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Treaties' End: The Past, Present, and Future of International Lawmaking in the United States

ABSTRACT. Nearly every international agreement that is made through the Treaty Clause should be approved by both houses of Congress as a congressional-executive agreement instead. In making this case, this Article examines U.S. international lawmaking through empirical, comparative, historical, and policy lenses. U.S. international lawmaking is currently haphazardly carved up between two tracks of international lawmaking, with some areas assigned to the Treaty Clause route, others to the congressional-executive agreement route, and many uncomfortably straddling the two. Moreover, the process for making international law that is outlined in the U.S. Constitution is close to unique in cross-national perspective. To explain how the United States came to have such a haphazard and unusual system, this Article traces the history of U.S. international lawmaking back to the Founding. The rules and patterns of practice that now govern were developed in response to specific contingent events that for the most part have little or no continuing significance. The Treaty Clause process is demonstrably inferior to the congressional-executive agreement process as a matter of public policy on nearly all crucial dimensions: ease of use, democratic legitimacy, and strength of the international legal commitments that are created. Thus, this Article concludes by charting a course toward ending the Treaty Clause for all but a handful of international agreements. By gradually replacing most Article II treaties with ex post congressional-executive agreements, policymakers can make America's domestic engagement with international law more sensible, effective, and democratic.

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INTRODUCTION

In the fall of 2007, Senate hearings finally commenced on the United Nations Convention on the Law of the Sea, a treaty that has been languishing in the Senate since 1994, when Bill Clinton was still a fresh face in the White House.¹ Submitted to the Senate under the Treaty Clause of the Constitution,² the treaty must gain the consent of two-thirds of the Senate in order to become law for the United States—a hurdle it has been unable to clear for over a decade because of a small but determined opposition. Meanwhile, free trade agreements between the United States and Peru, Colombia, and Panama are also up for approval. But these agreements are proceeding not through the Treaty Clause but as “congressional-executive agreements,” subject to approval by a majority of both houses of Congress. Signed in 2006, one has already been approved by Congress and at least one more is likely to be approved later this year.³

As these examples show, the process for making binding international agreements in the United States today proceeds along two separate but parallel tracks: one that excludes the House of Representatives and another that includes it, one that requires a supermajority vote in the Senate and another that does not, one that is expressly laid out in the Constitution and one that is not.⁴ I refer to both of these methods of making international commitments as “international lawmaking” to emphasize the dependence of international law

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1. President Bush issued a press statement on May 15, 2007, in which he urged the Senate to “act favorably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress.” See Press Release, White House, President’s Statement on Advancing U.S. Interests in the World’s Oceans (May 15, 2007), available at <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html>. The Senate began hearings on September 27, 2007. *The U.N. Convention on the Law of the Sea: Hearing Before the S. Foreign Relations Comm.*, 110th Cong. (2007).
 2. U.S. CONST. art. II, § 2.
 3. The agreement with Peru was approved by the U.S. House of Representatives on November 2, 2007, and by the U.S. Senate on December 4, 2007. A fourth proposed free trade agreement—with South Korea—has faced more substantial opposition over concerns that the agreement would harm the already-stressed U.S. auto industry and demands that Korea liberalize its markets for American beef and farm products. See *Call for FTA Approval*, KOREA TIMES, Jan. 29, 2008, http://www.koreatimes.co.kr/www/news/opinion/opi_view.asp?newsIdx=18146&categoryCode=202.
 4. The only mention of international agreements other than treaties in the Constitution appears in Article I, Section 10, which forbids the states to “enter into any treaty, alliance, or confederation,” but simply requires that they first obtain the consent of Congress before entering into “any agreement or compact with another State, or with a foreign power.” U.S. CONST. art. I, § 10.

on individual countries' decisions to commit to it. International law may be negotiated by states in New York or Geneva or Montreal, but it is not made at the negotiating table. It is made by countries when they agree as a matter of law to a binding international commitment. For it is the act of consent by each country that transforms an international agreement from a piece of paper devoid of any legal force into law that binds.⁵

Of the two methods for making international law in the United States, the Treaty Clause—which requires a two-thirds vote in the Senate and bypasses the House of Representatives—is the better known of the two; it is principally used to conclude agreements on extradition, taxation, and investment and commercial matters. But an increasingly common path is the congressional-executive agreement, now used in virtually every area of international law. Each year, hundreds of congressional-executive agreements on a wide range of international legal topics are enacted by simple majorities in the House and Senate and signed into law by the President, outside the traditional Treaty Clause process. (Executive agreements entered into by the President alone—often called sole executive agreements—are also on the rise and involve no formal congressional involvement at all.⁶)

It is puzzling that two distinct methods of lawmaking operate side-by-side within a single nation—all the more so because virtually no other country deals with international law as we do. Most other countries make international law in the same way they make domestic law—a norm followed by one of our two methods (congressional-executive agreements) but not the other (the Treaty Clause). Because the Treaty Clause requires that all but thirty-three members of the Senate assent to a treaty and includes no provision for participation by members of the House, it surely makes a substantial difference which of these two methods is used. For this reason alone, it would be natural to expect that there are compelling, consistent reasons why each method is used in particular areas or instances.

Yet that is not the case. Although there are patterns to the current practice of using one type of agreement or another, those patterns have no identifiable

5. For more on the domestic foundations of international law, see Oona A. Hathaway, *The Domestic Political Foundations of International Law* (Apr. 14, 2008) (unpublished manuscript, on file with author).

6. This Article addresses sole executive agreements only indirectly because they have generally been used for very limited purposes. That may, however, be beginning to change, as sole executive agreements have in very recent years been used to establish agreements that in earlier times would likely have been made through the Article II treaty process. This topic is the subject of an article in progress. See Oona A. Hathaway, *Imbalance of Power: Growing Presidential Power over U.S. International Lawmaking* (Apr. 14, 2008) (unpublished manuscript, on file with author).

rational basis. For example, most free trade agreements are concluded through congressional-executive agreements. By contrast, agreements on investment and commercial matters—issues no less critical to the smooth operation of the global economy—are concluded through both treaties and congressional-executive agreements. The Law of the Sea Convention mentioned at the outset was brought to the Senate under the Treaty Clause. But most other fisheries and maritime agreements are concluded through congressional-executive agreements. Human rights agreements are concluded as treaties. Meanwhile, the vast majority of education, health, and debt-restructuring agreements with developing countries—issues that can be just as important to human dignity—are concluded as congressional-executive agreements. Compared with agreements authorized as congressional-executive agreements, a higher share of agreements considered under the Treaty Clause are multilateral. Nonetheless, the vast majority of multilateral agreements are concluded through congressional-executive agreements.

There is, I argue, no persuasive explanation for these differences based on the subject matter, form, topic, or any other substantive basis. The explanation for these differences lies not in reason, but in history—a history that it is now time to leave behind. Rooted in now-irrelevant (and discredited) concerns of slaveholding states, overtaken by actual political practice almost from the Constitution's beginning, the Treaty Clause was the product of circumstances that have little continuing relevance.

The current bifurcated system took its shape over the course of the twentieth century. The United States gradually abandoned the mercantilist, protectionist trade policy that it had pursued since the Civil War in favor of a policy built on reciprocal trade agreements with foreign states. The legal innovation that enabled this transformation subsequently expanded to include almost every area of international law—an expansion fueled by the perceived cumbersomeness of the Treaty Clause alongside the desire and need for the country to engage more fully in the international sphere. Meanwhile, opposition to human rights agreements motivated significant opposition to treaties in the second half of the century. In the 1950s, a series of proposed amendments to the Constitution (generally referred to collectively as “the Bricker Amendment” after the chief sponsor in the Senate) aimed to prevent the United States from entering international human rights agreements that some feared would be used to challenge segregation and Jim Crow. The controversy ended in a “compromise” in which the amendment was defeated at the cost of future human rights agreements, which would henceforth be concluded only as treaties that had been rendered almost entirely

unenforceable through reservations, understandings, and declarations.⁷ All of the rest of international law was haphazardly carved up between these two tracks—with some areas assigned to the Treaty Clause route, others to the congressional-executive agreement, and many uncomfortably straddling the two.

Paying fealty to this history by requiring that treaties continue to be used in certain historically contingent areas of international law comes at a substantial continuing cost: compared to congressional-executive agreements, treaties have weaker democratic legitimacy, are more cumbersome and politically vulnerable, and create less reliable legal commitments. The final failure is particularly worrisome, since the central purpose of international lawmaking is to create reliable commitments between states.

This Article makes the case for a new direction: nearly everything that is done through the Treaty Clause can and should be done through congressional-executive agreements approved by both houses of Congress. The congressional-executive agreement includes the House of Representatives in the lawmaking process, is less subject than is a treaty to stonewalling by an extreme minority, and rarely requires the passage of separate implementing legislation to enter into effect. Moreover, the agreement is often easier to enforce and can be subject to more stringent rules regarding unilateral withdrawal, thus allowing the United States to make stronger and more consistent international commitments. A congressional-executive agreement might seem to lack the “‘dignity’ of a treaty.”⁸ But in fact a congressional-executive agreement that is expressly approved by Congress is more legitimate and more reliable than a treaty, and it can and should be used for even the most important international commitments.⁹

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7. To take just one example, the United States entered extensive reservations, understandings, and declarations at the time it ratified the International Covenant on Civil and Political Rights, including a declaration “[t]hat the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.” See International Covenant on Civil and Political Rights, Declarations and Revisions, 138 Cong. Rec. 8070-71 (1982), Dec. 16, 1966, S. EXEC. DOC. NO. 95-2, 999 U.N.T.S. 171, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>.
 8. Louis Henkin notes that congressional-executive agreements are generally interchangeable with treaties, but cautions that “doubts might spark if [a congressional-executive agreement] were used for an agreement traditionally dealt with by treaty and that seems to ask for the additional ‘dignity’ of a treaty, for example, a major alliance or disarmament arrangement.” LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 217 n.* (2d ed. 1996).
 9. For reasons that will be made clear, I regard only a congressional-executive agreement that is expressly approved by Congress after it has been negotiated by the President as an

In laying out the case for “treaties’ end,” I examine U.S. international lawmaking through empirical, comparative, historical, and policy lenses. I begin in Part I with a broad empirical assessment of the international lawmaking practice of the United States during the last two decades of the twentieth century. What I find has implications for the longstanding debate over the “interchangeability” of treaties and congressional-executive agreements—calling into question the empirical claims of many of those on both sides of the debate.

I next consider the treaty-making process in cross-national comparative perspective. The United States, it turns out, is extraordinarily unusual. The process for making international law that is outlined in the U.S. Constitution is close to unique. Together with the evidence about recent U.S. practice, these findings pose a puzzle: why does the United States have such an anomalous system for making international law?

In Part II, I develop a historical account that provides some answers. It traces the current odd and unsatisfactory international lawmaking arrangement back to the Founding. The current system of international lawmaking in the United States rests, I show, on rules and patterns of practice developed in response to specific contingent events—events that for the most part have little or no continuing significance.

In Part III, I show that the Treaty Clause, besides having no strong legal or historical claim for priority today, is demonstrably inferior as a matter of U.S. public policy to congressional-executive agreements expressly approved by both houses of Congress on nearly all crucial dimensions: ease of use, democratic legitimacy, and strength of the international legal commitments that are created.

I conclude in Part IV by presenting a vision for the future of international lawmaking in the United States that charts a course toward ending the Treaty Clause for all but a handful of international agreements. By gradually replacing most Article II treaties with congressional-executive agreements, policy makers can make America’s domestic engagement with international law more sensible, more effective, and more democratic.

adequate substitute for an Article II treaty. An agreement authorized by Congress in advance, while also referred to as a congressional-executive agreement, is not equivalent.

I. U.S. INTERNATIONAL LAWMAKING AND THE DEBATE OVER INTERCHANGEABILITY

Since at least the 1940s, most scholars of U.S. international lawmaking have fallen into two broad camps—opposite sides in what is often called “the interchangeability debate.” On one side stand those who argue that congressional-executive agreements and Article II treaties are and should be treated as wholly interchangeable. On the other are those who say that they are not and should not be: treaties and congressional-executive agreements have appropriately separate spheres that can be described and justified with legal and analytical reasons.

A notable feature of this debate is that most of the arguments rest upon a remarkably thin understanding of the current international lawmaking practice in the United States—and yet many on both sides make strong (and conflicting) claims that their normative views are reflected in actual practice. Thus, after outlining the two sides in the interchangeability controversy, I begin to fill this gap by undertaking an examination of current practice. Doing so is an important step toward settling the debate over interchangeability. Examining the empirical record makes it possible to determine which, if any, of the descriptive claims is accurate—and shows that neither side gets the story right. Moreover, examining current practice is essential for assessing that practice, and ultimately reforming it, as I argue we should.

My examination proceeds in two stages. I begin with an analysis of how international law is currently made in the United States. The legal and regulatory framework that applies to international lawmaking is thin and opaque. Aimed primarily at preventing the evasion of congressional oversight over international agreements altogether, the framework provides scant guidance with regard to what should happen *within* Congress. The result is a practice of international lawmaking that is not consistent with either side of the interchangeability debate. Treaties and congressional-executive agreements are not fully interchangeable, for there are many areas of law in which one instrument or the other is exclusively or almost exclusively used. At the same time, the use of treaties and congressional-executive agreements does not conform to the predictions of those who argue that the two lawmaking instruments operate in separate spheres, for there are many areas of law where the two are used interchangeably. These findings, fully consistent with no existing theory, are in themselves deeply puzzling.

They are all the more so, I show, when viewed in comparative context—the second stage of my examination. The United States, it turns out, is extraordinarily unusual in the way it makes much of its international law. Indeed, by examining the international (and domestic) lawmaking procedures

of nearly every nation in the world, I am able to say confidently that the U.S. Treaty Clause creates a process for making international law that has almost no parallel abroad. This distinctive process results, moreover, in predictable yet haphazard divisions that have important consequences for the United States' ability to engage in international cooperation.

A. *The Interchangeability Debate*

The modern debate over the interchangeability of congressional-executive agreements and Article II treaties dates to the 1940s, when executive agreements began to rise in prominence. On one side of this vigorous exchange are those who argue that treaties and executive agreements are wholly interchangeable. On the other are those who argue that treaties and congressional-executive agreements are instead exclusive instruments, and that the Constitution requires that each be used in limited circumstances.

Since at least the 1940s, the weight of scholarly opinion has rested with the first view. Wallace McClure wrote in 1941 that "executive agreements and treaties have been used interchangeably to accomplish seemingly identical purposes" and hence "there is, *prima facie*, no reason to deny the existence of constitutional authorization for the use of executive agreements relating to whatever subjects may be dealt with by the treaty-making power."¹⁰ Shortly thereafter Edward Corwin concluded that executive agreements through incremental "constitutional development" had come to serve many of the same purposes as treaties.¹¹ And near the close of World War II, Myres McDougal and Asher Lans wrote that "our constitutional law today makes available two parallel and completely inter-changeable procedures, wholly applicable to the

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10. WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* 32 (1941). It was, however, already a subject of debate as early as 1934. See Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 *GEO. WASH. L. REV.* 271, 271 (1934) ("In recent years, there has been considerable discussion as to that clause of the Constitution which requires for the ratification of a treaty, the concurrence of two-thirds of the Senators present.").
 11. EDWARD S. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 41 (1944). He noted, as well, that executive agreements had "the force of 'supreme law of the land.'" *Id.* at 42. He further argued that "if the subject-matter to be regulated falls within the powers of Congress, the latter may constitutionally authorize the President to deal with it by negotiation and agreement with other governments, the treaty-making power to the contrary notwithstanding." *Id.* at 44.

same subject matters and of identical domestic and international legal consequences, for the consummation of intergovernmental agreements.”¹²

This view has continued to hold sway among much of the scholarly community. Louis Henkin, writing in the mid-1990s, concluded that “it is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty.”¹³ The 1987 Restatement (Third) of Foreign Relations Law endorsed interchangeability, noting that, “[a]t one time it was argued that some agreements can be made only as treaties Scholarly opinion has rejected that view.”¹⁴ More recently,

12. Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pt. 1), 54 YALE L.J. 181, 187 (1945); see also Honoré Marcel Catudal, *Executive Agreements: A Supplement to the Treaty-Making Procedure*, 10 GEO. WASH. L. REV. 653, 655 (1942) (“It is clear that, from the point of view of its legal effect in international law, any properly concluded agreement between states is equally binding, whether designated as a ‘treaty’ or ‘agreement’ or what-not.”); C.H. McLaughlin, *The Scope of the Treaty Power in the United States* (pt. 2), 43 MINN. L. REV. 651 (1959) (weighing the merits of the two-thirds rule and of the proposal to amend it to require a majority vote in both houses); Quincy Wright, *The United States and International Agreements*, 38 AM. J. INT’L L. 341, 342 (1944) (“The text of the Constitution does not say that the ‘treatymaking’ process is the exclusive method of making international agreements, and in practice it has not been so.” (citation omitted)).
13. HENKIN, *supra* note 8, at 217 (footnote omitted). Phillip Trimble and Alexander Koff also conclude that the two methods are equivalent: “These congressional-executive agreements provide an alternative procedure that is accepted as constitutionally equivalent to the Article II procedure, and which has been used from time to time for arms control agreements.” Phillip R. Trimble & Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT’L L. 55, 58 (1998); see also John K. Setear, *The President’s Rational Choice of a Treaty’s Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. 55, 511 (2002) (“[N]either the Constitution nor Congress nor the courts place any meaningful constraints on the president’s choice of preratification pathway.”).
14. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters’ note 8 (1987). The Restatement further notes, however, that “[i]n principle, a Congressional-Executive agreement must be within the powers of the President and Congress.” *Id.* § 303 reporters’ note 7 (emphasis added). The Restatement also explains:

[S]uch an agreement can be made on any subject within the legislative powers of Congress or within the President’s own constitutional authority. It has been suggested that the authority to make a Congressional-Executive agreement may be broader than the sum of the respective powers of Congress and the President; that in international matters the President and Congress together have all the powers of the United States inherent in its sovereignty and nationhood, and they can therefore make any international agreement on any subject.

Id. The Restatement also vaguely notes that “[s]ole executive agreements are subject to the constitutional limitations applicable to treaties and other international agreements.” *Id.* § 303 cmt. h. It goes on to explain: “[t]o the extent that the President’s constitutional

Bruce Ackerman and David Golove offered a powerful defense of the interchangeability position, albeit a modified one. They argued that the concept of interchangeability dates not to the founding of the nation, but to the New Deal era. Over the course of the late 1930s and early 1940s, Congress, the President, the courts, and legal scholars together developed a new constitutional consensus that permitted the President to submit international agreements to both houses of Congress for approval in lieu of the Article II process.¹⁵ By the time a majority of both houses of Congress approved the 1945 Bretton-Woods Agreement that would create the foundations of a new world economic order, the congressional-executive agreement had ascended to the core of U.S. international lawmaking, where it remains today.¹⁶

On the other side of the debate stands a smaller but outspoken group of critics who have repeatedly challenged the eclipse of the Treaty Clause.¹⁷ In the 1940s, these critics—most prominently Edwin Borchard—argued that the Constitution required certain international agreements to be made by treaty alone and that any effort to change this requirement was ill-advised.¹⁸ Though Borchard's pro-status quo view was in the scholarly minority at the time, it appeared to triumph in the halls of Congress, with the failure of a proposed Amendment to the Constitution in 1945 that would have ended the two-thirds provision in favor of a majority vote in both houses of Congress.¹⁹ The reason for the failure, however, likely did not please the Treaty Clause purists: the Amendment failed to gain support at least in part because many in Congress concluded that they could achieve the same result without it, by substituting congressional-executive agreements for Article II treaties.²⁰

In recent years, at least two separate anti-interchangeability positions have arisen. The first, put forward by Laurence Tribe, is a modern version of the purist position that international agreements must be made through the Treaty

authority overlaps powers of Congress, he may make sole executive agreements on matters that Congress may regulate by legislation." *Id.* (citation omitted).

15. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

16. *Id.* at 891-93.

17. Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944) [hereinafter Borchard, *Executive Agreement*]; Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945) [hereinafter Borchard, *Treaties*].

18. See Borchard, *Treaties*, *supra* note 17.

19. For the debate on the floor of the House, see 91 CONG. REC. 4041-82 (1945).

20. Ackerman & Golove, *supra* note 15, at 886-88. The congressional debate suggested that some of the representatives held such a view, though the prevailing view on the point seems to be one of confusion. See 91 CONG. REC. 4056 (1945) (statement of Rep. Sumners) ("The line of demarcation between what, under usage at least, is being done by Executive agreement, and what is being done by treaty is pretty narrow and confused.").

Clause. In the mid-1990s, Tribe launched a broad-scale and hard-hitting attack on Ackerman and Golove's method of analysis and their conclusion that the "congressional-executive agreement [is] an all-purpose substitute for the treaty."²¹ Using congressional-executive agreements as if they were fully interchangeable with treaties, he argued, is inconsistent with the text, structure, and history of the Constitution and would allow Congress to exceed the powers expressly granted to it.²² Instead, Tribe advocated that the Treaty Clause be treated as the exclusive method for treaty approval. Consequently, U.S. participation in the North American Free Trade Agreement (NAFTA), the World Trade Organization, the Bretton Woods Agreements, and many other agreements concluded by congressional-executive agreement should have been submitted to the Senate under the Treaty Clause.²³

A second anti-interchangeability theory might be called the "separate spheres" approach. One version, advanced by John Yoo, argues that Article I and Article II agreements are both constitutional but have their own mutually exclusive zones of authority.²⁴ Congressional-executive agreements, in Yoo's words, "must be used to approve international agreements that regulate matters within Congress's Article I powers" to ensure "that the same public lawmaking process will apply to the same subjects, regardless of whether an international agreement is involved or not."²⁵ The Article II treaty process is required, on the other hand, "if the nation seeks to make agreements outside of Congress's competence or bind itself in areas where both President and Congress exercise competing, overlapping powers."²⁶ In Yoo's telling, not only

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21. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1252 (1995).
 22. For example, he argues that their view of complete interchangeability would permit Congress to enter into international agreements on its own, despite Article II's grant of a controlling role in negotiating international agreements. *Id.* at 1252-58. He emphasizes, moreover, the lack of textual support for the interchangeability thesis, arguing that the absence of the word "only" from the Treaty Clause is not license to read into it a concurrent and plenary authority to exercise parallel power under Article I. *Id.* at 1272-76.
 23. *Id.* at 1277, 1283-84.
 24. See John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).
 25. *Id.* at 764. The Eleventh Circuit has criticized this approach, calling it "unhelpful, inasmuch as it requires courts to delve into areas not normally reserved for judicial expertise." See Louis Klarevas, *The Surrender of Alleged War Criminals to International Tribunals: Examining the Constitutionality of Extradition via Congressional-Executive Agreement*, 8 UCLA J. INT'L L. & FOREIGN AFF. 77, 104 n.118 (2003) (quoting *Made in the USA Found. v. United States*, 242 F.3d 1300, 1315 n.33 (11th Cir. 2001)).
 26. Yoo, *supra* note 24, at 764.

is this division of labor constitutionally required, but it almost perfectly comports with the practices of the nation over the past fifty years—“whatever is, is right.”²⁷

A second version of the separate spheres approach is associated with Peter Spiro.²⁸ In an article published almost simultaneously with Yoo’s, Spiro sought, like Yoo, to make sense of the “persistent patterns of instrument choice.”²⁹ He did so, however, not primarily through textual analysis of the Constitution but by examining the acceptance, contestedness, age, and pedigree of existing practices.³⁰ In Spiro’s account, the “ongoing interplay among the branches gives rise to an accreted refinement of norms, in much the same way as judicial decisions do in other areas of the law.”³¹ This historical interplay, he argued, had given rise to separate domains for the Treaty Clause and congressional-executive agreements that were logical, embedded, and worthy of respect.

B. How International Law Is Made in the United States

For all the broad claims made in the interchangeability debate, surprisingly little is known about current international lawmaking practice in the United States. My aim in this Section, therefore, is to describe how international lawmaking actually takes place in the United States. The following Section compares these practices with those of other nations.

As will become clear, the evidence is consistent with neither side of the interchangeability argument. Treaties and congressional-executive agreements are not used as perfect substitutes for one another, as interchangeability advocates would have it. Yet neither do the two instruments of international lawmaking have well-defined, exclusive, and defensible areas of authority, as critics of the interchangeability position contend. Although it is possible to

27. ALEXANDER POPE, AN ESSAY ON MAN 17 (London, William Hyde 1844) (1734); see also Yoo, *supra* note 24, at 798-813, 823-25.

28. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001). Tribe, he argues, takes an excessively formalistic approach and fails to adequately account for history and practice. Ackerman and Golove, however, set too high a bar for constitutional reinterpretation and then overstate the transformation that occurred during the 1940s to meet it. *Id.* at 962-65. Yoo, on the other hand, “does not appear to allow for constitutional evolution on these questions.” *Id.* at 1007.

29. *Id.* at 1034.

30. *Id.* at 964.

31. *Id.*

detect patterns in the use of one instrument over another, these patterns have little or no identifiable rational basis.

Far from resolving the debate, then, these findings present a puzzle of their own: why does the United States have such a confused system for making international law?

1. *Legislative and Regulatory Guidelines*

Commentators who favor interchangeability as a normative ideal almost universally argue that interchangeability is reflected in practice, with treaties and congressional-executive agreements used almost entirely interchangeably. Those, on the other hand, who oppose interchangeability argue that Article II and congressional-executive agreements are used differently—usually in ways that coincide with the author's normative framework, whatever that might be. A deeper examination of the empirical evidence over last two decades of the twentieth century proves both claims wrong. Treaties and congressional-executive agreements are not used interchangeably. But neither are the differences between them driven by any reasoned analytical differences. In short, the decision to pursue an agreement through one or the other of the two major international lawmaking processes is driven principally by historical happenstance and political considerations.

The decision to conclude an international agreement as a treaty, a congressional-executive agreement, or a sole executive agreement is made in the first instance by the U.S. Department of State. The Department is guided in its decision by rules and regulations first enacted in the 1950s, now known as the Circular 175 Procedure.³²

The procedure requires that a request for authorization to negotiate or sign a treaty or other international agreement must take the form of an action memorandum that includes, among other things, a discussion of the basis for the type of agreement recommended. Eight factors are to be taken into consideration:

32. Office of the Legal Adviser, Treaty Affairs, Circular 175 Procedure, <http://www.state.gov/s/l/treaty/c175/> (last visited Apr. 24, 2008). The Circular 175 was a 1955 Department of State circular that prescribed a process for coordination of approval of treaties and other international agreements. Though still referred to as the "Circular 175 Procedure," the requirements now appear at 22 C.F.R. § 181.4 (2007); and 11 FOREIGN AFFAIRS MANUAL § 720 (2006). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303, reporters' note 8 (1987) ("The criteria generally used by the Executive Branch in selecting the form by which an international agreement should be approved, and the procedures for consulting with Congress as to the choice made, are set forth in Circular 175 . . .").

The extent to which the agreement involves commitments or risks affecting the nation as a whole;
 Whether the agreement is intended to affect state laws;
 Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
 Past U.S. practice as to similar agreements;
 The preference of Congress as to a particular type of agreement;
 The degree of formality desired for an agreement;
 The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
 The general international practice as to similar agreements.³³

The Circular 175 procedure also requires the Office of the Legal Adviser to provide a memorandum prior to negotiating an international agreement that discusses and justifies the use of the Article II treaty process or the use of an executive agreement and, inter alia, an "analysis of the Constitutional powers relied upon."³⁴

This set of regulations, which at first appears comprehensive, leaves a great deal of room for the exercise of discretion. This should come as no surprise. The regulations were not crafted to prevent evasion of the Treaty Clause through congressional-executive agreements. They aimed instead at ensuring congressional involvement in the making of international agreements. In particular, members of Congress sought to prevent the President from making excessive use of executive agreements concluded with little or no oversight by Congress (sometimes called sole executive agreements).³⁵

While the Circular 175 and accompanying regulations provide some direction about the situations in which sole executive agreements are not appropriate, they give relatively little guidance regarding the choice between a

33. 11 FOREIGN AFFAIRS MANUAL, *supra* note 32, § 723.3.

34. Office of the Legal Adviser, Treaty Affairs, Circular 175 Procedure, *available at* <http://www.state.gov/s/l/treaty/c175/>. Note that 11 FOREIGN AFFAIRS MANUAL, *supra* note 32, § 723.3 further emphasizes that

[i]n determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the President, the Senate, and the Congress as a whole.

35. The Case-Zablocki Act of 1972, Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b (2000)), was yet another effort by Congress to monitor executive agreements. It requires that binding agreements concluded outside the Treaty Clause be submitted to Congress within sixty days.

treaty and a congressionally authorized executive agreement. For example, the first factor—how extensive the commitment or risks affecting the nation—was likely intended to discourage the use of sole executive agreements in situations with extensive commitments or risks. But it is far from clear how this factor would affect the choice between an Article II treaty and a congressional-executive agreement. Clearly, an agreement that involves commitment or risks affecting the nation as a whole should have the approval of more than one branch of government. Less clear is whether such an agreement should be subject to a supermajority vote in the Senate, as required by the Article II process, or instead to a majority vote in both houses of Congress.³⁶ That is true of many of the eight factors, which were almost certainly not intended to guide the choice between the two different forms of congressional approval.³⁷

Only two of the listed eight factors have any significant bearing on the choice between the Article II and congressional-executive agreements processes. Past U.S. practice as to similar agreements (the fourth factor above)

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36. Indeed, the inconsistency of practice through the early 1980s led the Supreme Court to conclude that “Congress has not been consistent in distinguishing between Art. II treaties and other forms of international agreements.” *Weinberger v. Rossi*, 456 U.S. 25, 30 (1982). Other scholars have noted that the Circular 175 factors are ambiguous and do not actually play a significant role in the President’s decision-making process. *See, e.g.*, HENKIN, *supra* note 8, at 222 (“One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with consent of the Senate (or of both houses), [but no one] has told us which are which.”); 2 VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* § 10:2 (2d ed. 2005) (“There are no clear guidelines.” (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303, reporters’ note 8 (1987))); Andrew T. Hyman, *The Unconstitutionality of Long-Term Nuclear Pacts That Are Rejected by over One-Third of the Senate*, 23 *DENV. J. INT’L L. & POL’Y* 313, 340 (1995) (“Circular 175 does not say which of these criteria determine whether an executive agreement can be used instead of a treaty, nor does it say which of the criteria determine the type of executive agreement.”); Phillip R. Trimble & Jack S. Weiss, *The Role of the President, the Senate and Congress with Respect to Arms Control Treaties Concluded by the United States*, 67 *CHI.-KENT L. REV.* 645, 648 (1991) (“The Circular 175 factors are rather general and may sometimes suggest inconsistent choices, and probably do not have much impact on actual Executive branch decisions. Rather, the choice of constitutional procedure is basically a political choice.”); Eric M. Fersht, Note, *Litigating for Nuclear Nonproliferation: Legal Claims in U.S. Federal Courts To Seek Suspension, Modification or Termination of the United States-Japan Nuclear Cooperation Agreement*, 6 *GEO. INT’L ENVTL. L. REV.* 503, 513 (1994) (“The State Department criteria provide no definitive guidance as to when an international agreement should be concluded as a treaty or as a congressional-executive agreement. The malleability of the guidelines suggest that the choice of agreement form may be a purely political decision by the executive branch.”).
37. *See* Jack S. Weiss, Comment, *The Approval of Arms Control Agreements as Congressional-Executive Agreements*, 38 *UCLA L. REV.* 1533, 1561 n.116 (1991) (arguing that the eight factors are ambiguous).

can offer guidance regarding the use of the Treaty Clause as opposed to a joint resolution. As elaborated below, patterns of practice have evolved around particular subject areas of international lawmaking—practices that are increasingly entrenched. In addition, the preference of Congress as to a particular type of agreement (the fifth factor) can also influence the choice between the two types of agreements.³⁸ Where the Senate makes clear its preference that an agreement proceed through the Article II process, that would likely influence the executive's choice of instrument—not simply because of deference to the Senate's constitutional authority but also (perhaps primarily) because a majority of the Senate can defeat a joint resolution if it feels its unique constitutional authority is threatened. Nonetheless, this power is a limited one, for a majority of the Senate may approve a congressional-executive agreement even over the opposition of a significant minority.³⁹

The regulations have thus done little to illuminate and guide the practice of choosing between international lawmaking processes—much less encourage transparent and principled distinctions. As the next Subsection shows, recent international lawmaking practice in the United States shows many clear signs of this indistinct guidance.

2. *Article II Treaties vs. Congressional-Executive Agreements: The Empirical Evidence*

To date, relatively little attention has been paid to when treaties and congressional-executive agreements are actually used in U.S. international lawmaking. Early work on the topic simply noted that there are distinct uses of the two types of instruments.⁴⁰ Recent work often stops at the

38. Where congressional preferences are not clear, the Executive is encouraged by the regulations to seek them out. The guidelines provide, for example, that when there is a question whether an international agreement should be concluded as a treaty or executive agreement, there should be consultation with Congress. 11 FOREIGN AFFAIRS MANUAL, *supra* note 32, § 723.4.

39. In most cases, the legislation approving a congressional-executive agreement may be filibustered. In such cases, a supermajority of sixty is required to approve the agreement.

40. For early accounts, see McLaughlin, *supra* note 12, at 709 (“[T]here are significant subjects for which the treaty is still considered the appropriate vehicle, notably conclusion of peace, defensive alliances, double taxation, consular rights, international control of commodities, fisheries, international claims, extradition, general lawmaking conventions, and friendship, commerce and navigation.”); Wright, *supra* note 12, at 345 (“It has been contended that the constitutional authority to make international agreements depends on the subject matter of the agreement. Within a certain field, it is said, the President can make treaties alone, on

observation that trade is an area in which congressional-executive agreements are prominent, whereas human rights and arms control are areas in which treaties are more common.⁴¹ The most comprehensive examination of the empirical evidence, John Yoo's examination of the treaties in force in 2000,⁴² only focuses on a few areas of law and does not say much about the United States' *current* treaty practice.⁴³ Peter Spiro's similar examination stops at the observation that of the three major areas of international lawmaking, the treaty form is used in two (arms control agreements and mutual security pacts and human rights conventions), and congressional-executive agreements in the third (trade agreements). Yet this leaves the vast bulk of international agreements unaccounted for.

Part of the reason for the relative absence of empirical work is that there is no single comprehensive database available that delineates sole executive agreements, congressional-executive agreements, and Article II treaties. Nonetheless, it is possible to gain a reasonably complete picture of international lawmaking in the United States by cross-referencing a variety of

other matters he can make them with consent of Congress, and on still other matters he can make them only with the consent of two-thirds of the Senate.”).

41. The best of these is Peter Spiro's work. Spiro, *supra* note 28. On the use of congressional-executive agreements in the area of trade, the best work is Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, 8 TEMP. INT'L & COMP. L.J. 257 (1994).
42. Yoo finds that there are five central areas in which the U.S. government has used the treaty process (political agreements such as NATO, arms control, human rights, extradition, and environment) and four where it has used congressional-executive agreements as the primary instrument (trade, air transport, postal regulation, and taxes). Yoo, *supra* note 24.
43. Yoo explains:

I conducted this survey by relying upon the U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2000 (2000), which groups agreements by subject-matter and by party. I then used the Statutes at Large and the United States Treaty Series to verify whether an agreement had undergone the treaty process or the statutory process.

Id. at 803 n.156. The largest portion of agreements listed in the *Treaties in Force* in 2000 were entered much earlier—indeed the majority were entered prior to 1945. See, e.g., U.S. DEP'T OF STATE, A GUIDE TO THE UNITED STATES TREATIES IN FORCE 5-80 (Igor I. Kavass ed., 2005) [hereinafter TREATIES IN FORCE] (listing all the agreements entered between 1776 and 1945 still in force in 2005). It also does not aim to be comprehensive. As the *Guide* explains, “the *Treaties in Force* is not a comprehensive research tool.” *Id.* at vii. Yoo's article discusses only a handful of subject areas, which capture only a small portion of the full population of treaties and executive agreements. Moreover, it excludes any agreements no longer in force, regardless of how recently concluded. It thus does not allow us to distinguish historical agreements from modern practices—a significant problem given how much practices have changed over time.

databases.⁴⁴ That is what I do here in an effort to provide insight into U.S. international lawmaking over the course of the two decades from 1980 to 2000. This examination reveals two trends in lawmaking.⁴⁵ First, the line between the different types of international lawmaking—particularly the various kinds of executive agreements—is not nearly as distinct as usually assumed. Second, treaties and congressional-executive agreements are used in ways that do not conform to any of the existing academic accounts.

Descriptions of international lawmaking in the United States generally break international agreements into two categories: executive agreements and

44. There are multiple databases of treaties and other international agreements of the United States: (1) Oceana, Treaties and International Agreements Online [hereinafter Oceana Database] (currently offline, but available in revised form along with the other data for this article at <http://yalelawjournal.org/117/8/hathaway.html>); (2) The Library of Congress, Thomas: Treaties, <http://thomas.loc.gov/home/treaties/treaties.html> (last visited Dec. 18, 2007) [hereinafter Thomas Database]; (3) U.S. Dep't of State, Reporting International Agreements to Congress Under Case Act, <http://www.state.gov/s/l/treaty/caseact/> (last visited Dec. 18, 2007); (4) U.S. Dep't of State, Treaties and Other International Acts Series (TIAS), <http://www.state.gov/s/l/treaty/tias/> (last visited Jan. 29, 2008); (5) TREATIES IN FORCE, *supra* note 43; (6) U.S. Dep't of State, Treaty Actions, <http://www.state.gov/s/l/treaty/c3428.htm> (last visited Dec. 18, 2007); (7) TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA (Hunter Miller ed., 1931) [hereinafter TREATIES AND OTHER INTERNATIONAL ACTS]. For more details on each of these sources, see Appendix A.
45. I focus here on subject matter because it has been the central focus of the literature. There are other reasons one might expect one instrument to be used over the other, but none proves a particularly good guide on closer inspection. First, consider multilateral versus bilateral agreements. Of the 2744 executive agreements concluded between 1980 and 2000, only 152 (6%) were multilateral. See Oceana Database, *supra* note 44 (author's calculations). By contrast, of the 372 Article II treaties concluded during this same period, 130 (35%) were multilateral. Thomas Database, *supra* note 44 (author's calculations). Hence even as Article II treaties are more likely to be multilateral agreements than are executive agreements, multilateral agreements are more likely to be executive agreements. Second, the label given to an agreement proves to be an imperfect guide. Agreements concluded through the United Nations are more likely to be ratified through the Article II process unless they are specifically designated an "agreement." This was determined by comparing the treaty record from the Thomas Database, *supra* note 44, to the database of treaties at the United Nations, Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp> (last visited Nov. 26, 2007). An agreement is also somewhat more likely to proceed through Article II if it is designated a "treaty," "convention," "contract," or "protocol." If, on the other hand, it is designated an "agreement" it is more likely to proceed as a congressional-executive agreement or sole executive agreement. But there are many counterexamples. To take just two: The Inter-American Coffee Agreement was ratified through the Article II process. In addition, Congress specifically authorized the Postmaster General to negotiate and conclude postal "treaties" or "conventions" without submitting the agreements to the Senate for approval. 5 U.S.C. § 372 (2000).

Article II treaties. But there are, in fact, three very different kinds of executive agreements that differ significantly in the amount of interbranch cooperation they require. First are congressional-executive agreements. These are agreements concluded by the President and either authorized in advance or approved after the fact through the same process used for ordinary federal legislation. The second and third types of executive agreements are both commonly referred to as "sole executive agreements." One is concluded pursuant to a treaty obligation and the other is concluded solely on the President's own constitutional authority.⁴⁶ Unlike *ex post* congressional-executive agreements, sole executive agreements require nothing more than congressional inaction to take effect.⁴⁷

The discussion that follows focuses broadly on the first type of executive agreements just mentioned: congressional-executive agreements. It is worth noting, however, that this broad category actually contains at least two subtypes that differ in the degree of control retained by Congress and hence in the amount of interbranch cooperation that they require. First are congressional-executive agreements authorized in advance by legislation ("ex ante congressional-executive agreements" or "congressionally authorized executive agreements") involve relatively little interbranch cooperation.

46. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303(4) (1987) ("[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."). This division of executive agreements into three categories appears in the 1955 Department of State Circular, which directed its officers to use the executive agreement form

only for agreements which fall into one or more of the following categories: a. Agreements which are made pursuant to or in accordance with existing legislation or a treaty; b. Agreements which are made subject to Congressional approval or implementation; or c. Agreements which are made under and in accordance with the President's Constitutional power.

Dep't of State Circular No. 175, Dec. 13, 1955, *reprinted in* 50 AM. J. INT'L L. 784, 785 (1956). It was common well before then, as well. See HUGH EVANDER WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 437 (1936); 1 WESTEL WOODBURY WILLOUGHBY, WILLOUGHBY ON THE CONSTITUTION 467-79 (1910).

47. Executive agreements differ as well in their domestic legal effect. Because they are accompanied by legislation giving them effect, congressional-executive agreements automatically have the force of federal law. Sole executive agreements, however, are concluded by the President alone and hence carry force only so long as they are not inconsistent with federal law concluded with Congress's express consent. In a clash between ordinary federal legislation and a sole executive agreement, therefore, the legislation is given primacy unless the sole executive agreement was expressly intended to effect a treaty obligation, in which case the last-in-time rule is applied. In this case the executive agreement takes on the force of a treaty obligation as a matter of domestic law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 115 cmt. c (1987).

Indeed, in many cases, they do not involve a more significant congressional role than do sole executive agreements based on a prior treaty arrangement. This is particularly true of the numerous agreements based on broad authority granted well in advance, which make up the largest group of congressional-executive agreements.⁴⁸ Second are congressional-executive agreements that require approval by Congress only after the agreement is negotiated (“ex post congressional-executive agreements”) perforce involve deeper interbranch cooperation. However, such agreements are much less common than their less restrictive counterparts. Although an accurate count is almost impossible, during the twenty-year period under examination here, it appears there were a small number, including agreements on fisheries, trade, atomic energy, investment, education, and the environment.⁴⁹

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48. For example, the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified in scattered sections of 22 U.S.C.), provides authorization for large numbers of executive agreements on debt, defense, economic cooperation, judicial assistance, and narcotic drugs, categories that alone account for over eight hundred of the nearly three thousand executive agreements under study here.
49. See Atomic Energy Act—Exemption, Pub. L. No. 109-401, 120 Stat. 2726 (2006) (codified in scattered sections of 22 U.S.C.); Balanced Budget Downpayment Act, Pub. L. No. 104-99, § 201(a), 110 Stat. 26, 34 (1996) (approving the Global Learning and Observations To Benefit the Environment (GLOBE) agreement and appropriating funds to the Commerce, Justice, and State Departments and to the judiciary); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified in scattered sections of 19 U.S.C.); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in scattered sections of 19 U.S.C.); South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, 107 Stat. 1503 (1993) (codified in scattered sections of 22 U.S.C.) (encouraging U.S. private sector investment in and trade with South Africa); Support for East European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298 (1989) (codified in scattered sections of 22 U.S.C.) (removing trade restrictions and liberalizing foreign investment between the United States, Poland, and Hungary); United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-499, 102 Stat. 1851 (1988) (codified at 19 U.S.C. § 2122 (2000)); Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy, Pub. L. No. 99-183, 99 Stat. 1174 (1985) (codified at 42 U.S.C. § 2156 (2000)); United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (1985) (codified at 19 U.S.C. § 2112 (2000)). This list was compiled through a search of the titles of the agreements in the Statutes at Large database and an examination of the legislation for language indicating that the act constituted not simply implementing legislation but formal approval of the agreement. Though as far as I am aware this is the most comprehensive listing of ex post congressional-executive agreements during this period, it is almost certainly true that this list misses several congressional-executive agreements, either because the agreement was not listed in the Oceana Database of executive agreements on which the searches are based or because my assistants and I failed to catch the agreement in our search of the Statutes at Large. See Oceana Database, *supra* note 44.

In the remainder of this Subsection, I put these distinctions to one side and focus on congressional-executive agreements taken as whole, excluding, when possible, sole executive agreements. When we compare the substantial body of congressional-executive agreements authorized in some form by Congress to Article II treaties, we find that both sides of the interchangeability argument fail.⁵⁰ To make this comparison, it is necessary to begin by examining the full set of Article II treaties. During the last two decades of the twentieth century, such treaties were used in a relatively narrow set of areas. Table 1 groups all of the treaties entered by the United States during this period by subject matter.⁵¹ The two most prevalent types of treaties are extradition treaties, which make up fully twenty-seven percent of treaties, and taxation treaties, which make up nineteen percent of treaties. Next are treaties on investment (eleven percent), commercial matters (seven percent), fisheries and wildlife (seven percent), arms control (four percent), maritime matters (four percent), shipping and marine pollution (four percent), and the environment (two percent). A variety of other areas—including aviation, consular relations, maritime matters, telecommunications, international law and organization, human rights, labor, nuclear safety, intellectual property/copyrights, dispute settlement and arbitration, and legal documents—have also seen multiple treaties, though not in large numbers.

50. If we restrict congressional-executive agreements to the final subtype of agreements, the conclusion is not changed: congressional-executive agreements and treaties are clearly not used interchangeably. Of the more than twenty different areas of international law where there are treaties (see Table 1), congressional-executive agreements have been used in only six. But the separate-spheres argument also fails, because congressional-executive agreements and treaties coexist in several issue areas.

51. This listing includes all treaties transmitted to Congress between 1980 and 2000, where advice and consent was granted by the Senate. The Table is based on data I compiled from the Thomas Database, *supra* note 44. The dataset includes amendments to a treaty if a vote of advice and consent is recorded and if it has been granted a "Treaty Doc." number independent of the original treaty. For unclassified treaties (those listed under "International Law" or "International Law and Organization"), I examined the treaties to determine which category, if any, they belonged in and added them to the subject area tallies accordingly. These and all other datasets used or cited in this Article are available at <http://yalelawjournal.org/117/8/hathaway.html>.

Table 1.
TREATIES ENTERED BY THE UNITED STATES, 1980-2000

SUBJECT	NUMBER	PERCENTAGE OF TOTAL
Extradition and Criminal Assistance	103	27%
Taxation	73	19%
Investment	43	11%
Commercial	27	7%
Fisheries and Wildlife	25	7%
Arms Control	15	4%
Maritime Matters	15	4%
Shipping and Marine Pollution	13	3%
Environment	8	2%
Aviation	7	2%
Consular	6	2%
Telecommunications	6	2%
International Law and Organization	6	2%
Human Rights	5	1%
Labor	5	1%
Nuclear Safety	5	1%
Intellectual Property/Copyrights	3	1%
Dispute Settlement and Arbitration	2	1%
Legal Documents	2	1%
Agriculture	1	<1%
Atomic Energy	1	<1%
Customs	1	<1%
Education	1	<1%
International Expositions	1	<1%
Terrorism	1	<1%
TOTAL	375	100%

Congressional-executive agreements, by contrast, have been used in a wide variety of areas—over one hundred during the 1980s and 1990s, according to the most comprehensive available data. Table 2 lists the twenty most common subject areas. Executive agreements do not, except on rare occasions, identify the source of the authority under which they are concluded—whether under the President’s constitutional power or an *ex ante* or *ex post* congressional authorization. As a consequence, separating executive agreements that are congressionally authorized from those that are not requires a painstaking search for authorizing legislation. To determine whether an agreement is a congressional-executive agreement, it is necessary to search the Statutes at Large prior to the date the agreement went into effect for terms related to that subject area.⁵² Then it is necessary to read each statute to determine whether it actually authorizes the relevant international agreements. Using this method, a research assistant and I found authorizing legislation for agreements in every subject area specifically listed in Table 2 (though not for those in the “Other” category). We were unable to find any relevant authorizing legislation for agreements in the following areas: aviation, finance, taxation, telecommunication, scientific cooperation, and arms limitation. As a result, we excluded them from the table along with those agreements that are most obviously sole executive agreements. Among the subject areas included in the table, agreements regarding defense are the most prevalent, constituting just over thirteen percent of all agreements entered into during the decade. Other areas in which congressional-executive agreements are commonly used include trade (eight percent), debts (eight percent), postal matters (seven percent), agriculture (six percent), atomic energy (four percent), and economic cooperation (four percent).

52. For example, to find authorizing legislation for agreements on agriculture, we searched the entire Statutes at Large for “agricultural commodities” or “agriculture” in the same sentence as “agreement.”

Table 2.**CONGRESSIONAL-EXECUTIVE AGREEMENTS TOP TWENTY AREAS, 1980-2000**

SUBJECT	NUMBER	PERCENTAGE OF TOTAL
Defense	358	13%
Trade	226	8%
Debts	220	8%
Postal Matters	204	7%
Agriculture	167	6%
Atomic Energy	117	4%
Economic Cooperation	115	4%
Employment	81	3%
Investment	77	3%
Education	67	4%
Narcotic Drugs	56	2%
Peace Corps	45	2%
Mapping	43	2%
Environment	34	1%
Fisheries	30	1%
Judicial Assistance	28	1%
Customs	26	1%
Maritime Matters	25	1%
Space Cooperation	24	1%
Energy	19	1%
Other ⁵³	782	28%
TOTAL	2744	100%

53. The "Other" category includes all of the executive agreements between 1980 and 2000 in the Oceana Database that are not obviously sole executive agreements, treaties, or simply amendments to prior agreements. It includes agreements in ninety-three separate subject areas.

There are a few areas of law in which the Article II process was used exclusively during the 1980s and 1990s. Foremost was extradition, about which there were 103 treaties (twenty-seven percent of all treaties during this period) and apparently no executive agreements of any kind.⁵⁴ The only other areas in which the Article II process was used exclusively were human rights (five Article II treaties) and dispute settlement (two Article II treaties).⁵⁵ In addition, there are several areas of law in which all significant international agreements were concluded through the Article II process, and any congressional-executive agreements appear to be entered pursuant to obligations under a treaty obligation or under the sole authority of the President (where there are, in other words, no true congressional-executive agreements). This includes arms control (with fifteen Article II treaties devoted to the topic⁵⁶), aviation (with seven Article II treaties⁵⁷), the environment

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54. All of the treaty totals referenced in this paragraph are from the Thomas Database, *supra* note 44, which was used to calculate Table 2. The finding that there are no congressional-executive agreements on any of these topics was based on analysis of the Oceana Database, *supra* note 44, as described in the text accompanying note 52. While there are no executive agreements on extradition, there are some agreements on criminal assistance. *See infra* note 67.
55. Notably, there are several international agreements that include dispute-resolution mechanisms that have been concluded as congressional-executive agreements, and even as sole executive agreements. For example, the North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), and the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, both provide for substantial dispute-resolution systems. The same is true of the Agreement on Trade in Wine, U.S.-Eur. Cmty., arts. 5, 11, Mar. 10, 2006, Hein's No. KAV 7599, which provides for resolution of disputes and to which the United States acceded by an exchange of letters between executives (a form of sole executive agreement); and the International Coffee Agreement 2001, *opened for signature* Nov. 1, 2000, 2161 U.N.T.S. 312, to which the United States acceded in 2005 through a sole executive agreement. *See* Int'l Coffee Org., United States Accedes to the International Coffee Agreement 2001, http://www.ico.org/show_news.asp?id=18; *see also* International Coffee Agreement 2001, *supra* (addressing the management of disputes and complaints).
56. During the 1980s and 1990s, there were a few executive agreements on arms control, but they all appear to have been sole executive agreements concluded pursuant to a treaty obligation. *See, e.g.*, Agreement on the Conduct of a Joint Verification Experiment Relating to Nuclear Testing, U.S.-U.S.S.R., May 31, 1988, 88 Dept. State Bull. 67 (Aug. 1988). In 1988, Congress passed the Arms Control and Disarmament Act, which provides that any agreement that "would obligate the United States to reduce or limit the Armed Forces or armaments of the United States" could be made only through the treaty power or congressional-executive agreement. 22 U.S.C. § 2573(b) (2000). Since then, nearly all arms control agreements have been made through the Treaty Clause. An interesting exception to

(eight Article II treaties),⁵⁸ labor (five Article II treaties),⁵⁹ consular relations (six Article II treaties),⁶⁰ taxation (seventy-three Article II treaties),⁶¹ and telecommunications (six Article II treaties).⁶²

this usual rule is an agreement that predates the two-decade focus here, but is nonetheless sufficiently important to note: the Interim Agreement on Limitation of Strategic Offensive Arms (SALT I), U.S.-U.S.S.R., art. V, May 26, 1972, 11 I.L.M. 791 (1972), which was passed as a congressional-executive agreement. Numerous amendments to arms control agreements have also been made without any involvement by Congress. See David A. Koplow, *When Is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate*, 59 U. CHI. L. REV. 981 (1992); see also Ronald A. Lehmann, *Reinterpreting Advice and Consent: A Congressional Fast Track for Arms Control Treaties*, 98 YALE L.J. 885, 890 n.29 (1989) (noting that “no President has yet concluded an arms control accord in anything other than treaty form”); Trimble & Weiss, *supra* note 36, at 652 (“[T]he record of United States-Soviet arms control over the past thirty years shows that most United States-Soviet arms control agreements have been concluded as Article II treaties.”).

57. A search for the agreements in the Statutes at Large turned up no evidence that any of the executive agreements were congressional-executive agreements. Most are air-transport agreements or air-safety agreements concluded pursuant to treaty obligations. Even the single multilateral executive agreement, the Agreement To Ban Smoking on International Passenger Flights Between Canada, the United States, and Australia, appears to be a sole executive agreement. Article 7 of the Agreement provides: “This Agreement shall enter into force on the 120th day following signature by the Governments of Australia, Canada, and the United States of America.” See Agreement To Ban Smoking on International Passenger Flights, U.S.-Austl.-Can., Nov. 1, 1994, T.I.A.S. No. 12,578. The agreement was signed for the United States by Frederico Pena, who was at the time the U.S. Secretary of Transportation. The primary international treaty on aviation is the 1944 Convention on International Civil Aviation, which established the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations charged with coordinating and regulating international air travel. This treaty, along with a series of appended agreements, provides the legal framework for international aviation. Of these foundational agreements, only the Convention on Civil Aviation was submitted for approval by the Senate under Article II. The remaining agreements were approved by sole executive agreement. See Erwin Seago & Victor E. Furman, *Internal Consequences of International Air Regulations*, 12 U. CHI. L. REV. 333, 342-43 (1945). This pattern continues today. Of the executive agreements entered during the period under study (eleven in all), all appear to be sole executive agreements. Section 1102 of the 1958 Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731, discusses international agreements, but does not delegate authority to enter them. The same is true of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 1117(c), 94 Stat. 42 (1980) (codified at 49 U.S.C. § 1502 (2000)) (“Nothing in this section shall preclude the transportation of persons . . . by foreign air carriers if such transportation is provided for under the terms of a bilateral or multilateral air transport agreement.”) The exceptions to this rule are aviation “security agreements,” which appear to be broadly authorized *ex ante* in the Aviation Security Improvement Act of 1990, 22 U.S.C. § 5501 (2000), which states, “The Secretary of State is directed to enter, expeditiously, into negotiations for bilateral and multilateral agreements for enhanced aviation security objectives.”
58. There are over thirty executive agreements on “environmental cooperation” during this period. Several of these were concluded under the Global Learning and Observations To

Benefit the Environment (GLOBE), a science and education program authorized by legislation, and probably should have been classified as education agreements. Those remaining all appear to be sole executive agreements, and many appear to have been concluded in connection with a treaty arrangement. Oceana Database, *supra* note 44 (author's calculations); see, e.g., Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, U.S.-Mex., Aug. 14, 1983, 35 U.S.T. 2917 [hereinafter La Ruz Agreement]. The sole exception during this period is the NAFTA "side agreement" on the environment, North American Agreement on Environmental Cooperation (NAAEC), U.S.-Can.-Mex., art. 10(7), Sept. 13, 1993, 32 I.L.M. 1480, 1486-87, which was negotiated by the member countries' environmental agencies and approved in conjunction with NAFTA. See Oceana Database, *supra* note 44 (listing the agreement as the only agreement under the subject area "environment" that is not a treaty); see also FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM 29 (1995) (discussing the negotiating history of the side agreement); Charnovitz, *supra* note 41, at 287-94. Interestingly, Senator Ted Stevens actively objected to the NAAEC on the grounds that it should have been submitted as a "treaty," but he received no significant support. *Id.* at 295.

59. All five article 2 agreements on labor were concluded under the auspices of the International Labor Organization. In addition, there were two executive agreements on labor during this period: Guidelines for a Cooperative Program in Labor Mediation and Alternative Dispute Resolution Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States, U.S.-Taiwan, Apr. 7, 1995, Oceana Database, *supra* note 44; and Guidelines for a Cooperative Program in Labor Affairs, U.S.-Taiwan, Dec. 6, 1991, Oceana Database, *supra* note 44. Both were concluded as sole executive agreements. In addition, there were numerous executive agreements on employment. The subjects of these agreements, however, were quite distinct.
60. There were four sole executive agreements on consular matters (subject area "consuls") during this period, all with China, most of which were apparently related to the negotiations of the Consular Convention Between the United States of America and the People's Republic of China, U.S.-P.R.C., Sept. 17, 1980, 33 U.S.T. 2973, which was itself submitted to advice and consent. Those four executive agreements are the Agreement Concerning the Establishment of Additional Consulates General, U.S.-P.R.C., Jan. 17, 1981, 33 U.S.T. 3048; Agreement Concerning the Establishment of Additional Consulates General, U.S.-P.R.C., Sept. 17, 1980, T.I.A.S. No. 12,007; Agreement Concerning the Enlargement of Existing Consular Districts, U.S.-P.R.C., June 16, 1981, T.I.A.S. No. 12,007; and Agreement Regarding the Maintenance of the U.S. Consulate General in Hong Kong, U.S.-P.R.C., Mar. 25, 1997, 36 I.L.M. 813. See Oceana Database, *supra* note 44.
61. There were eighty-four executive agreements on taxation during this period, all of which appear to be sole executive agreements. Oceana Database, *supra* note 44 (author's calculations).
62. There were forty-eight executive agreements on telecommunications during this period, all of which appear to be sole executive agreements. Oceana Database, *supra* note 44 (author's calculations). Many are concluded pursuant to the obligations created by the International Telecommunication Convention, Dec. 21, 1959, 12 U.S.T. 1761, which created the International Telecommunication Union.

In many areas, a significant number of agreements were concluded as Article II treaties, but congressional-executive agreements appear to be important as well—these are areas where the interchangeability thesis comes closest to being accurate. These include investment (forty-three Article II treaties and seventy-seven congressional-executive agreements),⁶³ maritime matters (fifty-three Article II treaties and sixty-eight congressional-executive agreements),⁶⁴ education (one Article II treaty and sixty-seven congressional-

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63. There were forty-three Article II treaties on “investment” (eleven percent of all treaties). At the same time, there were seventy-four congressional-executive agreements on “investment incentives,” two on “investment guarantees,” and one on “investment disputes,” for a total of seventy-seven, or three percent of all agreements. The congressional-executive agreements appear to have been authorized under two separate legislative acts: (1) the Act for International Development of 1961, Pub. L. No. 87-195, §§ 222, 601(b), 75 Stat. 424, 430, 438 (codified in scattered sections of 22 U.S.C.), which includes language on investment guaranties and investment incentives; and (2) the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 307, 98 Stat. 2948, 3012 (codified in scattered sections of 19 U.S.C.), which amends the 1974 Act to authorize the President to make agreements not just in “international trade” but also in “(A) trade in both goods and services, and (B) foreign direct investment by United States persons, especially if such investment has implications for trade in goods and services.” *Id.*
64. There were twenty-five Article II treaties on fisheries and wildlife, thirteen on shipping and marine pollution, fifteen on general maritime matters, for a total of fifty-three treaties, or fourteen percent of all treaties. During the same period, there were thirty congressional-executive agreements on fisheries, twenty-five on maritime matters, eight on sea beds, three on boundary waters, and two on whaling, for a total of sixty-eight, or four percent of all agreements. Several of these agreements were submitted to Congress for approval. *See, e.g.*, Agreement Concerning Fisheries off the Coasts of the United States of America, U.S.-Jap., Jan. 1, 1983, 34 U.S.T. 2059, *approved by* United States-Japan Fishery Agreement Approval Act of 1987, Pub. L. No. 100-220, § 1001, 101 Stat. 1458, 1459 (codified at 16 U.S.C. § 1801 note (2000)); Agreement Concerning Fisheries off the Coasts of the United States, U.S.-Ice., July 24, 1984, T.I.A.S. 11,032, *approved by* National Fishing Enhancement Act of 1984, Pub. L. No. 98-623, tit. I, 98 Stat. 3394, 3394 (codified at 16 U.S.C. § 1823 note (2000)). This is true despite the fact that in 1976, Congress enacted a law providing that all “international fishery agreements” would automatically become effective sixty days after submission to both houses of Congress, unless Congress rejects them through a joint resolution. *See* 16 U.S.C. § 1823(a) (2000). It seems the joint resolutions approving select fisheries agreements were done to speed the implementation process by avoiding the sixty-day waiting period. *See, e.g.*, Letter from President Jimmy Carter to Congress on United States-Japan-International Fishery Agreement to the Congress Transmitting the Agreement (Feb. 21, 1977), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=6754> (“Since 60 calendar days of continuous session as required by the legislation are not available before March 1, 1977, I strongly recommend that the Congress consider amendment of the ‘Fishery Conservation Zone Transition Act’ in order to incorporate this Agreement.”).

executive agreements),⁶⁵ nuclear safety and technology (five Article II treaties and nineteen congressional-executive agreements),⁶⁶ and judicial and criminal assistance (more than twenty Article II treaties and congressional-executive agreements).⁶⁷ Trade, usually thought of as an area in which congressional-executive agreements dominate, is also an area of shared authority: over two hundred congressional-executive agreements on trade were concluded during

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65. There was one Article II agreement on education during this period: the Protocol to the Agreement on the Importation of Educational, Scientific, and Cultural Materials (Florence Agreement), *adopted* Nov. 15, 1989, S. TREATY DOC. NO. 97-2, 131 U.N.T.S. 25. During this same period, there were sixty-seven congressional-executive agreements on education, many them concluded under the GLOBE agreement that was passed as a part of the Balanced Budget Down Payment Act, Pub. L. No. 104-99, § 201(a), 110 Stat. 26, 35 (1996) (codified in scattered sections of 19 U.S.C.). The Act appropriates funds to the Departments of Commerce, Justice, and State, and to the judiciary, under which the GLOBE agreement was listed as one of the “projects or activities” to be included. *Id.* at 34-35. The remaining education agreements—and even the GLOBE agreements themselves—appear to have been negotiated under authority provided to the President in the Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, § 103(a), 75 Stat. 527, 529 (codified at 22 U.S.C. § 2451-2464 (2000)), which authorizes the President to “enter into agreements with foreign governments and international organizations in furtherance of the purposes of this Act.”
66. There are five Article II treaties on “nuclear safety” and nineteen executive agreements on “nuclear safety,” “nuclear war,” “nuclear weapons,” or “nuclear weapons—non-proliferation.” Many appear to be authorized by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2021 (2000).
67. A substantial number of the treaties classified under “extradition and criminal assistance” create obligations to engage in mutual assistance on criminal matters. *See, e.g.*, Treaty on Mutual Legal Assistance on Criminal Matters, U.S.-U.K., Jan. 6, 1994, S. TREATY DOC. NO. 104-2; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 164, 28 I.L.M. 497. The same is true of a substantial number of the executive agreements classified under “judicial assistance.” There are three main categories of agreements within this category. First, there are various agreements between the United States and the United Kingdom or the Netherlands—as early as 1980—on joint cooperation for law enforcement matters. Second, a large handful of agreements are joint efforts between the United States and developed countries specifically in narcotics control and drug trafficking. Finally, more recent agreements provide for “assistance in the development of civilian law enforcement” and appear to have been authorized through the International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 712, 99 Stat. 190, 244-45 (codified at 22 U.S.C. § 2346(c) (2000)) (“The President may furnish assistance under this chapter to countries and organizations . . . to strengthen the administration of justice in countries in Latin America and the Caribbean” and “[f]unds may not be obligated for assistance under this section unless the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate are notified of the amount and nature of the proposed assistance at least 15 days in advance in accordance with the procedures applicable to reprogrammings pursuant to section 634A of this Act.”).

the 1980s and 1990s,⁶⁸ but there were significant numbers of Article II treaties as well.⁶⁹

Finally, there are numerous areas of international law in which agreements are concluded exclusively or almost exclusively through congressional-executive agreements. Agreements on defense matters are the most numerous,

68. These were nearly all authorized by the following legislation: Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (renewing fast-track authority through July 2007); Trade and Development Act of 2000, Pub. L. No. 106-200, §§ 107, 201, 114 Stat. 251, 256, 275 (authorizing the development of a plan to establish a free trade agreement with sub-Saharan African countries); Uruguay Round of Multilateral Trade Negotiations Act, Pub. L. No. 103-49, 107 Stat. 239 (1993) (renewing fast-track authority for the Uruguay Round of the General Agreement on Tariffs and Trade); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1102-03, 102 Stat. 1107 (renewing and expanding fast-track authority); Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (renewing fast-track authority); Trade Act of 1974, Pub. L. No. 93-618, §§ 101-106, 125-126, 151, 88 Stat. 1978, 1982-85, 1991-93 (creating fast-track procedure); and Trade Agreements Extension Act of 1955, Pub. L. No. 84-86, 69 Stat. 162 (giving the President authority to conclude bilateral trade agreements, although the tariff reductions he was allowed to conclude were narrowly guided).

69. These were categorized by the Senate under "commerce." They include the International Grains Agreement, S. TREATY DOC. NO. 105-4 (1997); Convention on the Limitation Period in the International Sale of Goods, S. TREATY DOC. NO. 103-16 (1993); Protocol to the Treaty of Friendship, Commerce, and Consular Rights, U.S.-Fin., S. TREATY DOC. NO. 102-34 (1992); Treaty Concerning Business and Economic Relations, S. TREATY DOC. NO. 101-18 (1990); International Natural Rubber Agreement, 34 U.S.T. 642 (1979); International Wheat Agreement, July 24, 1971, 22 U.S.T. 821; U.N. Convention on Contracts for the International Sale of Goods, S. TREATY DOC. NO. 98-9 (1988); International Coffee Agreement, S. TREATY DOC. NO. 98-2 (1983); Revised Nice Agreement Concerning the International Classification of Goods and Services for Trade (Treaty Number 96-5, 1983); Revised Customs Convention on the International Transport of Goods Under Cover of TIR Carnets, S. TREATY DOC. NO. 95-13 (1981); International Natural Rubber Agreement, Oct. 6, 1979, 34 U.S.T. 637; Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment To Be Used for Such Carriage, S. TREATY DOC. NO. 96-2 (1980). In addition, the United States used the Article II process for all but one of the trade agreements concluded at the United Nations that it has joined. These include the U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980; the Constitution of the United Nations Industrial Development Organization, Apr. 8, 1979; the Agreement Establishing the International Fund for Agricultural Development, June 13, 1976; the Convention on the Limitation Period in the International Sale of Goods, June 14, 1974; and the Protocol Amending the Convention on the Limitation Period in the International Sale of Goods; the Agreement Establishing the Asian Development Bank, Dec. 4, 1965; Convention on Transit Trade of Land-Locked States, July 8, 1965. See United Nations, Multilateral Treaties Deposited with the Secretary-General (Nov. 15, 2007), <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp>.

with 358 such agreements during the 1980s and 1990s.⁷⁰ These agreements include status of forces agreements,⁷¹ training agreements,⁷² and mutual logistical support,⁷³ among others. Debt agreements were also exclusively concluded through executive agreements, most of which appear to have been congressionally authorized in advance.⁷⁴ In the modern era, postal agreements

70. Initial authorization for most of these agreements appears in the Act for International Development of 1961, Pub. L. No. 87-195, § 503, 75 Stat. 424, 435, which provides:

The President is authorized to furnish military assistance on such terms and conditions as he may determine, to any friendly country or international organization . . . by . . . acquiring from any sources and providing . . . any defense article or defense service . . . assigning or detailing members of the Armed Forces of the United States . . . to perform duties of a noncombatant nature, including those related to training or advice.

Id. Authority to enter into “military education and training” agreements was also granted in the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 106(a), 90 Stat. 729, 732, which stated: “Part II of the Foreign Assistance Act of 1961 is amended by adding . . . ‘The President is authorized to furnish . . . military education and training to military and related civilian personnel of foreign countries.’” Authority to make “[c]ross servicing agreements” and “research and development exchange” agreements was also granted in the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, §§ 1103-1204, 100 Stat. 3816, 3962-71, which granted “[a]uthority to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States.” *See id.* § 1105(b), 100 Stat. at 3963 (“[T]he Congress urges and requests the President and the Secretary of Defense to pursue diligently opportunities for the United States and major non-NATO allies of the United States to cooperate . . . in research and development on defense equipment and munitions . . .”); *see also* Defense and Security Assistance Improvements Act of July 21, 1996, Pub. L. No. 104-164, 110 Stat. 1421; International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, 99 Stat. 190.

71. Status of Forces Agreement, U.S.-Papua N.G., Feb. 28, 1989, T.I.A.S. No. 11,612.
72. *See, e.g.*, Agreement Concerning the Provision of Training Related to Defense Articles Under the United States International Military Education and Training (IMET) Program, U.S.-Nig., Feb. 26, 1986, T.I.A.S. No. 11,106.
73. Agreement on Mutual Logistic Support, U.S.-Fr., Feb. 23, 1987, T.I.A.S. No. 12,293.
74. There were 220 debt agreements. Authority to enter into these agreements appears to flow from three separate legislative sources: (1) Act for International Development of 1961, Pub. L. No. 87-195, § 201(a)-(b), 75 Stat. 424, 426 (codified in scattered sections of 22 U.S.C.) (providing that “[t]he President shall establish a fund to be known as the ‘Development Loan Fund’ to be used by the President to make loans pursuant to the authority contained in this title. . . . on such terms and conditions as he may determine, in order to promote the economic development of less developed friendly countries and areas”); *id.* § 202(b) (providing that “[w]henver the President determines that it is important . . . and in recognition of the need for reasonable advance assurances in the interest of orderly and effective execution of long-term plans and programs of development assistance, he is authorized to enter into agreements committing, under the terms and conditions of this title, funds authorized to be appropriated under this title, subject only to the annual

are all concluded through congressional-executive agreements.⁷⁵ Agreements on agriculture are almost exclusively concluded through congressional-executive agreements, with 167 such agreements and only one Article II treaty concluded during the 1980s and 1990s (and the one treaty was concluded in 1980).⁷⁶ The same is true of agreements on atomic energy, where there were 117 agreements and one Article II treaty.⁷⁷ Congressional-executive agreements

appropriation of such funds”); *id.* § 202(c) (providing that “the President shall notify the Foreign Relations and Appropriations Committees of the Senate and the Speaker of the House . . . of the provisions of such agreement[s]”); (2) Enterprise for the Americas Act of 1992, 22 U.S.C. § 2430c (2000) (providing that the President “may reduce the amount owed to the United States . . . that is outstanding . . . as a result of concessional loans made to an eligible country by the United States under part I of this Act, chapter 4 of part II of this Act, or predecessor foreign economic assistance legislation”); *id.* § 703(b) (requiring the President to notify the “appropriate congressional committees” fifteen days in advance of any determination that a country is eligible under that Act); (3) Tropical Forest Conservation Act of 1998, 22 U.S.C. § 2431d (2000) (providing that the President “may reduce the amount owed to the United States . . . that is outstanding . . . as a result of concessional loans made to an eligible country by the United States under part I of this Act, chapter 4 of part II of this Act, or predecessor foreign economic assistance legislation”); *id.* § 808 (providing authority to engage in debt-for-nature swaps and debt buybacks); *id.* § 812 (requiring that the President “shall consult with the appropriate congressional committees on a periodic basis to review the operation of the Facility under this part and the eligibility of countries for benefits from the Facility under this part”).

75. See 39 U.S.C.A. § 407 (b)(1) (West 2006) (giving the Secretary of State the “power to conclude postal treaties, conventions, and amendments related to international postal services and other international delivery services”). In addition, the United States is a member of a treaty that creates an international postal union. Treaty Concerning the Formation of a General Postal Union, Oct. 9, 1874, 19 Stat. 577.
76. There are 167 executive agreements on agriculture during the period under study (150 classified under “agricultural commodities” and 17 under “agriculture”). Many of the agreements were negotiated under authority granted in the Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, §§ 101-109, 68 Stat. 454, 455-57. See *id.* § 101 (providing the President “authoriz[ation] to negotiate and carry out agreements with friendly nations or organizations of friendly nations to provide for the sale of surplus agricultural commodities for foreign currencies”); *id.* § 202 (providing “authoriz[ation] [for] the transfer on a grant basis of surplus agricultural commodities from Commodity Credit Corporation stocks to assist programs undertaken with friendly governments”); *id.* § 108 (requiring that “[t]he President shall make a report to Congress with respect to the activities carried on under this Act at least once each six months and at such other times as may be appropriate”).
77. There are 117 executive agreements on “atomic energy” which seem to fall under six types: international atomic energy agreements; “cooperation in nuclear safety” agreements; “exchange of information” agreements; “cooperation in nuclear research” agreements; “cooperation in nuclear waste management” agreements; and “non-proliferation” agreements. These were authorized by the Atomic Energy Act of 1954, Pub. L. No. 83-703, § 123, 68 Stat. 919, 940, which authorized the Commission, the Department of Defense, and the President to suggest cooperative agreements with other nations and regional defense

were exclusively used in the areas of economic cooperation, where there were 115 agreements,⁷⁸ and employment.⁷⁹ These are just a few of the areas covered by executive agreements. Indeed, in close to one hundred different areas of law, the United States enters agreements exclusively by means of executive agreements.⁸⁰

organizations pursuant to sections 54, 57, 64, 82, 103, 104, or 144 of the Act, which will enter into force if “the proposed agreement for cooperation, together with the approval and the determination of the President, has been submitted to the Joint Committee and a period of thirty days has elapsed while Congress is in session.” One was an ex post congressional-executive agreement. *See* Agreement on Cooperation Concerning Peaceful Uses of Nuclear Energy, U.S.-P.R.C., July 23, 1985, 99 Stat. 1174 (entered into force on Mar. 19, 1998).

78. There were 115 “economic cooperation” executive agreements, many of which are titled “economic and technical cooperative” agreements or “economic stabilization and recovery” agreements. These were authorized by the Act for International Development of 1961, Pub. L. No. 87-195, § 211, 75 Stat. 424, 427, which provided that the President “is authorized to furnish assistance on such terms and conditions as he may determine in order to promote the economic development of less developed friendly countries and areas, with emphasis upon assisting the development of human resources through such means as programs of technical cooperation and development.” *See also id.* § 241 (authorizing the President to “carry out programs of research into, and evaluation of, the process of economic development in less developed friendly countries and areas”); *id.* § 634(d) (mandating annual reports to Congress).
79. There were eighty-one executive agreements on “employment.” Almost all relate to the employment of the dependents of U.S. government personnel operating abroad. Authorization for the President to enter into these agreements was provided for in the Act for International Development of 1961, Pub. L. No. 87-195, 75 Stat. 424. *See id.* § 633(f), 75 Stat. at 445 (“Funds provided for in agreements with foreign countries for the furnishing of services under this Act shall be deemed to be obligated for services of personnel employed by the United States government as well as other personnel.”); *see also id.* § 633(h), 75 Stat. at 445 (“Arrangements may be made by the President with such countries for reimbursement to the United States Government or other sharing of the cost of performing such functions.”).
80. The classification schemes for treaties and executive agreements are not perfectly comparable, as they are designated by two separate entities. Yet there are many areas of law in which there are executive agreements that do not appear to be covered by Article II treaties. The subject areas in the Oceana Database, *supra* note 44, that do not have obvious analogs in the treaties covered in the Thomas Database, *supra* note 44, during the 1980 to 2000 period include, among others: Defense, Debts, Postal Matters, Atomic Energy, Economic Cooperation, Scientific Cooperation, Employment, Finance, Narcotic Drugs, Peace Corps, Mapping, Judicial Assistance, Space Cooperation, Energy, Social Security, Health, Peacekeeping, Claims, Satellites, Navigation, Cultural Property, Cultural Relations, Tourism, Pollution, Diplomatic Relations, Sea Beds, Weapons, Visas, Property, North Atlantic Treaty Organization, Weather Stations, Privileges and Immunities, Oceanography, Marine Pollution, War Crimes, Textiles, Humanitarian Aid, Embassy Sites, Conservation, Canals, Technical Cooperation, Patents, Hazardous Wastes, Tracking Stations, Refugees, Germany, Financial Institutions, Copyright, Boundary Waters, Boundaries, Whaling, Veterans Affairs, Transportation, Timber, Supplies, Seismic Observations, Prisoner

This summary of the empirical evidence calls into question the claims of both sides of the interchangeability debate. Scholars who argue that congressionally authorized executive agreements and treaties are (and ought to be) fully interchangeable fail to accurately describe both the past and present practices of the United States. Though there are some areas of law in which treaties and congressionally authorized executive agreements are today used interchangeably, there are also significant areas that are dominated almost entirely by one process or the other. By ignoring the distinct uses to which the two different processes for making international law are put, those who favor interchangeability undermine confidence in their accounts. And in seeing the world as they wish it to be, they fail to recognize that the continuing use of the Treaty Clause has had a disproportionately large effect on U.S. participation in some areas of international law—including human rights—while leaving other areas entirely unaffected.

Yet those who argue that the two processes are not interchangeable (and ought not to be) also miss important parts of the story. These scholars correctly note that the Treaty Clause and congressional-executive agreements are not treated as fully interchangeable. They err, however, in providing an incomplete picture of current practices in the United States. They fail to acknowledge, for instance, that the instruments are both used in several areas of law. They also attempt to shoehorn the patterns of practice that they detect into reasoned theories of constitutional law that simply do not fit the facts. And finally, they fail analytically to provide a coherent normative account that justifies the different uses to which the two processes are put.

For example, Yoo's claim that congressionally authorized executive agreements are used exclusively for agreements that fall within Congress's Article I powers whereas treaties are used for agreements that extend beyond Article I is contradicted by the evidence. There is little evidence that the two instruments are used exclusively in certain areas of law, much less in the constitutionally guided manner that Yoo suggests. Quite the contrary: in many areas of international law—including investment, maritime matters, education, nuclear safety and technology, judicial and criminal assistance, and trade—Article II treaties and congressional-executive agreements are used side-by-side. Moreover, areas of law in which Article II treaties are used extensively, including human rights, dispute resolution, arms control, aviation, the environment, labor, consular relations, taxation, and telecommunications,

Transfer, Meteorology, Lend Lease, Judicial Cooperation, Investment Guarantees, Headquarters, Grain, Disaster Assistance, Cambodia, and Banking. (These are all the subject areas on which there was more than one executive agreement for which there was no obvious treaty analog.)

almost never extend beyond Congress's Article I powers. If agreements on human rights, labor, and taxation were beyond Congress's Article I powers, then the Civil Rights Acts, the Labor Department, and the Internal Revenue Service would seem to be unconstitutional exercises of federal power as well.

This examination of the current international lawmaking process of the United States suggests that empirical reality does not fit the expectations of scholars on either side of the interchangeability debate. The two types of international agreements are neither treated as fully interchangeable nor used in ways that reflect relevant legal differences. Far from resolving the debate, then, the findings simply complicate the puzzle posed by U.S. international lawmaking: if neither side is right, as appears to be the case, then what explains the current international lawmaking practices of the United States? This puzzle deepens when we consider the international lawmaking practices of the United States in comparison with those of the rest of the world.⁸¹

C. U.S. Practice in Comparative Perspective

International law provides strikingly little guidance to states about how they ought to make international law. The 1972 Vienna Convention on the Law of Treaties, which incorporates widely accepted principles of international law, provides states with some guidance. It dictates that in order for a state to bind itself to an international agreement, it must express its consent. But how that consent is expressed or determined is left entirely to domestic law.⁸² As a consequence, there is a wide variety of practices among states.

The only way to know how states make international law, then, is to look to the domestic legal rules that govern the process. Working with a team of researchers, I have taken a step in this direction by compiling a comprehensive database of the treaty-making and domestic lawmaking practices of every country in the world that had a constitution in the year 2007. It turns out that the U.S. Treaty Clause stands out as a remarkably unusual method of making international law. Only five other countries in the world—Algeria, Burundi, Iraq, Micronesia, and the Philippines—require a supermajority vote in their

81. Scholars who have written about the international lawmaking process in the United States frequently assume that the U.S. international lawmaking process is the norm. See, e.g., Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2007 (2004) ("As in the United States, treaty formation in most countries is governed by a special process in which, characteristically, the legislature plays a lesser role."). As the next Section shows, that assumption turns out to be incorrect.

82. See Vienna Convention on the Law of Treaties arts. 11-17, May 23, 1969, 1155 U.N.T.S. 331.

legislature in order for the country to ratify a treaty.⁸³ By contrast, most states require that international law be made through a simple or absolute majority vote in the legislature.

The United States is also one of a small handful of countries that combine two features in their Constitution—an international lawmaking process that provides for less involvement by part of the legislature in international treaty making than in domestic lawmaking and the automatic incorporation of the results of that process into domestic law. The vast majority of states provide in their constitutions for an international lawmaking process that mirrors the domestic lawmaking process. One hundred and twenty-four states currently have voting thresholds in the legislature for treaties that are the same as those for domestic laws.⁸⁴ By contrast, fifty-nine (including the United States) provide for different voting thresholds in either house of the legislature for treaties than for domestic legislation. Of these, only ten (again, including the United States) explicitly provide in their constitution for some level of automatic incorporation of international law into domestic law.⁸⁵ Those countries are listed in Table 3.

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83. Algeria requires a majority in the lower house and three-quarters of all members in the upper house; Burundi requires two-thirds of present members in the lower house and two-thirds of present members in the upper house; Iraq requires two-thirds of all members in the lower house and requires no vote in the upper house; Micronesia requires two-thirds of all members in its unicameral legislature; and the Philippines requires no vote in the lower house and two-thirds of all members in the upper house. See Oona A. Hathaway, *Constitutions of the World: Codebook & Dataset* (April 1, 2008) (unpublished manuscript, on file with author). Several other countries specify special voting procedures that include a supermajority threshold for particular subsets of treaties—for example, human rights treaties that are to be given constitutional status. If there are multiple legislative voting procedures for treaties outlined in a constitution, the dataset codes the more general voting procedure.
84. Calculations by author based on a new dataset of all of the constitutions in the world, as of 2007. *Id.* For a comparison of the domestic and international lawmaking requirements of every country in the dataset, see *infra* Appendix B.
85. There are, in total, fifty states that explicitly provide in their constitution for some level of automatic incorporation of international law into domestic law, as does the United States. *Id.* In addition, twenty-six states that do not explicitly provide that treaties have any independent domestic legal force nonetheless give treaties status in relation to ordinary domestic legislation (ranging from requiring that ordinary legislation be interpreted in conformity with ratified human rights treaties to explicitly establishing general supremacy of treaties over ordinary legislation).

Table 3.

COUNTRIES THAT PROVIDE DIFFERENT METHODS FOR MAKING INTERNATIONAL LAW THAN FOR MAKING ORDINARY LEGISLATION, WHERE TREATIES ARE SELF-EXECUTING

COUNTRY	ORDINARY LEGISLATION (LOWER HOUSE)	ORDINARY LEGISLATION (UPPER HOUSE)	TREATIES (LOWER HOUSE)	TREATIES (UPPER HOUSE)
Cyprus	Majority	Majority	Majority	No Involvement
Ecuador	Majority	N/A (unicameral)	Majority of all Members	N/A
Ethiopia	Majority	Majority	Majority	No Involvement
Georgia	Majority	N/A (unicameral)	Majority of all Members	N/A
Mexico	Majority	Majority	No Involvement	Majority
Serbia	Majority	N/A (unicameral)	Majority of all members	N/A
Slovak Republic	Majority	N/A (unicameral)	Majority of all Members	N/A
Slovenia	Majority	Majority	Majority	No Involvement
Tajikistan	Majority of all members	Majority of all members	Majority of all members	No Involvement
United States	Majority	Majority	No Involvement	2/3 Majority

Four of the ten countries (Ecuador, Georgia, Serbia, and the Slovak Republic) have marginally *higher* voting standards for treaties than for domestic legislation. They require that a treaty be passed by a majority of all of the members of the legislature, rather than a simple majority of those present. In each case, the legislature is unicameral and hence no part of the legislature that is involved in domestic lawmaking is excluded from international lawmaking. (Moreover, the Slovak Republic makes only a subset of treaties explicitly self-executing.⁸⁶)

The six remaining countries—Cyprus, Ethiopia, Mexico, Slovenia, Tajikistan, and the United States—provide for less involvement by a part of the legislature in treaty making than in domestic lawmaking. Of these, Cyprus provides that treaties are supreme over ordinary legislation, but does not

86. CONST. SLOVAK REPUBLIC 1992, art. VII, § 5 (Slovk.) (“International treaties concerning human rights and fundamental freedoms, international treaties, for whose implementation a law is required, and international treaties, which directly establish rights or obligations of physical persons or juridical persons and which were ratified and promulgated in the manner established by law, have precedence before those (established) by laws.”).

explicitly grant treaties independent legal force. In addition, Cyprus, Ethiopia, and Slovenia all provide for extremely limited upper house involvement in domestic legislation. (Cyprus's upper house is involved only in legislation affecting subnational communities (and, indeed, there is a special voting procedure involving both houses for treaties that involve the competence of the upper house, hence the domestic and international processes are effectively the same); Ethiopia's upper house is primarily responsible for interpreting the Constitution and for federal-regional issues and is not usually involved in the regular legislative process; and Slovenia's upper house involvement in ordinary legislation is largely limited to a veto over legislation that can be overridden by the lower house through simple re-passage.) This leaves Mexico, Tajikistan, and the United States as the only countries in the world that provide for significantly less involvement by a part of the legislature in treaty-making than in domestic lawmaking *and* make the results of this process automatically part of domestic law in more than a few confined areas of law.

The United States is therefore unusual in requiring a supermajority legislative vote to approve treaties, it is in the distinct minority in excluding a part of the legislature that is usually involved in domestic lawmaking from international lawmaking, and it is among a small handful of countries that combine the latter feature with a rule that makes treaties automatically a part of domestic law. That the process for making treaties in the United States is extremely unusual does not mean, of course, that it is necessarily wrong or misguided. But it does raise questions, to which I shall return later in the Article, about the legitimacy of this method of international lawmaking. It also deepens the puzzle of U.S. international lawmaking: why is the system so unusual? Part II is devoted to answering this question. It examines how we arrived at the unusual compromise represented by the Treaty Clause.

II. A BRIEF HISTORY OF INTERNATIONAL LAWMAKING IN THE UNITED STATES

International lawmaking has changed dramatically over the more than two centuries since the country's founding. Examining this transformation helps to explain why the country has two separate methods for making international law whose distinct uses are not well defined. And it helps to explain why the United States adopted a process for making international law that is so unusual in comparative perspective.

The examination of the history of international lawmaking in the United States serves another related purpose as well. Many of those on opposing sides of the interchangeability debate argue that their normative claims are reflected in (and hence find support from) past and present practice. Hence, several

interchangeability scholars argue that treaties and congressional-executive agreements not only ought to be interchangeable, but that they in fact are (and long have been) treated this way by policymakers. Similarly, many of those supporting the separate spheres approach argue not only that the two methods ought not be used interchangeably, but that each type of agreement is (and long has been) used in precisely the way that they advocate (for example, as noted earlier, Yoo argues that congressional-executive agreements are used for agreements that fall under Congress's Article I authority, and treaties are used for agreements that exceed this authority).

The blurring of the line between the normative and positive in the debate over the two tracks of international lawmaking likely stems at least in part from the natural reflex of lawyers to look to the weight of history – or precedent – to guide future practice. But there are reasons behind this reflex beyond a simple preference for continuity. Rules developed over time often have developed in response to functional needs – hence the practices of the present are forged in the furnace of history and address needs of which we may be only dimly aware. Moreover, past practices can serve as a guide (albeit an imperfect one) as to what practices are and are not permitted or prohibited by the Treaty Clause. One need not hold an originalist view of constitutional interpretation to believe that past uses and interpretation of the Constitution provide some guide as to what is and is not permitted by the text.

Yet the mere fact that current practice has been shaped through the accretion of historical precedent – as is true of the use of the Treaty Clause and congressional-executive agreements – does not in itself offer a normative justification for that practice. That a set of practices exists is not reason enough to assume that they are either functionally or legally the best practices – nor that how things are is how they must (or ought to) be. Indeed, where the reasons that gave rise to current practices have been discredited and rendered obsolete, as I shall argue is the case here, the fact that practices are as they are tells little about what they ought to be.⁸⁷

Examining the history of international lawmaking practices in the United States and how they have developed over time reveals that they have been shaped directly in response to a set of particular historical circumstances – many of which no longer hold today. The Treaty Clause was a compromise carefully crafted to hold together the coalition of states in a single government.

87. For related arguments about the path dependence of the common law and historically contingent changes in U.S. trade law, see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); and Oona A. Hathaway, *Positive Feedback: The Impact of Trade Liberalization on Industry Demands for Protection*, 52 INT'L ORG. 575 (1998).

Two circumstances in particular shaped the Clause: first, the assumption that the Senate would serve as a council of advisors for the President, and second that the supermajority requirement would protect regional interests, particularly those of southern slaveholding states. These original goals are now obsolete.

Executive agreements, on the other hand, began as a quite modest tool, used for a relatively limited set of purposes. That all changed near the end of the nineteenth century, as the country turned to these agreements to facilitate reciprocal trade reductions with other nations. The use of executive agreements gradually expanded over the course of the century to the point that they came to far exceed treaties in scope, number, and importance. Meanwhile, the Treaty Clause once again became the center of controversy in the 1950s. In a sign of an emerging backlash against the human rights revolution—and particularly against the fear that human rights treaties would be used to challenge racial segregation—a series of amendments to the Constitution were proposed to restrict the treaty power of the federal government. This is the history that has shaped the system of international lawmaking in the United States today.

A. *The Treaty Clause: A Compromise To Save the Union*

The word “treaty” appears four times in the Constitution. The most important of these for the purposes of this discussion is the so-called Treaty Clause, which states that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.”⁸⁸

This Clause was no mere afterthought. The Confederation that existed at the time of the Constitutional Convention had proven fundamentally incapable of observing many of its treaty obligations.⁸⁹ Especially troubling was the

88. U.S. CONST. art. II, § 2, cl. 2. The other three are: (1) the Compacts Clause, which prohibits the states from making “treaties” with foreign nations, but permits them to enter into “agreement[s] or compact[s]” with foreign powers with the consent of Congress, *id.* art. I, § 10, cls. 1, 3; (2) the Cases-and-Controversies Clause, which provides: “[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made,” *id.* art. III, § 2, cl. 1; (3) and last, the Supremacy Clause, which states that “[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land,” *id.* art. VI, cl. 2.

89. For example, Governor Edmund Randolph complained that:

It [the Confederation] does not provide against foreign invasion. If a State acts against a foreign power contrary to the laws of nations or violates a treaty, it

failure to abide by the Treaty of Peace with Great Britain, which forbade the United States from placing lawful impediments in the way of British citizens who sought to collect their prewar debts.⁹⁰ Because the United States was an unreliable treaty partner—as it was unable to guarantee that the states would observe the Confederation's treaty agreements—it had difficulty negotiating treaties with other nations.⁹¹ Moreover, because the country was unable to live up to many of the agreements it had managed to negotiate, its treaty partners felt justified in doing the same.⁹²

An important goal of the Constitutional Convention was, therefore, to strengthen the federal government's power to create enforceable treaties. Yet there was significant uncertainty about where to place the strengthened treaty power. Indeed, during the first day of discussion of the Treaty Clause, Randolph adjourned the conversation by noting that “almost every Speaker had made objections to the clause as it stood.”⁹³ Much of the discussion of the clause at the Convention focused on the question of whether to bring the House into the process. After vigorous debate, they decided to place

cannot punish that State, or compel its obedience to the treaty. It can only leave the offending States to the operations of the offended power.

Charles A. Lofgren, *War Powers, Treaties, and the Constitution*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 242, 247 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (alteration in original) (emphasis omitted) (quoting Edmund Randolph); see also FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 3-15 (1973).

90. And so it was with many of the new country's treaty commitments. While discussing trade policy before the British Parliament in 1787, Lord Grenville declared, “we do not know whether they [the United States] are under one head, directed by many, or whether they have any head at all.” MARKS, *supra* note 89, at 68 (quoting William Smith to John Jay). Much of this narrative is guided by *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1937) [hereinafter *FEDERAL CONVENTION RECORDS*]; Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties*, 55 *WASH. L. REV.* 1 (1979); Lofgren, *supra* note 89; and Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, in 1 *PERSPECTIVES IN AMERICAN HISTORY* 233 (1984).
91. For example, the United States was unable to conclude a treaty with Spain in 1786. Bestor, *supra* note 90, at 60-68; Lofgren, *supra* note 89, at 243-44.
92. The American failure to prohibit postwar confiscations of British property as provided in the Treaty of Peace gave Great Britain an excuse to refuse to live up to its side of the agreement. It therefore refused to withdraw its forces from a line of posts south of the Canadian border in northern New York, severely compromising U.S. security. MARKS, *supra* note 89, at 3-51. Frederick Marks demonstrates the deep and widespread dissatisfaction with the country's ability to regulate commerce with foreign nations and provide for the national defense under the Articles of Confederation. *Id.* at 3-95.
93. 2 *FEDERAL CONVENTION RECORDS*, *supra* note 90, at 393.

responsibility for concluding treaties in the hands of the President and the Senate alone.

There were two central reasons for this decision. First, it was expected that the Senate would be directly involved in negotiating treaties and would serve as the President's "council of advisors" in treaty making. Second, it was seen as a way to keep the federal government from bargaining away regional interests. Indeed, the Treaty Clause was ineluctably shaped by a particular set of events that made the southern states exceptionally wary of any process that would allow the north to bargain away their shared interests.

The remainder of this section examines more fully these two rationales for the Treaty Clause. These rationales, I argue, are entirely products of a particular time and a set of circumstances that no longer hold.

1. *The Senate as a "Council of Advice" to the President*

The two historians to have examined the Treaty Clause most closely—Jack Rakove and Arthur Bestor—both conclude that "[a]dvice . . . was to be given at every stage of diplomacy, from the framing of policy and instructions to the final bestowal of consent."⁹⁴ The process required a manageable number of participants as well as secrecy—a role that most believed to be better entrusted to the twenty-six-member Senate than to the much larger House.⁹⁵ Not everyone shared this view. Gouverneur Morris, James Wilson, and James Madison favored the inclusion of the House in the treaty-making process. The "great obstacle they now confronted," historian Jack Rakove explains, "was the objection that the larger and more popular chamber of the legislature would not possess the requisite secrecy and efficiency to be an effective partner in

94. Rakove, *supra* note 90, at 249. Bestor and Rakove differ on the precise role the Founders intended the President to play in the treaty-making process, with Rakove noting that "it is difficult to accept the conclusion"—put forward by Bestor—"that the President was brought into the treaty process simply to serve as the agent of the Senate or to avoid violating the principle of a unitary executive." *Id.* at 250. Akhil Amar discusses this tension, finding Rakove's view more nuanced and persuasive. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 564 n.38 (2005).

95. The first Senate actually included only twenty-two Senators, although the Constitution authorized twenty-six. See RICHARD STREB, *THE FIRST SENATE OF THE UNITED STATES 1789-1795*, at 11 (1996) (noting that Virginia and New York ratified the Constitution too late to seat their Senators). General Charles C. Pinckney later explained that the House had been excluded from treaty making because it "would be a very unfit body for negotiation." 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 281 (J.B. Lippincott & Co. 1941) (Jonathan Elliot ed., 1836); see also Rakove, *supra* note 90, at 246 (discussing the exchange between Wilson and Sherman).

negotiations, particularly on occasions where urgent matters of war and peace were on the tapis.”⁹⁶ Repeatedly they argued for broader participation of the House in treaty making and repeatedly their proposals were either ignored or voted down.⁹⁷

When the final draft of the Treaty Clause was read on September 7, Wilson submitted an amendment that would have given the House precisely the same rights as the Senate in treaty making.⁹⁸ He argued that since treaties were “to have the operation of laws, they ought to have the sanction of laws also.”⁹⁹ He continued: “The circumstances of secrecy in the business of treaties formed the only objection” – an objection he argued was “outweighed” by the argument in favor of “obtaining the Legislative sanction.”¹⁰⁰ Roger Sherman responded that the “necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature.”¹⁰¹ Wilson’s proposal was decisively rejected.¹⁰²

96. Rakove, *supra* note 90, at 241 n.14.

97. See 2 FEDERAL CONVENTION RECORDS, *supra* note 90, at 538. Morris proposed an amendment stating that “no Treaty shall be binding on the U.S. which is not ratified by a law.” *Id.* at 392. The amendment received favorable remarks from a few, but nonetheless failed. After the failure of Morris’s proposal, Madison “hinted for consideration, whether a distinction might not be made between different sorts of Treaties . . . and of Alliance for limited terms – and requiring the concurrence of the whole Legislature in other Treaties.” *Id.* at 394. This whole clause was committed to the Committee on Detail which apparently did not pursue Madison’s suggestion. For more on this issue, see Rakove, *supra* note 90, at 240–41. Amar documents Madison and Wilson’s continued efforts to put forward their position even after the Convention. AMAR, *supra* note 94, at 302–07. It appears that having lost the battle to involve the House directly in the treaty-making process, Wilson and Madison went on to argue that treaties would require additional action by Congress in order to have legal effect – a position that does not appear to reflect the majority view of the Convention, given that their repeated efforts to amend the constitutional text to reflect this view all failed.

98. See 2 FEDERAL CONVENTION RECORDS, *supra* note 90, at 538.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*; see also Rakove, *supra* note 90, at 246. On January 16, 1788, when South Carolina was considering whether to call a ratification convention, General Charles C. Pinckney and Pierce Butler, former members of the state’s delegation to Philadelphia, explained why the Treaty Clause took the form it did. Butler noted that to give it to the Senate alone would have destroyed “the necessary balance,” and giving it to the President alone would have “smacked too much of monarchy.” Rakove, *supra* note 90, at 242. The House was not included because size posed “an insurmountable objection.” *Id.* Pinckney, too, noted that “it was agreed to give the President a power of proposing treaties . . . and to vest the Senate (where each state had an equal voice) with the power of agreeing or disagreeing to the terms proposed.” *Id.* at 243.

The central justification for including the Senate and excluding the House—that the Senate, with its smaller size, could more efficiently engage in negotiations and keep those negotiations secret—quickly proved wrong. Early in his presidency, President George Washington regarded the Senate as a “council of advice” in the treaty-making process.¹⁰³ And yet eight years later, he had almost entirely ceased seeking the Senate’s advice. Several events contributed to this transformation. The story is often recounted of the first and last visit by a President to the Senate chamber to consult about a treaty: President Washington went to the Senate on August 22, 1789, to consult about proposed treaties with the Southern Indians.¹⁰⁴ He was so frustrated with the experience that he declared it “defeats every purpose of my coming here” and never again appeared in person to discuss a treaty with the Senate.¹⁰⁵ By the end of his second term, President Washington had all but abandoned the process of consulting the Senate prior to opening treaty negotiations.¹⁰⁶ He assumed control of treaty negotiations and generally asked for Senate approval only once the agreements were finalized—a practice that largely continues to this day.¹⁰⁷ As Louis Henkin observed almost two centuries later, “‘advice and consent’ has effectively been reduced to ‘consent.’”¹⁰⁸

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103. RALSTON HAYDEN, *THE SENATE AND TREATIES 1789-1817*, at 6 (1920). Ralston Hayden writes that President Washington’s early approach to treaty making “is an indication of the feeling which seems to have been prevalent that the latter really was a council of advice upon treaties and appointments—a council which expected to discuss these matters directly with the other branch of the government.” *Id.* Hayden quotes a message from Washington to Congress stating, “I think it advisable to postpone any negotiations on the subject [of the northeast boundary], until I shall be informed of the result of your deliberations, and receive your advice as to the propositions most proper to be offered on the part of the United States.” *Id.* at 59.
104. CORWIN, *supra* note 11, at 33. Hayden writes: “[T]he practice of personal consultation failed to become firmly established largely because it proved to be an inconvenient and impracticable method of transacting business.” HAYDEN, *supra* note 103, at 6.
105. CORWIN, *supra* note 11, at 33.
106. Robert E. Dalton, *National Treaty Law and Practice: United States*, in NATIONAL TREATY LAW AND PRACTICE 765, 777 (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds., 2005); see also CORWIN, *supra* note 11, at 33-34; SENATE COMM. ON FOREIGN RELATIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 2 (2001) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS] (“Within several years, however, problems were encountered in treaty-making and Presidents abandoned the practice of regularly getting the Senate’s advice and consent on detailed questions prior to negotiations. Instead, Presidents began to submit the completed treaty after its conclusion.”).
107. This principle of executive control over negotiations was fully entrenched when the Supreme Court declared in *United States v. Curtiss-Wright Export Corp.* that “the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties

The Senate also proved incapable of keeping a secret. Indeed, even the small number of appointed Senators were too many to maintain secrecy. The 1795 Jay Treaty with Great Britain addressed many issues left over from the American Revolution and was central to averting renewed war between the two nations. The terms of the treaty were leaked to a local newspaper by a Senator involved in the negotiations.¹⁰⁹ This event reinforced Washington's opinion that the Senate was not "a safe repository for diplomatic secrets."¹¹⁰

Even if these events had not so quickly put an end to the expectations of the Founders, it would likely be impossible today to regard the Senate as a council of advisors on treaty making. Indeed, the very qualities that the Founders believed disqualified the House of Representatives from participation in treaty negotiations—large size and popular electoral base—are today both true of the Senate. The first Senate included a comparatively modest twenty-two members, and those members, unlike representatives in the House, were at the time not subject to direct election but were instead appointed by the state legislatures. Today, the Senate has grown to one hundred members—much larger than the first House of Representatives, which had sixty-five members—and Senators are directly elected.¹¹¹

2. *Protecting Regional Interests: The Mississippi River and the Origins of the Treaty Clause*

There was a second, equally important—and today, equally irrelevant—justification offered for entrusting the treaty-making power to the Senate and requiring that it approve those treaties by a two-thirds vote: the supermajority requirement in the Senate was seen as a method for preventing the federal government from concluding treaties that would disproportionately disadvantage a particular region or significant subset of states. In maintaining a role for the states through the Senate, the Treaty Clause made it possible for

with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." 299 U.S. 304, 319 (1936).

108. HENKIN, *supra* note 8, at 177.

109. Once the Jay treaty was concluded, the President and Senate agreed to keep its terms secret. They nonetheless were leaked. After much of its contents had already been revealed, Senator Stevens T. Mason of Virginia sent his copy of the Jay treaty to the editor of a newspaper. HAYDEN, *supra* note 103, at 90.

110. *Id.* at 93.

111. U.S. CONST. amend. XVII.

those states to place sole responsibility for international lawmaking in the hands of the federal government.

The Constitutional Convention sought to address a thorny dilemma: On the one hand, the Convention was motivated in significant part by a desire to strengthen the role of the federal government in international affairs, where collective action by the states was essential to the success of the nation. On the other hand, there was great fear that the strengthened national government would act in ways that disfavored and discriminated against a minority of states. To satisfy both concerns, the Convention gave the Senate shared responsibility with the President for treaty making. Madison observed in the discussion of the Treaty Clause that “the Senate represented the States alone.”¹¹² The states would cede their foreign policy power to the federal government, but they would maintain a central role in treaty making through their role in the Senate.

This focus was not the result of general or theoretical concerns. It was, instead, formed in direct response to a recent controversy over treaty negotiations with Spain in the Continental Congress.¹¹³ Spain, which controlled the mouth of the Mississippi River, had offered the United States a

112. 2 FEDERAL CONVENTION RECORDS, *supra* note 90, at 392. Earlier, Wilson, who opposed the method chosen for appointing the Senate, argued that it “will not represent the property or numbers of the Nation, but they will represent the *States*, whose interests may oppose the Genl. Government.” *Id.* at 158. Many similar statements that reflect the understanding that the Senate would represent the states appear throughout the Convention records. See, e.g., *id.* at 160 (citing George Mason as stating that “we have agreed that the national Legislature shall have a negative on the State Legislatures—the Danger is that the national, will swallow up the State Legislatures—what will be a reasonable guard agt. this Danger, and operate in favor of the State authorities—The answer seems to me to be this, let the State Legislatures appoint the Senate . . .”).

113. AMAR, *supra* note 94, at 191 (noting that “[a]t the Founding, the paradigm case of sectional disparity involved the Mississippi River,” and that leading Federalists repeatedly assured skeptics that the supermajoritarian safeguards of the Article II treaty process would protect regional minorities); Warren, *supra* note 10, at 272 (“[I]t seems to be little known that [the Treaty Clause] was inserted in the Constitution, *not* on any general theory, but chiefly to take care of one, specific political situation existing in 1787—namely to allay the fears of the Southern States lest, under the new Constitution, there might be a surrender of American rights to the free navigation of the Mississippi River.”); see also Ackerman & Golove, *supra* note 15, at 810; Lofgren, *supra* note 89, at 245; R. Earl McClendon, *Origin of the Two-Thirds Rule in Senate Action upon Treaties*, 36 AM. HIST. REV. 768, 768 (1931) (“[A]ny purely theoretical reasons which may have influenced the adoption of the two-thirds rule were supported by at least two specific aims: the retention of the right to navigate the Mississippi River and the protection of the Newfoundland fisheries.”); Rakove, *supra* note 90, at 272-74; Warren, *supra* note 10, at 294 (“The two-thirds provision was inserted (as a North Carolina delegate, Hugh Williamson, later wrote), ‘for the express purpose of preventing a majority of the Senate or of the States . . . from giving up the Mississippi . . .’”).

deal: it would give the United States trade concessions that would benefit the North; in exchange the country would temporarily cede rights of free navigation on the Mississippi.¹¹⁴ The northern states, which saw the trading rights as essential to their economies and which formed a narrow majority of the states, supported the deal.¹¹⁵ The southern states vigorously opposed it, for they saw free navigation of the Mississippi as central to future trade and emigration in the south. Free trade and emigration were, in turn, viewed by many as essential to maintaining the South's political clout in the new union, presumably thereby protecting the tenuous compromise over slavery by making it possible for new slave states to form in the south.¹¹⁶

Though outnumbered, the southern states succeeded in blocking the deal because the Articles of Confederation required that treaties receive approval of

114. The rights were to be ceded for a period of twenty-five years. Warren, *supra* note 10, at 283. Many in the north considered the trading rights essential. Commercial conditions in the Northeast were "becoming desperately serious," due to Great Britain's navigation laws and "obstructions to fishery rights," which threatened to "spell practical ruin to the shipping interest of New York and New England." *Id.* at 282.
115. See, e.g., *id.* at 285 ("The Eastern States . . . consider a commercial connexion with Spain as the only remedy for the distresses which oppress their citizens, most of which they say flow from the decay of their commerce." (quoting Henry Lee, Virginia)).
116. See *id.* at 282, 289 (noting that the issue of navigation of the Mississippi revolved around "future possible commerce" and that settlers in the area "had one dominant idea in common": "sending their commerce down to the Mississippi River and thence to the sea."). The records of the ratification debates in Virginia suggest that the exchange with Spain was viewed by many in the south as an effort by the north to prevent emigration into the south and to thereby retain the thin northern majority. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 347-66 (Jonathan Elliot ed., 1861) [hereinafter DEBATES IN SEVERAL STATE CONVENTIONS]; *id.* at 365 ("I look upon this as a contest for empire. . . . If the Mississippi be shut up, emigrations will be stopped entirely. There will be no new states formed on the western waters. This will be a government of seven states. This contest of the Mississippi involves this great national contest; that is, whether one part of the continent shall govern the other. The Northern States have the majority, and will endeavor to retain it. This is, therefore, a contest for domination—for empire." (quoting Grayson, Virginia)); see also 4 DEBATES IN SEVERAL STATE CONVENTIONS, *supra*, at 115 ("The President and seven senators, as nearly as I can remember, can make a treaty which will be of great advantage to the Northern States, and equal injury to the Southern States. They might give up the rivers and territory of the Southern States." (quoting Porter, North Carolina)); Warren, *supra* note 10, at 285 ("The object in the occlusion of the Mississippi on the part of these people, so far as it is extended to the interests of their States . . . is to break up, so far as this will do it, the settlements on the Western waters, prevent any in the future, and thereby keep the States southward as they now are . . ." (quoting James Monroe, Virginia)). There was also fear among some that the new settlements would not join the Union but would instead form an independent territory. See Warren, *supra* note 10, at 286-87.

nine of the thirteen states. The debates at the Constitutional Convention and later ratification debates in the several states reveal that support for the new Constitution required that states retain a similar power to block any similar deal.¹¹⁷ The issue was central to the new Constitution. Indeed, James Madison observed before the Convention in a letter to Washington, "I am entirely convinced . . . that unless the project to yield the occlusion of the Mississippi for twenty-five years be abandoned by Congress, the hopes of carrying this State (of Virginia) into a proper Federal system will be demolished."¹¹⁸

The new Constitution thus preserved the supermajority requirements from the Articles of Confederation, which had required that nine out of thirteen states approve any treaty, with each state voting as a whole.¹¹⁹ The Constitution adopted a two-thirds requirement and gave each state, regardless of its size, an equal share in making treaties through the Senate. This supermajority requirement offered assurance to those concerned that minority (particularly the southern states') interests would be subject to the desires of the majority (particularly the northern states).¹²⁰ The new Constitution, however, did not give the vote to the state delegation as a whole, but instead gave the vote to each state through its representatives in the Senate. Hence, it permitted each Senator to vote individually—making it possible that one Senator from Maryland, for example, might vote in favor of the treaty and another against.¹²¹ The new provision also allowed for growth in the number of states—it stated that the standard would require the support of two-thirds of the Senators rather than nine of the thirteen states.

Having retained their power to participate in international lawmaking through the Senate, states relinquished virtually all power to act unilaterally in

117. See, e.g., 3 DEBATES IN SEVERAL STATE CONVENTIONS, *supra* note 116, at 347-66, 499-516 (discussing the issue in the Virginia debates); 2 FEDERAL CONVENTION RECORDS, *supra* note 90, at 540-43.

118. Warren, *supra* note 10, at 287. Indeed, nearly one-tenth of the pages of the report of the Virginia debate over the completed Constitution were devoted to the Treaty Clause. *Id.* at 297. It was also a subject of vigorous debate in North Carolina and South Carolina. See 4 DEBATES IN SEVERAL STATE CONVENTIONS, *supra* note 116, at 115-120, 265-81, 291-93.

119. See ARTICLES OF CONFEDERATION of 1781 art. IX.

120. Bruce Ackerman and David Golove emphasize this point. Ackerman & Golove, *supra* note 15, at 810.

121. This choice proved a fateful one almost immediately. The Jay Treaty of 1794 was approved by a vote of twenty votes to ten and had the voting "been by States and not by individual Senators, it would have failed, although rejection would almost certainly have meant war between this country and Great Britain." Hunter Miller, Historical Adviser, Dep't of State, Address to the Students of Columbus Univ.: Treaties and the Constitution (Jan. 13, 1937), in 16 U.S. DEPT. OF STATE, THE DEPARTMENT OF STATE PRESS RELEASES 49, 52 (1937).

international affairs to the federal government. The Compacts Clause prohibited the states from making treaties with foreign powers on their own.¹²² Moreover, the Constitution gave the new federal Congress the power to “regulate Commerce with foreign Nations.”¹²³ This addressed the failure of the Articles of Confederation to provide a sufficient source of funding for the federal government.¹²⁴ The new Constitution also gave the U.S. government the power to enforce the treaties it negotiated—a change that was rightly seen as essential to a strong and effective national government. Treaties were the “supreme law of the land” and could be enforced against the states by federal courts. And enforce they did. Between 1791 and 1835, more than twenty percent of the cases heard by the Supreme Court involved foreign or international law.¹²⁵ A full thirty of these early cases involved the Treaties of Peace with Great Britain.¹²⁶ These thirty cases included some of the most important cases of the era.¹²⁷

Together these changes significantly expanded federal power over foreign affairs, in particular by strengthening the federal government’s ability to enter enforceable treaties with foreign powers. The price of a stronger enforcement power, however, was a supermajority requirement in the Senate—a requirement that appears to have resulted directly from the recent controversy over Spain’s offer to exchange navigation rights on the Mississippi for trading privileges that would benefit the north. Understood narrowly, the Treaty Clause was framed to prevent the cession of territory to foreign control in order to gain trading privileges that benefit another. More broadly, the Clause can be seen as aimed at preventing treaties that would harm a particular regional interest of a minority of states in order to benefit a slim majority of states.

122. U.S. CONST. art. I, § 10, cls. 1, 3.

123. U.S. CONST. art. I, § 8, cl. 3.

124. See, e.g., CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* (2005) (arguing that the most pressing need motivating the Constitution was to allow the federal government to pay off debts incurred during the Revolutionary War).

125. Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket*, 114 *YALE L.J.* 855, 872, 873 tbl.1. (2005).

126. *Id.* at 884 tbl.8.

127. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), for example, involved the clash between a state law and the Treaty of Peace with Great Britain—the very kind of conflict that inspired the Constitutional Convention to begin with. The Supreme Court ruled that the Treaty of Paris overrode Virginia state law that provided for confiscation of debts owed to an alien enemy. In the process, the Court established not only the supremacy of treaty law over state law, but also the Court’s power to review state laws more generally. This ruling was reaffirmed and expanded in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

If the original vision of those who drafted and voted to ratify the Treaty Clause is conceived more broadly, it is clear that current practice has drifted far from it. Indeed, as we shall see in the following Section, international agreements on trade are today made almost exclusively through congressional-executive agreements rather than the Article II treaty process. At the same time, the few areas still reserved for the Treaty Clause do not have any identifiable regional character or any other impact on a particular minority of states. Hence the passage of time has so transformed international lawmaking in the United States that the congressional-executive agreement has now even come to be used in the very circumstances that originally motivated the United States' unusual and restrictive Treaty Clause.

But what of congressional-executive agreements? When did they emerge, how did their uses expand, and how have they changed in the process? In short, how did congressional-executive agreements come to fill the large and growing gaps left by the Treaty Clause, and even to almost wholly supplant it in many areas of law?

B. The Rise of the Congressional-Executive Agreement

Congressional-executive agreements have been in use since the very beginning of the republic. Though they are not expressly provided for in the Constitution, scholars often point to the Constitution's recognition of international agreements that are not treaties in Article I, Section 10, which provides that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."¹²⁸

¹²⁸ U.S. CONST. art. I, § 10, cl. 3. Article I, Section 10 provides, in full:

[cl. 1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[cl.2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[cl. 3] No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in

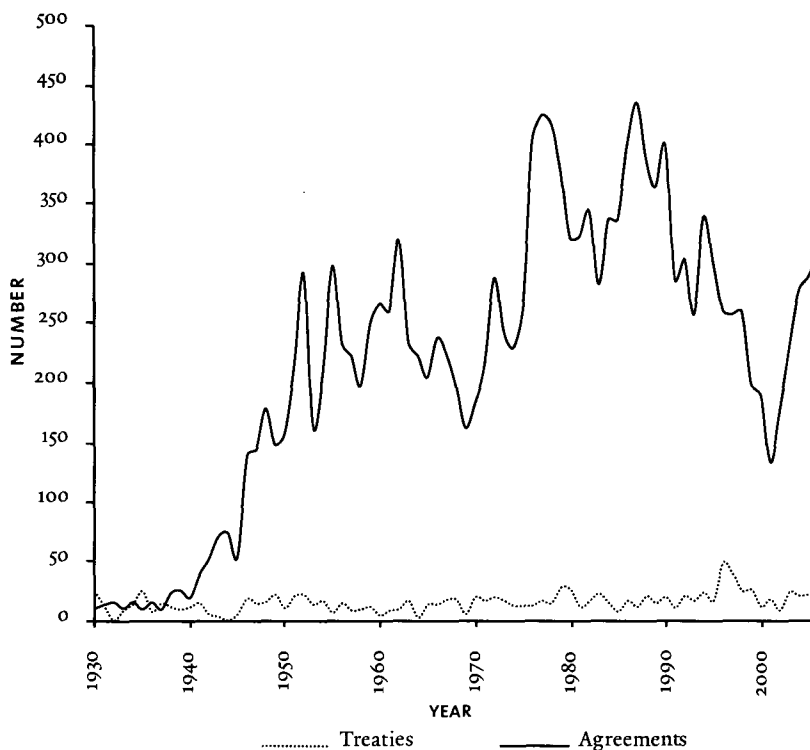
This has long been taken as tacit acknowledgement that international agreements other than treaties can and do exist.¹²⁹

Though present, sole executive and congressional-executive agreements at first took a back seat to Article II treaties. In the first half century of its independence, the United States ratified sixty treaties but joined only twenty-seven published executive agreements.¹³⁰ Over the course of the nineteenth century, the balance began to shift away from treaties and toward international agreements, changing the face of international law in the United States in the process. In the fifty years preceding the Second World War, a shift between the two had already begun to occur, with the country concluding 524 treaties and 917 executive agreements.¹³¹ In the final decade of the twentieth century, executive agreements far outweighed treaties as an instrument of international lawmaking – with 249 treaties and 2857 executive agreements concluded during this period. Figure 1 below, which shows the number of treaties and executive agreements concluded by the United States each year from 1930 to 2006, illustrates this trend. The average number of treaties concluded each year has grown from slightly over one per year during the first fifty years of the republic to about twenty-five per year during the 1990s.¹³² Executive agreements, on the other hand have gone from one on average every two years during the first fifty years of the republic to well over three hundred per year.¹³³

War, unless actually invaded, or in such imminent Danger as will not admit of delay.

129. See, e.g., Note, *International Agreements Without the Advice and Consent of the Senate*, 15 YALE L.J. 18, 18 (1905).
130. TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106, at 39 tbl.II-1. There is little information about what percentage of these are sole executive agreements. One study concluded that 5.9% of the executive agreements entered into between 1938 and 1957 were based exclusively on the President's constitutional authority. McLaughlin, *supra* note 12, at 721 tbl.III. Another study found that between 1946 and 1972, 88.3% of executive agreements were based at least in part on statutory authority, 6.2% were based on treaties, and 5.5% were sole executive agreements. CONG. RESEARCH SERV., 95TH CONG., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES 22 (Comm. Print 1977).
131. TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106, at 39 tbl.II-1.
132. *Id.* at 39 tbls.II-1 & II-2.
133. *Id.*; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters' note 8 (1987) (citing S. REP. NO. 98-205, at 38 (1984)) ("There are many more executive agreements than treaties and the gap has increased in recent years. As of June 1, 1983, the United States was a party to 906 treaties and 6571 executive agreements, most of them Congressional-Executive agreements.").

Figure 1.
TREATIES AND EXECUTIVE AGREEMENTS CONCLUDED BY THE UNITED STATES¹³⁴



Congressional-executive agreements have thus been present at nearly every period of American history, but they have rapidly grown more numerous and important since the 1940s. They have also changed in character. The next two Subsections trace the evolution of the executive agreement from a modest tool used for very limited purposes to the centerpiece of U.S. international lawmaking.

¹³⁴ Data for 1930 to 1999 are from TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106, at 39 tbl.II-2. Data for 2000-2006 are from Memorandum from the U.S. Dep't of State Legal Adviser, Office of Treaty Affairs (Apr. 2007) (on file with author).

1. *The First Hundred Years: A Modest Tool*

For this Article, I reviewed every significant international agreement concluded by the United States from the Founding through 1863.¹³⁵ During this period, congressional-executive agreements almost exclusively arose from prior authorizations by Congress to the executive to conclude an agreement.¹³⁶ In no case is there any evidence that Congress expressly approved these agreements after they were negotiated. Hence congressional involvement was limited to prior authorization of, and appropriations for, the negotiations.

Among the earliest congressional-executive agreements were a series of agreements that provided for the development of international communication through an international postal service. The second Congress established the Post Office and in the process provided that “the Postmaster General may make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices.”¹³⁷ By 2000, the country had entered into over four hundred such agreements.¹³⁸

135. The collection of international agreements from 1776 to 1863 is available in TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, vols. 1-8.

136. See Ackerman & Golove, *supra* note 15, at 820-21 (discussing what they term “interbranch collaboration”); Yoo, *supra* note 24, at 765-66. Ackerman and Golove identify two categories where Congress gives advance authorization for the President to reach an agreement: (1) “proclamation statutes”—agreements created pursuant to a congressional statute that affects foreign relations, but requires the President to determine certain facts before it goes into effect; and (2) “ex ante authorizations”—agreements initiated after Congress has enacted legislation that authorizes or requires the President to negotiate and conclude an agreement. Ackerman & Golove, *supra* note 15, at 821-27. “Congress may enact legislation that requires, or fairly implies, the need for an agreement to execute the legislation. Congress may authorize the President to negotiate and conclude an agreement, or to bring into force an agreement already negotiated, and may require the President to enter reservations.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (1987).

137. Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239. This provision was reenacted by the Third Congress, see Act of May 8, 1794, ch. 23, § 26, 1 Stat. 354, 365-66, and repeatedly thereafter. See also McCLURE, *supra* note 10, at 38. The current legislative authorization can currently be found at 39 U.S.C.A. § 407 (West 2006).

138. Oceana Database, *supra* note 44 (author’s calculations) (showing 204 international agreements under the subject “Postal Matters” that have no treaty document number). In addition, the United States joined the Treaty of Bern on July 1, 1875, under the same congressional authorization. The treaty established the General Postal Union, known today as the Universal Postal Union, the purpose of which was to unify disparate postal services and regulations to permit the free exchange of international mail. See Treaty Concerning the Formation of a General Postal Union, Oct. 9, 1874, 19 Stat. 577. Ackerman and Golove argue that postal agreements are the “narrow exception that proves the rule” that ex ante

Through the mid-1800s, congressional-executive agreements were also used to establish relations with island nations surrounding the United States.¹³⁹ In each case, the expeditions that led to the agreements were authorized in advance and funded by Congress, and Congress received updates and reports on the expeditions after their conclusion.¹⁴⁰ Congress also passed statutes authorizing (but not requiring) the executive to take particular actions that might not otherwise fall within its authority or that might require specific appropriations. In 1794, Congress offered the President authorization to “lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation.”¹⁴¹ And in 1815, after the ratification of the Treaty of Ghent, Congress authorized the President to “cause all the armed vessels . . . on the lakes, except such as he may deem necessary to enforce the proper execution of the revenue laws, to be sold or laid up, as he may judge most conducive to the public interest.”¹⁴² Executive agreements were also used in large numbers during this period to settle particular claims or cases.¹⁴³ They were used less

congressional agreements were of limited use and generally not regarded as creating reciprocal legal obligations. See Ackerman & Golove, *supra* note 15, at 825-26. Not mentioned by them, but potentially useful to understanding this exception is the fact that the postmasters, who carry out the postal agreements, are subject to senatorial confirmation. In 1952, twenty-one thousand postmasters had been confirmed by the Senate, which gives Congress another method of controlling the postal service. See GEORGE B. GALLOWAY, *THE LEGISLATIVE PROCESS IN CONGRESS* 76 (1953).

139. Sulu, Feb. 5, 1842, 4 *TREATIES AND OTHER INTERNATIONAL ACTS*, *supra* note 44, at 349-61 (“for the purpose of encouraging trade”); Fiji, June 10, 1840, *id.* at 275-85 (commercial regulations); Samoa, Nov. 5, 1839, *id.* at 241-56 (commercial regulations); Hawaii, Dec. 23, 1826, 3 *TREATIES AND OTHER INTERNATIONAL ACTS*, *supra* note 44, at 269 (among other things, confirming the “peace and friendship subsisting” between the parties); Tahiti, Sept. 6, 1826, *id.* at 250 (“promoting the commercial intercourse and friendship subsisting between the respective nations”).
140. For example, several of the agreements cited in note 139, *supra*, were concluded by the “United States Exploring Expedition” or “Wilkes Expedition,” which was authorized by Congress. Act of May 14, 1836, ch. 61, 5 Stat. 27-29.
141. Act of June 4, 1794, ch. 41, 1 Stat. 372.
142. Act of Feb. 27, 1815, ch. 62, § 4, 3 Stat. 217.
143. The following agreements appear in the most complete collection of treaties and executive agreements during this era, *TREATIES AND OTHER INTERNATIONAL ACTS*, *supra* note 44: Great Britain, April 3 and 4 and July 10, 1863, 8 *TREATIES AND OTHER INTERNATIONAL ACTS*, *supra* note 44, at 933; France, Dec. 30, 1862, and Feb. 18, 1863, *id.* at 907; Great Britain, Dec. 1, 1862, and June 1 and 20, 1863, *id.* at 883; Sweden and Norway, June 11 and 12, 1862, *id.* at 821; Denmark, Feb. 19, 1862, *id.* at 707; France, Jan. 17 and 24, 1862, *id.* at 691; Spain, Dec. 19 and 20, 1861, *id.* at 681; Japan, Nov. 26, 1861, *id.* at 635; Great Britain, Oct. 11 and 24, 1861, *id.* at 607; Chile, Mar. 9 and 14, 1861, *id.* at 585; Turkey, July 18, 1860, *id.* at 519; Chile, Jan. 16 and 28, 1860, *id.* at 449; Papal States, June 24, July 4 and 26, and Aug. 2, 1859, *id.* at

frequently to create territorial agreements pursuant to prior treaties,¹⁴⁴ an agreement on the exchange of prisoners of war,¹⁴⁵ an agreement for joint occupation,¹⁴⁶ and a colonization agreement.¹⁴⁷

267; China, Oct. 26 and Nov. 1, 1858, *id.* at 13; Chile, Sept. 10, 1858, *id.* at 3; Peru, June 4, 1857, 7 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 587; Guatemala, Oct. 26 and 29, 1855, *id.* at 325; Fiji, Oct. 23, 1855, *id.* at 283; France, Aug. 3 and 7, 1855, *id.* at 147 (regarding not claims, but a court case involving a French consul); Switzerland, Mar. 9 and 16 and Apr. 12, 1855, *id.* at 113; Spain, Feb. 21 and June 28, 1855, *id.* at 31; Venezuela, June 1, 1853, 6 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 197; Great Britain, Feb. 8, 1853, *id.* at 111; Ecuador, Feb. 5, 1853, *id.* at 105; Uruguay, June 23 and 24, 1852, *id.* at 45; Peru, Aug. 6, 1852, *id.* at 59; Netherlands (Batavian Republic), Dec. 7 and 12, 1799, 5 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 1075; Venezuela, May 1, 1852, *id.* at 1063; Ecuador, June 15, 1849, *id.* at 581; New Granada, Apr. 25, 1848, *id.* at 437; Venezuela, Apr. 12, 1848, *id.* at 429; Venezuela, Nov. 16, 1846, *id.* at 109; Venezuela, Nov. 16, 1846, *id.* at 103; New Granada, May 16, 1846, 4 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 813; Great Britain, Nov. 10 and 26, 1845, *id.* at 779; New Granada, Mar. 29, 1845, *id.* at 741; Russia, Apr. 19 and 22, 1825, 3 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 201; Colombia, Mar. 16, 1825, *id.* at 195. These executive agreements appear to have been used only for cases where the United States was the recipient of funds. In cases where the United States might have to pay money under an agreement, the agreement was generally done by treaty (this is true even though there was usually separate legislation authorizing the necessary appropriations). *See, e.g.*, Convention for the Settlement of the Pending Claims of the Citizens of Either Country Against the Other, U.S.-Peru, Jan. 12, 1863, 8 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 915; Treaty for Final Settlement of Claims of Hudson's Bay Company and Puget's Sound Agricultural Company, U.S.-Gr. Brit., July 1, 1863, *id.* at 949. It appears that Congress was kept informed of the agreements, but it generally did not formally approve them. For example, President John Quincy Adams reported the results of the "Convention for Adjusting Certain Claims" to Congress, but he does not appear to have requested congressional approval for the negotiations or agreement. 3 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 197. In a similar case against Russia, then Secretary-of-State John Quincy Adams instructed the U.S. Minister to Russia as follows: "Hitherto this subject has been under the exclusive direction, and control of the Executive. But unless some satisfactory prospect of its adjustment should appear from your communications to this Department, it will cease to be so at the next Session of Congress." *Id.* at 206.

144. Declaration of the Commissioners Under Article 5 of the Treaty of London (Jay Treaty), U.S.-Gr. Brit., Oct. 25, 1798, 8 Stat. 116 (Nov. 19, 1794), 2 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 430; Decision of the Commissioners Under Article 4 of the Treaty of Ghent, U.S.-Gr. Brit., Nov., 24, 1817, *id.* at 655 (specifying borders); Declaration of the Commissioners Under Article 6 of the Treaty of Ghent, U.S.-Gr. Brit., June 18, 1822, 3 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 65.
145. Cartel for the Exchange of Prisoners of War, U.S.-Gr. Brit., May 12, 1813, 2 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 557 (ratified by Secretary of State).
146. Joint Occupation of San Juan Island, U.S.-Gr. Brit., Oct. 25, 1859 to Mar. 23, 1860, 8 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 281 (agreeing to joint occupation of San Juan Island).

Notably, with the exception of the general friendship and commerce agreements concluded with island nations, which were intended to set the stage for future trade relations but did not establish any specific terms of trade, there is little evidence during this period of congressional-executive agreements regarding international trade. This makes sense in light of the origins of the Treaty Clause, which was intended, after all, to make it difficult for the federal government to enter into agreements that would involve trading off the interests of one region against another's. It would seem perverse, in light of this history, to permit the very same agreements to be concluded through majority votes in the House and Senate. Indeed, the topics covered by these early congressional-executive agreements were quintessentially national in nature. The postal agreements, for example, had no particular regional impact but instead permitted all persons in the United States to send and receive mail across borders.

2. *The Second Hundred Years: Reversal of Fortunes*

The role of congressional-executive agreements would begin to change as the nineteenth century drew to a close. From the Civil War until 1887, the United States was highly protectionist and had a policy of high, nonnegotiable, nondiscriminatory tariffs.¹⁴⁸ Indeed, the tariff was from the Founding until the advent of the income tax in 1913 the major source of revenue for the federal government.¹⁴⁹ The tide began to turn, however, in 1887. That year, Democratic President Grover C. Cleveland devoted his Annual Message to Congress entirely to the subject of tariffs. In it, he argued for duty-free raw materials to give domestic manufacturers "a better chance in foreign markets"

147. Colonization Agreement, U.S.-Den., July 19, 1862, 8 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 833 (providing for resettlement on St. Croix of persons seized in the slave trade).

148. Much of the background relayed here draws upon David A. Lake's masterful study of U.S. trade policy during this period. See DAVID A. LAKE, POWER, PROTECTION, AND FREE TRADE: INTERNATIONAL SOURCES OF U.S. COMMERCIAL STRATEGY, 1887-1939, at 6 (1988) (describing America's transition from the passive protectionism of the mid-nineteenth century to its active liberalism of the mid-twentieth century).

149. The U.S. treasury derived about ninety percent of its revenue from customs duties before the Civil War. Customs duties made up more than three-quarters of federal revenue during the antebellum period, except during years when sales of federal lands produced substantial revenue. Duties remained the major source of income for the federal government up until passage of the Sixteenth Amendment permitted a federal income tax. See John Mark Hansen, *Taxation and the Political Economy of the Tariff*, 44 INT'L ORG. 527, 529 (1990). Hansen shows that "each 10 percentage point increase in the fraction of revenues raised from nontariff sources lowered average tariff rates by 1.4 percentage points." *Id.* at 545.

and thereby give Americans “the opportunity of extending their sales beyond the limits of home consumption.”¹⁵⁰ The bill that resulted stimulated the “Great Debate” in the presidential election of 1888 in which the Republicans emphasized their commitment to protectionism. Cleveland narrowly lost the presidential election (he won the popular vote only to lose the electoral college to his Republican challenger, Benjamin Harrison), and the Republicans moved to enact their protectionist policies into law. William McKinley, the Republican chair of the House Ways and Means Committee,¹⁵¹ celebrated the protectionist bill that his committee designed, declaring it would “increase the demand for American workmen.”¹⁵² The McKinley Tariff Act of 1890¹⁵³ did indeed raise tariffs on dutiable imports from 45.1% to 48.4%. Yet it also incorporated Cleveland’s proposal for duty-free raw materials, increasing the number of items on the “free list” (those that pay no duty) so that the average duties on all imports fell from 29.9% to 23.7% percent.¹⁵⁴

Most important for our purposes here, the McKinley Act also embodied a new provision that authorized the President to negotiate reciprocal agreements with foreign nations.¹⁵⁵ Under the Act, sugar, molasses, coffee, tea, and raw

150. LAKE, *supra* note 148, at 98-99; *see also* F.W. Taussig, *The New United States Tariff*, 4 ECON. J. 573, 573-74 (1894).

151. In an interesting historical twist, McKinley would later transform from a staunch protectionist into a proponent of export promotion and hence of reciprocity. As President (an office he held from 1897 to 1901), he was a proponent of the Dingley Act, which had reciprocity at its core. Indeed, his final speech in office as President was largely devoted to the issue. In it, he proclaimed, “[r]eciprocity is the natural outgrowth of our wonderful industrial development under the domestic policy now firmly established” and argued for policies that would “extend and promote our markets abroad.” McKinley was shot a day later and died the following week. He was succeeded in office by Theodore Roosevelt, who refused to raise the issue of the tariff. LAKE, *supra* note 148, at 140. For a nearly contemporaneous account of the events that led to the 1890 Tariff Act, *see* F.W. TAUSSIG, *THE TARIFF HISTORY OF THE UNITED STATES* (New York, G.P. Putnam’s Sons 1896).

152. 21 CONG. REC. 4253 (1890) (statement of Rep. McKinley); LAKE, *supra* note 148, at 99 (quoting Rep. McKinley); *see also* U.S. SENATE COMM. ON FINANCE, CUSTOMS TARIFFS, TO REDUCE THE REVENUE AND EQUALIZE DUTIES ON IMPORTS AND FOR OTHER PURPOSES, H.R. REP. NO. 1466 (1890) (discussing the McKinley Act).

153. Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 567, 612; *see* H. REP. NO. 1466 (1890).

154. LAKE, *supra* note 148, at 100. The issue of duty-free raw materials continued to be championed by the Democrats after Cleveland’s lost election. *See id.*; Taussig, *supra* note 150, at 574.

155. Initially opposed by congressional leadership, the provision succeeded because of the determined efforts of Secretary of State James Blaine, who heavily lobbied Congress and took the issue to the public directly through letters and public speeches. A member of the House Ways and Means Committee from a western state who opposed reciprocity complained that “Blaine’s plan has run like a prairie fire all over my district.” DAVID SAVILLE

hides would be on the free list unless the President determined that the exporting country imposed duties on American products that were reciprocally unjust and unreasonable.¹⁵⁶ No congressional approval was required to put any of the actions into effect, making this provision the “most generous grant of tariff-making authority given by Congress to the executive until 1934.”¹⁵⁷ The authors of the Act carefully avoided the kind of regional animosity generated on the eve of the Constitutional Convention by fashioning the list of commodities to apply exclusively to articles that could not be produced in the United States or could not be produced in sufficient quantity to meet domestic demand.¹⁵⁸ Many international agreements followed—with Spain (on behalf of Cuba and Puerto Rico), the United Kingdom (for its colonies), Santo Domingo, Guatemala, Salvador, Honduras, Nicaragua, Germany, and Austria-Hungary—in which the foreign countries made tariff concessions in return for duty-free status on their own goods.¹⁵⁹

MUZZEY, JAMES G. BLAINE: A POLITICAL IDOL OF OTHER DAYS 447 (1934); see GAIL HAMILTON, BIOGRAPHY OF JAMES G. BLAINE 687 (Norwich, Conn., Henry Bill Publ'g Co. 1895); LAKE, *supra* note 148, at 108-13. Blaine was himself a proponent of protectionism. He and his allies saw the reciprocity provision not as a tool of obtaining free trade but instead as “an external protection for American labor.” 21 CONG. REC. 9511 (Sept. 2, 1980). Indeed, the congressional leadership resisted reciprocity not because they perceived it as an abdication of power, but in part because they worried that sugar would be *less likely* to enter free of duty under a reciprocity regime. In an ironic twist, protectionists wished to have sugar enter free of duty because it provided twenty-three percent of all tariff revenue and thirteen percent of all federal government revenue in 1888, helping to generate a generous budget surplus. Protectionists believed that by placing sugar on the free list they would reduce the surplus and hence remove an argument used by Cleveland and other tariff reformers to advocate a reduction in tariffs. LAKE, *supra* note 148, at 110-11. At the same time that sugar duties were lowered through the McKinley Act, Congress enacted direct subsidies to domestic sugar producers to reduce the impact on domestic producers. *Id.*; see also Taussig, *supra* note 150, at 583-90 (discussing the sugar tariff).

156. The bill specified the rates of duty that were to be imposed if the President determined that a nation had failed to make appropriate concessions. In the years immediately following the passage of the Act, F.W. Taussig noted the peculiarity of this structure of the reciprocity provision. TAUSSIG, *supra* note 151, at 251-83.
157. LAKE, *supra* note 148, at 101.
158. H.R. REP. No. 1466, at 244 (1890) (“The aim has been to impose duties upon such foreign products as compete with our own . . . and to enlarge the free list wherever this can be done without injury to any American industry, or wherever an existing home industry can be helped and without detriment to another industry which is equally worthy of the protecting care of the Government.”).
159. J. LAURENCE LAUGHLIN & H. PARKER WILLIS, RECIPROCITY 210-11, 214-15 (1903). Laughlin and Willis refer to the agreements as “treaties,” but in fact the agreements were never submitted to the Senate for advice and consent and would today be labeled congressional-executive agreements because they were concluded by the executive, as authorized by

This sea change in lawmaking authority did not go unchallenged. Shortly after the agreement went into effect, importers challenged the Act as “unconstitutional and void.”¹⁶⁰ In particular, they objected to the delegation to the President to suspend and impose duties, a legislative and treaty-making power that they contended was vested by the Constitution in Congress alone.¹⁶¹ The Supreme Court held that the Act did not improperly allocate congressional power to the President because the President was simply executing an Act of Congress and was therefore not actually exercising a lawmaking function.¹⁶² Citing a long history of legislation in which Congress had “conferred upon the president powers, with reference to trade and commerce, like those conferred by the [1890 Act].”¹⁶³ It explained that “[n]othing involving the expediency or the just operation of [the Act] was left to the determination of the president.”¹⁶⁴

Whether wittingly or not, this picture of the President’s role left out a great deal. Far from simply “ascertain[ing] the existence of a particular fact” or “declar[ing] the event upon which [Congress’s] expressed will was to take effect,”¹⁶⁵ the President in fact took the Act as license to negotiate international agreements with foreign powers that looked so much like international treaties that they were frequently referred to as “treaties,” even though they were never submitted to the Senate.¹⁶⁶ Despite its questionable basis in fact, the holding in

Congress in the McKinley Act. For example, the agreement with Guatemala, referred to by Laughlin and Willis as “[t]he treaty with Guatemala,” *id.* at 210 n.7, was explicitly concluded as an executive agreement pursuant to the McKinley Act. See Proclamation No. 26, 27 Stat. 1025, 1025-26 (1892) (“Whereas, pursuant to section 3 of the Act of Congress approved October 1, 1890 . . . Now, therefore, be it known that I, Benjamin Harrison, President of the United States of America, have caused the above stated modifications of the tariff laws of Guatemala to be made public for the information of the citizens of the United States of America.”).

160. *Field v. Clark*, 143 U.S. 649, 651 (1892); *In re Sternbach*, 45 F. 175, 175 (C.C.S.D.N.Y. 1891) (upholding the constitutionality of the Act).

161. *Field*, 143 U.S. at 651; *Sternbach*, 45 F. at 176.

162. *Field*, 143 U.S. at 692-94. Notably, the case was challenged as an unconstitutional delegation, not on Treaty Clause grounds. Peter Spiro argues that “[t]he fact that the statute was not challenged on Treaty Clause grounds, and that the Court did not suggest any such infirmity, can be taken as some evidence that *ex ante* bicameral authorization was considered constitutional.” Spiro, *supra* note 28, at 988-89 & n.128.

163. *Field*, 143 U.S. at 683.

164. *Id.* at 693.

165. *Id.*

166. See *supra* note 159; see also, e.g., *Migliavacca Wine Co. v. United States*, 148 F. 142, 142 (C.C.W.D. Wash. 1905) (referring to various executive agreements entered pursuant to the Tariff Act of 1897, e.g., Proclamation No. 12, ch. 12, 30 Stat. 1774 (1898), as “treaties”).

Field v. Clark became the legal linchpin in the gradual replacement of the treaty by congressional-executive agreement. Along with subsequent decisions upholding similar tariff legislation against constitutional challenge,¹⁶⁷ the decision set the stage for extensive use of congressional-executive agreements in the area of international trade.¹⁶⁸

The reciprocity provision that lay at the center of *Field v. Clark* ultimately proved to be the most popular element of the 1890 Act.¹⁶⁹ Reciprocity thus became an important element of much successive legislation, including most immediately the Dingley Act of 1897, which expanded the principle of reciprocity to European markets and to new commodities.¹⁷⁰ But it was not

167. *B. Altman & Co. v. United States*, 224 U.S. 583 (1912). The Court found an executive agreement authorized by a tariff act to be a “treaty” for jurisdictional purposes. *Id.* at 601; *see also Star-Kist Foods, Inc. v. United States*, 275 F.2d 472, 483 (C.C.P.A. 1959) (citing *B. Altman*, 224 U.S. 583) (finding that a commercial agreement authorized by Congress in advance was not an unconstitutional delegation and noting that “[s]uch a procedure is not without precedent nor judicial approval”); *Louis Wolf & Co. v. United States*, 107 F.2d 819, 827 (C.C.P.A. 1939) (finding a U.S.-Cuban trade agreement, authorized by Congress in advance through tariff legislation, to be a “commercial convention”). In the late 1950s, the federal courts held that congressional-executive trade agreements could find a constitutional basis in the joint exercise of Congress’s tariff and commerce authorities and the President’s authority over foreign affairs. *Star-Kist Foods, Inc. v. United States*, 169 F. Supp. 268 (Cust. Ct. 1958), *aff’d*, 275 F.2d 472 (C.C.P.A. 1959).

168. The Act of July 24, 1897, ch. 11, 30 Stat. 151, included a similar reciprocity provision. In the years that followed, federal courts repeatedly accepted the enforceability of a variety of reciprocity agreements with foreign countries negotiated under the Act. *See, e.g., La Manna, Azema & Farnan v. United States*, 144 F. 683 (2d Cir. 1906) (per curiam) (concluding that a reciprocal commercial agreement with France, Proclamation No. 12, U.S.-Fr, May 30, 1898, 30 Stat. 1774, negotiated under Tariff of 1897 superseded the provision of a different rate of the same Act); *United States v. Luyties*, 130 F. 333 (2d Cir. 1904) (per curiam) (holding that the importation at issue was within the reciprocal commercial agreement with France and the United States, Proclamation No. 12); *United States v. Julius Wile Bros. & Co.*, 130 F. 331 (2d Cir. 1904) (enforcing a reciprocal commercial agreement with France negotiated under authority granted in the Tariff Act of 1897); *Mihalovitch, Fletcher & Co. v. United States*, 160 F. 988, 988 (C.C.S.D. Ohio 1908) (finding a reciprocal commercial agreement with Germany, negotiated under the Tariff Act of 1897 and allowing a reduction of duty on “spirits,” to be binding and enforceable); *C.B. Richard & Co. v. United States*, 151 F. 954 (C.C.S.D.N.Y. 1907), *aff’d* 158 F. 1019 (2d Cir. 1907) (per curiam) (finding a reciprocal commercial agreement with Italy, Proclamation No. 16, U.S.-Italy, July 18, 1900, 31 Stat. 1979, negotiated under the Tariff Act of 1897 to be enforceable but concluding that the item at issue in the case was not covered by the agreement); *Nicholas v. United States*, 122 F. 892 (C.C.S.D.N.Y. 1900) (enforcing the terms of the reciprocal commercial agreement entered into between the United States and France, Proclamation No. 12, *supra*).

169. LAKE, *supra* note 148, at 126.

170. Act of July 24, 1897, ch. 11, 30 Stat. 151. The Act authorized the President to suspend the duty on a variety of products aimed at the European market, including argols (crude tartar

until after the Great Depression – which saw a collapse in world trade – that the policy of reciprocity became firmly entrenched.¹⁷¹ In 1934, the United States repudiated the protectionist Smoot-Hawley Act of 1929 and adopted the Reciprocal Trade Agreements Act (RTAA),¹⁷² signaling a fundamental shift away from inward-looking mercantilist protectionism toward outward-looking export promotion through reciprocal trade arrangements with other nations.¹⁷³ The Act authorized President Roosevelt to negotiate bilateral agreements with other countries to reduce tariffs up to fifty percent in exchange for compensating tariff reductions by the partner trading country. The President eagerly took up the charge, quickly negotiating executive agreements across Latin America, as well as with Belgium, Canada, Sweden, Spain, and Switzerland, among others.¹⁷⁴

This move to a universal policy of reciprocity set the stage for the transformation of American trade policy. Tariffs had been the lifeblood of the United States, the central source of funding for the national government. The amendment of the Constitution in 1913 to permit an income tax brought an end to this dependence on tariffs for government funding. This change, coupled with the gradual transfer of broad-based authority over tariffs to the President, set the stage for America's emergence as the foremost leader in global commerce. The transfer of significant authority to the President allowed trade policy to begin to escape the vortex of congressional logrolling that had long plagued it. Smoot-Hawley—laden as it was with tariffs to satisfy constituencies in nearly every state—stood as the epitome of the worst that Congress could produce. In the RTAA, Congress repudiated this approach by

as deposited in wine casks), brandies, champagne, still wines, paintings, and statuary. Section 4 of the Act also included a sweeping new provision that permitted the President to lower duties by twenty percent on any good or eliminate the tariff entirely on any item that was “the natural product of a foreign country and not of the United States,” though such agreements were only to be entered into with the advice and consent of the Senate, as well as the approval of Congress. Reportedly, the tariff rates were increased to offset this possible twenty percent reduction. In the end, however, none of the agreements negotiated under section 4 were successfully passed through Congress. LAKE, *supra* note 148, at 130. The issue resurfaced even more prominently in 1913 in the Underwood Act, pushed by Democratic President Woodrow Wilson through a majority Democratic Congress (the first Democratic majority in both houses since 1894). LAKE, *supra* note 148, at 153–59.

171. Abraham Berglund, *The Reciprocal Trade Agreements Act of 1934*, 25 AM. ECON. REV. 411, 415–17 (1935).
172. Ch. 474, 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. § 1351 (2000)).
173. See, e.g., LAKE, *supra* note 148, at 204–215.
174. Berglund, *supra* note 171, at 416, 419–23. Notably, the executive agreements are once again referred to as “treaties” by Berglund, despite the fact that they were never resubmitted to Congress for approval. See, e.g., *id.* at 419.

relinquishing significant power over trade policy, in the process tying its own hands to prevent narrow-minded horse-trading to satisfy every constituency.

In the process, Congress also repudiated the original vision of the Treaty Clause. The Clause was, after all, intended precisely to make it difficult, if not impossible, for the federal government to enter into international agreements (especially those involving trading rights) that would benefit one part of the country at the expense of another. By enacting the RTAA authorizing the President to enter into trade agreements that would do exactly that, Congress turned its back on this original vision. The President could enact trade policy that he believed to be in the national interest even if doing so might hurt manufacturers centered in particular states. And he could do so with the concurrence of a simple majority of both houses of Congress instead of a supermajority of the Senate.

The transformation in the way trade agreements are made is important in its own right, but its significance does not end there. The acceptance of executive agreements on trade paved the way for a transformation in international lawmaking in the United States more generally. It set legal precedents that allowed an expansion of this method of making international law. *Field v. Clark* and subsequent decisions approving executive agreements to lower tariffs were cited by federal courts considering challenges to other congressional-executive agreements. For instance, in *United States v. Belmont*,¹⁷⁵ the Supreme Court enforced an executive agreement with the Soviet Union that assigned to the U.S. government all claims against U.S. nationals, citing as precedent its earlier approval of “commercial agreements with foreign countries” under the Tariff Act of 1897.¹⁷⁶ These decisions have been read as giving the Court’s stamp of authority to the use of executive and congressional-executive agreements far from the trade arena.¹⁷⁷

With its constitutionality firmly established, the executive agreement was used at an ever-increasing rate in vast areas of international law. It was gradually used, moreover, in an almost entirely new way. Up until the New Deal Era, congressional-executive agreements almost always took the form of ex ante authorization by Congress to the President to negotiate an agreement on a particular topic. The Tariff Acts, for example, authorized the President to negotiate agreements on tariffs with foreign countries. During the New Deal, the President began to initiate agreements himself, inviting Congress to

175. *United States v. Belmont*, 301 U.S. 324 (1937).

176. *Id.* at 330-31. This was followed by *United States v. Pink*, 315 U.S. 203 (1942).

177. Edwin Borcharad criticized the use of these decisions to justify the broad use of executive agreements in Borcharad, *Executive Agreement*, *supra* note 17, at 680-83.

approve the terms after the fact through an ordinary statute, a joint resolution, or by enacting implementing legislation.¹⁷⁸

This type of ex post congressional-executive agreement emerged in response to the high hurdle imposed by the Treaty Clause alongside the desire and need for the country to engage more fully in the international sphere.¹⁷⁹ At the close of World War I, the Senate famously and disastrously refused to ratify the Treaty of Versailles—a decision that, in the words of President Wilson, “broke the heart of the world.”¹⁸⁰ A debate ensued in the years that followed over proposed amendments to the Constitution to end the two-thirds rule. There was a concerted effort to amend the Treaty Clause to require that treaties be approved by a majority vote in both houses rather than a two-thirds vote in the Senate alone.¹⁸¹ The amendment failed to pass, largely because

178. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (1987); Ackerman & Golove, *supra* note 15.

179. Bruce Ackerman and David Golove coined the term “ex post” congressional-executive agreements, arguing that they are largely a New Deal creation. Ackerman & Golove, *supra* note 15, at 813-15, 860-61. Other developments, legal and political, also aligned to make ex post agreements of this kind attractive. During the New Deal era, legal and policy developments led to reduced congressional control over the executive, increasing presidential power and enabling the emergence of the modern presidency. In response to increased presidential authority, Congress attempted to develop a variety of methods of monitoring executive actions. Among these, famously, is the legislative veto—later ruled illegal by the Supreme Court in *INS v. Chadha*. 462 U.S. 919 (1983). The ex post congressional-executive agreement served a similar purpose. It created a mechanism that allowed the Executive wide latitude in designing international policy, but kept some limits in place by requiring the Executive to return to Congress for final approval. It escaped the fate of the legislative veto because it called for approval by both houses of Congress, rather than the single house ruled illegal in *Chadha*. This is not to say that *Chadha* had little effect on international lawmaking—quite the contrary. The fuller story appears in Hathaway, *supra* note 6.

180. Borchard, *Executive Agreement*, *supra* note 17, at 664.

181. See H.R.J. Res. 264, 78th Cong. (1944); H.R.J. Res. 246, 78th Cong. (1944); H.R.J. Res. 238, 78th Cong. (1944); H.R.J. Res. 64, 78th Cong. (1943); H.R.J. Res. 31, 78th Cong. (1943); H.R.J. Res. 6, 78th Cong. (1943). The *New York Times* and *Washington Post* both ran a series of editorials supporting the effort. A central concern voiced early in the debate was that the Senate might reject the treaty creating the United Nations, just as it had rejected the Versailles Treaty at the close of the previous war. Even when that concern dimmed, the general concern that the Clause would impede international cooperation remained. See *America's Treaty Making*, N.Y. TIMES, Aug. 19, 1943, at 18; *The Approval of Treaties*, N.Y. TIMES, Nov. 29, 1944, at 22; *Approval of Treaties*, WASH. POST, Aug. 27, 1944, at 4B; *Approval of Treaties*, N.Y. TIMES, May 22, 1944, at 18; *Approval of Treaties*, N.Y. TIMES, Apr. 17, 1944, at 22; *A National Necessity*, WASH. POST, May 1, 1945, at 8; *The Senate's Treaty Power*, N.Y. TIMES, Sept. 5, 1944, at 18; *Signal to the House*, WASH. POST, Feb. 28, 1945, at 8; *The Treaty-Making Power*, N.Y. TIMES, May 3, 1945, at 22; *Two-Thirds Rule*, WASH. POST, May 3, 1945, at 10; *Two-Thirds Rule*, WASH. POST, Oct. 21, 1944, at 6; *Two-Thirds Rule Repeal*, WASH.

supporters concluded they could achieve what they wished without it. And they have been proved largely, though not entirely, right.

From the interwar period on, the ex post congressional-executive agreement was increasingly used as a substitute for the Treaty Clause.¹⁸² In 1925, for example, a House Committee Report concluded that it was proper for the country to adhere to the Permanent International Court of Justice by congressional resolution, rather than through the Article II process.¹⁸³ In 1934, the United States joined the International Labor Organization pursuant to congressional approval.¹⁸⁴ And at the close of World War II, the country agreed to participate in the many new postwar international institutions—including the International Monetary Fund, the International Bank for Reconstruction and Development,¹⁸⁵ the Food and Agriculture Organization of the United Nations,¹⁸⁶ the United Nations Educational, Scientific and Cultural Organization,¹⁸⁷ and the World Health Organization¹⁸⁸—through ex post congressional-executive agreements.¹⁸⁹

POST, Feb. 26, 1945, at 8; *Vital to Peace*, WASH. POST, June 25, 1945, at 6. *But see* A. Leonard Allen, *Not a Question of Prestige*, SHREVEPORT TIMES (La.), Jan. 16, 1945, at 2B, *reprinted in* 91 CONG. REC. A213 (1945); Louis Ludlow, *Stick to First Principles*, INDIANAPOLIS STAR, Mar. 7, 1945, *reprinted in* 91 CONG. REC. A1495 (1945); *The Senate and Peace*, N.Y. HERALD TRIB., Apr. 17, 1944, at 14 (supporting the two-thirds rule).

182. Ackerman and Golove argue that the debate ended in a “new constitutional compromise: while the Senate might retain its traditional powers over treaty making, the President would gain the constitutional authority to call upon Congress, instead of the Senate, to approve pending international obligations.” Ackerman & Golove, *supra* note 15, at 866. Though I think they give too little weight to the earlier developments, particularly in trade law, they are right that this moment affirmed and consolidated this transformation in the process of international lawmaking in the United States.
183. H.R. REP. NO. 68-1569, at 16 (1925). The decision to adhere to the Court by congressional-executive agreement was an explicit topic of the report. *See id.* at 7-17.
184. Congress approved adherence to the part of the Versailles treaty that created the International Labor Organization. Providing for Membership of the United States in the International Labor Organization, 73 Cong. Rec. 1182 (1934).
185. U.S. participation in the International Monetary Fund and the International Bank for Reconstruction and Development was authorized in the Bretton Woods Agreements Act, Pub. L. No. 79-171, 59 Stat. 512 (1945).
186. H.R.J. Res. 145, 79th Cong., 59 Stat. 529 (1945).
187. H.R.J. Res. 305, 79th Cong., 60 Stat. 712 (1946).
188. S.J. Res. 98, 80th Cong., 62 Stat. 441 (1948).
189. Others included the Agreement for United Nations Relief and Rehabilitation Administration, H.R.J. Res. 192, 78th Cong., 58 Stat. 122 (1944), and the International Refugee Organization, S.J. Res. 77, 80th Cong., 61 Stat. 214 (1947). For more, see LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 226-30 (4th ed. 2001).

During this period, the center of gravity of U.S. international lawmaking began to shift from treaties to congressional-executive agreements. In 1937, Hunter Miller, then the Historical Adviser and Editor of Treaties for the Department of State, concluded that executive agreements “made pursuant to legislative authority” had become extensive both “in number and in importance.”¹⁹⁰ He continued, “[t]he subject matter of other Executive agreements is very varied: Tariff duties, arbitration, copyrights, patents, most-favored-nation treatment, radio, aviation, shipping, measurement of vessels, and the cession of Horseshoe Reef in Lake Erie, are among them.”¹⁹¹ He concluded, “any picture of international acts of the United States which left the Executive agreements out of consideration would be fragmentary.”¹⁹²

In an opinion issued in August 1946, Acting Attorney General James McGranery responded to a query from the Secretary of State as to whether the agreement that would establish the U.N. headquarters in New York would have equal legal effect if concluded as a congressional-executive agreement rather than an Article II treaty. He concluded that it would “operate as the supreme law of the land superseding any inconsistent State or local laws with the same effect in that regard as a treaty ratified by and with the advice and consent of the Senate.”¹⁹³ The agreement was soon thereafter concluded by congressional-executive resolution.¹⁹⁴

By the end of World War II, then, the stage was set for the reversal of fortunes of treaties and congressional-executive agreements that soon followed. The legal foundation for the congressional-executive agreement was firmly established in a series of approving Supreme Court decisions, beginning in the trade area and gravitating outward to unrelated areas of foreign affairs. Dismay over the failure of the Versailles treaty had led policy makers to be more open to finding ways to work around the Treaty Clause. And the resulting push for constitutional amendment, though ultimately unsuccessful, made clear the deep political support for a transformation in the way international law was made in the United States. The years that followed saw an ever-increasing growth in executive agreements, and a stagnation of agreements approved through the Treaty Clause process. This progress, however, was interrupted by a controversy that erupted in the 1950s over human rights agreements—a

190. See Miller, *supra* note 121, at 58.

191. *Id.* at 60.

192. *Id.*

193. International Agreement Executed by President, 40 Op. Att’y Gen. 469 (1946).

194. S.J. Res. 144, 80th Cong., 61 Stat. 756 (1947).

controversy that fundamentally shaped current international law practice in the United States.

C. Divergent Paths: The Bricker Amendment Controversy and Fast Track

The Treaty Clause once again became the center of controversy in the early 1950s. This time, however, instead of proposals to reduce the hurdles to international lawmaking, the Senate considered a series of proposals that would have substantially increased them. Senator John W. Bricker of Ohio, a conservative Republican, offered a series of amendments to the Constitution to restrict the treaty power of the federal government. The amendment was submitted in various forms, beginning in 1951. The version reported by the Senate Judiciary Committee in 1953 provided that any provision of a treaty or other international agreement that conflicted with the Constitution would have no force or effect, that treaties could become effective as “internal law” in the United States only through legislation that would be valid in the absence of the treaty, and that Congress would have power to regulate all executive and other agreements with foreign nations and organizations.¹⁹⁵

Why the backlash against the Treaty Clause? There were several reasons—the emergence of the Cold War, the growing hegemony of the United States, and rising isolationism, among others.¹⁹⁶ Yet even more central than the geopolitical backdrop was an emerging backlash against the human rights revolution that had been led by the United States—a backlash that continues to inspire opposition to international law in the United States even today.

As at the Founding, regional differences over race were not far below the surface of the debate. The constitutional amendments proposed by Bricker were motivated in substantial part by fears that international agreements on human rights would be used to force internal changes, particularly on issues of segregation. American Bar Association President Frank Holman dedicated his term as President in the 1940s to warning of the dangers of international

195. S.J. Res. 1, 83d Cong. (1953), reprinted in DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* 224 app. F (1988). For an excellent study of the relationship between the fight for human rights and civil rights in the post-World War II era, including a discussion of the Bricker Amendment controversy, see CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955* (2003). For another excellent study of the role of human rights and the debates over the Bricker amendment in shaping the treaty process, see NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* (1990).

196. See, e.g., Arthur H. Dean, *Amending the Treaty Power*, 6 *STAN. L. REV.* 589 (1954).

law.¹⁹⁷ He went so far as to claim that if a white person driving through Harlem were to accidentally run over a black child, the driver could be extradited to an international tribunal or foreign court on charges of genocide.¹⁹⁸ Holman's views were extreme but influential. John Foster Dulles was later quoted as cautioning against the "trend toward trying to use the treaty-making power to effect internal social changes."¹⁹⁹ During the debate over the amendment, *Time Magazine* speculated that the "the fight arose" because of such concerns. It cited, in particular, the U.N. Charter, which gave the federal government "power to enact 'civil rights' legislation which could not have been enacted before the charter was signed," the U.N. Charter's requirement that states respect rights "without distinction as to race," and what it said was the Genocide Convention's definition of genocide to include "causing . . . mental harm" to members of a "national, ethnical, racial or religious group."²⁰⁰

The Bricker Amendment was, in short, a thinly veiled effort to prevent the use of international human rights agreements to curtail racial segregation in the United States. It gained the strong support of southern Democrats, who feared that the Genocide Convention and International Covenant on Civil and Political Rights could be used to justify an anti-lynching bill or to supersede and invalidate segregation laws and other discriminatory state legislation.²⁰¹ The Amendment was ultimately defeated by a margin of only a single vote, largely thanks to a vigorous campaign against it by President Dwight Eisenhower.

Yet Eisenhower paid a price for this success. He agreed not to accede to the emerging human rights conventions.²⁰² His administration and that of his successors also incorporated the core commitment of Bricker to prevent the use

197. FRANK E. HOLMAN, *THE LIFE AND CAREER OF A WESTERN LAWYER, 1886-1961*, at 356-451 (1963).

198. TANANBAUM, *supra* note 195, at 13.

199. *The Bricker Amendment: A Cure Worse than the Disease?*, *TIME*, July 13, 1953, at 20.

200. *Id.* Not mentioned in the article but widely known at the time was a petition to the United Nations by a large number of influential black intellectuals and leaders charging the United States with genocide. The petition is reprinted in *WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE* (William L. Patterson ed., 1951).

201. TANANBAUM, *supra* note 195, at 14-15.

202. *Hearings Before a Subcomm. of the S. Comm. on the Judiciary on S.J. Res. 1 Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements and S.J. Res. 43 Proposing an Amendment to the Constitution of the United States Relating to the Legal Effect of Certain Treaties*, 83d Cong. 825 (1953) (statement of John Foster Dulles, Secretary of State).

of international human rights agreements to effect internal changes. When the country finally did ratify the conventions decades later, it paid fealty to the “ghost of Senator Bricker” by eviscerating the agreements with reservations, understandings, and declarations that rendered them unenforceable.²⁰³ And a set of guiding principles for international lawmaking first written in the heat of the controversy in 1953 and still in effect in amended form today in the form of Circular 175 and the attendant regulations, echoes this commitment: treaties are not to “be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.”²⁰⁴

Even as international human rights law stagnated in the United States, international trade law continued to grow and expand. The earlier-mentioned Reciprocal Trade Agreements Act of 1934, as amended and extended in the 1950s, continued to provide for the negotiation of tariff reduction agreements. Reflecting a growing consensus that international trade was beneficial to the United States,²⁰⁵ Congress continued to pursue legislation that eased agreements to reduce trade barriers. In 1962, it granted the President unprecedented authority to negotiate tariff reductions of up to fifty percent, paving the way for the Kennedy Round of General Agreement on Tariffs and Trade on June 30, 1967, the last day before expiration of the Act.²⁰⁶

In the 1970s, Congress took even one step further toward easing the process for making international trade agreements, giving the President “fast-track” negotiating authority.²⁰⁷ First authorized in the Trade Act of 1974, fast-track authority allowed the President to negotiate trade agreements without “interference” by Congress. The resulting agreement was to be submitted to both houses of Congress for an up-or-down vote under special rules that prohibited any amendment, did not allow filibuster in the Senate, and placed

203. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

204. John Foster Dulles, *The Making of Treaties and Executive Agreements*, 28 DEP'T ST. BULL. 591, 592 (1953).

205. HELEN V. MILNER, *RESISTING PROTECTIONISM: GLOBAL INDUSTRIES AND THE POLITICS OF INTERNATIONAL TRADE* (1988) (examining why trade policies remained favorable to free trade in the 1970s despite the presence of pressures that had produced rampant protectionism in the 1920s).

206. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (codified in scattered sections of 19 U.S.C.).

207. It is also called trade promotion authority. The laws that create fast track appear in the Trade Act of 1974, Pub. L. No. 93-618, §§ 151-154, 88 Stat. 1978, 2001-08 (codified as amended at 19 U.S.C. §§ 2191-2194 (2000)). The Trade Act of 2002 extended and conditioned their application. Pub. L. No. 107-210, §§ 2103-2105, 116 Stat. 933, 1004-16 (codified as amended at 19 U.S.C. §§ 3803-3805 (2006 Supp.)).

strict limits on debate.²⁰⁸ Some of the most important congressional-executive agreements still in effect today emerged from this process, including NAFTA and several rounds of the General Agreement on Tariffs and Trade (GATT).²⁰⁹

Almost entirely absent in the debates over these trade agreements, or about fast-track authority, was any rhetoric about the internal changes the agreements would impose. Critics attacked the agreements on the grounds that they would take away jobs, harm certain industries, and create an environmental race to the bottom. And yet the blanket assertion that the agreements would effect internal changes did not arise as a central argument against the trade agreements, as it had against the human rights agreements. That is true even though the internal changes that would be brought about by the trade agreements were, objectively speaking, much more significant than those that would have been brought about by a handful of human rights agreements. To take just one example, the United States ended steel tariffs after a World Trade Organization panel found them inconsistent with the GATT, opening up the struggling U.S. steel industry to more vigorous competition from abroad.²¹⁰ Despite the significant impact of free trade agreements like the GATT on domestic law and policy, they have never struck the “sovereignty” chord in the way human rights agreements have, probably because the impact on moral and social issues is more indirect even if potentially more powerful.

International agreements on human rights and trade thus diverged during the post-World War II era. Human rights agreements stagnated, victims of vigorous opposition by those fearing they would be used to effect internal change. Meanwhile, trade agreements—many of which would bring about internal changes just as great, if not greater—proliferated and flourished, supported by successive legislative acts aimed at easing international lawmaking.

²⁰⁸ 19 U.S.C. § 2191 (2000).

²⁰⁹ Agreements passed under fast-track authority include: the United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (2003); the United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (2003); the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); the United States-Bahrain Free Trade Agreement Implementation Act, Pub. L. No. 109-169, 119 Stat. 3581 (2004); the United States-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302, 118 Stat. 1103 (2004); the United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, 118 Stat. 919 (2004); the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1992); and the Israel-United States Free Trade Area Agreement Implementation Act, Pub. L. No. 99-47, 99 Stat. 82 (1985).

²¹⁰ Proclamation No. 7741, 68 Fed. Reg. 68,483 (Dec. 8, 2003).

The history of the Treaty Clause and congressional-executive agreements helps to explain why the United States today uses treaties and congressional-executive agreements exclusively in some areas and more or less interchangeably in others, and why U.S. treaty practice is so unusual in comparative perspective: the law simply developed over time in response to particular events and circumstances. The Treaty Clause was shaped initially by a specific vision of the role that the Senate would play in treaty making—a role that was eclipsed virtually overnight by the realities of foreign affairs—and by a need to gain the support of the southern states, which were threatened by the prospect of international agreements that might trade off their interests against those of the more numerous northern states. Later, the use of the treaty process was curtailed, particularly in the area of human rights, in response to challenges by those who feared the agreements would be used to challenge segregationist policies in the South.

Meanwhile, the growth of the executive agreement from a very limited tool into the primary means of international lawmaking was spurred by a felt need for a process by which the President could negotiate reciprocal trade agreements as the United States emerged as a more economically open international power. Once it was established as a legitimate and constitutional means of making international law, the congressional-executive agreement migrated into a host of different areas, though its strongest hold has remained in the area of international trade—ironically, the very area that prompted southern states to demand the two-thirds rule that has made the Treaty Clause so cumbersome.

This history does more, however, than simply help us understand why we have the two-track system we have today. It also allows us to consider whether the forces that shaped the rules are ones we wish to allow to continue to guide decisions today. What we discover is that the rules we have today are an artifact of historical circumstances that have little continuing validity. The line currently drawn between treaties and congressional-executive agreements is largely unprincipled, guided primarily by accidents of history.

If we see the current division of labor between treaties and congressional-executive agreements as little more than a curious historical artifact—as I argue we should—then we should not invoke current practice to justify current practice but instead should examine the rules on their own merits. When we do that, as I show in the next Part, we find abundant reasons to abandon the Article II treaty in most cases in favor of the congressional-executive agreement.

III. THE CASE FOR (ALMOST) ABANDONING THE TREATY CLAUSE

The Treaty Clause has been steadily losing influence and importance over the course of the century as congressional-executive agreements have gradually eclipsed it as the central method of international lawmaking in the United States. In this Part, I argue that it is time to complete the transition, by replacing most of the remaining Article II treaties with ex post congressional-executive agreements.

Doing so would have several clear benefits. First and foremost, this way of making international law would enjoy increased legitimacy and stronger democratic credentials. But there are also practical benefits: congressional-executive agreements, I argue, are not only less likely to be held hostage by a small minority than are Article II treaties; they also generally create more reliable commitments, both because they are more likely to be enforced and because they can be more difficult for a single branch of government to unilaterally undo. This final advantage is significant. The very purpose of international agreements, after all, is to serve as a method of committing the parties to the agreement to an agreed course of action.

The current system of international lawmaking in the United States already takes advantage of these benefits in some areas. But these advantages are forfeited in others. In those areas most dominated by the Treaty Clause—especially those where the Article II process is used as the exclusive means of approving international agreements—agreements are much more vulnerable to being held hostage by a small number of extreme political actors, are more difficult to implement, and can be easier for the President to unilaterally undo. It is therefore in those areas that the more frequent use of congressional-executive agreements would bring the greatest benefits.

To be clear, this is not an argument for complete interchangeability of the two instruments as a matter of law. There are certain acts to which the treaty power does not extend and hence where legislation passed by both houses of Congress and signed by the President is required to create a binding and enforceable commitment (which is, as I shall show, a significant reason weighing in favor of concluding such an agreement as a congressional-executive agreement instead).²¹¹ At the same time, there is a much smaller set of cases in which treaties will continue to be required.²¹² In the vast majority of cases in which either instrument can be used—where, that is, treaties and congressional-executive agreements are legally interchangeable—there are

211. See *infra* notes 239 and 245 and accompanying text.

212. See *infra* Section IV.A.

strong reasons for preferring a congressional-executive agreement even if a treaty might traditionally have been used. These reasons are the subject of this Part.

A. Stronger Democratic Legitimacy

The Treaty Clause's voting structure gives rise to real concerns about the democratic legitimacy of international law in the United States. By now it seems normal that the Treaty Clause excludes the House of Representatives from the process. That exclusion was originally justified by a need for secrecy and a desire to have the Senate function as a council of advisors in the treaty-making process. Yet these rationales were almost immediately undermined by actual practice. By the end of George Washington's presidency, "advice and consent" had been reduced to "consent" alone. Hence the Article II process specifying exclusion of the House—the body of Congress designed to be most representative of the population (with membership based on population, not territory) and most responsive to popular control (with two-year, rather than six-year, terms)—is based largely on a set of assumptions that are no longer correct, if indeed they ever were.²¹³

The ex post congressional-executive agreement, which requires approval by a majority in both houses, has greater democratic legitimacy than the Article II treaty as a result. Democratic theorist Robert Dahl, comparing the treaty power and congressional-executive agreements, wrote: "an executive agreement combined with a joint resolution of Congress is much the superior alternative. Surely majority action by both Houses is more 'democratic'—in the sense that majority rule is an essential element of democratic procedure."²¹⁴

213. Indeed, Jefferson wrote that treaties could not be used for agreements falling within Congress's powers, largely because they excluded the House from participation. THOMAS JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE COMPOSED ORIGINALLY FOR THE USE OF THE SENATE OF THE UNITED STATES* § 52, at 109 (New York, Clark & Maynard 1873). The Constitution must have meant "to except those subjects of legislation in which it gave a participation to the [H]ouse of Representatives." *Id.*; see also Ackerman & Golove, *supra* note 15, at 810-12. Of course, the House of Representatives is itself not perfectly representative, in no small part due to gerrymandering and the lack of competitive elections. See JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* (2005); THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

214. ROBERT A. DAHL, *CONGRESS AND FOREIGN POLICY* 24 (1950). He continued:

The shift in the basis of American politics from section to class, together with the enormous change from the politics of minority rule as espoused and practiced by the Federalists to a mass democracy oriented toward majority rule—these

The exclusion of the House is particularly problematic when set in comparative context. As noted, the United States, Mexico, and Tajikistan are the only countries in the world that provide for significantly less involvement by a part of the legislature in treaty making than in domestic lawmaking (by excluding the House in the United States) *and* make the results of this process automatically part of domestic law in more than a few confined areas of law. This gives rise to the possibility that Presidents could game the system, using the international lawmaking process as an end-run around the House.²¹⁵

But even if this possibility is discounted (and admittedly it is only likely to arise in rare circumstances), the broader implications of the United States' comparatively restrictive process are both substantial and too often neglected. Critics of international law frequently contend that international law is undemocratic, basing much of their complaints on the odd, exclusionary process by which the United States conducts treaties. The assumption behind the complaint is apparently that the U.S. process, so weakly democratic, is also the international norm. The U.S. process is indeed weakly democratic, but it is far from the norm. If the democratic problem with international law is that the U.S. international lawmaking process excludes the House, that is a problem easily remedied – by including the House.

The exclusion of the House from a significant body of international lawmaking is particularly problematic in the modern era, when international law and domestic law are increasingly intertwined and overlapping. International law today does not simply deal in matters of diplomatic relations and border disputes. Modern international law is about everything from education to tax policy to torture. In this era, the exclusion of the House from participation in international lawmaking is increasingly dissonant.

fundamental alterations in political ethos make it entirely illogical that a minority of Senators can block a foreign policy endorsed by a majority of the people and their representatives in Congress.

Id. at 24.

215. Lest this seems an unrealistic prospect, see, for example, James Raymond Vreeland, *Institutional Determinants of IMF Agreements* (Feb. 6, 2004) (unpublished manuscript), available at http://yale.edu/macmillan/globalization/Institutional_Determinants_.pdf, in which he argues that governments that are more constrained domestically often seek to use IMF agreements to push through unpopular policies that would otherwise be impossible to achieve. See also Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881, 911 (1978) (arguing that "[t]he international system is not only a consequence of domestic politics and structures but a cause of them"); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 457 (1988) (arguing that governments exploit "IMF pressure to facilitate policy moves that [are] otherwise infeasible internally").

The same lawmaking process that sets too low a bar (or, more accurately, no bar) in the House sets an excessively high bar in the Senate. The two-thirds rule imposed by Article II is among the highest imposed in the Constitution—used only for such matters as impeachment, override of presidential veto, amending the Constitution, and removal of the President from office for inability to discharge the powers and duties of his office.²¹⁶ There are some who celebrate this high hurdle, arguing that a treaty commitment should be subjected to the increased scrutiny and heightened level of consensus that comes with a supermajority voting requirement. Yet there are substantial, and frequently unacknowledged, costs to this exceptionally high requirement.

The supermajority requirement imposed by the Treaty Clause means that treaties that enjoy the support of a strong majority of the population and its political representatives may still not receive approval. This is all the more true because the Senate is extremely malapportioned—far more so today than was the true at the Founding, or even a century ago.²¹⁷ Senators representing only about eight percent of the country's population can halt a treaty.²¹⁸

Achieving support of a two-thirds majority also requires playing to the polarized extremes of modern American politics.²¹⁹ Consider, by way of illustration, the difference in ideological positions of the fifty-first vote in the Senate versus the sixty-seventh. If we array the senators in the 109th Congress from most liberal to most conservative according to a widely used measure of ideological position, we see that in the 109th Congress the sixty-seventh senator was just over twice as conservative as the fifty-first senator.²²⁰ In the

216. See U.S. CONST. art. I, §§ 3, 7; *id.* art. V; *id.* amend. XXV.

217. See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 16-43 (1999) (discussing Senate apportionment).

218. Calculated by adding the populations of the eighteen least populous states and dividing by the total U.S. population. U.S. Census Bureau, www.census.gov (last visited Mar. 28, 2008) (author's calculations). In 1788 it would have taken states accounting for at least fourteen percent of the country's population to do the same. CORWIN, *supra* note 11, at 48-49 (“[W]hereas in 1788 a ‘recalcitrant one-third plus one man of the Senate’ could not have been recruited from States containing less than one-seventh of the population, an equally lethal combination can today be compounded out of Senators representing less than one-thirteenth thereof.”). The Senate is now among the most malapportioned legislative bodies in the world. See ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 46-54 (2001); see also SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 25-78 (2006).

219. See, e.g., HACKER & PIERSON, *supra* note 213.

220. Royce Carroll et al., *Dw-Nominate Scores with Bootstrapped Standard Errors* (Aug. 15, 2007), <http://www.voteview.com/dwnomin.htm>. The DW-NOMINATE scores provide a number between -1 (liberal) to 1 (conservative). For more on the data, see KEITH T. POOLE &

reverse dimension, the sixty-seventh senator was also just over twice as liberal as the fifty-first. In other words, the supermajority requirement means treaties must gain the support of senators that are twice as conservative or liberal as the so-called median voter in the Senate.²²¹

The presence of the filibuster in the Senate does narrow the gap between the treaty process and congressional-executive agreements. When legislation may be filibustered, the requirement for passage increases to sixty senators—reducing the gap to the two-thirds (or sixty-seven votes) requirement of the Treaty Clause. There are some instances where a revised process has been put in place for congressional-executive agreements—for example, the fast-track process—that explicitly precludes filibusters in the Senate. But for the most part, these agreements are subject to the super-majority requirement imposed by the filibuster, as is the majority of legislation more generally.

HOWARD ROSENTHAL, *IDEOLOGY & CONGRESS* (2d ed. 2007). The dataset shows that arrayed from liberal to conservative, the fifty-first vote is Senator Coleman of Minnesota, with a .217 nominate score. The sixtieth vote (which is what would be required to overcome a filibuster) is Senator Talent (.343), and the sixty-seventh vote is Senator Hagel (.433). Arrayed in the opposite direction (from conservative to liberal), the fifty-first vote is Senator Specter (.103), the sixtieth is Senator Pryor (-.264), and the sixty-seventh is Senator Robert Byrd (-.324). Carroll et al., *supra*. In both cases, I treat Senator Corzine and Senator Lautenberg as a single vote, for Lautenberg replaced Corzine when he resigned to become Governor of New Jersey. Both are at the far liberal end of the spectrum. This is not to suggest that votes on international agreements will line up on ideological grounds, but simply to illustrate the point that a more extreme minority is able to prevent agreements that must receive the support of sixty-seven senators.

221. There may be cases in which a supermajority requirement of this form is democracy-enhancing, because it requires a broader consensus to develop before action can be taken. Judith Resnik, for example, has persuasively argued that a supermajority is democracy-promoting in the context of the selection of Article III judges. See Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *CARDOZO L. REV.* 579, 638 (2005). There is a difference between the nature of the decision to appoint a judge for life versus the decision to approve a treaty that leads to a difference, in my view, in the democratic legitimacy of the supermajority requirement in the two cases. First, the dangers of a “false positive” are much greater in the case of the judge: if a judge who commands a bare majority is appointed, that judge holds the position for life and cannot be removed except in extraordinary cases. By contrast, a treaty that passes with a bare majority can be undone by a later-in-time federal statute. Second, the harm of a “false negative” is much smaller in the case of the judge: if a particular nominated judge is not approved, another one who can command broader support will almost certainly be nominated in his or her stead. This will cause delay, but ultimately the seat will likely be filled. By contrast, if a treaty is rejected, there will be no international agreement (unless, of course, it is concluded by ex post congressional-executive agreement, as I advocate here). The failure to approve agreements can therefore cause significant harm to the nation’s ability to engage in international cooperation.

The use of the filibuster has expanded substantially since the rise of congressional-executive agreements. Once reserved almost exclusively for the defense of core regional interests—and then almost exclusively for southern defense of Jim Crow—the filibuster is now used frequently on controversial legislation even when regional interests are not at stake. Far more a tool of partisan warfare than it once was, the filibuster is now a routine part of Senate lawmaking, making congressional-executive agreements less distinct from Article II treaties than they once were.

Nonetheless, the filibuster carries with it political risks: it requires mounting a public opposition to proposals that frequently have clear majority support. Moreover, even with the filibuster, the Article II process sets the bar substantially higher. In a polarized body of one hundred Senators, seven votes are hardly a trivial additional hurdle. Add to this the extreme malapportionment of the Senate, and it becomes clear that congressional-executive agreements are less likely to be held up by political actors representing a small minority of voters than are agreements subject to the Article II process.

B. A Less Cumbersome and Politically Vulnerable Process

It is clear that an extraordinary level of consensus is required to conclude an Article II treaty. This might at first appear harmless, but it is not. Treaties can be halted by those far outside of the mainstream—and can be held hostage even in the face of broad popular support. It is no coincidence, then, that the Treaty Clause has been regarded by some as “an almost insuperable obstacle to entrance by the United States into an international organization”²²² John Hay, who as Secretary of State helped negotiate the Treaty of Paris of 1898 ending the Spanish-American War, later said, “A treaty entering the Senate . . . is like a bull going into the arena: no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive.”²²³ Hay’s prediction was overwrought, but his essential argument—that obtaining the Senate’s advice and consent can be exceptionally difficult—was correct.

Some scholars deny that the two-thirds requirement in the Senate imposes any significant hindrance to international agreements. They cite the fact that

222. CORWIN, *supra* note 11, at 32.

223. 2 WILLIAM ROSCOE THAYER, *THE LIFE AND LETTERS OF JOHN HAY* 393 (Houghton Mifflin Co. 1915) (1908).

few treaties have been rejected by the Senate.²²⁴ It is true that only a few treaties have been defeated in the Senate (though the number is larger than proponents of this view sometimes acknowledge). And yet this fact alone does not support the contention that the Treaty Clause does not impose an obstacle to agreements, even those that enjoy wide popular support. Under Senate Rules, there is no procedure by which a President can call a vote on a resolution of ratification. Hence a treaty can remain before the Senate indefinitely if the Senate chooses not to act. There are, at present, forty-eight treaties pending before the Senate.²²⁵ The oldest is the International Labor Organization Convention Concerning Freedom of Association and Protection of the Right To Organize, which was submitted to the Senate on August 27, 1949.²²⁶ Other notable treaties that remain before the Senate include the Vienna Convention on the Law of Treaties (submitted on November 22, 1971),²²⁷ the International Covenant on Economic, Social and Cultural Rights (submitted on February 23, 1978),²²⁸ the American Convention on Human Rights (submitted on February 23, 1978),²²⁹ Convention on the Elimination of All Forms of Discrimination

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224. John Yoo argues, for example, that “[o]nly twice in the last century, in 1919 with the Treaty of Versailles and [in 1999] with the comprehensive Nuclear Test-Ban Treaty, has the Senate rejected a significant treaty sought by the President.” Yoo, *supra* note 24, at 758. In fact, the true number is seven. They are: Treaty of Versailles (1919, 1920), a commercial rights treaty with Turkey (1927), the St. Lawrence Seaway treaty with Canada (1934), the treaty on the World Court (1935), the Law of the Sea Convention (1960), the Montreal Aviation Protocols (1983), and the Comprehensive Nuclear Test-Ban Treaty (1999). See U.S. Senate, Art & History, Treaties, Rejected Treaties, <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#5> (last visited Jan. 29, 2008). In total, the Senate has rejected twenty-one treaties submitted to it by the President. In twelve of these, the treaties received majority support from the Senate. *Id.*
225. U.S. Dep’t of State, Treaties Pending in the Senate (Jan. 22, 2008), <http://www.state.gov/s/l/treaty/pending/>. Even when Congress approves a resolution of ratification, it may not be sufficient. In 1992, the Senate consented to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, but the treaty has not been ratified by the United States because Congress has not approved implementing legislation. See U.S. Evtl. Prot. Agency, Basel Convention, <http://www.epa.gov/epaoswer/osw/internat/basel.htm> (last visited Jan. 29, 2008).
226. Int’l Labor Org., Int’l Labor Org. Convention No. 87 Concerning Freedom of Association and Protection of the Right To Organize, 68 U.N.T.S. 17 (July 4, 1950); see U.S. Dep’t of State, *supra* note 225.
227. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 311; see U.S. Dep’t of State, *supra* note 225.
228. United Nations International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360; see U.S. Dep’t of State, *supra* note 225.
229. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 9 I.L.M. 99; see U.S. Dep’t of State, *supra* note 225.

Against Women (submitted on November 12, 1980),²³⁰ Convention on Biological Diversity (submitted on November 20, 1993),²³¹ United Nations Convention on the Law of the Sea (submitted on October 7, 1994),²³² and the Comprehensive Nuclear-Test-Ban Treaty (submitted on September 23, 1997).²³³

The high hurdle to obtaining advice and consent in the Senate also has a less visible cost. As Representative Kefauver put it in a debate in 1945 over a constitutional amendment to change the Treaty Clause, "The damage done by the two-thirds rule cannot be measured solely by the treaties which secured a majority vote of the Senate but failed because of the lack of two-thirds. The fear that treaties are very likely to be rejected prevents desirable treaties from being conceived."²³⁴ It is impossible to measure this "damage," for it is impossible to know which agreements would have been brought to the Senate, much less "conceived" in the first place, but for the difficulties imposed by the Treaty Clause. Yet it is reasonable to infer that the numbers are not insignificant. Imagine how foolish it would be to say that the presidential veto is not a hurdle because only a miniscule share of legislation is subject to a veto; or that congressional incumbents are not advantaged in electoral contests—it is simply that no good challengers run against them. Strategic actors look ahead, and when they see an insurmountable hurdle, they are not likely to continue on their present path.

This is not to say that obtaining approval of two-thirds of the Senate is always harder than obtaining the approval of a majority of both houses of Congress. If the House and Senate are extremely far apart ideologically—

230. United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; see U.S. Dep't of State, *supra* note 225.

231. United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 822; see U.S. Dep't of State, *supra* note 225.

232. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261; see U.S. Dep't of State, *supra* note 225.

233. Comprehensive Nuclear-Test-Ban Treaty, Sept. 24, 1996, 35 I.L.M. 1443; see U.S. Dep't of State, *supra* note 225.

234. 91 CONG. REC. H4043 (daily ed. May 2, 1945) (statement of Rep. Kefauver). The same might be said of the process for amending the U.S. Constitution. Only six amendments proposed by Congress have failed to be ratified by the states. Yet this low failure rate should not be read to mean that constitutional amendments are easy to make. A better measure of the difficulty of amendment is the infrequency of amendment—twenty-seven in more than two hundred years. Indeed, the most recent amendment—the twenty-seventh—was originally proposed in 1789 but was not ratified until 1992. Another piece of circumstantial evidence for the proposition that the Treaty Clause is perceived as an exceptionally high hurdle is the growing number of international agreements concluded outside that process. See *supra* Tables 1 and 2.

unlikely, but possible—then agreements with majority support in one body may face tough sledding in the other. Moreover, while congressional committees wield relatively limited power in the Senate, with its comparatively open debate process, they nonetheless maintain substantial agenda-setting power. Depending on which senators sit on the various committees within the Senate, the committee structure might be more amenable to treaties than to equivalent agreements submitted as congressional-executive agreements. Under the Senate rules, for example, all Article II treaties proceed through the Senate Foreign Relations Committee. When the committee is led and populated by a majority of Senators who are generally favorable to treaties, as it is today, that can be an asset. There have been points in U.S. history, however, when the Committee was a decided impediment. It is probably not coincidental, for example, that the years in which Senator Jesse Helms, a declared foe of international law, was chair, the Committee saw few treaties approved by the Senate.

Congressional-executive agreements, by contrast, generally proceed through the relevant subject matter committees in the Senate. It is possible, though there is no evidence to suggest, that these committees might be less favorable toward international agreements that delegate some of their authority than a committee focused on foreign relations would be. Or they might be more favorable, if they broadly support action—international or domestic—in this subject area. The point is that Article II treaties and congressional-executive agreements intersect with the Senate committee process slightly differently, and in ways that could, depending on the composition and orientation of the focal committees, influence the ease of pursuing agreements through either.

There may be reasons to want a process that requires greater consensus—and hence is more cumbersome. A process that imposes higher hurdles might be considered a means of ensuring that the ephemeral views of a slim majority will not be embodied in international commitments that later majorities might oppose. As Robert Dahl once explained, “Because an international commitment might be substantially binding on future majorities, and thus may limit the options available to subsequent majorities, there is something to be said for any process that requires the consent of a rather large present majority before such a commitment may be made.”²³⁵ A more cumbersome

235. DAHL, *supra* note 214, at 24. Despite acknowledging this presumed advantage of the Treaty Clause, Dahl goes on to conclude that congressional-executive agreements are nonetheless the better method of international lawmaking, not least because “the House today plays too important a role in determining our international policies for its claims to be long ignored.” *Id.* at 25.

process might also be deemed desirable on the expectation that it would ensure that international commitments would not fluctuate with small shifts in the tide of public opinion. Finally, a process that requires a supermajority might be seen as somehow more dignified and respectable on the international stage. As will be discussed in more depth in the next Section, however, these arguments are based on inaccurate assumptions about the stability and permanence of obligations made under the Article II Treaty Clause, as well as about the international context in which they exist.

C. More Reliable Commitments

Congressional-executive agreements create more reliable international commitments than do Article II treaties. This is an important and perhaps surprising advantage. It is important because the central purpose of an international agreement is to commit states to act in ways consistent with the agreement. It may be surprising, because, as just argued, the bar in Congress is generally higher for Article II treaties—which might be thought to create a stronger assurance of political durability. Indeed, the very limited scholarship on the issue to date has argued that, because of this higher bar, treaties do in fact create a stronger commitment.²³⁶ That scholarship is misguided. Fixated on vote thresholds in the Senate, it has missed the two core reasons why congressional-executive agreements create stronger commitments than do Article II treaties: their stronger domestic legal status and their more stringent rules regarding withdrawal from an enacted agreement.

There is a beneficial side effect of a move away from Article II treaties toward congressional-executive agreements. As we shall see, avoiding commitments that are unenforceable or that the President might withdraw from without congressional involvement also promises to bring better balance to the exercise of authority by Congress and the President over international lawmaking, while at the same time more effectively protecting the House's traditional scope of authority.

²³⁶ The one empirical project on this topic argues that treaties serve as a more costly signal of intent to comply with the terms of international agreements than do executive agreements. See Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 *PRESIDENTIAL STUD. Q.* 440 (2005). That study, however, does not distinguish between sole executive agreements (which are clearly less costly than treaties) and congressional-executive agreements (which frequently are not).

1. *Enforcement of Treaties and Congressional-Executive Agreements*

International law and domestic law are separate but deeply intertwined legal systems.²³⁷ The mere fact that a state is bound as a matter of international law does not ipso facto mean that the state is bound as a matter of domestic law. Whether it is or not depends on domestic law—that is, how and when international legal obligations are “brought back home.” International law truly binds only when there is a way to enforce a state’s obligation under international law in domestic courts. This is where the difference between treaties and congressional-executive agreements becomes interesting: a congressional-executive agreement creates a more reliable commitment on behalf of the United States than does a treaty because unlike a treaty it erases this line between domestic and international law—allowing for a one-stage rather than a multi-stage process to create an enforceable legal commitment.

To understand this difference, we must examine how international obligations become enforceable as a matter of U.S. domestic law. With treaties, this is often a two-step process. The U.S. Constitution specifies that once ratified, treaties are the “Supreme Law of the Land.”²³⁸ That would seem to settle the matter. When it comes to applying this rule, however, it becomes quite a bit more complicated than it first appears. To begin with, there are two types of treaties: those that are self-executing—meaning that they become part of domestic law immediately upon ratification—and those that are non-self-executing—meaning that they require Congress to enact implementing legislation before they become enforceable.²³⁹

237. Hans Kelsen once explained the dualist view of international law as follows: “Traditional theory . . . sees in international and national law two different, mutually independent, isolated norm systems, based on two different basic norms.” HANS KELSEN, *PURE THEORY OF LAW* 328 (1967).

238. U.S. CONST. art. VI, § 2.

239. See 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(4) (1987). For an overview of the different ways that treaties can be non-self-executing, see Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995). See also Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1119 (1992); David N. Cinotti, Note, *The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land*, 91 GEO. L.J. 1277, 1279 (2003). In the United States, treaties may be non-self-executing by their own terms, by virtue of a “Reservation, Understanding, or Declaration” (RUD), or because implementing legislation is constitutionally required. An example of the second is the International Covenant on Civil and Political Rights (ICCPR), which was ratified by the Senate in 1992 with a RUD rendering it non-self-executing. Courts have upheld this RUD, declaring the ICCPR to be non-self-executing. See *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); *Beazley v. Johnson*, 242 F.3d 248, 267–68 (5th Cir. 2001); *Igartua De La Rosa v. United States*, 32 F.3d

Treaties that are self-executing are, by virtue of the Supremacy Clause, enforceable in domestic court upon ratification. Yet this does not necessarily mean that treaties are always and in every case enforced. The relative legal status of state law, federal statutory law, treaties, and constitutional law has been an active subject of debate over the course of American history. Today, most scholars agree that treaties have a status equivalent to the federal statutory law.²⁴⁰ Hence where treaty obligations are inconsistent with the Constitution, the Constitution will prevail.²⁴¹ Where they are inconsistent with a federal statute, courts apply the “last in time rule” whereby the obligation imposed later in time prevails. And where they are inconsistent with state law, the treaty obligations prevail.

Enforcement of treaties that are not self-executing is even more complicated. In such cases, two problems can emerge. First, a non-self-

8, 10 n.1 (1st Cir. 1994); S. REP. NO. 102-23, at 15 (1991); 138 CONG. REC. S4781-84 (1992). There are at least two alternative theories on the extent of the third category of non-self-executing treaties (those for which implementing legislation is constitutionally required). The first is that of John Yoo—that treaties cannot extend into Congress’s Article I power. A second and I think stronger theory is that there are certain acts to which the treaty power does not extend for textual, historical, and structural constitutional reasons, including, for example, making appropriations. *See Reid v. Covert*, 354 U.S. 1, 16 (1957) (“[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”); EDWARD S. CORWIN, NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER 8-20, 18 (1913) (arguing that treaties cannot appropriate money, acquire territory, or conflict with the Bill of Rights, and that the treaty power “must be confined to its proper business and must be exercised in good faith”); Chandler P. Anderson, *The Extent and Limitations of the Treaty-Making Power Under the Constitution*, 1 AM. J. INT’L L. 636, 653 (1907) (reviewing several historical events and congressional views and concluding that these views “show a consensus of opinion that with respect, at least, to the appropriation of money and the regulation of tariff duties treaty stipulations cannot be regarded as self-executing, and require legislative action to carry them into effect”); *see also infra* note 245. A congressional report issued in 1816 noted the “necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create states, or to cede territory.” 14 ANNALS OF CONG. 1019 (1854). All but the last are correct. Although it has been much debated over the years, it appears that cession of territory must be done by treaty. *See infra* note 322.

240. For a notable exception, see AMAR, *supra* note 94, at 302-07.

241. *See, e.g., Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (per curiam) (“[T]he treaty power, like all powers granted to the United States, is limited by other restraints found in the Constitution on the exercise of governmental power.”); 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. a (1987) (“In their character as law of the United States, rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions, and requirements of the Constitution, and cannot be given effect in violation of them.”).

executing treaty could impose an international obligation on the United States that would be unenforceable as a matter of domestic law—because the necessary implementing legislation has not been passed—leaving the country in violation of its international obligations.²⁴² To avoid this problem, the Senate generally postpones its advice and consent to a non-self-executing treaty until implementing legislation can be enacted concurrently.²⁴³ Alternatively, it might give its advice and consent to the ratification of a treaty contingent upon the subsequent enactment of implementing legislation.²⁴⁴ Although sensible, these solutions are not costless. Under each approach, non-self-executing treaties face an additional hurdle to ratification: in both cases,

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242. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106, at 20 (“Treaties approved by the Senate have sometimes remained unfulfilled for long periods because implementing legislation was not passed.”). There is currently a split between the circuit courts on the question of whether the Vienna Convention on Consular Relations provides a private right of action. See *Cornejo v. County of San Diego*, 504 F. 3d 853 (9th Cir. 2007) (finding that the Convention is self-executing but does not give rise to a private right of action); *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007) (finding that the Convention does create a private right of action).
243. See, e.g., Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 11, 1998, 38 I.L.M. 1; Ronald D. Rotunda, *The Chemical Weapons Convention: Political and Constitutional Issues*, 15 CONST. COMMENT. 131 (1998). For an example of the process through which treaties are ratified and implementing legislation is enacted concurrently, see the congressional debate on the ratification of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. 146 CONG. REC. 8866 (2000).
244. Robert E. Dalton, *National Treaty Law and Practice: United States*, in NATIONAL TREATY LAW AND PRACTICE 13 (Monroe Leigh, Merritt R. Blakeslee & L. Benjamin Ederington eds., 1999), available at <http://www.asil.org/dalton.pdf> (“Where implementing legislation is necessary with respect to a treaty that has received Senate advice and consent to ratification, it is the practice of the United States to delay deposit of its instrument of ratification until enactment of the legislation.”). For example, the Senate made its advice and consent to the Genocide Convention and the Convention Against Torture, contingent on passage of the necessary implementing legislation. See U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. 36,198, 36,199 (1990); U.S. Senate Resolution of Advice and Consent to Ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide, 132 CONG. REC. 2349, 2350 (1986); see also Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT’L L. 612, 613 (1986). For additional examples, see Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, Mar. 20, 1989, 28 I.L.M. 652, which has yet to be ratified despite receiving contingent advice and consent of the Senate, and Convention Providing a Uniform Law on the Form of an International Will, <http://www.state.gov/s/l/c3562.htm>, which has yet to be ratified despite receiving contingent advice and consent of the Senate.

the treaty cannot be ratified until implementing legislation is passed. In other words, the treaty must have the support of the President and two-thirds of the Senate, *and* a majority in both the Senate and the House of Representatives to enact separate implementing legislation.

This is not the only dualist dilemma posed by the Supremacy Clause. The placement of the authority to consent to treaties solely in the Senate has created some constitutional puzzles as well. Chief among them is the question of the rights and responsibilities of the House of Representatives regarding treaties that involve powers granted to it by the Constitution, such as the power to appropriate funds.²⁴⁵ The constitutional grant of authority to the Senate to make treaties without the House creates two seemingly untenable alternatives regarding the House's power of appropriations: either it is empowered to nullify treaties that require appropriations by failing to appropriate the funds necessary to carry it out, or it is required to make the appropriations specified in a treaty without exercising any independent judgment.²⁴⁶ Neither option has

245. The issue first arose in 1796 in connection with a treaty with Great Britain. In order to carry out the treaty, the government needed to appropriate funds. The House resisted the claim that it was required to appropriate the money necessary to make good on the treaty obligations and insisted that it instead had the right to deliberate independently. The issue came up repeatedly in the context of tariffs, which were, until the enactment of the income tax, the primary source of revenue for the United States. The first of these arose in 1815 under a commercial treaty with Great Britain that required diminishing tariff duties. In that case, a conference committee report concluded that the Senate could enter into a treaty obligation without approval by the House, but acknowledged the "necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations." Anderson, *supra* note 239, at 649 (quoting 29 ANNALS OF CONG. 1019 (1815)). This did not put the issue to rest, however, and it resurfaced periodically. *Id.* at 649-50. In 1887, Congress appeared to shift its position slightly. A committee report stated that "the President, by and with the advice and consent of the Senate, cannot negotiate a treaty which shall be binding on the United States, whereby duties on imports are to be regulated, either by imposing or remitting, increasing or decreasing them, without the sanction of an act of Congress . . ." *Id.* at 650-51. More than a century after the debate began, Senator Cullom, Chairman of the Committee on Foreign Relations, concluded, "[T]he authority of the House of Representatives in reference to treaties has been argued and discussed for more than a century, and has never been settled in Congress and perhaps never will be." *Id.* at 651; *see also id.* at 653 ("The views expressed in Congress . . . and by authoritative writers on the subject, show a consensus of opinion that with respect, at least, to the appropriation of money and the regulation of tariff duties treaty stipulations cannot be regarded as self-executing, and require legislative action to carry them into effect."); *Turner v. Am. Baptist Missionary Union*, 24 Fed. Cas. 344, 345 (D. Mich. 1852) (No. 14,251) ("A treaty under the federal constitution is declared to be the supreme law of the land. . . . It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect . . . as where the appropriation of money is required.")

246. *See H.R. REP. NO. 68-1569*, at 8-9 (1925) (discussing the accession to the World Court); *see also 29 ANNALS OF CONG. 520-674* (1815-1816) (debating the necessity of a bill for carrying

proven appealing or persuasive. To address the conundrum, early presidents adopted the custom of sending a message to the House of Representatives when a treaty might require an appropriation. In some of those cases, the appropriation was voted before the presentation of the treaty to the Senate.²⁴⁷ Similar arguments have been made in the past about treaties that provide for reciprocal raising and lowering of duties, the acquisition or cession of territory, regulations of commerce with foreign nations, naturalization of aliens, and agreements to engage in or refrain from war.²⁴⁸

Congressional-executive agreements avoid many of these dualist dilemmas. Congressional-executive agreements are, after all, created by means of legislation. That legislation not only has the status equivalent to federal statutory law, it *is* federal statutory law. There is little difference between most congressional-executive agreements and self-executing treaties that do not infringe on the House's traditional scope of authority—in both cases, they create binding legal obligations that are inferior to the Constitution, subject to the later-in-time rule with federal statutes, and superior to state law. Yet when an agreement is not explicitly self-executing, a congressional-executive agreement can offer significant advantages. Congressional-executive agreements are generally presumed self-executing unless specified otherwise. The legislation creating them, moreover, can include any necessary implementing language. The legislation provides, in effect, one-stop shopping: the same act that provides the authority to accede to the international agreement can also make the necessary statutory changes to implement the obligation incurred.

This advantage is even more pronounced in the wake of the Supreme Court's recent decision in *Medellin v. Texas*.²⁴⁹ The Court held that none of the treaty obligations at issue in the case were self-executing and hence the obligations were unenforceable in federal court in the absence of implementing legislation.²⁵⁰ Though the full impact of this ruling is not yet entirely clear, the decision appears at the very least to raise new doubts about whether many U.S. treaty obligations are binding under domestic law—doubts that would be

into effect the 1815 Convention of Commerce, between the United States and Great Britain). A conference committee report concluded that both the House and Senate agreed that “in some cases it is necessary” to have legislative enactment to carry out a treaty obligation, though the extent of that necessity remained a point of contention between the representatives of the two houses. *Id.* at 1018-23.

247. H.R. REP. No. 68-1569, at 9 (1925).

248. *See, e.g., id.* at 9-10.

249. 128 S. Ct. 1346 (2008).

250. *Id.* at 1347-48.

largely absent were the agreements instead enacted as congressional-executive agreements.

Yet another advantage of congressional-executive agreements arises because the House is an equal participant in creating them. The constitutional dilemma that exists when a treaty requires making decisions traditionally within the House's core scope of authority does not exist in the case of a substantively identical congressional-executive agreement because the House is directly involved in the creation of the agreement. We can see this by looking once again at the changes in the way that international trade obligations are agreed to. Before enactment of the Tariff Act of 1890, international agreements to raise or lower duties ran squarely into the dilemma outlined above. A House Report from 1925 recounted that in "treaties affecting revenue legislation or the raising or lowering of duties . . . [t]he necessity of the concurrence by the House . . . has been very generally asserted by that body and acquiesced in by the Senate."²⁵¹ The usual solution to this dilemma was to insert into the treaties a condition that the changes provided in the treaty would not be effective without the concurrence of Congress.²⁵² The gradual move toward concluding trade agreements primarily as congressional-executive agreements put an end to this two-stage process. Unlike treaties on the same topic, reciprocal trade agreements approved by Congress did not need to be separately submitted for approval by Congress before taking effect.

A congressional-executive agreement thus creates a more reliable commitment on behalf of the United States than does a treaty.²⁵³ Unlike treaties, congressional-executive agreements are not subject to conditional consent and the law creating them is unquestionably federal law, enforceable by the courts. As a result, the United States is able to be a more reliable negotiating partner. At the same time, the process of enacting congressional-executive agreements simply and effectively protects the prerogative of the

251. *Id.* at 1354.

252. *Id.* ("In these treaties a condition has often been inserted to the effect that the changes provided in the proposed treaty should not be effective without the concurrence of Congress.").

253. One might agree with the claim that treaties lead to less effective commitments and yet argue that the current system is nonetheless a good one. The argument might be that the United States uses the Article II process in precisely those areas where it intends not to make an enforceable reciprocal commitment. While that argument might be made with regard to some of the areas of law that are concluded exclusively by treaty—including human rights, the environment, labor, dispute settlement, and perhaps extradition—it is harder to make in others—including arms control, aviation, consular relations, taxation, and telecommunications.

House to participate in decisions that lie within its traditional scope of authority.²⁵⁴

2. *Withdrawal from Treaties and Congressional-Executive Agreements*

Treaties and congressional-executive agreements differ not only in how they are made. They also differ in how they are unmade. It should be noted immediately that this area of law is unsettled and deserves deeper treatment than is possible here. Nonetheless, even a brief analysis of this unsettled area makes one conclusion clear: the case for congressional control over withdrawal from congressional-executive agreements is much stronger than the case for congressional control over withdrawal from treaties. On the whole, then, treaties will generally be easier to undo than congressional-executive agreements. Treaties therefore constitute a less reliable commitment.

The Constitution is silent on the issue of withdrawal, both from treaties and from congressional-executive agreements.²⁵⁵ The open questions left by this silence have inspired a centuries-long debate. To understand it, we must begin with the somewhat paradoxical way in which treaty obligations are made. The President has the power to present (or not present) a negotiated treaty to the Senate for approval. Once presented, it cannot be revoked by him without the Senate's concurrence.²⁵⁶ Yet this is something of a pyrrhic power, for while the Senate is vested with the authority to give its "advice and consent" on the treaty, it is the President who actually ratifies the treaty once the Senate has offered its approval. Hence even if the Senate were to vote to approve the treaty, a President who has turned against it (or who never was for it, the treaty having been submitted to the Senate by a prior administration)

²⁵⁴ The House's prerogative would likely still be reasonably well protected by the current system of making treaty obligations that encroach on the House's authority contingent on the passage of implementing legislation, either before or after the advice and consent of the Senate is given. Yet involving the House from the beginning through a congressional-executive agreement has two advantages. First, it makes it unnecessary to determine in each instance what portions of the agreement require the acquiescence of the House (a decision that might on occasion wrongly exclude the House). Second, it is simply much less cumbersome. Rather than prepare separate legislation on the portions of the agreement that require assent of the House, the agreement can simply be submitted to the House just as it is to the Senate.

²⁵⁵ See HENKIN, *supra* note 8, at 211 ("[T]he Constitution tells us only who can make treaties for the United States; it does not say who can unmake them.").

²⁵⁶ TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106, at 145 ("The President does not have the formal authority to withdraw a treaty from Senate consideration without the Senate's concurrence.").

might simply refuse to file the papers necessary to give that consent effect – and do so entirely legally.²⁵⁷

If the President does enter the ratification after receiving the advice and consent of the Senate, the obligation thereby enters into effect as a matter of both domestic and international law.²⁵⁸ Under international law, any subsequent effort to withdraw from that treaty is governed by the treaty itself or, if it is silent on withdrawal or revocation, by the Vienna Convention on the Law of Treaties. But that well-settled rule tells us nothing about withdrawal from treaties as a matter of *domestic law* – nor about the allocation of power among the branches of government in the decision to withdraw.

The Constitution provides no direct guidance on the question. Though it specifies the process for making treaties, it is silent on the question of withdrawal.²⁵⁹ Some have argued that because the President has the power not to ratify a treaty even after the Senate's consent has been given, the President must have the parallel authority to withdraw that ratification regardless of the Senate's position on withdrawal. The Restatement endorses this view, stating that “[u]nder the law of the United States, the President has the power . . . to suspend or terminate an agreement in accordance with its terms.”²⁶⁰ This view has never been formally upheld by the courts and remains controversial.²⁶¹ The

257. For a more complete outline of the process by which a treaty proceeds through the Senate, see TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106.

258. It becomes domestic law by virtue of the Supremacy Clause. Whether or not the treaty can be enforced in domestic courts depends on whether or not the treaty is self-executing.

259. Louis Henkin notes that, as a result, “[a]t various times, the power to terminate treaties has been claimed for the President, for the President-and-Senate, for President-and-Congress, for Congress.” HENKIN, *supra* note 8, at 211. Some issues regarding treaty withdrawal are more settled than others. For example, most would agree that the President may unilaterally withdraw from a treaty in accordance with the terms of the agreement or because the agreement has been materially violated by another party in ways that give rise to a right to terminate. See, e.g., S. COMM. ON FOREIGN RELATIONS, 95TH CONG., TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER 22-24 (Comm. Print 1979) [hereinafter TERMINATION OF TREATIES].

260. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 (1987). Hunter Miller also shared this view. He wrote, “What may be called the negative control of treaty making is absolute in the President. . . . At any stage in the making of a treaty, until it is internationally complete, the President may, in the exercise of his own discretion, bring the proceedings to an end.” Miller, *supra* note 121, at 52.

261. There is some scholarship suggesting that the President does not have the power to unilaterally withdraw from treaties, though much of it is now decades old. See, e.g., HENKIN, *supra* note 8, at 211-14, 489 n.139 (discussing the debate over the authority of the President to withdraw unilaterally from treaties and citing a variety of authorities for the proposition that the President should not have the power to withdraw unilaterally); John H. Riggs, Jr., *Termination of Treaties by the Executive Without Congressional Approval: The Case of the*

courts have twice refused to settle the issue, declining to intervene to prevent unilateral withdrawal from a treaty by the President on the grounds that the challenge to the President's authority posed a political question, among other reasons.²⁶²

The Senate, perhaps not surprisingly, opposes the idea that the President can unilaterally withdraw from a ratified treaty. The Senate Foreign Relations Committee has repeatedly contended that the termination of treaties requires the participation of the Senate or Congress.²⁶³ A report prepared in 2001 by the Senate Foreign Relations Committee concluded that whether termination of a treaty "requires conjoint action of the political branches remains . . . a live issue

Warsaw Convention, 32 J. AIR L. & COM. 526, 533-34 (1966) (arguing that courts should require "some form of Congressional approval" for termination of a treaty); Comment, *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 U. CHI. L. REV. 580 (1967) (arguing that the President cannot terminate a treaty alone where private rights are affected).

262. The first case was presented after President Carter unilaterally terminated a mutual-defense treaty with Taiwan in 1979. Several members of Congress sued to prevent the withdrawal. The Court of Appeals for the District of Columbia held that the President acted within his constitutional authority. *Goldwater v. Carter*, 617 F.2d. 697, 709 (D.C. Cir.), *rev'd*, 444 U.S. 996 (1979). A plurality of the Supreme Court dismissed the case because the issue presented was a nonjusticiable political question, and it never addressed the merits of the argument. *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring); *see also* TERMINATION OF TREATIES, *supra* note 259. The second case arose in the wake of President Bush's unilateral withdrawal of the United States from the Anti-Ballistic Missile Treaty with the Soviet Union. A nonbinding resolution condemning the withdrawal failed to obtain sufficient support to pass. Subsequently, thirty-two members of the House challenged the constitutionality of the unilateral withdrawal in court. *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2-3 (D.D.C. 2002). The court dismissed the suit on the grounds that the members of the House lacked standing because "plaintiffs have alleged only an institutional injury to Congress, not injuries that are personal and particularized to themselves," and that the "issue raised by these congressmen is a nonjusticiable political question." *Id.* at 18. Consequently, the Court concluded, the "defendants' motion to dismiss or, in the alternative, for summary judgment is granted, and plaintiffs' motion for summary judgment is denied." *Id.* In addition to these instances of withdrawal, President Roosevelt denounced an extradition treaty with Greece in 1933 and a Treaty of Commerce, Friendship and Navigation with Japan in 1939. The withdrawals were apparently uncontroversial because Congress was considering resolutions to the same effect. *See* HENKIN, *supra* note 8, at 212, 489 n.138.
263. *See, e.g.*, S. REP. NO. 96-119, at 6 (1979) ("[T]he Committee . . . cannot accept the notion advanced by Administration witnesses that the President possesses an 'implied' power to terminate any treaty, with any country, under any circumstances, irrespective of what action may have been taken by the Congress by law or by the Senate in a reservation to that treaty."); S. REP. NO. 34-97, at 3 (2d Sess. 1856) (explaining that "the President and Senate, acting together, [are competent] to terminate [a treaty]" and that under some circumstances a treaty can be terminated by the joint action of the President and Congress).

which the Supreme Court has sidestepped in the past.”²⁶⁴ Yet it admitted that “[a]s a practical matter . . . the President may exercise this power since the courts have held that they are conclusively bound by an executive determination with regard to whether a treaty is still in effect.”²⁶⁵ Indeed, in a recent case the Senate did not object to the unilateral withdrawal from a treaty by the President.²⁶⁶

If the law on withdrawal from treaties is unsettled, the law on withdrawal from congressional-executive agreements is even more so. Some advocates of interchangeability have argued that congressional-executive agreements and treaties are fully interchangeable in every respect—withdrawal included.²⁶⁷ John Setear, for example, argues that “the president may unilaterally and decisively choose not to ratify the [congressional-executive agreement] or decide later to terminate the [congressional-executive agreement] after its ratification.”²⁶⁸

²⁶⁴. TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106, at 199.

²⁶⁵. *Id.* at 201 (citing *Charlton v. Kelly*, 229 U.S. 447, 474-76 (1913); *Terlinden v. Ames*, 184 U.S. 270, 290 (1902)). Henkin comes to a similar conclusion. He writes, “If issues as to who has power to terminate treaties arise again, it seems unlikely that Congress will succeed in establishing a right to terminate a treaty (or to share in the decision to terminate).” HENKIN, *supra* note 8, at 213-14.

²⁶⁶. The Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Swed., Sept. 1, 1994, S. TREATY DOC. NO. 103-29, a bilateral treaty between Sweden and the United States, was unilaterally terminated by the President, effective January 1, 2008. See United States Terminates Estate and Gift Tax Treaty with Sweden, June 15, 2007, <http://www.treasury.gov/press/releases/hp463.htm>. The Senate did not voice any public objection. This silence may be due in part to the fact that the treaty was no longer necessary because Sweden had abolished its tax on inheritances and gifts, rendering the treaty unnecessary by its own terms. See *id.* There may also have been informal communications between the State Department and Congress that are not part of the public record.

²⁶⁷. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 303 cmt. e (1987) (“The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”); HENKIN, *supra* note 8, at 217 (“[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty . . .”); Ackerman & Golove, *supra* note 15, at 805 (“[T]here is no significant difference between the legal effect of a congressional-executive agreement and the classical treaty approved by two thirds of the Senate.”).

²⁶⁸. John K. Setear, *The President’s Rational Choice of a Treaty’s Prer ratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. 5, 11 (2002). Interestingly, while Setear believes that congressional-executive agreements can be unilaterally terminated, “implementing legislation cannot be undone, at least in the formal sense, by the president alone—nor, given the requirements of ordinary legislation, be undone by Congress alone unless it possesses the two-thirds majority in both houses necessary to override a presidential veto.” *Id.* at 15 (emphasis added). My view is similar.

This simple analogy is mistaken. Even were there “no significant difference between the legal effect of a congressional-executive agreement and the classical treaty,”²⁶⁹ it would not necessarily follow that the two devices are *procedurally* interchangeable in every respect. In fact, treaties and congressional-executive agreements are *defined* by their procedural differences. The full interchangeability argument, moreover, is incoherent if it holds that congressional-executive agreements operate like ordinary federal legislation *before* ratification but like treaties *after* ratification.²⁷⁰

To settle the question of who has the power to withdraw from congressional-executive agreements, it is first important to consider the source of the power to conclude the agreements. On this point, as on nearly every other constitutional issue regarding congressional-executive agreements, there is substantial disagreement. Setear, for example, suggests that the congressional-executive agreement arises from a “hybrid form of law making”:

The President may withdraw from a treaty or a congressional-executive agreement unilaterally unless Congress has expressly limited the President’s power to withdraw through a reservation, understanding, or declaration (in the case of a treaty) or in the authorizing legislation (in the case of a congressional-executive agreement). Yet the President *cannot* unilaterally undo the legislation giving rise to the congressional-executive agreement. To the extent the legislation creates domestic law that operates even in the absence of an international agreement, that law will survive withdrawal from the international agreement by the President.

269. Ackerman & Golove, *supra* note 15, at 805.

270. There is one important similarity between treaties and congressional-executive agreements on the issue of withdrawal. Congress can supersede both as a matter of domestic law by enacting later-in-time legislation. It is well accepted that Congress can enact a statute that supersedes a previously ratified treaty. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899) (“It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country . . .”); *Cherokee Tobacco Case*, 78 U.S. (11 Wall.) 616, 621 (1870) (concluding that a subsequent act of Congress supersedes a prior inconsistent treaty). *But cf.* AMAR, *supra* note 94, at 303 (arguing that “[b]y allowing federal treaties to repeal federal statutes and, symmetrically, statutes to repeal treaties, the modern judiciary has paid insufficient heed to the text of Article VI itself, ignoring the apparent legal hierarchy implicit in that text.”). In my view, Congress retains the same power in the context of congressional-executive agreements, for it would be absurd for Congress to have less power to undo congressional-executive agreements than to undo Article II treaties. H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 563 (1999) (arguing that “the executive branch has conceded that ‘[t]he authorities treat the power of Congress to enact statutes that supersede executive agreements and treaties for purposes of domestic law as a plenary one, not subject to exceptions based on the President’s broad powers concerning foreign affairs’”). In both cases, however, the *international* obligation remains intact until the President formally withdraws on behalf of the country.

The congressional-executive agreement resembles legislation in its basic voting rules – a majority of each house of Congress – but the absence of a veto override mechanism and the fact that the president may unilaterally invalidate the congressional action clearly distinguish the congressional-executive agreement from the constitutionally prescribed pathway for statutory law. The congressional-executive agreement is neither Article I legislation nor Article II advice and consent.²⁷¹

Ackerman and Golove, by contrast, place congressional-executive agreements within Article I, explaining that “Articles I and II set up alternative systems through which the nation can commit itself internationally.”²⁷² On the opposite side of the political spectrum, John Yoo concurs with this vision of congressional-executive agreements as arising from Article I, though it leads him to a very different conclusion.²⁷³

The case that congressional-executive agreements rest on authority granted in Article I is by far the most persuasive. In practice, the vast majority of congressional-executive agreements – both *ex ante* and *ex post* – arise from legislation that proceeds through precisely the same process that is used for ordinary Article I legislation: it must be passed by a majority of both houses of Congress and is subject to veto by the President. Even the nonconstitutional procedural rules are the same as those that apply to regular legislation. For example, the legislation proceeds through the same subject matter committees, and the Senate is able to filibuster the legislation, except when both houses of Congress have previously agreed to expedited procedures that preclude a filibuster.²⁷⁴

Two features separate legislation that creates congressional-executive agreements from regular legislation, though they are not sufficient to transform the constitutional foundation of the enterprise. The first is that *ex post* congressional-executive agreements are themselves almost always initially drafted by the executive branch in consultation with the foreign country partner or partners rather than by Congress. This is not as significant a transfer of power as it might at first appear. The legislation actually putting that agreement into effect is generally drafted in a way similar to drafting in the ordinary legislative process. Moreover, there are significant amounts of regular

271. Setear, *supra* note 268, at 34-35.

272. Ackerman & Golove, *supra* note 15, at 920.

273. John C. Yoo, *Laws As Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

274. See, e.g., Trade Act of 1974, Pub. L. No. 93-618, § 151, 88 Stat. 1978, 2001-04 (codified as amended at 19 U.S.C. § 2191 (2000)) (creating a fast-track procedure for trade agreements).

domestic legislation drafted in the first instance by parties outside Congress—including the executive branch and even private entities. Hence this alone is not sufficient to call into question the constitutional source of the power being exercised. The second and more significant difference between congressional-executive agreements and regular legislation is that, in the former case, the President might be seen to possess an absolute veto that cannot be overridden through a supermajority vote. A congressional-executive agreement is either initiated by legislation (in the case of an *ex ante* agreement) or confirmed by legislation (in the case of an *ex post* agreement). In either case, before the agreement can be perfected, the executive must give the consent of the United States to the deal in whatever manner specified by the agreement or sponsoring international organization.²⁷⁵ The authority of the President to formalize the nation's commitment in this way is nearly always recognized in the legislation that makes the agreement possible. For example, the NAFTA Implementation Act stated that "Congress approves . . . the North American Free Trade Agreement," but specified under the heading "Conditions for Entry Into Force of the Agreement" that "[t]he President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force . . . of the Agreement for the United States"²⁷⁶ Alternatively, the legislation might provide that the agreement "as contained in the message to Congress from the President of the United States . . . is approved by Congress as a governing . . . agreement" and "shall enter into force and effect with respect the United States on the date of the enactment of" the Act.²⁷⁷ In such cases, the agreement has been negotiated and approved by the executive before being submitted to Congress for its approval.

This arrangement does not create a veto power that exceeds that provided in the Constitution for Article I legislation. The legislation itself is subject to an ordinary veto—a veto that may be overridden—in the same way that any

275. A common refrain, stemming from the Supreme Court decision in the *Curtiss-Wright* case in 1936, is that the

President [is] the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

276. Pub. L. No. 103-182, § 101(a)-(b), 107 Stat. 2057, 2061 (1993) (codified at 19 U.S.C. § 3311 (2000)).

277. United States-Japan Fishery Agreement Approval Act of 1987, Pub. L. No. 100-220, § 1001, 101 Stat. 1458, 1459 (codified as amended at 16 U.S.C. § 1823 (2000)). Almost all of the *ex post* fisheries agreements use nearly identical language in the legislation.

legislation would be. The President's power is not a power to interfere or intercede in the legislative process. Rather, it is a power to serve as the representative of the United States on the world stage—and hence as the only entity of the U.S. government that can legally represent the assent of the country to an international agreement. This is, in the United States, no mere ministerial authority, at least in the treaty context. When it comes to Article II, with the authority to file the instrument of ratification comes the power to independently assess the merits of the decision to ratify. The question is whether the same is true of congressional-executive agreements. Put another way, if Congress approves an agreement and the President either signs it or fails to sustain a veto of it, is the President required to carry out that approval by committing the United States to the agreement against his or her own better judgment?

This vexing constitutional dilemma has been avoided by the careful approach that Congress has taken in the authorizing legislation for congressional-executive agreements. Those that offer *ex ante* approval for negotiation of agreements do not *require* the President to conclude agreements, but instead “authorize,” “approve,” or otherwise grant the authority to the President to proceed with the agreement. Even legislation approving *ex post* agreements usually “authorizes” the exchange of notes to formalize the agreement, leaving room for exercise of discretion by the President. This is the constitutionally appropriate approach. While Congress may set the terms and conditions of agreements in great detail—and may approve or refuse an agreement—requiring the President to formalize the commitment would improperly interfere with the President's constitutional capacity to speak for and to represent the United States abroad. The President does not exercise an absolute veto, but he retains some measure of discretion in the execution of the legislation insofar as it requires him to exercise his authority to act as the “sole organ of the federal government” on the world stage.²⁷⁸

278. To say that the President is the “sole organ” of the federal government in international relations does not mean that the President has exclusive authority over the nation's foreign affairs. It means something quite a bit more limited: the President is empowered to act as the formal legal representative of the United States and is therefore uniquely empowered to speak with foreign entities on behalf of the United States. This does not mean that Congress has little or no role in foreign affairs, but simply that this power to represent the nation is granted exclusively to the President. This is both functionally logical and consistent with historical practice. For example, while serving as Secretary of State, Jefferson informed the French Minister to the United States that the President is “the only channel of communication between this country and foreign nations.” H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 53 (2002). Likewise, in 1897 the Committee on Foreign Relations concluded that “[t]he executive branch is the sole mouthpiece of the nation in

Yet that discretion is not unlimited. It can be cabined by Congress, even dramatically so. The legislation giving rise to congressional-executive agreements varies a great deal in the degree to which it specifies the conditions of the agreement. In some cases, as in the Atomic Energy Act,²⁷⁹ the legislation specifies detailed requirements for the agreements. In others, the legislation simply authorizes the President to conclude “fisheries agreements” or agreements that “provide for the sale of surplus agricultural commodities,”²⁸⁰ with little detail offered as to the expected content of the agreements. Congress is acting within its authority when it imposes even the most significant conditions on such agreements. To the extent that Congress has the power to withhold its approval altogether, it necessarily has the lesser included power to condition its approval.²⁸¹

communication with foreign sovereignties.” EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, at 219 (1984) [hereinafter CORWIN, *THE PRESIDENT*] (quoting the Committee on Foreign Relations). And in 1920, President Wilson refused to give notice of the termination of treaties despite being “authorized and directed” to do so by Congress. He responded that the direction was not “an exercise of any constitutional power possessed by Congress.” *Id.* at 220. Willoughby recounts two similar events:

when in 1877 Congress passed two joint resolutions congratulating the Argentine Republic and Republic of Pretoria upon their having established a republican form of government, and directing, in the one case, the Secretary of State to acknowledge the receipt of a despatch from Argentine, and in the other to communicate with Pretoria, the President vetoed both resolutions.

1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 199 (1910). It is important to note that the power to communicate does not of necessity imply a unilateral power to make foreign policy. See HENKIN, *supra* note 8, at 339-40 n.19 (noting that Jefferson’s statement (and a similar statement by Marshall, cited by the Supreme Court in *Curtiss-Wright*) did not imply any power to make foreign policy; that substantive power was instead “read into the phrase” in *Curtiss-Wright*).

279. Atomic Energy Act of 1954, Pub. L. No. 83-703, § 123, 68 Stat. 919, 940 (codified as amended at 42 U.S.C. § 2153 (2000)) (authorizing the President to suggest cooperative agreements with other nations and regional defense organizations pursuant to sections 54, 57, 64, 82, 103, 104, and 144 of that Act).
280. Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, §§ 101-109, 68 Stat. 454, 455. (providing the President “authoriz[ation] to negotiate and carry out agreements with friendly nations or organizations of friendly nations to provide for the sale of surplus agricultural commodities for foreign currencies”).
281. There is, moreover, a parallel power vested in the Senate under Article II. The Senate may offer its consent to a treaty under particular conditions. It has long been accepted that if the President subsequently ratifies the treaty, he or she must do so consistent with those conditions. See WILLOUGHBY, *supra* note 278, § 195 (“There would seem to be no question but that, having the power either to approve or to disapprove an international agreement negotiated by the President, the Senate has also the power, when disapproving a proposed treaty, to state upon what conditions it will approve . . .”). The earliest such example is the

The conditions that Congress can attach to its approval are not unlimited, however. Congress can place a wide array of substantive conditions on the agreements it authorizes the President to negotiate (requiring, for example, that fisheries agreements meet certain environmental standards or that atomic energy agreements be made only with nations that are members of the Nuclear Nonproliferation Treaty²⁸²). Similarly, Congress may impose conditions under which the President may withdraw. Congress may grant the President full discretion to withdraw, may permit withdrawal when the conditions giving rise to the agreement change, or may limit withdrawal only to circumstances specified in the agreement itself. Congress can even require that withdrawal from an agreement occur only if Congress passes a statute permitting it or prohibit withdrawal altogether, which would have precisely the same effect (a later-in-time statute could always modify the prohibition). What Congress probably cannot do, however, is condition its approval of an agreement on the requirement that it participate in subsequent decisions to modify or withdraw from agreements through any process other than the enactment of a statute—for example, through majority votes in both houses of Congress without a requirement of presentment.²⁸³ There are also very limited circumstances in

Jay Treaty, Treaty of London, U.S.-Gr. Br., 8 Stat. 116 (Nov. 19, 1794), which the Senate consented to on the condition that certain specified changes be made to the treaty. See SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 68 (1904); WILLOUGHBY, *supra* note 278, § 195 (same). It is equally long- and well-settled that after receiving the advice and consent of the Senate, the President may not amend a treaty in ways not specifically directed by the Senate without returning to the Senate for reapproval. See WILLOUGHBY, *supra* note 278, § 195. It may even be possible for the Senate to prohibit withdrawal except under the terms inherent in the treaty itself. The Restatement adopts this view, though it is not attentive to the issues raised by *INS v. Chadha*, 462 U.S. 919 (1983); see *infra* note 283, and hence adopts what appears to be an overly broad view of the Senate's ability to condition withdrawal. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 cmt. a (1987) ("If the United States Senate, in giving consent to a treaty, declares that it does so on condition that the President shall not terminate the treaty without the consent of Congress or of the Senate, or that he shall do so only in accordance with some other procedure, that condition presumably would be binding on the President if he proceeded to make the treaty.").

282. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 169.
283. I say "probably" because the resolution of this question rests on one's interpretation of the limits imposed by the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, which held the legislative veto unconstitutional. Read more broadly—and in the context of other related decisions—the Court arguably held not simply that the particular form of the legislative veto is unconstitutional, but that Congress cannot shortcut the lawmaking process. In this view, Congress may set out in a statute significant substantive limits on withdrawal from the congressional-executive agreements thereafter concluded or prohibit withdrawal from the agreements altogether, but Congress may not require subsequent action by itself (short of a

which the President might legitimately take actions that necessarily render an agreement obsolete even in the face of congressional limits on withdrawal.²⁸⁴

That Congress can condition and even prohibit withdrawal does not mean that the President loses all authority over the terms of the agreement. Far from it. As the sole actor charged with representing the United States on the

statute) to make or unmake law. In this view, even a requirement that a majority of both houses of Congress approve withdrawal from a congressional-executive agreement would be unconstitutional, for it would not meet the presentment requirement. This reading finds some support in the case law on the analogous context of congressional power to remove executive officials. The Supreme Court has held invalid congressional attempts to participate in the removal of executive officials. See *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (“Unlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction.”); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 787 (5th ed. 2006) (noting the *Morrison* Court’s recasting of the different results in *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey’s Executor v. United States*, 295 U.S. 602 (1985), based on Congress’s attempt to participate in the removal process in one (*Myers*) and not the other (*Humphrey’s Executor*)). Though important as an academic and legal matter, the difference between the broader and narrower readings is of little functional importance here. The nonstatutory process that Congress would most likely use to authorize withdrawal from an international agreement is a concurrent resolution, which is not subject to presentment. The presence or absence of the presentment requirement should make no difference under normal circumstances (other than perhaps a change in the person holding the presidency), because the President would almost certainly sign a statute permitting him or her to withdraw from an international agreement. Hence, if Congress wishes to retain the power to approve withdrawal, it should do so through the constitutionally unassailable route of a statute. (Notably, even under the broader reading, Congress may modify its own internal rules regarding debate, amendments, etc., as in the fast-track process.)

284. For example, the President might suspend recognition of a foreign government and thereby suspend an international agreement between them. This view was espoused by Alexander Hamilton in the course of publicly defending American neutrality toward France during the French Revolution (a position he had vigorously advocated to President Washington and the cabinet) in an article he contributed to the *Gazette of the United States* (Philadelphia) under the pseudonym “Pacificus.” THE WORKS OF ALEXANDER HAMILTON 432 (Henry Cabot Lodge ed., 1904). After first noting that the executive possesses the power to recognize foreign governments, Hamilton explained that “where a treaty antecedently exists between the United States and such nation,” this power of recognition “involves the power of continuing or suspending [the treaty’s] operation. For until the new government is *acknowledged*, the treaties between the nations, so far at least as regards public rights, are of course suspended.” EDWARD S. CORWIN, THE PRESIDENT’S CONTROL OF FOREIGN RELATIONS 13 (1917) (quoting Hamilton (Pacificus)). The circumstance described by Hamilton can be said to be one in which the international agreement ceases to exist *by its own terms*. This principle applies more generally: even if Congress prohibits withdrawal from an agreement without prior statutory approval, the President could permissibly withdraw from an international agreement when the agreement ceases to exist by its own terms (unless Congress expressly specifies otherwise).

international stage, the President retains the power to negotiate (or not) the terms of the agreement with the foreign party and to formally communicate (or not) the consent of the United States. Thus Congress is well advised to take into account any objections the President might have to conditions it seeks to impose on the terms of an agreement. If it fails to do so, it might find it has no international agreement.²⁸⁵

The interbranch cooperation required at the point of creation of congressional-executive agreements has deep significance for the level of cooperation required at the point of termination. Termination of congressional-executive agreements by the President is more complicated than is withdrawal from Article II treaties. Congress cannot prevent the President from communicating with foreign governments about the termination of a congressional-executive agreement (as long as the termination is consistent with the terms of the statute that created the agreement). Hence the President could unilaterally withdraw the United States from a congressional-executive agreement by communicating the withdrawal to the foreign parties. Yet the act of withdrawing from the international agreement does not undo the statute on which the agreement rests—which *cannot* be undone without the cooperation of Congress. Even though the President may be able to “unmake” the international commitment created by a congressional-executive agreement as a matter of international law, the President *cannot* unmake the legislation on which the agreement rests.²⁸⁶ As the Supreme Court stated in *INS v. Chadha*, “Amendment and repeal of statutes, no less than enactment, must conform with Art. I,” including the requirements of bicameralism and presentment.²⁸⁷ The President is not able to terminate a statute unilaterally, and hence cannot terminate the statutory enactment that gives rise to a congressional-executive

285. H. Jefferson Powell comes to a similar conclusion. See Powell, *supra* note 270 (concluding that the Constitution vests the President with the clear authority to formulate and implement foreign policy and vests Congress with powers that enable it to exercise a near-absolute veto on the President’s ability to carry out those choices). Corwin, whom Powell critiques, also reflects on the question of presidential power over foreign affairs. He too concludes that Congress does not possess the power to compel the President to act in this way. See CORWIN, *THE PRESIDENT*, *supra* note 278, at 214-23; see also WILLOUGHBY, *supra* note 278, at 468 (“[I]t is, of course, improper for the Senate or any other organ of the Federal Government, by resolution or otherwise, to attempt to communicate with a foreign power except through the President.”).

286. Unlike self-enforcing treaties that cease to have either domestic or international legal effect once the agreement is dissolved, congressional-executive agreements have a domestic role independent of their international one.

287. *Chadha*, 462 U.S. at 954.

agreement.²⁸⁸ And insofar as the statute specifies a course of action by the United States,²⁸⁹ the President is required to execute it unless and until the underlying statute is repealed or superseded.

This approach solves a constitutional dilemma that has plagued the congressional-executive agreement. Many scholars have acknowledged that the statutory basis of congressional-executive agreements cannot be terminated by the President without the consent of the majority of both houses of Congress.²⁹⁰ Yet if this is true, then a peculiar consequence would seem to result: Congress usually has the authority to initiate legislation without the involvement of the President and, if it can override a veto, can engage in lawmaking without the President's consent. If congressional-executive agreements are indeed equivalent to legislation, then it would seem to follow that Congress should be able to initiate and negotiate the agreements as it would any other piece of legislation. Yet this would be an impermissible encroachment on the President's inherent foreign affairs powers, for it would allow Congress to conclude international agreements over the President's objection.²⁹¹

288. On this issue, John Yoo states that, "defenders of interchangeability might allow the President the same ability to terminate congressional-executive agreements as to terminate treaties. This, however, would provide the President with the heretofore unknown power of executive termination of statutes." Yoo, *supra* note 24, at 815. However, the President may unilaterally terminate the effect of a statute under conditions specified in (or on rare occasion unstated but inherent in) the statute itself, because he would in doing so be executing the statute. See, e.g., *supra* note 284.

289. For example, protecting particular human rights, observing particular environmental standards, or refraining from "double-taxing" certain kinds of income.

290. See, e.g., Christopher B. Stone, *Signaling Behavior, Congressional-Executive Agreements, and the SALT I Interim Agreement*, 34 GEO. WASH. INT'L L. REV. 305, 353 (2002) ("[W]hile no court has tested the proposition, the President probably cannot unilaterally terminate congressional-executive agreements. Congressional-executive agreements are international accords that the President has submitted for congressional approval as statutes. That is, congressional-executive agreements represent a form of lawmaking. Since Congress can repeal existing laws only by passing new legislation, presumably Congress must pass a new law to repeal a congressional-executive agreement."); Tribe, *supra* note 21, at 1253 n.108 ("Just as the President certainly could not 'terminate' a statute enacted by two thirds of each House of Congress, so the President should have no authority to undo other exercises of Article I power by congressional supermajorities."); Yoo, *supra* note 24, at 815 (arguing that because congressional-executive agreements take the form of legislation, they cannot be terminated without a subsequent legislative act).

291. Tribe, *supra* note 21, at 1253-54 (arguing that "If Article I allows Congress to approve bicamerally all international agreements that deal with foreign commerce, then Article I on its face allows Congress to approve any such international agreement negotiated . . . even if the current President objects to that international agreement," and that this result "is dramatically at odds with the well-accepted principle that the President is the primary representative of

The approach described above solves the problem by marking out the areas of authority of each branch: Congress approves the legislation necessary to authorize (in the case of *ex ante* agreements) or to approve (in the case of *ex post* agreements) the agreement. The President, on the other hand, manages the negotiations of the agreement with the foreign government and registers the formal assent of the United States to the agreement (based on the authority or assent offered by Congress), thereby binding the country as a matter of international law. Neither can craft an agreement without the other. Congress cannot encroach on the President's foreign affairs power, for it cannot communicate assent to the agreement on behalf of the United States—only the President can do so. What it can do without the President is enact legislation. Congress could not commit the United States to a free trade agreement without the President, for Congress cannot speak with a legally binding voice on behalf of the United States on the international stage. But it might achieve a similar result by passing a statute that unilaterally reduces tariffs on goods imported from a particular country.²⁹² Moreover, as already noted, Congress can condition its consent to a congressional-executive agreement through detailed legislation.²⁹³

The bottom line is that while there are some similarities between treaties and *ex post* congressional-executive agreements at the time of withdrawal, the President is on the whole likely to find it more difficult to withdraw unilaterally from a congressional-executive agreement than an Article II treaty. This is because Congress can, as part of the legislation authorizing the agreement, commit the country to a certain course of action even in the absence of a formalized international commitment. A congressional-executive agreement therefore can create a more reliable commitment than an Article II treaty.

the nation in foreign affairs.”). It is, moreover, long settled that Congress has no power to communicate directly with foreign states. See WILLOUGHBY, *supra* note 278, at 468 (“[I]t is, of course, improper for the Senate or any other organ of the Federal Government, by resolution or otherwise, to attempt to communicate with a foreign power except through the President.”).

292. This statute could then be vetoed by the President and the veto could be overridden by a supermajority vote in both houses of Congress.

293. It can likely even set the conditions under which withdrawal from the agreement would be permissible, though not without limit: under *INS v. Chadha*, 462 U.S. 919 (1983), it cannot make withdrawal conditional upon its own future participation. Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 cmt. a (1987) (“Congress could impose such a condition [on withdrawal] in authorizing the President to conclude an executive agreement that depended on Congressional authority.”).

The claim that congressional-executive agreements establish a *stronger* international commitment than do treaties runs against the grain of the very limited scholarship on the issue to date.²⁹⁴ That scholarship is, in my view, misguided. Though the treaty might appear to require a “higher degree of consensus than is needed to pass an ordinary law” because it requires a two-thirds vote in the Senate,²⁹⁵ it is far from clear that a majority vote in the Senate *and* House requires any less of a consensus. Moreover, it may be true that foreign governments have in the distant past been wary of accepting a commitment that is not labeled a “treaty,”²⁹⁶ but it seems unlikely that wariness would remain once they understand the nature of the legal framework. Indeed, that foreign states have been entirely willing to enter trade agreements with the United States where a congressional-executive agreement was used rather than an Article II treaty suggests that other countries are perfectly willing to accept agreements concluded outside the Article II process. Moreover, the vast majority of foreign nations make their own international legal commitments in precisely this way (that is, through a process that is identical to that used for domestic lawmaking).²⁹⁷ It would be passing strange for them to find a similar process in the United States insufficiently reliable. Replacing treaties with congressional-executive agreements would make for better international lawmaking in the United States. The process would be more democratically legitimate, less cumbersome, and less subject to political manipulation, and the United States would be able to make more reliable international legal commitments. The next Part turns to the issue of how

294. The one empirical project on this topic argues that treaties serve as a more costly signal of intent to comply with the terms of international agreements than do executive agreements. See Martin, *supra* note 236. That study, however, does not distinguish between sole executive agreements (which are clearly less costly than treaties) and congressional-executive agreements (which I believe are not).

295. THOMAS M. FRANCK & EDWARD WEISBARD, FOREIGN POLICY BY CONGRESS 144 (1979).

296. Ackerman and Golove recount an incident in which the United States withdrew from a congressional-executive agreement without providing the notice required in the agreement itself. Ackerman & Golove, *supra* note 15, at 823-24. Putting to one side whether the arguments of the Secretary of State explaining the validity of the withdrawal were accurate at the time they were made, they certainly would not be considered accurate today. (Indeed, Ackerman and Golove recount the story precisely to illustrate the discontinuity between the treatment of such agreements in the past and in the present.) Congress is always able to pass a subsequent statute that revokes either a treaty commitment or a congressional-executive agreement as a matter of domestic law, but it does not possess the power to revoke the international commitment unilaterally as a matter of international law.

297. See *supra* Part I; see also U.N. Legislative Series, Laws and Practices Concerning the Conclusion of Treaties, U.N. Doc. ST/LEG/SER.B/3, U.N. Sales No. 1952.v.4 (1952), cited in McLaughlin, *supra* note 12, at 658 n.18.

congressional-executive agreements could come to play this near-exclusive role in U.S. international lawmaking. Far from insurmountable, the legal and practical issues that this change presents are eminently manageable. A better process is within reach.

IV. THE END OF THE TREATY AND ITS CONSEQUENCES

Neither the Constitution nor international law stands in the way of sidelining the Treaty Clause. From a constitutional standpoint, nearly every agreement that can be entered through the Article II treaty process can also be concluded by means of a congressional-executive agreement. Nor would replacing most treaties with congressional-executive agreements preclude using the Treaty Clause in the very small number of instances where an agreement could only be authorized in that way.

The international legal consequences of abandoning treaties for congressional-executive agreements are equally benign. Replacing the Article II process with congressional-executive agreements will have no effect on the country's ability to adhere to international agreements as a matter of international law—even those that require states to “ratify” the agreement in order to put it into effect.

Thus, elevating the congressional-executive agreement to near-exclusive status as the nation's way of making international law is both constitutional and consistent with international law. That does not, of course, necessarily mean that it is possible. As I argue, however, this switch could be put into effect with minimal political and legal dislocation, through a strategy that I will show is as simple as it promises to be effective.

A. *Constitutional Consequences*

Congressional-executive agreements are constitutionally permissible.²⁹⁸ The question is how far the authority to enter such agreements extends.²⁹⁹ Can

²⁹⁸ As already noted, the 1937 case *United States v. Belmont*, 301 U.S. 324 (1937), set the stage for the expanded use of congressional-executive agreements. There, the U.S. Supreme Court held that while the supremacy of treaties

is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.

congressional-executive agreements be used for all international agreements pursuable under the Treaty Clause or just some of them?

The answer, I argue, is almost all. In contrast with Article II treaties, congressional-executive agreements cannot exceed the bounds placed by the Constitution on congressional authority. As discussed more extensively above,³⁰⁰ the constitutional authority for congressional-executive agreements arises principally from Article I. Hence, unlike agreements concluded under the Treaty Clause, congressional-executive agreements are limited in scope by the powers enumerated in Article I.³⁰¹ In those few cases in which an agreement exceeds the constitutionally permitted scope of a congressional-executive agreement, the agreement would have to be concluded under the Article II Treaty Clause.

Id. at 331. The case has been read to sanction executive agreements and to give them “the force of ‘supreme law of the land.’” CORWIN, *supra* note 11, at 42.

299. A recent challenge came in a 1999 case that questioned the power of the President to conclude NAFTA. The district court upheld the power of the President to negotiate the agreement, but the Eleventh Circuit vacated the decision and refused to reach the merits on the grounds that the case presented a nonjusticiable political question and hence the court lacked Article III jurisdiction. *Made in the USA Found. v. United States*, 242 F.3d 1300 (11th Cir. 2001), *vacating* 56 F. Supp. 2d 1226 (N.D. Ala. 1999); *see also Extension of Reciprocal Trade Agreements Act: Hearings on H.J. Res. 407 Before the H. Comm. on Ways and Means*, 76th Cong. 2480-93 (1940) (statement of Green H. Hackworth, Legal Advisor, Dep’t of State); H.R. REP. NO. 76-409, at 47-48 (1939); 40 Op. Att’y Gen. 469 (1946) (assuring foreign governments that the congressional-executive agreement was the equivalent of a treaty and would stand as the supreme law of the land); 29 Op. Att’y Gen. 380 (1912); 19 Op. Att’y Gen. 513 (1890) (defending constitutionality of using executive agreements to conclude postal agreements); Memorandum from Robert H. Jackson, Att’y Gen., on the Constitutionality of the Trade Agreement Act (Feb. 29, 1940), *reprinted in Extension of Reciprocal Trade Agreements Act: Hearings on H.J. Res. 407 Before the S. Comm. on Finance*, 76th Cong. 728-43 (1940). The most prominent critic of this almost universal view is Laurence Tribe. *See* Tribe, *supra* note 21.

300. *See supra* text accompanying notes 272-277.

301. There are some who would argue for a broader power. *See, e.g.,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporter’s note 7 (1986) (“It has been suggested that the authority to make a Congressional-executive agreement may be broader than the sum of the respective powers of Congress and the President; that in international matters the President and Congress together have all the powers of the United States inherent in its sovereignty and nationhood, and they can therefore make any international agreement on any subject.”).

The Supreme Court famously addressed this issue in *Missouri v. Holland*,³⁰² where it held that the Treaty Clause delegates to the federal government power “additional to and independent of the delegations to Congress.”³⁰³ The Court’s decision in that case has been the subject of attack for decades.³⁰⁴ Nonetheless, it is widely accepted, and I think rightly so, that the decision in *Missouri v. Holland* was correct in at least one respect: a treaty may be concluded that governs matters that fall outside the powers of Congress to legislate.³⁰⁵ Any other reading would render the Treaty Clause superfluous: “if the treaty-making power could only deal with matters entrusted to Congress, there would seem to have been no particular occasion for delegating that power to the

302. 252 U.S. 416 (1920). The case presented the question whether the Constitution gives authority to the federal government to conclude agreements that exceed the specifically enumerated powers of Article I. The Court held that it did. Justice Holmes, writing for the Court, explained:

It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, “a power which must belong to and somewhere reside in every civilized government” is not to be found.

Id. at 433 (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)).

303. HENKIN, *supra* note 8, at 191.

304. The narrowly defeated series of amendments offered by Senator Bricker between 1952 and 1957 were specifically declared to be an effort to “overrule” *Missouri v. Holland* by requiring that a treaty become law only through legislation that could have been passed in the absence of the treaty. See S.J. Res. 1, 83d Cong., 99 CONG. REC. 6777 (1953). For more on the Bricker Amendment, see *supra* text accompanying note 194.

305. See, e.g., RESTATEMENT (THIRD) OF INT’L LAW § 302 cmt. d (1987); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000). Though widely held, this view is not universal. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1868 (2005). A separate proposition that flows from the decision is the claim that by using the phrase “a treaty followed by an act” the Court meant to suggest that a treaty can expand the space within which Congress can legislate because such legislation can be said to be “necessary and proper” to carrying out the treaty. (For a critique of this view, see Bradley, *supra*; and Rosenkranz, *supra*. For a defense, see Golove, *supra*, at 1099-1100.) I do not attempt to address this question here. I only note that the problem would not exist in the context of a congressional-executive agreement, because such agreements are confined to the preexisting scope of legislative power as defined in Article I. If an agreement exceeds the legislative power, it would have to be concluded as an Article II treaty. Cf. Carlos Vasquez, *W[h]ither Missouri v. Holland* (2008) (unpublished manuscript, on file with author). For a discussion of *Missouri v. Holland* that emphasizes the concurrency of state, federal, and international power, see Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland* (Mar. 24, 2008) (unpublished manuscript, on file with author).

President and Senate instead of to the President and Congress.”³⁰⁶ It follows that the Treaty Clause was intended to include some powers that would otherwise have not been available to the federal government. Moreover, the Article II treaty power and Congress’s enumerated powers are separate and independent powers of the federal government; it is no more reasonable to think that the treaty power is limited to the enumerated powers than it is to think that, for example, Congress’s power to provide and maintain a navy is limited to its power to regulate commerce.³⁰⁷

The issue that remains to be determined is the extent of the additional power granted to the federal government by the Treaty Clause. To what matters, if any, does (or did) the Treaty Clause extend but the legislative power of Congress does not—and how is that gap to be defined? The predominant approach to this question examines the reach of Congress’s Article I powers and compares them to the international agreements the country might wish to conclude. As Thomas M. Franck and Michael Glennon put it, “[T]he President and the Senate together may achieve via the treaty power what Congress and the President cannot do under Article I, section 8 of the Constitution.”³⁰⁸

Scholars adopting this approach have come to very different conclusions about how far the Treaty Clause extends beyond Congress’s Article I powers. This is due in part to shifting interpretations of Congress’s Article I powers. Louis Henkin argued as early as 1959 that however big the gap might have been at the time *Missouri v. Holland* was decided, it had reduced to almost nothing in the decades since. When *Missouri v. Holland* was decided, the limitations on congressional power were understood to be much greater than they are today. The Commerce Clause power, in particular, was interpreted much more narrowly.³⁰⁹ Henkin explains, “with expanding Congressional power there were virtually no matters of any exigency—including human

306. Anderson, *supra* note 239, at 656.

307. David Golove nicely outlines the debate over whether the treaty power is “properly conceived as an independent grant of power ‘delegated’ to the national government or as only an alternative mode of exercising the legislative powers granted to Congress in Article I,” and defends the former view. Golove, *supra* note 305, at 1087–88.

308. THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* (2d ed. 1993).

309. During the New Deal period, the Supreme Court substantially expanded its interpretation of the federal regulations permitted under the Commerce Clause. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act, 7 U.S.C. § 35 (2000)); *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000)). For the more constrained pre-New Deal vision of the Commerce Clause, *see, for example*, HENRY CAMPBELL BLACK, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* 202–40 (4th ed. 1927).

rights legislation—with which Congress could not deal even in the absence of treaty.”³¹⁰

In 2001, John Yoo adopted a similar approach to Henkin’s—like Henkin, he measures the gap between the Treaty Clause and Congress’s ordinary legislative powers by examining the limits on Congress’s Article I powers. Yet Yoo arrived at almost the opposite conclusion, in part due to recent legal developments at the time he was writing. A series of Supreme Court decisions during the half decade before he wrote appeared to signal an intent by the Court to move once again toward a more restrictive view of the Commerce Clause power of the federal government.³¹¹ Yoo concluded, in light of this change, that political agreements and agreements on human rights, arms control, extradition, and the environment must be concluded under the Treaty Clause because they exceed Congress’s Article I powers.³¹² Even at the time it was written, the restrictive view of Congress’s enumerated powers put forward by Yoo was too aggressive. According to Yoo, political agreements and agreements on human rights, arms control, extradition, and the environment were required to be concluded under the Treaty Clause because they exceeded Congress’s Article I powers.³¹³ This argument reflects a view of the restrictions on Congress’s Article I powers that is inconsistent with much of modern domestic lawmaking, to say nothing of congressional-executive forays into international affairs.

Regardless of its accuracy at the time he wrote, Yoo’s position has become less tenable in the years since. The pendulum appears to have swung back once again toward a more expansive interpretation of the Commerce Clause power

310. HENKIN, *supra* note 8, at 193; *see also* Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 913 (1959).

311. *See* United States v. Lopez, 514 U.S. 549 (1995); *see also* United States v. Morrison, 529 U.S. 598 (2000) (holding unconstitutional the portion of the Violence Against Women Act of 1994 codified at 42 U.S.C. § 13,981 (2000) because it exceeded congressional power under the Commerce Clause and under Section 5 of the Fourteenth Amendment to the Constitution); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (finding that the Commerce Clause does not permit the federal government to abrogate the sovereign immunity of the states).

312. Specifically, he concludes that national security and arms control agreements fall “within the President’s plenary powers as Commander-in-Chief and sole organ of the nation in its foreign relations,” human rights agreements “may rest outside of Congress’s enumerated powers,” that it is “unclear what congressional power could justify extradition,” and that much of international environmental law extends beyond the Commerce Clause powers of the federal government. *See* Yoo, *supra* note 24, at 811-12.

313. *See id.*

by the Supreme Court.³¹⁴ Hence under Henkin and Yoo's approach, the gap between Congress's legislative power and the Treaty Clause would once again appear vanishingly small. Although there has been some retrenchment by the Supreme Court on the extent of congressional power since its heights, there are few international agreements that would fall beyond the enumerated powers as currently understood and for which an Article II treaty would therefore be required. For example, under this approach, a treaty that gave victims of gender-motivated violence the right to sue their attackers in federal court would arguably need to be concluded under Article II.³¹⁵

That is not to say that Congress's powers are unlimited. It is possible that a treaty would be proposed that exceeds congressional powers and hence an Article II treaty would be required. For this reason, the shift of most international lawmaking to congressional-executive agreements does not render the Article II Treaty Clause a nullity. Were there an international agreement that required the federal government to exercise powers beyond those granted to Congress, it could (and should) be ratified through the Treaty Clause just as it would be today.

This brings me to a second—and I think better—approach to the question of when the Treaty Clause permits the federal government to reach matters that are outside the bounds of Congress's legislative power. This approach does not simply see the Treaty Clause as a means of avoiding or overriding federalism constraints placed on Congress's ordinary legislative powers. It instead focuses first and foremost on the fundamental purpose for including the Treaty Clause in the Constitution: to enable the United States to enter into agreements with foreign nations. That purpose gives rise to a competing national interest that is not subject to the same concerns and constraints as ordinary legislation.³¹⁶

Even though the treaty power is not limited in the same way as the legislative power of Congress, it is far from unlimited. It is instead subject to

314. In recent years, the Court has stepped back from its efforts to restrict federal power under the Commerce Clause. *See, e.g.,* *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (upholding the portion of Partial-Birth Abortion Ban Act of 2003 codified in 18 U.S.C. § 1531 (2000)); *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding a federal law banning cannabis use in the face of state law approving its use for medicinal purposes even though the cannabis in question had not entered interstate commerce).

315. *See Morrison*, 529 U.S. 598.

316. For an excellent and much more detailed account of the treaty power than is possible here, see Golove, *supra* note 305.

limits of its own, consistent with its distinct purpose.³¹⁷ Article II treaties “must have the consent of a foreign nation.”³¹⁸ They must, moreover, be genuine—that is the parties must have a mutual interest in the subject matter of the agreement. That mutual interest can be manifested in reciprocal or respective commitments by the parties.³¹⁹ By contrast, a treaty concluded for the sole purpose of enabling a party to avoid its domestic lawmaking rules would *not* constitute a genuine agreement.³²⁰ The necessity of a foreign partner willing to enter an agreement of mutual interest serves as both a justification for and a limit on the treaty power.

This helps to explain why the treaty power might permit the federal government to enter agreements that are not within the legislative power of Congress, but it does not alone answer the question of when an Article II treaty might be necessary (because a congressional-executive agreement would be inadequate). A full and complete answer to this question requires a theory not only of the treaty power but of congressional power as well—a task that is beyond the reach of this Article. I can, nonetheless, identify three areas of law where the Treaty Clause has been used beyond the ordinary jurisdiction of the

317. The treaty power is also subject to some of the same constraints: a treaty may not violate the Bill of Rights and other constitutional limitations. *See* HENKIN, *supra* note 8, at 185 (“It is now settled . . . that treaties are subject to the constitutional limitations that apply to all exercises of federal power, principally the prohibitions of the Bill of Rights; numerous statements also assert some minor limitations on the reach and compass of the Treaty Power.”); *id.* at 187 (“[A] treaty cannot grant a title of nobility, or a duty on articles exported from any state, or give preference to the ports of one state over those of another. Treaties, surely, are also subject to the Bill of Rights.”); *see also* *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (“It would not be contended that [the treaty power] extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent.”).

318. A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES, *supra* note 213, at 109-10; *see also* Henkin, *supra* note 310, at 907 (“A treaty is an international agreement on a matter of international concern. It may not deal with a matter which is not of international concern . . .”); TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106, at 24 (“The treaty power is recognized by the courts as extending to any matter properly the subject of international negotiations.”).

319. *See* Henkin, *supra* note 310, at 931.

320. Anderson, *supra* note 239, at 665 (noting that an exercise of the treaty-making power must fall “within the general scope and purpose of the Constitution . . . [and] accord with the underlying conditions inherent in the nature of the treaty-making power—namely, that it must be exercised ‘to promote the general welfare’ of the American people and that the matters dealt with must directly concern the international interests or relations of the nation” and that these requirements must be fulfilled “actually as a matter of fact, and not as a mere subterfuge for exercising the power”); Golove, *supra* note 305, at 1090 n.41.

federal government, as defined by existing or contemporary jurisprudence, scholarly commentary, and historical practice: (1) cession of territory, (2) extradition, and (3) disabilities of aliens.

First, there is significant reason to think that cession of territory by the United States to a foreign sovereign can only be made by treaty. In his commentaries on American law, published in 1826, James Kent opined that it “would seem to be that such a power of cession does reside exclusively in the treaty-making power under the Constitution of the United States, although a sound discretion would forbid the exercise of it without the consent of the interested state.”³²¹ This view is consistent with the history of the Treaty Clause, as detailed in Subsection II.A.2. above. The Clause was crafted, after all, in the face of concerns by those in the South that the new United States might bargain away navigation rights to the Mississippi in return for trading privileges that would primarily benefit the North.³²²

321. THEODORE DWIGHT WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 161 (6th ed. 1897) (quoting Chancellor Kent).

322. The weight of scholarship supports this view. *See, e.g.*, CRANDALL, *supra* note 281, at 98 n.1 (detailing the cession of disputed territory from Maine and Massachusetts in the Webster-Ashburton treaty with Great Britain, which was consented to by both states after more than a decade of negotiations); WILLIAM W. STORY, 2 LIFE AND LETTERS OF JOSEPH STORY 288-89 (1851) (noting that Chief Justice Marshall believed that the treaty power extended to the cession of territory and commenting that “[i]f the national government does not possess it, it is to all intents and purposes an extinguished right of sovereignty, for the States do not possess or retain it”); 1 WILLOUGHBY, *supra* note 46, at 507-13 (discussing practice, court decisions, and scholarly commentary and concluding that “[s]hould territory be alienated to a foreign power, it would seem that this would have to be done by treaty”); QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 89 (1922) (noting that “[i]n the only case of foreign cession of state territory that has arisen, the adjustment of the Maine boundary by the Webster-Ashburton treaty of 1842, the political expediency if not the constitutional necessity of obtaining the state’s consent was admitted” yet “in case of necessity . . . a treaty cession without such consent would doubtless stand”). In addition, agreements concerning boundaries in which the United States cedes a claim over disputed territory would also seem to be encompassed within the Article II Treaty Clause’s exclusive jurisdiction for the same reason. *See, e.g.*, 1 JOHN BASSETT MOORE, INTERNATIONAL LAW DIGEST §§ 158-162 (1906) (detailing all of the historical cases in which the boundary of the United States was disputed and resolved – always by treaty). It is also worth noting that the Supreme Court held in 1832 (in an opinion authored by Chief Justice Marshall) that a federal treaty is necessary to grant tribal sovereignty over Indian reservations. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). That may no longer hold true, given subsequent modifications to rules regarding state jurisdiction over Indian reservations. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 219-20 (1959) (stating that tribal sovereignty is an absolute bar to state jurisdiction only where “the state action infringed on the right of reservation Indians to make their own laws and be ruled by them”). But the principle that cession of sovereignty to a foreign sovereign – including perhaps even a tribal sovereign – requires a treaty remains.

A second area in which a treaty is likely necessary is extradition of a U.S. citizen to a foreign country.³²³ The treaty power clearly extends to extradition agreements both because extradition is in the genuine shared interest of the parties and because it allows the “punishment of malefactors, the common enemies of every society.”³²⁴ Moreover, most such agreements are reciprocal—each state party grants extradition rights to the other. Though it is within the treaty power, it appears that extradition likely falls outside of the reach of ordinary federal legislation.³²⁵ When a citizen is extradited for criminal

323. John Moore defines extradition as “the act by which one nation delivers up an individual, accused or convicted of an offense outside of its own territory, to another nation which demands him, and which is competent to try and punish him.” 1 JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 3 (1891); see also *Terlinden v. Adams*, 184 U.S. 270, 289 (1902) (defining extradition as “the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender”). The following argument does not apply to extradition from one state to another within the United States or from the territories to a state. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (upholding the Act of 1793); 21 MOORE, *supra*, at 848-50.

324. 1 MOORE, *supra* note 323, at 5 (quoting Attorney General Cushing, from an opinion published in 1855).

325. The Supreme Court has long held that extradition is within the treaty power. See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (“As the rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations . . . it follows that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced, when it demands the surrender of any one charged with offences against it.”). The case law evinces some ambiguity about whether the treaty power is exclusive in its application to extradition. In *Valentine v. United States*, 299 U.S. 5, 8 (1936), for example, the Court held: “the power to provide for extradition is a national power But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision.” The Court continued, “Whatever may be the power of the Congress to provide for extradition independent of treaty, that power has not been exercised save in relation to a foreign country or territory ‘occupied by or under the control of the United States.’” *Id.* at 9. Finally, it concluded, “Aside from that limited provision, the Act of Congress relating to extradition simply defines the procedure to carry out an existing extradition treaty or convention.” *Id.* It is, moreover, widely accepted law that where extradition treaties place limits on the trial, including on the crimes that can be prosecuted, those limits must be respected. Hence states that prosecute persons surrendered under a treaty can only prosecute to the extent provided in the treaty. See 1 MOORE, *supra* note 323, at 194-280. As the Court notes in *Valentine*, that restriction was (and is) encompassed in the legislation enacted to give effect to extradition treaty obligations. See *Valentine*, 299 U.S. at 9-10. Notably, a statute provides for extradition to the international criminal tribunals for Yugoslavia and Rwanda. Pub. L. No. 104-106, § 1342(a), 110 Stat. 186, 486 (1996). The statute has been upheld against a challenge that it was unconstitutional to surrender a person to an international tribunal in the absence of an Article II treaty. *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999). However, the

prosecution in another country, the citizen is no longer entitled to the constitutional protections to which he or she would otherwise be entitled.³²⁶ Moreover, surrender of a citizen to criminal prosecution by a foreign sovereign can be seen as a relinquishment of sovereign power over the citizen much in the way cession of territory is relinquishment of sovereign power over physical territory.³²⁷ Actual practice seems to reflect the view that a treaty is necessary in these cases: there is no instance of the extradition of a U.S. citizen to a foreign country in the absence of a treaty.³²⁸ And, as noted above, every international

petitioner in the case was not a U.S. citizen (he was a citizen of Rwanda) and the extradition was not to a foreign state but to an international tribunal (both the Rwandan and Yugoslavian tribunals are subsidiary organs of the Security Council, on which the United States holds a permanent veto).

326. A citizen is “[o]ne who, under the Constitution and laws of the United States, or of a particular state, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights.” BLACK’S LAW DICTIONARY 244 (6th ed. 1990); see *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165-66 (1874) (“There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection.”); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 296 (1990) (describing early debate over extradition and noting that a lawyer argued against extradition on the ground that “the Constitution secured every citizen a right to trial by a jury imbued with domestic political principles, and extradition should not be used as a way of weakening that protection”).
327. See, e.g., LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 362 (1912) (“The importance of individuals to the Law of Nations is just as great as that of territory, for individuals are the personal basis of every State. Just as a State cannot exist without a territory, so it cannot exist without a multitude of individuals who are its subjects and who, as a body, form the people or the nation.”); cf. *Wright v. Court of Appeals*, G.R. No. 113213 (S.C. Aug. 15, 1994), available at <http://www.supremecourt.gov.ph/> (Phil.) (“A paramount principle of the law of extradition provides that a State may not surrender any individual for any offense not included in a treaty of extradition. This principle arises from the reality of extradition as a derogation of sovereignty. Extradition is an intrusion into the territorial integrity of the host State and a delimitation of the sovereign power of the State within its own territory.”).
328. Writing in 1910, Willoughby noted that there had been no instance in which a fugitive had been extradited in the absence of a treaty. 1 WILLOUGHBY, *supra* note 278, § 205. (This is not quite correct: in 1864, Don Jose Augustin Arguelles, then lieutenant-governor of the district of Colon in Cuba and a citizen of Spain, was extradited to Cuba, with which the U.S. had no extradition treaty. This excited much controversy and was not repeated. See 1 MOORE, *supra* note 323, at 33-35.) Willoughby goes on to state that even though there is no legislation authorizing the President to extradite fugitives “there would seem to be no constitutional objection” to such legislation. 1 WILLOUGHBY, *supra* note 278, § 205. Willoughby cites no authority for this claim, but cites a source that concludes that the issue is unsettled: 2 CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* § 435, at 211 (1902). Notice that Willoughby and Butler were both writing of the extradition of fugitives as a general matter. As Chandler Anderson makes clear, extradition of a U.S. citizen is a

agreement to which the United States belongs on the subject of extradition has been concluded as an Article II treaty.

The third area of lawmaking in which a treaties have been necessary—though in this case are no longer—is the disabilities of aliens. State laws prohibiting aliens from enjoying the same rights as citizens in areas such as the collection of debt, inheritance, and employment were once common. At various points in U.S. history, the Supreme Court’s jurisprudence on the Commerce Clause would have made federal legislation to eliminate these disabilities impossible.³²⁹ Nonetheless, the Court repeatedly upheld treaties that invalidated these disabilities on the grounds that the state laws were inconsistent with a treaty obligation of the United States.³³⁰ In doing so, the Court frequently granted greater scope to treaties than to ordinary legislation.³³¹

different matter. Anderson, *supra* note 239, at 661 (“[T]he deportation of aliens is within the powers of Congress . . . , yet in the matter of deportation a citizen stands on a widely different footing from an alien and the right of Congress to surrender a citizen except under the authority of a treaty may well be doubted.”).

329. See *supra* note 309. This is merely a descriptive claim. There is a strong argument for the proposition that the Commerce Clause was intended from the very start to have a broader reach than it has at times been given by the Supreme Court. See, e.g., AMAR, *supra* note 94, at 107-08; Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199 (2003).
330. Indeed, many of the cases cited by Justice Holmes in support of the Court’s conclusion in *Missouri v. Holland*, 252 U.S. 416 (1920), concerned the rights of aliens. E.g., *Blythe v. Hinekley*, 180 U.S. 333 (1901) (holding that alien defendant’s right to inherit was protected by a treaty); *Geofroy v. Riggs*, 133 U.S. 258 (1890) (holding that a treaty protected a French citizen’s rights to inherit land); *Hauenstein v. Lynham*, 100 U.S. 483 (1879) (holding that the treaty of 1850 with the Swiss Confederacy providing for the removal of alienage disabilities in inheritance nullified a conflicting Virginia law); *Chirac v. Chirac*, 15 U.S. (2 Wheat) 259 (1817) (holding that a treaty with France gave French citizens the right to purchase and hold land in the United States, and removed the incapacity of alienage); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (holding that the treaty of 1783 nullified a state law confiscating debts due from Virginia citizens to British citizens).
331. See Anderson, *supra* note 239, at 658-60 (discussing *Ware* and similar cases). Today many of the same protections for aliens could be also accomplished through federal legislation under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and various federal powers over foreign affairs and matters, *Id.* art. I, § 8. See, e.g., *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 449 (1979) (holding a California ad valorem property tax unconstitutional as applied to Japanese shipping companies’ cargo containers used exclusively in foreign commerce, because it was inconsistent with Congress’s power under the Commerce Clause to regulate commerce with foreign nations); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (“Laws imposing such burdens . . . even though they may be immediately associated with the accomplishment of a local purpose . . . provoke questions in the field of international affairs. And specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty ‘To establish an uniform Rule

As the above discussion illustrates, the shift of most international lawmaking to congressional-executive agreements does not entirely eliminate the Article II Treaty Clause. Where an international agreement requires the federal government to exercise powers beyond those granted to Congress, the agreement can be concluded as an Article II treaty. The central change that would result from the proposal offered herein comes not from eliminating the Article II treaty altogether but from favoring congressional-executive agreements when either instrument could be used – which is most (but not all) of the time.

B. The International Legal Consequences

It is worth pausing to consider whether there are any international legal consequences of ceasing to use treaty ratification through the Treaty Clause for nearly all international agreements. Would changing the way international law is made in the United States mean relinquishing the power to join agreements designated as “treaties” or agreements that require states to “ratify” in order to bind themselves? The answer, in a nutshell, is no.

To begin with, the term “treaty” does not have the same meaning in U.S. and international law. In the United States, the term is generally used to refer to international agreements that are submitted to the Senate for advice and consent.³³² In international law, the term “treaty” means “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”³³³ Hence all congressional-executive agreements are in fact “treaties” as that term is used in international law.

The international rules regarding “ratification” are equally open to congressional-executive agreements. International law defers almost completely to states to decide the method by which they will accept an

of Naturalization . . .”). The same might be said of special *abilities* granted to aliens—particularly immunity from prosecution granted to foreign officials under consular treaties. See, e.g., *Commonwealth v. Jerez*, 457 N.E.2d 1105 (Mass. 1983) (affirming the dismissal of charges against a foreign consul for assault and battery). A similar argument might be made that a treaty that gives victims of gender-motivated violence the right to sue their attackers in federal court would need to be concluded under Article II. See *United States v. Morrison*, 529 U.S. 598 (2000) (finding that portions of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, exceeded the Commerce Clause power).

332. TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106, at 1.

333. Vienna Convention on the Law of Treaties art. 2, § 1(a), May 23, 1969, 1155 U.N.T.S. 311.

international legal obligation. It provides only that to bind itself to a treaty agreement, a state must consent to it “by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”³³⁴ What is required for that act of consent to be made is left entirely to domestic law.³³⁵ It is worth emphasizing that ratification, acceptance, approval, and accession all have equal legal effect.³³⁶ Ratification is, in fact, a term that is usually used to refer to the narrow set of cases in which the state has earlier “signed” a treaty and then later consents to be legally bound by it (usually after the agreement has received approval through the domestic political process).³³⁷ When a state is not among those who signed the treaty at its inception but later consents to be bound by it (again, in a process determined entirely by domestic law), this act of consent is usually referred to as “accession” rather than ratification—and it is understood to have exactly the same legal effect.³³⁸

At its origins, ratification was a “formal and limited act by which, after a treaty had been drawn up, a sovereign confirmed, or finally verified, the full powers previously issued to his representative to negotiate the treaty.”³³⁹ At a time when communication and travel could take a matter of months, and therefore domestic governments could not direct negotiations as they occurred, this allowed state representatives to negotiate agreements and provisionally agree to them without binding the states they represented to agreements the governing authorities had not yet seen, much less approved.³⁴⁰ Indeed, one of

334. *Id.* art. 11.

335. *Id.* arts. 11-17.

336. *See, e.g., id.* art. 14, § 2 (“The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.”).

337. *See id.* art. 14, § 1.

338. *See id.* art. 15; 2 Y.B. INT’L L. COMM’N, 1966, at 199 [hereinafter 1966 YEARBOOK] (“Accession is the traditional method by which a State, in certain circumstances, becomes a party to a treaty of which it is not a signatory.”). In the rare case that a party submits an instrument of accession that indicates that it is subject to ratification, the Secretary General treats it “simply as a notification of the government’s intention to become a party,” and does not consider the state a party to the agreement until an unqualified instrument of accession, agreement, or ratification is submitted. *Id.* (quoting Summary of the Practice of the Secretary-General as Depository of Multilateral Agreements, ¶ 48, ST/LEG/7).

339. 1966 YEARBOOK, *supra* note 338, at 197.

340. The first means of instant long-distance communication was the electrical telegraph. The first transcontinental telegraph system was established on October 24, 1861, and the first successful transatlantic telegraph cable was completed on July 27, 1866. LEWIS COE, THE TELEGRAPH: A HISTORY OF MORSE’S INVENTION AND ITS PREDECESSORS IN THE UNITED STATES 45, 100 (1993).

the earliest recorded executive agreements—the Cartel for the Exchange of Prisoners of War with Great Britain, concluded on May 12, 1813—indicates that the United States “ratified” the agreement, even though the agreement was “ratified” not by the Senate but by Secretary of State James Monroe.³⁴¹ Today the term is usually used to refer to cases in which a state has signed a treaty and then requires time to seek approval for it on the domestic level, often through legislative approval.³⁴²

Indeed, the International Law Commission’s report on the Vienna Convention on the Law of Treaties, which codified customary law regarding treaty practice, emphasized that the word “ratification” is used in the Convention to refer exclusively to “ratification” on the international plane. The distinct concepts of ratification on the domestic and international planes are related in that domestic approval is necessary for the international act of ratification. Nonetheless, “the international and constitutional ratifications of a treaty are entirely separate procedural acts carried out on two different planes.”³⁴³

In sum, it is possible for a state to “ratify” a treaty as a matter of international law regardless of what it calls the process of approving the treaty as a matter of domestic law. And a state can enter an agreement that constitutes a “treaty” as a matter of international law regardless of what the state calls that same agreement under domestic law.³⁴⁴ Thus the decision to end the use of the Treaty Clause will have no effect as a matter of international law on the United States’ ability to enter any international agreement.

341. 2 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 565 (“Having seen and considered the foregoing Cartel for the Exchange of Prisoners, in all and every one of its Articles, and approved the same, I do hereby declare that the said Cartel is accepted, ratified and confirmed on the part of the United States.”).

342. Vienna Convention on the Law of Treaties art. 2, § 1(b), art. 14, § 16, May 23, 1969, 1155 U.N.T.S. 311; United Nations Treaty Collection, Treaty Reference Guide, *available at* <http://untreaty.un.org/English/guide.asp> (last visited Apr. 20, 2008) (“Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. . . . The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.”) There is no requirement that ratification involve legislative approval. 1966 YEARBOOK, *supra* note 338, at 201.

343. *Id.* at 197.

344. A state may even file an “instrument of ratification” without engaging in *any* formal domestic legal process, as long as the instrument is filed by a qualified representative of the state and the process for approving consent to the treaty is consistent with domestic law.

C. Treaties' End

With the weightier issues of constitutional scope and international legal consequences out of the way, a more practical question looms: how, precisely, could the proposal offered here be put into effect—how, that is, should the Treaty Clause end?

The end could come in three ways. First, a constitutional amendment could change Article II to provide that both houses of Congress must pass a treaty by a majority vote in order for the President to ratify. Second, legislation could be passed akin to the fast-track legislation that would have the same effect—requiring that nearly all agreements that would have proceeded as Article II treaties proceed as congressional-executive agreements. Third, the process of gradual evolution away from the Treaty Clause toward congressional-executive agreements could simply be continued at a quicker pace, led by the executive branch. Though there are advantages to each route, I advocate the last of these options, what I will call the “informal reform strategy.” Neither a constitutional amendment nor special legislation is required to bring the era of the Treaty Clause to a close, and so there is no reason to take on the burden—far heavier in the former case than the latter—imposed by these options.

The informal reform strategy is both legally unproblematic and politically feasible. It is, as a mechanical matter, breathtakingly simple. It would require no changes to existing law or regulations. As I have argued, the regulations that currently govern the decision whether to submit an agreement as a treaty or as a congressional-executive agreement leave extraordinary room for the exercise of discretion by the executive branch.³⁴⁵ No formal legal changes are therefore required to permit even a fairly substantial change in current practice. All that is necessary to end the use of the Article II process is for the President to cease proposing agreements as Article II treaties and instead to propose them as congressional-executive agreements.

Of course, nothing so important is likely to be so easy, and this is no exception. The barriers are political, not legal, but they are barriers nonetheless. Ending the use of the Treaty Clause will require the cooperation of the two parts of government vested with the power to create Article II treaties—the President and the Senate. The President's role is the most direct. At the present, it is the President, through the State Department, who initially decides whether an international agreement will be pursued as a treaty, a

345. That decision is guided by Circular 175 and the attendant regulations. As noted above, however, those regulations are vague and provide relatively little true guidance to the State Department—and do little to cabin its discretion.

congressional-executive agreement, or a sole executive agreement. For treaties to cease, then, the President must support the decision to cease using them.

And that alone is not enough. A sufficient portion of the Senate must also buy in. Formally, the President may have unfettered control over which instrument to use for a given international agreement. But if a large enough number of Senators conclude that an agreement that has been presented as a congressional-executive agreement ought to proceed as a treaty instead, they can act to bar the agreement's passage on that ground.³⁴⁶ In short, the Senate (or at least enough of its members to end a filibuster) must accept the change in international lawmaking instruments in order for it to succeed.

It might seem unthinkable that the Senate would relinquish its sole power to provide "advice and consent" in favor of shared authority to approve congressional-executive agreements. Yet that is precisely what it has done over the last half century, repeatedly and with little overt resistance.³⁴⁷ Indeed, the history of congressional-executive agreements is the story of the gradual relinquishment of the Senate's sole authority over international agreements in lieu of the shared authority of congressional-executive agreements. The proposal here calls for taking this process to its logical and salutary conclusion.³⁴⁸

As noted, Congress could actively instigate the phase-out of treaties by mandating that nearly all international agreements be submitted to it not as Article II treaties but as congressional-executive agreements. Indeed, it has done so effectively in several other instances. Congress (acting through both houses) has specifically provided, for example, for international fisheries agreements to be made as congressional-executive agreements.³⁴⁹ Similarly, so-

346. Indeed, the regulations cited above acknowledge this role and provide for explicit consultation of the Senate by the executive branch in cases of ambiguity.

347. Moreover, in previous clashes with the President over authority to make international agreements, the Senate has also proven exceedingly willing to share authority with the House. The Case-Zablocki Act, 1 U.S.C. § 112b (2000), requires that sole executive agreements be reported to both houses of Congress, not simply the Senate. And the Circular 175 requirements are clearly more preoccupied with preventing the President from pursuing agreements without any involvement by Congress – and less concerned with what form that involvement might take.

348. Ackerman and Golove emphasize this point, noting, "Rather than demeaning the Senate, this Marshallian reading of Article I puts the Senators at the very heart of the entire process of international negotiation." Ackerman & Golove, *supra* note 15, at 920. I take up the related issue of congressional delegation of power over international lawmaking to the President in much more depth in Hathaway, *supra* note 6.

349. Congress enacted a law providing for the negotiation of reciprocal international fisheries agreements, which automatically become effective 120 days after submission to both houses

called fast-track legislation by Congress authorizes the President to negotiate international trade agreements and bring them back to Congress for final, accelerated approval—a process used in approving NAFTA, the United States-Israel Free Trade Area, and the Uruguay Round Agreements Act, among others.³⁵⁰ But Congress does not have to lead for the informal reform strategy to work; it merely has to follow.

It is important to emphasize what this proposal is not. It is not an argument for Congress to abdicate responsibility over international agreements. Far from it: both houses of Congress would now be routinely involved in international lawmaking. And it is not in any way an endorsement of sole executive agreements (agreements entered by the executive on its own constitutional authority). Quite the opposite. It is my hope that under the approach offered here, *fewer* international agreements will be made by the executive acting alone. By freeing the process of international lawmaking from the constraining bonds of the Two-Thirds Clause, this proposal holds out the possibility that the President can and will turn more frequently to Congress for approval of, and authority for, the international agreements the President makes.

It is also essential to emphasize that this is not a proposal to replace Article II treaties with what have been called *ex ante* congressional-executive agreements, in which Congress gives the President authority to negotiate agreements that can then go into effect automatically. Such agreements are not, in my view, true congressional-executive agreements, because congressional involvement is frequently tenuous. Treaties can be replaced only by congressional-executive agreements that are submitted to Congress for an up-or-down vote in both houses.

What does this mean in practice? It means that agreements in areas of law currently thought of as reserved for treaties—human rights, arms control, dispute settlement, aviation, the environment, labor, consular relations, taxation, and telecommunications—can and should be submitted as congressional-executive agreements instead.³⁵¹ There is nothing preventing the resubmission of the many stalled treaties still before the Senate as congressional-executive agreements, including, for example, the Vienna Convention on the Law of Treaties, the Convention on the Elimination of All

of Congress (excluding any days when Congress is adjourned), unless Congress rejects them through a joint resolution. See 16 U.S.C. §§ 1821-1823 (2000).

350. See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992).

351. Again, the very limited number of agreements that exceed Congress's Article I powers will still need to be submitted through the Article II process.

Forms of Discrimination Against Women, or even the U.N. Convention on the Law of the Sea, were it once again to fail to obtain enough support to secure the advice and consent of the Senate.³⁵²

These treaties may or may not succeed as congressional-executive agreements. But if they fail, they fail in a process that includes both houses of Congress and does not require that supporters scale the forbidding pinnacle of a two-thirds vote. And if they succeed, they succeed in a process that creates a stronger commitment to uphold the international laws to which America's representatives have democratically agreed.

CONCLUSION

Almost as soon as the ink dried on the Constitution more than two hundred years ago, the original vision of the Treaty Clause proved inadequate to the realities of international lawmaking. With the rise of congressional-executive agreements, international lawmaking in the United States began to change. It is now time to take the next step, to cease approving all but a very limited number of international agreements through the Article II process and instead approve them through both houses of Congress.

This would not only put an unpalatable past behind us, but would lead to more democratic, effective, efficient, and reliable international lawmaking. Unlike the treaty-making process, a congressional-executive agreement involves the House. This not only lends the lawmaking process greater legitimacy, as it includes the legislative body intended to be most representative of the American people. It also precludes the need for separate

352. There is some precedent for this type of resubmission. In 1844, a treaty that would have annexed the independent Republic of Texas to the United States failed to receive the required two-thirds support in the Senate. It was then resubmitted as a congressional-executive agreement and passed by a vote of twenty-seven to twenty-five in the Senate, thus bringing Texas into the Union. The process repeated in 1897, this time with Hawaii. After it became clear that a treaty providing for its annexation could not achieve two-thirds support, the agreement proceeded instead by a joint resolution in Congress. See S.J. Res. 55, 55th Cong., 30 Stat. 750, 750-51 (2d Sess. 1898) (accepting, ratifying, and confirming an order of accession of the Hawaiian islands); S.J. Res. 8, 28th Cong., 5 Stat. 797 (2d Sess. 1845) (joint resolution of Congress admitting Texas), *reprinted with commentary in* 4 TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44, at 689-739; Miller, *supra* note 121, at 58-59. There is only one other instance I am aware of in which an agreement was first submitted as a treaty, failed to receive sufficient support, and was later successfully resubmitted as a congressional-executive agreement. This was the agreement with Canada for the development of the St. Lawrence Seaway Project. See Catudal, *supra* note 12, at 662-63. Ackerman and Golove argue that the Texas and Hawaii cases are *sui generis*. See Ackerman & Golove, *supra* note 15, at 832-36.

implementing legislation for treaties that are either not self-executing or that encroach on the House's traditional scope of authority—requiring, for example, a new appropriation of funds. This in turn leads to more efficient lawmaking (requiring one step rather than two) and at the same time avoids the awkward possibility that the Senate would be willing to give its advice and consent to a treaty, but the House would be unwilling to support legislation to implement it. Moreover, because the lawmaking process would require simple majority votes in both houses rather than a supermajority vote in one house, it would be less likely to be subject to the whims of the unrepresentative political extremes that might command thirty-four votes in the Senate. And commitments once made are more likely to be kept because Congress is likely to have a greater say in undoing agreements that it has had a hand in making through legislation.

A near-exclusive reliance on congressional-executive agreements would, moreover, end the artificial divide between international and domestic lawmaking that belongs to a different time. In the founding era, there were on the order of twenty to thirty international agreements of all kinds per year. Today, there are several hundred. The range of topics covered by international agreements has exploded, including everything from traditional areas of international law, such as trade and consular relations, to areas that used to be solely within the power of domestic governments, such as human rights, the environment, taxation, and education. At the same time, domestic law has growing international implications when, for example, a domestic tax law in one country can attract investments away from another.³⁵³ In an age when international law increasingly reaches issues that once fell exclusively within the purview of domestic law and much of domestic law has new international implications, it makes no sense to make international law in a way wholly distinct from the national legislative process.

To bring to a final close the already waning influence of the Treaty Clause is not to commit the United States to a particular vision of the role or scope of international law in public affairs. For those who favor international law, this proposal holds out the hope of allowing the United States to engage more effectively and efficiently in the international sphere in all areas of law. For those who do not, this proposal promises to cure some of what they are likely to see as the most obvious flaws of the current international lawmaking system: its exclusion of the House, its creation of obligations that require courts to look exclusively to text written by those outside the United States,

353. For example, Tyco International stopped paying over four hundred million dollars a year in U.S. taxes after it rechartered in Bermuda to take advantage of that country's tax structure.

and its two tiers of law whose relative priority is officiated by the federal courts.

One might object that the ex post congressional-executive agreement does not possess the dignity of an Article II treaty. The argument of this Article has been that this objection is based on a chimera. It both places unfounded faith in agreements concluded through the Article II Treaty Clause and it gravely undervalues the ex post congressional-executive agreement. Ex post congressional-executive agreements are more democratically legitimate, are made through a more representative process, are more readily enforced, and are more difficult to undo unilaterally. If the dignity of an agreement is grounded in the esteem or respect in which it should be held, then ex post congressional-executive agreements are *more*, not less, dignified than treaties.

It would be foolish to think that procedural change alone could resolve deep substantive disagreements. But procedural change could ensure that our international lawmaking process does not unduly distort or contribute to those disagreements. In this way, perhaps the end of treaties can bring a new beginning for international lawmaking in the United States.

APPENDIX

A. Data Sources for Treaties and Executive Agreements

There is no single existing complete source of information about the past or present international lawmaking practices of the United States. This Article therefore draws upon several different overlapping sources to construct a more complete picture than is presently available. Table 4 summarizes these sources. The table is followed by a brief description of each source.

Table 4.
DATA SOURCES FOR TREATIES AND EXECUTIVE AGREEMENTS

SOURCE NAME	TREATIES	EXECUTIVE AGREEMENTS	OTHER
Library of Congress Thomas Database	1976-2006 (complete); 1968-1976 (sporadic)		Includes some procedural history.
Oceana Database	1789-1980 (sporadic); 1980-2000 (approx. 50%)	1780-1980 (sporadic); 1980-2000 (60%)	Includes many sole executive agreements, as well as many nonbinding agreements.
Treaties and Other International Acts of the United States of America	1776-1863 (complete)	1776-1863 (probably complete)	Includes full text, plus background documents.
U.S. Department of State Online Case Act Reports		2006-2007 (complete ³⁵⁴)	Includes full text, but excludes background memos that accompany submissions to Congress.
U.S. Department of State, Treaties and Other International Acts Series	1776-1997 (complete)	1776-1997 (complete)	Published annually, currently with a ten year lag.
Treaties in Force	Includes all treaties currently in force as of publication date.	Includes all executive agreements currently in force as of publication date.	Published annually since 1950; does not separate treaties from executive agreements.

354. As with all the "complete" public collections of international agreements listed here, secret and classified agreements are not included.

SOURCE NAME	TREATIES	EXECUTIVE AGREEMENTS	OTHER
U.S. Department of State Treaty Actions	1997 - 2007 (complete)	1997 - 2007 (complete)	Updated periodically.
U.S. Statutes at Large	1796-1950 (complete)		Also primary source of authorizing legislation for congressional-executive agreements.

(1) *Library of Congress's Thomas Database*. This online database includes individual listings of all of the Article II treaties entered by the United States from 1976 to the present (the text of the treaties is not included).³⁵⁵ It also includes a selection of treaties from earlier Congresses.

(2) *Oceana's Treaties and International Agreements Online Database*.³⁵⁶ This is the most complete existing electronic database on the executive agreements entered by the United States and is the primary source used in quantitative studies of executive agreements. It includes both treaties and executive agreements. The list of modern congressional-executive agreements (1980-2000) reported in Table 2 is based on this dataset, after eliminating agreements that are clearly treaties (those that are either listed with a treaty document number or that were identified as treaties through comparison to other databases), all amendments,³⁵⁷ and agreements that are likely to be nonbinding agreements or sole executive agreements.³⁵⁸

355. Thomas Database, *supra* note 44.

356. This database is currently offline, but is available in revised form along with the other data for this article at <http://yalelawjournal.org/117/8/hathaway.html>. It individually lists 3879 executive agreements between 1980 and 1999 (which I believe, based on comparisons to other datasets, to constitute about sixty percent of the total number of executive agreements entered during this period). Cf. TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 106, at 39. The database does not attempt to separate executive agreements into sole executive agreements and congressional-executive agreements, and it does not reliably identify Article II treaties (sometimes identifying them with a treaty document number, but more often not). Despite its failings, the database remains the most comprehensive publicly available electronic database on executive agreements of the United States.

357. This includes all agreements containing the words "amendment," "amending," "amended," "amendatory," "appendix," "protocol," "extension," "agreement extending," "agreement modifying," "agreement supplementing," "agreement supplementary to," "agreement suspending," "agreement terminating," "annex," "revised agreement," "revised plan," or "agreement continuing."

358. This includes all agreements whose titles contain the terms, "memorandum of understanding," "administrative arrangement," "administrative agreement," "arrangement regarding," "letter of agreement regarding," "declaration," "implementing arrangement," "interim agreement," "implementing agreement," "agreement implementing," "agreement

(3) *Treaties and Other International Acts of the United States of America*.³⁵⁹ This nine-volume collection includes all international agreements entered by the United States between 1776 and 1863. It includes the full text of each agreement, an opening summary outlining the method by which it was adopted into law, and detailed explanations and background material.

(4) *U.S. Department of State Online Case Act Reports*.³⁶⁰ For 2006 and 2007, the State Department has made available all international agreements declared to Congress under the Case Act (which by law should include all international agreements, other than a treaty, to which the United States is a party).³⁶¹ The collection includes the text of the agreements, but excludes the background memos of law that generally accompany the submission. The reports offer no other indication as to how the agreements entered into law, whether pursuant to a congressional statute or sole executive agreement.

(5) *U.S. Department of State, Treaties and Other International Acts Series (TIAS)*.³⁶² This collection includes all international agreements entered into by the United States (except those that are classified). The database is extraordinarily out of date. At present, the most recent published volume available is from 1995, with slips available through 1997. (An online version is available as well, but it is current only through 1996.³⁶³)

(6) *Treaties in Force*.³⁶⁴ This collection includes all international agreements in force as of the year of publication. (The publication uses the term “treaty” as defined in the Vienna Convention on the Law of Treaties: as an international agreement “governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”³⁶⁵). *Treaties in Force* includes those treaties and other

in implementation,” “acceptance of the report,” “agreed minute,” “agreed declaration,” “agreed record,” “agreement concerning interpretation,” “arrangement,” “exchange of letters” (without an agreement), “exchange of notes” (without an agreement), “joint commission,” “joint communiqué,” “joint letter,” “joint determination,” “joint statement,” “joint declaration,” “letter,” “memorandum,” “procedures,” “program of,” “record of understanding,” “technical agreement,” “understanding,” or “undertaking.”

359. See TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 44.

360. U.S. Dep’t of State, Reporting International Agreements to Congress Under Case Act, *supra* note 44.

361. 1 U.S.C. § 112b(a) (2000).

362. U.S. Dep’t of State, Treaties and Other International Acts Series (TIAS), *supra* note 44.

363. See HeinOnline, TIAS Agreements, <http://heinonline.org/HOL/Index?index=ustreaties/ustrias&collection=ustreaties> (last visited Apr. 20, 2008).

364. TREATIES IN FORCE, *supra* note 43.

365. Vienna Convention on the Law of Treaties, *supra* note 82, art. 2.

international agreements entered into by the United States if, as of the specified date, those treaties or agreements had not expired by their own terms, been denounced by the parties, been replaced or superseded by other agreements, or otherwise definitely been terminated. It does not indicate whether an agreement is a treaty or executive agreement.

(7) *U.S. Department of State Treaty Actions*. The U.S. Department of State lists “recent treaty actions” (including not only Article II treaties, but all international agreements), from 1997 to 2007 online.³⁶⁶ It does not indicate whether an agreement is a treaty or executive agreement.

(8) *U.S. Statutes at Large*. This is the official source for treaties from 1789 to 1950. It includes all treaties for these years. It is used here as the primary source of authorizing legislation for congressional-executive agreements. (It does not include the agreements themselves, only the legislation that authorizes them.)

366. U.S. Dep’t of State, Treaty Actions, *supra* note 44.

B. Constitutional Requirements for Domestic and International Lawmaking

Table 5.

CONSTITUTIONAL REQUIREMENTS FOR DOMESTIC AND INTERNATIONAL LAWMAKING³⁶⁷

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS? **
Afghanistan	Majority	Majority	Majority	Majority	No or No Mention
Albania	Majority	N/A	Majority	N/A	Yes
Algeria	Majority	3/4 of All Members	Majority	3/4 of All Members	No or No Mention
Angola	Majority	N/A	Majority	N/A	No or No Mention
Antigua and Barbuda	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Argentina	Majority	Majority	Majority	Majority	Yes
Armenia	Majority	N/A	Majority	N/A	Yes

367. This data was generated by coding all of the most recent constitutions of the countries listed. The detailed methodology, codebook, and dataset are available at <http://yalelawjournal.org/117/8/hathaway.html>. The texts of the constitutions were obtained through Oceana, Constitutions of Countries of the World, http://www.oceanalaw.com/main_product_details.asp?ID=341 (last visited Apr. 20, 2008).

* Indicates voting thresholds *when the relevant house is involved*. In many countries, a house of the legislature may have very limited substantive jurisdiction (this is especially common for the upper house). In some cases, moreover, the upper house may have an opportunity to vote on legislation, but that vote is nonbinding or may be overridden by the lower house. None of these important nuances are captured in this table, but they are included in the fuller dataset of which this is a part. For domestic law, if a house was mentioned but no specific voting threshold was specified, it was recorded as having a majority voting requirement. For treaties, if a house was mentioned but no specific voting threshold was specified, it was recorded as having the same voting threshold as for domestic law. Moreover, if there were multiple voting procedures for different types of treaties (for example, treaties that are to be given constitutional status, human rights treaties, or treaties that require an outlay of revenue), only the most general procedure is recorded here.

** This only includes explicit declarations that treaties have domestic legal status. Declarations that treaties have relative legal status—for example, that ordinary legislation must be interpreted in conformity with treaty obligations or that, in cases of conflict between treaties and ordinary legislation, treaties prevail—is not included in this table. Moreover, this information is based solely on the constitutional text.

TREATIES' END

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS?***
Australia	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Austria	Majority	Majority	Majority	Majority	No or No Mention
Azerbaijan	Majority of All Members	N/A	Majority of All Members	N/A	Yes
Bahamas	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Bahrain	Majority	Majority	Majority	Majority	Yes
Bangladesh	Majority	N/A	Majority	N/A	No or No Mention
Barbados	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Belarus	Majority of All Members	Majority of All Members	Not Involved or No Mention	Majority of All Members	No or No Mention
Belgium	Majority of All Members	Majority of All Members	Majority of All Members	Majority of All Members	No or No Mention
Belize	Majority	Majority	Not Involved or No Mention	Majority of All Members	No or No Mention
Benin	Majority	N/A	Majority	N/A	No or No Mention
Bhutan	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Bolivia	Majority	Majority	Majority	Majority	No or No Mention
Bosnia & Herzegovina	Majority	Majority	Majority	Majority	No or No Mention
Botswana	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Brazil	Majority	Majority	Majority	Majority	Some

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS?***
Brunei Darussalam	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Bulgaria	Majority	N/A	Majority	N/A	Yes
Burkina Faso	Majority	Majority	Majority	Majority	No or No Mention
Burundi	2/3 of Present Members	2/3 of Present Members	2/3 of Present Members	2/3 of Present Members	No or No Mention
Cambodia	Majority	Majority	Majority of All Members	No or No Mention	No or No Mention
Cameroon	Majority	Majority	Majority	Majority	No or No Mention
Canada	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Cape Verde	Majority of All Members	N/A	Majority of All Members	N/A	Yes
Central African Republic	Majority	N/A	Majority	N/A	No or No Mention
Chad	Majority	Majority	Majority	Majority	No or No Mention
Chile	Majority	Majority	Majority	Majority	No or No Mention
China	Majority	N/A	Majority	N/A	No or No Mention
Colombia	Majority	Majority	Majority	Majority	No or No Mention
Comoros	Majority	N/A	Majority	N/A	Yes
Congo, Democratic Republic of	Majority	Majority	Majority	Majority	No or No Mention
Congo, Republic of	Majority	Majority	Majority	Majority	No or No Mention
Costa Rica	Majority	N/A	Majority	N/A	No or No Mention
Cote d'Ivoire	Majority	N/A	Majority	N/A	No or No Mention
Croatia	Majority	N/A	Majority	N/A	Yes
Cuba	Majority	N/A	Majority	N/A	No or No Mention

TREATIES' END

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS? **
Cyprus	Majority	Majority	Majority	Not Involved or No Mention	No or No Mention
Czech Republic	Majority	Majority	Majority	Majority	Some
Denmark	Majority	N/A	Majority	N/A	No or No Mention
Djibouti	Majority	N/A	Majority	N/A	No or No Mention
Dominica	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Dominican Republic	Majority of All Members	Majority of All Members	Majority of All Members	Majority of All Members	No or No Mention
East Timor	Majority	N/A	Majority	N/A	Yes
Ecuador	Majority	N/A	Majority of All Members	N/A	Yes
El Salvador	Majority of All Members	N/A	Majority of All Members	N/A	Yes
Equatorial Guinea	Majority	N/A	Majority	N/A	No or No Mention
Eritrea	Majority	N/A	Majority	N/A	Some
Estonia	Majority	N/A	Majority	N/A	No or No Mention
Ethiopia	Majority	Majority	Majority	Not Involved or No Mention	Yes
Fiji	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Finland	Majority	N/A	Majority	N/A	No or No Mention
France	Majority	Majority	Majority	Majority	No or No Mention
Gabon	Majority	Majority	Majority	Majority	No or No Mention
Gambia	Majority	N/A	Other	N/A	No or No Mention
Georgia	Majority	N/A	Majority of All Members	N/A	No or No Mention

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS?***
Germany	Majority	Majority of All Members	Majority	Majority of All Members	No or No Mention
Ghana	Majority	N/A	Majority	N/A	No or No Mention
Greece	Majority	N/A	Majority	N/A	Yes
Grenada	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Guatemala	Majority of All Members	N/A	Majority of All Members	N/A	No or No Mention
Guinea	Majority	N/A	Majority	N/A	No or No Mention
Guinea-Bissau	Majority	N/A	Majority	N/A	No or No Mention
Guyana	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Haiti	Majority	Majority	Majority	Majority	Yes
Honduras	Majority	N/A	Majority	N/A	Yes
Hungary	Majority	N/A	Majority	N/A	No or No Mention
Iceland	Majority	N/A	Majority	N/A	No or No Mention
India	Majority	Majority	Majority	Majority	No or No Mention
Indonesia	Majority	Majority	Majority	Not Involved or No Mention	No or No Mention
Iran	Majority	N/A	Majority	N/A	No or No Mention
Iraq	Majority	Majority	2/3 of All Members	Not Involved or No Mention	No or No Mention
Ireland	Majority	Majority	Majority	Not Involved or No Mention	No or No Mention
Israel	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Italy	Majority	Majority	Majority	Majority	No or No Mention

TREATIES' END

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS? **
Jamaica	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Japan	Majority	Majority	Majority	Majority	No or No Mention
Jordan	Majority	Majority	Majority	Majority	No or No Mention
Kazakhstan	Majority of All Members	Majority of All Members	Majority of All Members	Majority of All Members	No or No Mention
Kenya	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Kiribati	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Korea, North	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Korea, South	Majority	N/A	Majority	N/A	Yes
Kuwait	Majority	N/A	Majority	N/A	Yes
Kyrgyz Republic	Majority of All Members	N/A	Majority of All Members	N/A	Yes
Laos	Majority	N/A	Majority	N/A	No or No Mention
Latvia	Majority	N/A	Majority	N/A	No or No Mention
Lebanon	Majority	N/A	Majority	N/A	No or No Mention
Lesotho	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Liberia	Majority	Majority	Majority of All Members	Majority of All Members	No or No Mention
Libya	Majority	N/A	N/A	N/A	No or No Mention
Liechtenstein	Majority	N/A	Majority	N/A	No or No Mention
Lithuania	Majority	N/A	Majority	N/A	Some
Luxemburg	Majority of All Members	N/A	Majority	N/A	No or No Mention

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS?***
Macedonia	Majority	N/A	Majority	N/A	Yes
Madagascar	Majority	Majority	Majority	Majority	No or No Mention
Malawi	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Malaysia	Majority	Majority	Majority	Majority	No or No Mention
Maldives	Majority of All Members	N/A	Not Involved or No Mention	N/A	No or No Mention
Mali	Majority	N/A	Majority	N/A	No or No Mention
Malta	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Mauritania	Majority	Majority	Majority	Majority	No or No Mention
Mauritius	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Mexico	Majority	Majority	Not Involved or No Mention	Majority	Yes
Micronesia	2/3 of All Members	N/A	2/3 of All Members	N/A	No or No Mention
Moldova	Majority	N/A	Majority	N/A	No or No Mention
Mongolia	Majority	N/A	Majority	N/A	Yes
Montenegro	Majority	N/A	Majority	N/A	No or No Mention
Morocco	Majority	Majority	Majority	Majority	No or No Mention
Mozambique	Majority	N/A	Majority	N/A	No or No Mention
Myanmar	Majority of All Members	N/A	Majority of All Members	N/A	No or No Mention
Namibia	Majority	Majority	Majority	Majority	Yes
Nauru	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Nepal	Majority	N/A	Other	N/A	No or No Mention

TREATIES' END

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS?***
Netherlands	Majority	Majority	Majority	Majority	Yes
Nicaragua	Majority	N/A	Majority	N/A	No or No Mention
Niger	Majority	N/A	Majority	N/A	No or No Mention
Nigeria	Majority	Majority	Majority	Majority	Some
Norway	Majority	Majority	Majority	Majority	No or No Mention
Oman	N/A	N/A	N/A	N/A	Yes
Pakistan	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Palau	Majority	Majority	Majority of All Members	Majority of All Members	No or No Mention
Panama	Majority	N/A	Majority	N/A	No or No Mention
Papua New Guinea	Majority	N/A	Other	N/A	No or No Mention
Paraguay	Majority	Majority	Majority	Majority	Some
Peru	Majority of All Members	N/A	Majority of All Members	N/A	Yes
Philippines	Majority	Majority	Not Involved or No Mention	2/3 of All Members	No or No Mention
Poland	Majority	Majority	Majority	Majority	Yes
Portugal	Majority	N/A	Majority	N/A	Yes
Qatar	Majority	N/A	Majority	N/A	Yes
Romania	Majority	Majority	Majority	Majority	Some
Russian Federation	Majority of All Members	Majority of All Members	Majority of All Members	Majority of All Members	Yes
Rwanda	Majority	Majority	Majority	Majority	No or No Mention
Saint Lucia	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS? **
Saint Vincent & Grenadines	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Samoa	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Sao Tome and Principe	Majority	N/A	Majority	N/A	No or No Mention
Saudi Arabia	N/A	N/A	N/A	N/A	No or No Mention
Senegal	Majority	N/A	Majority	N/A	No or No Mention
Serbia	Majority	N/A	Majority of All Members	N/A	Yes
Seychelles	Majority	N/A	Majority	N/A	No or No Mention
Sierra Leone	Majority	N/A	Majority	N/A	No or No Mention
Singapore	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Slovak Republic	Majority	N/A	Majority of All Members	N/A	Some
Slovenia	Majority	Majority	Majority	Not Involved or No Mention	Yes
Solomon Islands	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Somalia	Majority	N/A	Majority	N/A	No or No Mention
South Africa	Majority	Majority	Majority	Majority	Some
Spain	Majority	Majority	Majority	Majority	Yes
Sri Lanka	Majority	N/A	Majority	N/A	No or No Mention
Sudan	Majority	2/3 of All Members	Majority	Not Involved or No Mention	No or No Mention
Suriname	Majority of All Members	N/A	Other	N/A	No or No Mention

TREATIES' END

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS? **
Swaziland	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Sweden	Majority	N/A	Other	N/A	No or No Mention
Switzerland	Majority	Majority	Majority	Majority	No or No Mention
Syria	Majority	N/A	Majority	N/A	No or No Mention
Taiwan (Republic of China)	Majority	N/A	Majority	N/A	No or No Mention
Tajikistan	Majority of All Members	Majority of All Members	Majority of All Members	Not Involved or No Mention	Yes
Tanzania	Majority	N/A	Majority	N/A	No or No Mention
Thailand	Majority	Majority	Majority	Majority	No or No Mention
Togo	Majority	Majority	Majority	Majority	Some
Tonga	Majority	N/A	Majority	N/A	No or No Mention
Trinidad & Tobago	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
Tunisia	Majority of All Members	N/A	Majority of All Members	N/A	Yes
Turkey	Majority	N/A	Majority	N/A	Yes
Turkmenistan	Majority	N/A	Majority	N/A	No or No Mention
Tuvalu	Majority	N/A	Majority	N/A	No or No Mention
Uganda	Majority	N/A	Majority	N/A	No or No Mention
Ukraine	Majority of All Members	N/A	Majority of All Members	N/A	Some
United Kingdom	Majority	Majority	Not Involved or No Mention	Not Involved or No Mention	No or No Mention
United States	Majority	Majority	Not Involved or No Mention	2/3 of Present Members	Yes

COUNTRY	DOMESTIC LAW LOWER HOUSE VOTE*	DOMESTIC LAW UPPER HOUSE VOTE*	TREATIES LOWER HOUSE VOTE*	TREATIES UPPER HOUSE VOTE*	DO TREATIES HAVE DOMESTIC LEGAL STATUS? **
Uruguay	Majority	Majority	Majority of All Members	Majority of All Members	No or No Mention
Uzbekistan	Majority of All Members	N/A	Majority of All Members	N/A	No or No Mention
Vanuatu	Majority	N/A	Majority	N/A	No or No Mention
Venezuela	Majority	N/A	Majority	N/A	Some
Vietnam	Majority of All Members	N/A	Majority of All Members	N/A	No or No Mention
Yemen	Majority	N/A	Majority	N/A	No or No Mention
Zambia	Majority	N/A	Not Involved or No Mention	N/A	No or No Mention
Zimbabwe	Majority	Majority	Majority	Majority	Some

