra* notes 437-441 and accompanying text (describing this presumption in the statutory context). See also, e.g., *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 (1981) (“Broadly worded...statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common law tradition.”); *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.”).

⁵⁶⁰ See *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979) (holding that, although it contained no express uniformity directive, the Customs Container Convention reflected “a national policy to remove impediments to the use of containers” in international commerce and thus it displaced state law taxation rules that “frustrate[d] attainment of federal uniformity”). *But cf.* *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60 (1993) (observing that in *Japan Line Ltd.* “we did not hold that the [Customs Container] Convention and the federal regulatory scheme for cargo containers expressed a national policy to exempt containers from all domestic taxation”).

⁵⁶¹ See *supra* Part IV.B.1.

⁵⁶² See *supra* Part IV.B.2(b) (describing the distinction between gaps *infra legem* and gaps *praeter legem*)

Court in *Zicherman v. Korean Airlines Co.*⁵⁶³ At issue there was a specific regulatory gap in the Warsaw Convention on International Air Transportation.⁵⁶⁴ The Court held that although in general the treaty pursued international uniformity, the specific issue in dispute was “not an area in which the imposition of uniformity was found feasible.”⁵⁶⁵ It then quickly moved to the conclusion that the Convention did not “empower [it] to develop some common-law rule ... that will supersede the normal federal disposition.”⁵⁶⁶

On the narrow issue in dispute, *Zicherman’s* factual conclusion may be correct. The problem is that the Court failed to engage in any rigorous analysis of the possibility of an implied authorization of interstitial lawmaking powers by the federal courts.⁵⁶⁷ And its broad rhetoric has led lower federal courts to expand the conclusion on one narrow issue to a generalized notion that the Warsaw Convention does not ever allow gap-filling to advance the interests of national uniformity.⁵⁶⁸

A final note is appropriate here with regard to separation of powers and executive branch expertise. Because of the special responsibilities of the President in foreign affairs, federal courts properly may accord some deference to the views of the executive branch on

⁵⁶³ 516 U.S. 217 (1996).

⁵⁶⁴ Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. § 40105.

⁵⁶⁵ *Id.*, at 230.

⁵⁶⁶ *Id.*

⁵⁶⁷ Interestingly, the court ultimately finessed the issue of national uniformity by resorting to a separate federal statute to fill the gap in the treaty. *See id.*, at 230-31.

⁵⁶⁸ *See* *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 920- 21 (9th Cir. 1999)(*citing* *Zicherman* and holding that it must “refrain from fashioning a federal common law meaning to the term willful misconduct” under the Warsaw Convention); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 9 (2d Cir. 1996) (holding generally that the Warsaw Convention “does not authorize federal common law” and thus refusing to fill a separate gap in the Convention).

issues of treaty interpretation.⁵⁶⁹ Not all treaties affect foreign affairs equally, however.⁵⁷⁰ Nor is there any compelling reason to assume overriding executive branch expertise, as compared to standard means of judicial interpretation, across the full range of substantive treaty law. Highly specialized commercial law treaties again provide a good example here.⁵⁷¹ In short, as the foreign affairs and diplomacy implications of a treaty—and thus the assumptions about executive expertise—diminish, so too will the separation of powers concerns about judicial intrusion into fields of exclusive executive branch competence.

CONCLUSION

For the foreseeable future, most of the hard work of legal regulation will remain the province of purely domestic lawmaking vehicles. But just as the rise of shared national economic and social concerns spurred federal statutory solutions in the last century, so too has global interaction in recent decades increasingly compelled regulation through comprehensive international treaties.

The analysis here demonstrates that many of the traditional assumptions about the relationship of federal with state law fit at best uncomfortably, and upon careful reflection most likely not at all, in the treaty context. Founded on a premise of competing lawmaking

⁵⁶⁹ In recent years, the Supreme Court recently has described this proposition in quite measured terms. *See* *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)(observing that federal courts “ordinarily” should give “respect” to the “reasonable” views of the executive branch concerning the meaning of a treaty). *See also* *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60, 85 (1993)(Brennan, J., dissenting)(stating that Executive branch opinions about the displacement of state law and the compliance of a treaty with other constitutional prohibitions “consistent with the separation of powers, may not be given any weight beyond its power to persuade”).

⁵⁷⁰ *See supra* notes 549-556 and accompanying text.

⁵⁷¹ *See* Van Alstine, *Treaty Delegation*, *supra* note 18, at 1301-1302 (observing with regard to arguments about executive branch expertise that specialized commercial law treaties in fields such as “the international sale of goods, receivables financing, and security interests in moveable equipment” are drafted by “[e]xperts in the respective fields ... under the auspices of permanent international institutions, some of which are nongovernmental”).

powers, the presumption against preemption of state law by Article I legislation, for instance, makes little sense for exercises of the exclusive federal authority over international treaty making. Likewise, the special constitutional character of self-executing treaties fundamentally changes the calculus for understanding the role of federal courts in applying this form of federal law.

The equal constitutional status of treaties means at a minimum that, like their statutory counterparts, an express delegation of circumscribed lawmaking powers through treaties does not violate the limitations on federal common law. To be sure, foreign affairs implications do not alone transform all issues of treaty law into matters for federal court lawmaking. But a recognition of the status of treaties as a formal expression of national foreign affairs policy, when coupled with the vital needs of uniformity in the sovereign obligations of the United States, mandates a more accommodating approach to implied interstitial federal court lawmaking for the law within the scope of self-executing treaties.