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Treaties, Custom, Iteration, and Public Choice

John K. Setear*

The basic question asked in this paper can be simply stated. Assume that, in attempting to effect international legal cooperation, a national government consciously chooses between using treaties and using customary law as the form in which to embody its cooperative efforts. Which form of international law should we expect it to choose?

I analyze this question using two approaches that may be termed “rational choice” methodologies since they assume that the relevant decisionmakers rationally pursue known goals.¹ The first approach, which I call the “iterative perspective,” focuses on the efforts of a rational, public-minded government to minimize the transaction costs of international cooperation.² The iterative perspective implies that nation-states will choose to effect international legal cooperation through treaties.³ The second approach, which I call the “public

* Professor of Law, University of Virginia School of Law. I am indebted to the American Society of International Law for providing a forum at its annual meeting at which to present an early version of these ideas. See John K. Setear, *Explaining the Sources and Methods of International Law: Treaties, Custom, Rational Choice, and Public Choice*, 94 Am Socy Intl L Proc 187 (2000). I was able to present a version of this paper at a Conference on Rational Choice and International Law through the generosity of the conference’s sponsor (the University of Chicago Law School) and its organizers (Jack Goldsmith and Eric Posner). Rachel Setear and Paul Stephan provided helpful comments on an earlier draft, as did the students in a Colloquium on International Relations Theory held at the University of Virginia. Kent Olson’s ever-ready reference skills kept me from barking up the wrong tree.

I dedicate this piece to Harland Bloland, for his rare ability always both to read it and to get it.

¹ For a discussion of rational choice methodologies in international law and international relations, as well as some competing approaches in those fields, see John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 Va L Rev 1, 2–6 (1997).

² John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 Harv Intl L J 139, 174 (1996).

³ For works exploring the iterative nature of treaties, see id; John K. Setear, *Law in the Service of Politics: Moving Neo-Liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process to Define “Iteration”*, 37 Va J Intl L 641 (1997); John K. Setear, *Ozone, Iteration, and International Law*, 40 Va J Intl L 193 (1999).

choice” approach,⁴ examines the choices of self-interested governmental subunits.⁵ The public choice perspective predicts that national leaders will choose customary international law to effect international legal cooperation. With these divergent theoretical predictions in mind, I move to reality and argue that treaties rather than customary laws have been the favored embodiment of international legal cooperation, at least since World War II. I conclude that the evidence is thus more consistent with the iterative perspective than with the public choice approach.

I. TREATIES, CUSTOM, AND THE ITERATIVE PERSPECTIVE

A. TREATIES AND THE ITERATIVE PERSPECTIVE

Treaty and custom are generally identified as the most prominent sources of international law.⁶ In previous work,⁷ I have argued that the law of treaties—the set of general procedural rules governing the degree of obligation imposed upon nations by the text of any particular treaty⁸—is consistent with an institutional design aimed at promoting a formally delineated series of structured interactions among parties (“iterations”), and that such an institutional design fosters cooperative behavior against the backdrop of the Prisoner’s Dilemma typically thought to confront nation-states considering international political cooperation.⁹ In a complex world offering broad gains from cooperation but significant incentives to cheat, nations should structure their interactions to facilitate gradual cooperation over a number of clearly defined iterations, delineating what behavior constitutes cooperation at each interval.

The law of treaties specifies a set of rules for the promulgation of international agreements that results in a highly structured and iterative process

⁴ For an accessible introduction to public choice theory by one of its seminal theorists, see James M. Buchanan, *Public Choice: Politics Without Romance*, 19 Poly 13 (2003), available online at: <<http://www.cis.org.au/Policy/spr03/polspr03-2.pdf>> (visited Nov 22, 2004).

⁵ Paul B. Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 Am U J Int L & Poly 745, 746 (1995). For other works applying public choice theory in the context of international legal issues, see Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 Nw J Int L & Bus 681 (1996); Paul B. Stephan, *Courts, Tribunals, and Legal Unification—The Agency Problem*, 3 Chi J Int L 333 (2002).

⁶ See Ian Brownlie, *Principles of Public International Law* 5 (Oxford 6th ed 2003) (stating that treaties and custom “are obviously the important sources”).

⁷ See notes 2 and 3.

⁸ Setear, 37 Harv Int L J at 147–55 (cited in note 2) (describing the law of treaties). See Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331 (1980) (codifying the law of treaties).

⁹ See Setear, 37 Harv Int L J at 174–211 (cited in note 2); Setear, 37 Va J Int L at 654–721 (cited in note 3); Setear, 40 Va J Int L at 198–206 (cited in note 3).

with three distinct phases. First, potential parties to a treaty, guided by a relatively vague duty to act in good faith, meet in formalized international negotiations.

Second, after these negotiations conclude, representatives from the participating nations decide either to reject the resulting text or to adopt it through an affirmative vote or signature.¹⁰ Adoption here functions differently from signature in the typical domestic contract, particularly because of its inability to upgrade a negotiated text into a fully binding legal instrument.¹¹ Adopting nations must usually only refrain from actions that would undermine the object or purpose of the preliminary text.

The third phase of the treaty process begins when a treaty enters into force, an event ordinarily occurring within a given time after a specified number of nations have gone beyond mere adoption to indicate formally their complete consent to the treaty. Both the threshold number of fully consenting nations—who “ratify” the treaty (if they have previously adopted its text) or “accede to” the treaty (if they have not)¹²—and the requisite interval between the triggering ratification and the initial entry into force are typically elucidated by the relevant treaty. In contrast to the limited obligations flowing from adoption, a party that has ratified a treaty in force is bound to comply fully with all of that treaty’s terms.¹³ Any preconditions attaching to the head of state’s ratification or accession fall within the ambit of domestic law; frequently, the executive branch must exclusively obtain legislative consent before ratification.¹⁴

The law of treaties thus involves three distinct iterations—negotiation, signature, and entry into force—which impose corresponding obligations upon participants to negotiate in good faith, to avoid actions that defeat the treaty’s object or purpose, and to comply in good faith with all treaty terms.

¹⁰ Vienna Convention on the Law of Treaties, art 10 (cited in note 8) (establishing procedures for the authentication of treaty text).

¹¹ “The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.” *Id.*, art 11. However, the signature of a representative serves as consent to be bound only when

“(a) [t]he treaty provides that signature shall have that effect; (b) It is otherwise established that the negotiating States were agreed that signature should have that effect; or (c) The intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.” *Id.*, art 12(1).

¹² See *id.*, arts 14–15 (distinguishing ratification from accession).

¹³ Compare *id.*, art 18 (signing state obliged only to refrain from defeating object and purpose of treaty) with *id.*, art 26 (“treaty in force is binding upon the parties to it and must be performed by them in good faith”).

¹⁴ See Section II.A.

Furthermore, treaty law defines temporal periods with some clarity. Negotiations convene at a particular time and conclude when representatives adopt the treaty text, an act that generally transpires at a discrete moment. The third iteration in the treaty process—entry into force—occurs on a date mentioned in the treaty. The treaty text may also suggest a period for subsequent iterations, as when it specifies that the parties shall decide to renew the treaty after a given interval or allow it to lapse, or when the treaty states that the parties shall regularly meet to evaluate the efficacy of their agreement.¹⁵ The clarity of the relevant behaviors and of their accompanying temporal boundaries enable the treaty process to serve as an especially suitable, practical backdrop for the pursuit of international cooperation and an apt object of academic study.¹⁶

Finally, it bears noting that the typical treaty is in writing and often contains voluminous, highly detailed substantive regulations, as well as rules specifying the temporal boundaries of each stage of consent and the particular form of that consent.¹⁷ This situation differs markedly from that characterizing customary international law.

B. CUSTOM AND THE ITERATIVE PERSPECTIVE

Unlike treaty law, customary international law fails to create a series of temporally distinct, highly structured interactions among nations.¹⁸ Article 38(1)(b) of the Statute of the International Court of Justice states that the International Court of Justice shall apply “international custom, as evidence of a general practice accepted as law.”¹⁹ The second clause of this phrase sets forth

¹⁵ See Setear, 37 Harv Intl L J at 212–27 (cited in note 2). For a description of a set of treaties in which repeated iterations of negotiations yielded repeated treaty modifications reflecting greater and greater international cooperation, see Setear, 40 Va J Intl L at 206–82 (cited in note 3).

¹⁶ See Setear, 37 Va Intl L at 666–75, 721–24 (cited in note 3); Setear, 40 Va J Intl L at 283–99 (cited in note 3) (using ozone treaties to test comparative predictive power of two prominent schools of international relations).

¹⁷ For a discussion of an area of international cooperation that has undergone a number of wholesale revisions while retaining well-specified and detailed regulations throughout, see John K. Setear, *Can Legalization Last?: Whaling and the Durability of National (Executive) Discretion*, 44 Va J Intl L 711 (2004).

¹⁸ For a rational choice perspective on customary law that does not especially emphasize the contrast between treaty law and customary law, see Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 U Chi L Rev 1113, 1172 (1999). For criticisms of customary international law that raise points similar to those raised here, though not through the theoretical lens of the iterative perspective, see Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L Rev 665 (1986); Anthony D’Amato, *Trashing Customary Law*, 81 Am J Intl L 101 (1987) (discussing dilemmas courts face in applying customary international law).

¹⁹ Statute of the International Court of Justice (1945), art 38(1)(b), 50 Stat 1055, 1060.

the two elements of customary international legal rules: a behavioral element involving the widespread observance of a given behavior by a large number of nation-states, and a psychological element involving a self-conscious belief that adherence to the relevant behavior is a matter of international legal obligation rather than entirely a matter of legally unconstrained choice.²⁰

From the iterative perspective, three difficulties distinguish customary international law from laws originating in treaty texts. First, customary international law involves iterations with fluid temporal limits. Second, problems arise in determining whether a nation has consented to a rule of customary international law. Third, articulating the substantive customary rule itself, and accordingly evaluating whether a nation's actual behavior constitutes cooperation with (or defection from) the relevant attempt at international political cooperation, is difficult.

Rules of customary international law lack the lucid temporal boundaries characterizing rules of treaty law. Customary international law features a temporal dimension in requiring that a given practice persist in time²¹ (and across a significant segment of the international community)²² before it becomes elevated to a binding legal rule. However, customary international law manifests no structure within the requisite period of persistent practice, often imposing duties that nations must continually discharge. Examples of customary international legal norms include abstention from the use of force, respect for the diplomatic immunity of accredited representatives and embassy property of foreign nations, and noninterference with freedom of navigation on the high seas.²³ Such situations suggest no natural temporal bounds for iterations. Treaty

²⁰ Goldsmith and Posner, 66 U Chi L Rev at 1116–17 (cited in note 18). The psychological element, more familiarly known as *opinio juris*, suggests some logical difficulties, such as circularity and the need to impute “intentions” to a nation-state, but these are not directly pertinent to the comparison undertaken here.

²¹ See *The Paquete Habana*, 175 US 677, 694 (1900) (“[A] hundred years . . . is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.”); Restatement (Third) of the Foreign Relations Law of the United States § 102 cmt c (1987) (“A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place.”).

²² See Restatement (Third) of Foreign Relations Law § 102 cmt b (cited in note 21) (“[T]here is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become ‘particular customary law’ for the participating states.”).

²³ See *Military and Paramilitary Activities In and Against Nicaragua (Nicar v US)*, 1984 ICJ 392, 424 (Nov 26, 1984) (“Principles such as . . . respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international

law, in contrast, does involve distinct phases—namely negotiation, adoption, and entry into force—and thus at least formally possesses an iterative quality uncharacteristic of the customary international legal process.

The mechanisms for assessing whether a nation has consented to a rule of customary international law also lack the clarity of mechanisms imposed by the law of treaties upon potential adherents to a particular treaty. A nation, it is true, can unambiguously consent to a rule of customary international law by undertaking affirmative actions, supplemented by explicit official statements that legal compulsion drives its actions. Conversely, a nation can clearly signal its opposition to a customary international rule by persistently defying the rule and releasing explicit official statements indicating that its behavior is intended to express disagreement with the rule.

However, a number of intermediate cases, which occur with some frequency, undermine the clarity of consent. Some problems arise from the continuous nature of rules of restraint. Even a proposed rule as apparently quixotic as “refrain from warfare” accurately describes the practice of a majority of nations at most times. While several wars may be in progress around the world at any particular moment, rules are judged on a national, not global, basis, and most nations—save perhaps Vietnam—have been at peace for the vast majority of years since their foundings, even during the violent twentieth century. This observation raises the issue of whether nations that never explicitly intend to protest the development of a rule banning warfare, but occasionally undertake wars, still adhere to peace as a “practice.” Must a nation that desires to signal its consent to a “rule of peace” issue daily bulletins proclaiming that its behavior for that day rests upon its *opinio juris* with respect to that rule?

The ambiguity of silence in the mixed system of practical and psychological consent that constitutes customary international law further hinders international cooperation. Consent to a treaty requires a government formally and affirmatively state its intention to comply with treaty obligations in part (by adoption) or in full (by ratification or accession). However, customary international law allows a nation’s consent to be inferred. When a nation fails to object to an international practice that is accompanied by *opinio juris* on the part of other nations, that nation may be bound to the resulting rule of customary law.²⁴ This principle holds true even when the nation lacks an opportunity to

law, despite the operation of provisions of conventional law in which they have been incorporated.”).

²⁴ See Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in Ronald St. J. Macdonald and Douglas M. Johnston, eds, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* 513, 549 (Martinus Nijhoff 1983) (States “can advance a new rule of general international law, either in concert with other states or unilaterally, simply by evincing a new *opinio individualis juris generalis* If other states do not object, and in fact

announce its views on the given rules. One relatively dramatic example involves a new nation-state, which must typically consent to the entire body of customary international law before entering the international legal realm.²⁵

Customary international law thus suffers from a lack of temporally distinct iterations and from ambiguous mechanisms for indicating formal consent. The final criterion with special relevance to the iterative perspective considers the clarity of the substantive rule itself. A lucid, specific rule eases the process of determining whether a nation is cooperating with the international political endeavor at hand. Customary international law also evinces shortcomings on this count.

Because practice figures so prominently in defining customary rules, any change in such rules can only be effectuated after a period during which neither the old nor the new rule clearly governs. While a new rule articulated in a treaty takes full effect when the treaty enters into force, a new customary international legal rule has no discrete activation date. The new rule of customary international law accretes from the scattered choices of innovative nation-states who “legislate by doing,” gradually shedding their previous practice for the newer one. The innovator rarely generates an instantaneous, universal rush to the new practice; some nations affirmatively resist the implicit suggestion to alter their practices, while others continue their previous silence on the matter. The innovator is accordingly likely to be a violator for some interval, a situation that can perplex other nations pondering an appropriate response. Furthermore, a claim of innovation only becomes distinguishable from an unalloyed violation in retrospect, after one knows whether the “proposed” customary international rule has been widely adopted, and thereby accepted by other nations. This incongruity exacerbates the difficulty of determining a proper response to the innovator’s (or violator’s) deviation from the accepted norm of cooperation. If the British Empire decides to employ the Royal Navy to interdict the slave trade

follow suit [], a new *opinio generalis juris generalis* may grow up, thus bringing about a new rule of general international law.”).

²⁵ See L. Oppenheim, *International Law* § 27 at 31 (Longmans, Green 1st ed 1905) (One of “three conditions for the admission of new members into the circle of the Family of Nations” is that a “[s]tate must . . . expressly or tacitly consent to be bound for its future international conduct by the rules of International Law.”). This passage is reprinted through H. Lauterpacht, ed, *International Law* 44 (Longmans, Green 5th ed 1937) but has been omitted from more recent editions. A more modern perspective is found in Cheng, *Custom: The Future of General State Practice* at 517–18 (cited at note 24) (“An important reason why the existing members of international society wish to retain this right of admission to the international legal order is that they must be given an opportunity of assessing whether the aspiring entity is able and willing to abide by the rules of that legal order [I]nsofar as such an entity is anxious to join the system, it will normally be found that, instead of flaunting its freedom from the restraints of the rules of the system, it will do its best to show how much it is able and willing to abide by them.”).

at a time when such trade has long occurred and when such interdiction in international waters plainly violates the existing understanding of the freedom of the high seas, then one may plausibly characterize the Empire as a flagrant violator of existing custom or a laudable innovator (or both). One cannot be sure for some time whether the innovation will draw enough adherents to constitute a new norm of customary international law.

The unwritten, retrospective nature of customary international law also contributes to the difficulty of judging whether a nation's behavior demonstrates compliance with its obligations under such law. While treaties—agreements ordinarily penned before enactment—are prospectively oriented exercises, customary law derives its norms from the retrospection of observed behavior. To the extent that the prospective, written specification of rules enhances their clarity, compliance with a cooperative norm set forth in treaty law should be easier to determine than compliance with a cooperative norm of customary international law.

C. COMPARING TREATY TO CUSTOM, FROM THE ITERATIVE PERSPECTIVE

When comparing the two principal instruments of international law, treaty and custom, one may reasonably conclude that an iterative process more firmly undergirds the former. Treaty law features iterations with relatively distinct temporal boundaries; possesses clear, formal mechanisms for evaluating whether a nation has consented to certain rules; and boasts a prospective, written format, specifying rules that can serve as touchstones against which to assess the actual behavior of consenting nations. Given that treaties offer this myriad of advantages over custom from the iterative perspective, the executive²⁶ should utilize treaties as the preferred international instrument of cooperation.

II. TREATIES, CUSTOM, AND PUBLIC CHOICE

The iterative perspective is not the only angle from which to examine an executive's choice of international instrument. An alternative point of view—public choice theory—shares a fundamental assumption of actor rationality with the iterative perspective, but public choice theorists embrace a more atomistic view of governments and draw less benign conclusions about the outcome of the relevant process. Public choice theorists argue that groups of actors within government endeavor to maximize their own influence at the expense of other

²⁶ This argument assumes a rational executive acting in the public interest.

groups, both within and without government.²⁷ Bureaucrats, for example, may seek to maximize the budget or influence of their agency, or strive to obtain a lucrative postgovernmental job. Legislators may cater to special interests instead of attempting to convince the median voter that they deserve reelection.²⁸

A public choice analysis of the chief executive's decision to select a given international instrument preliminarily requires that general, theoretical descriptions of political actors be particularized. This Article focuses on the US President. The chief executive likely considers the general welfare of the public as one of a set of interests that also includes reelection, fundraising, and postadministration job prospects or speaking fees. When these personal and public interests diverge, the chief executive will sometimes favor the former. Furthermore, one can assume that the chief executive best advances personal interests when equipped with maximum decision-making autonomy; a recalcitrant Congress and vast, unresponsive bureaucracies can readily thwart presidential initiatives in the United States.²⁹ From a public choice perspective, an actor with market power (in this case, the president) would seek maximum freedom to set the relevant price (here, a bargain with concentrated political interests) without needing to solicit approval from others (notably outside Congress or the judiciary). A chief executive seeking such freedom of action may be described as an "influence-maximizer."

The type of instrument used in affirmatively binding the US to new international obligations significantly informs the degree of presidential

²⁷ For an early work in international relations that includes a discussion of the influence-maximizing perspective adopted here, see Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* 28–33 (Little, Brown 1971).

²⁸ See generally Note, *The Ass atop the Castle: Competing Strategies for Using Campaign Donations to Influence Lawmaking*, 116 Harv L Rev 2610, 2615 n 24 (2003) (citing nine articles that report statistically significant links between contributions and legislative behavior, as well as seven articles reaching the opposite conclusion and finding little or no link between interest group contributions and legislators' votes).

²⁹

Beguiled by their conviction that dispassionate analysis could trump the reigning orthodoxy, the Clinton appointees were unprepared for the rearguard action waged by career officers and bureaucrats in the Defense Department. . . . Senior officers, aided by civilian counterparts and conservatives in the Congress, stymied any momentum towards innovation and, when no high-level officials took the time to defend the process, the [1993 Nuclear Posture Review] reached conclusions which did little to alter Cold War precepts.

James R. Holmes and Janne E. Nolan, *Render unto Caesar: Bureaucracy and Nonproliferation after the Iraq War?*, 28 Fletcher F World Aff 73, 84–85 (2004); Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 83 Pol Sci Q 419, 424 (1968) ("At the beginning of his administration [John Quincy] Adams had proposed an ambitious legislative program; Congress had no intention of letting the President dictate what legislation was necessary, and, accordingly, had ignored every one of his major recommendations.") (footnote omitted).

influence. The president usually wields considerable control over policy instruments that set US positions on customary international law, but ordinarily shares control with the legislature when using treaty law to encapsulate official policy. Furthermore, courts more readily defer to executive assertions of customary law than to executive interpretations of treaty provisions.³⁰ On balance, then, an influence-maximizing president should choose customary law over treaty law.

³⁰ The Supreme Court, in interpreting the customary international legal rules of property expropriation and the “act of state” doctrine that has developed through the custom of US courts interpreting the actions of foreign governments, has stated:

[S]erious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.

Banco Nacional de Cuba v Sabbatino, 376 US 398, 432–33 (1963).

Curtis Bradley argues in favor of this additional deference:

[T]here are good policy reasons for judicial deference to the executive branch. Customary international law is very fluid and amorphous, making the executive branch’s expertise and access to information especially important. In addition, the formation and evolution of customary international law can be influenced by executive branch statements and actions. Indeed, the ability of the United States to influence a change in customary international law may depend on executive branch flexibility in interpreting the requirements of this law.

Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 Va L Rev 649, 708–09 (2000).

For instances in which the Supreme Court, by way of contrast, rejected the executive branch’s interpretation of treaties, see David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U Pa L Rev 1353, 1397–98 n 187 (1989) (listing cases).

One should be well aware, however, that courts give the executive a good deal of deference in the interpretation of *any* international law, including treaties and even relevant statutes. See *Sumitomo Shoji America, Inc v Avagliano*, 457 US 176, 184–85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”); David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L Rev 953, 954 (1994) (“Treaty interpretation is bankrupt because of unbridled deference” to the wishes of the executive branch.); Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 Am U J Intl L & Poly 559, 583 (1996) (“[T]he Court shows such great deference to executive interpretation of both statute and treaty, that effective judicial review is all but illusory.”).

A. TREATIES, THE CONSTITUTION, AND THE EXECUTIVE AS INFLUENCE-MAXIMIZER

Article II of the US Constitution enumerates presidential powers and contains the “Treaty Clause,” which establishes 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”³¹ Treaty law thus requires legislative participation, and the Treaty Clause’s supermajority provision accords increased importance to the Senate’s views relative to the case of ordinary legislation, which becomes law with only majority approval from each house.

The US president has sought the Senate’s advice and consent on a wide array of international agreements. In fact, international accords concerned with national security (such as the North Atlantic Treaty or nearly all arms control treaties)³² and the environment (such as the Montreal Protocol or the International Convention for the Regulation of Whaling) have almost exclusively traveled the Article II preratification pathway.³³ The Senate’s likely or apparent refusal to render advice and consent has not deterred the president from referring such agreements to the senior chamber. Presidents have, for example, gamely forwarded human rights agreements to the Senate despite that chamber’s repeated refusal to act on such accords.³⁴ Presidents have also paid for their

³¹ US Const, art II, § 2, cl 2.

³² See 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 S5, S26–27 (2002).

³³ See id at S32.

³⁴ Sarah Cleveland provides a variety of examples:

The Senate may refuse to consent to international agreements that the President has negotiated and signed, as in the infamous case of the Versailles Treaty. This tension has manifested itself more recently with the Senate’s refusal to ratify many human rights treaties. The Genocide Convention, for example, was signed and introduced to the Senate by President Truman in 1949. The treaty languished for nearly four decades, despite renewed requests for ratification by the Nixon and Carter Administrations, before the Senate finally gave its consent in 1988. The Senate similarly declined to ratify conventions relating to forced labor and women’s rights that were introduced by the Kennedy Administration. The Torture Convention, the International Covenant on Civil and Political Rights (ICCPR) and the Race Discrimination Convention were all introduced to the Senate by the Carter Administration, but Senate consent to these instruments was not forthcoming until the 1990s. The Senate has rendered the United States anomalous in the world community by continuing to withhold consent to the Convention to Eliminate All Forms of Discrimination Against Women and the Convention on the Rights of the Child. The Senate also has declined to consent to the American Convention on Human Rights.

Sarah H. Cleveland, *Crosby and the “One-Voice” Myth in U.S. Foreign Relations*, 46 Vill L Rev 975, 985–86 (2001) (footnotes omitted).

decisions to employ the Article II process on national security matters such as the Treaty of Versailles and the Comprehensive Test Ban Treaty, both of which the Senate defeated.³⁵ In the field of maritime law, President Clinton submitted the Law of the Sea Convention to the Senate during his first term, and the proposal has remained dormant since.³⁶

The president has also sometimes bypassed the Treaty Clause.³⁷ In some instances, Congress has granted the president advance authority to negotiate a treaty, with ratification contingent on the majority vote of both legislative houses—a procedure akin to that used to pass ordinary legislation. A textualist would note that such agreements almost invariably involve tariffs or taxes, and that Article I, Section 7 of the US Constitution states: “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”³⁸ However, some recent agreements circumventing the Article II process have dealt with nontariff barriers to trade. Textualists seeking support for this newer subject matter would presumably invoke Article I, Section 8, which establishes that “[The Congress shall have power] To regulate Commerce with foreign Nations.”³⁹ Given these constitutional provisions, federal courts hearing challenges to the North American Free Trade Agreement (“NAFTA”) have not invalidated the bicameral majority vote pathway to ratification. Although this procedure utilizes a different power-sharing structure from the Treaty Clause, it retains the principle of shared power between the executive and legislature branches.

The bicameral majority vote procedure, of which “fast-track” trade treaties comprise a subset, reflects a highly intricate power-sharing arrangement. In the fast-track schema, Congress first lays broad contours for a future agreement’s subject matter. Several of its members then officially join the US delegation negotiating the agreement. At some later, fixed time, the president gives Congress notice of his intention to sign the agreement, and within a certain period after doing so, presents to both houses a statute incorporating the treaty’s text. Congress caps this process by voting on the statute, which it may not amend. With their drafters presumably conscious of the Constitution’s “advice

³⁵ Robert H. Ferrell, *Woodrow Wilson and World War I: 1917–1921* at 156–59 (Harper & Row 1985) (Treaty of Versailles); Angelique R. Kuchta, Comment, *A Closer Look: The U.S. Senate’s Failure to Ratify the Comprehensive Test Ban Treaty*, 19 Dickinson J Intl L 333 (2001) (Comprehensive Test Ban Treaty).

³⁶ Setear, 31 J Legal Stud at S6 (cited in note 32).

³⁷ For a rational choice analysis of the President’s choice of a treaty’s preratification pathway, see *id.*

³⁸ US Const, art I, § 7, cl 1.

³⁹ US Const, art I, § 8, cl 3.

and consent” provision and international law’s reference to “ratification” by the head of state, fast-track agreements specify that the Congress “approves” the agreement in question, and that the president may “accept” the agreement once it enters into force in the international realm.⁴⁰ Such statutes, like those accompanying the World Trade Organization (“WTO”) agreement,⁴¹ are styled as implementing legislation, with provisions declaring the agreement null and void when its terms contravene US law.⁴²

The need for legislative consent from either a unicameral supermajority or a bicameral majority places a significant formal restraint on the president’s discretion. The bicameral majority vote process even mandates that the president receive statutory authorization from Congress before proceeding with treaty negotiations. If all treaties required resort to one of these preratification pathways, an influence-maximizing president would understandably select customary international law as the superior instrument for effecting international policy; as I argue in the next Section, the legislative constraints on the president’s use of customary law are minimal.

Sometimes, however, the president ratifies an international agreement, or treats it as binding, *without* consulting either house of Congress. Emergency situations—notably wars—foster such accords. For example, before official US belligerency in World War II, Franklin D. Roosevelt independently made a bases-for-destroyers bargain under which Britain received fifty nearly obsolete American destroyers and US forces occupied and administered British bases.⁴³ The president also routinely enters into bilateral investment treaties (“BITs”) without eliciting congressional support.⁴⁴ An influence-maximizing executive would prefer forming such agreements, which impose no apparent constraint on his freedom of action, as opposed to those requiring legislative consent.

⁴⁰ See Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 Geo Wash J Int L & Econ 687 (1996).

⁴¹ Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Apr 15, 1994), 1867 UNTS 3 (1995).

⁴² Uruguay Round Agreements Act (1994), § 102(a)(1), Pub L No 103-465, 108 Stat 4809, 4815 (codified at 19 USC § 3512(a)(1) (2000)) (“No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”). See also William R. Sprance, *The World Trade Organization and United States’ Sovereignty: The Political and Procedural Realities of the System*, 13 Am U Int L Rev 1225 (1998).

⁴³ See Aaron Xavier Fellmeth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935–1941*, 3 Buff J Int L 413, 467–80 (1996–97); Quincy Wright, *The Transfer of Destroyers to Great Britain*, 34 Am J Int L 680 (1940); Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 Am J Int L 569 (1940).

⁴⁴ See Setear, 31 J Legal Stud at S25 (cited in note 32).

Furthermore, federal courts have typically recognized the president's power to enter into important agreements without Congress' participation, even when such agreements ostensibly also encroached into the courts' domain and directly affected ongoing litigation. In *United States v Pink*,⁴⁵ the Supreme Court upheld the termination of claims in connection with the Litinov Agreement recognizing the Soviet Union, despite the fact that the president never submitted the Agreement to either chamber of the Congress. In *Dames & Moore v Regan*,⁴⁶ the Court upheld an executive agreement—formed without congressional input—that terminated ongoing claims against Iran in exchange for the release of US hostages. These cases narrowly apply only to executive agreements resolving claims against foreign governments, but they nonetheless demonstrate the Supreme Court's deference to executive agreements reached without Congress' support—even those interfering with the courts' jurisdiction.

However, treaty law in general significantly constrains the president's ability to commit the United States to a particular endeavor of international cooperation. The Constitution stipulates that the president must obtain support from a two-thirds majority of the Senate before ratifying a treaty.⁴⁷ The president actually possesses greater discretion than might be inferred from the Constitution, but he still frequently refers treaties to Congress and sometimes suffers resounding defeats at its hands.

B. CUSTOMARY LAW, THE CONSTITUTION, AND THE EXECUTIVE AS INFLUENCE-MAXIMIZER

Because the executive controls most levers of national practice relevant to the establishment of customary international law, but shares power with Congress in making treaty law, an influence-maximizing president should favor customary international law as an instrument of policy.

At a cursory glance, the US Constitution appears to give the Congress primacy in the formulation of all manifestations of national policy at and outside US borders. Article I of the Constitution vests Congress with the power to regulate commerce with foreign nations,⁴⁸ establish rules of naturalization,⁴⁹ and define and punish high-seas piracy or any other offense against "the Law of Nations."⁵⁰ Congress, rather than the president, has authority to declare war,

⁴⁵ 315 US 203, 229 (1942).

⁴⁶ 453 US 654, 679 (1981).

⁴⁷ US Const, art II, § 2, cl 2.

⁴⁸ US Const, art I, § 8, cl 3.

⁴⁹ US Const, art I, § 8, cl 4.

⁵⁰ US Const, art I, § 8, cl 10.

grant letters of marque, and define reprisal.⁵¹ Congress is clearly the patron of the armed forces, with the power to “raise and support Armies”⁵² and to “provide and maintain a Navy.”⁵³ It also possesses the power to “make Rules for the Government and Regulation of the land and naval Forces.”⁵⁴ The executive of course serves as commander in chief.⁵⁵ In addition, only the president can, subject to the Senate’s advice and consent, “make” treaties,⁵⁶ and, subject to a simple majority vote of the Senate, appoint “Ambassadors, other public Ministers and Consuls.”⁵⁷ The president also “shall receive Ambassadors and other public Ministers.”⁵⁸

If the Constitution’s framers conferred this preponderance of formal regulatory powers upon Congress in order to give the national legislature an enduring primary role in the conduct of foreign policy, however, their expectation has not achieved fruition. Congress retains some influence on foreign policy through the powers of textual specification (chiefly statutory authorizations), including control of appropriations. But the day-to-day administrative responsibilities entrusted to the executive have, over the centuries, effectively given the president primacy in the formulation and conduct of foreign policy.

Such primacy is especially pronounced in the formulation of customary international law. The instruments most relevant to this process are a nation’s diplomatic corps and its armed forces, both of which are readily controlled by the president. The most prominent objects of customary international law have traditionally been the law of the sea, the laws of war, the law of recognition of a nation, and the laws of diplomatic and consular immunity. The law of the sea (including the apprehension of pirates) and the laws of war rely crucially upon the practices adopted by a nation’s navy and army, respectively.⁵⁹ As commander

⁵¹ US Const, art I, § 8, cl 11.

⁵² US Const, art I, § 8, cl 12.

⁵³ US Const, art I, § 8, cl 13.

⁵⁴ US Const, art I, § 8, cl 14.

⁵⁵ US Const, art II, § 2, cl 1.

⁵⁶ US Const, art II, § 2, cl 2.

⁵⁷ Id.

⁵⁸ US Const, art II, § 3.

⁵⁹ See A. R. Thomas and James C. Duncan, eds, *73 International Law Studies: Annotated Supplement to The Commander's Handbook on the Law of Naval Operations* 297 (Naval War College 1999) (“The customary international law of armed conflict derives from the practice of military and naval forces in the field, at sea, and in the air during hostilities.”); James C. Duncan, *A Primer on the Employment of Non-Lethal Weapons*, 45 *Naval L Rev* 1, 52 (1998) (“Although customary international law may appear to remain constant, it does slowly change to incorporate new battlefield practices of warring land, naval and air forces.”). The United States employs its navy

in chief, the president effectively controls national policies relating to these standard objects of customary international law.

The law of recognition of a nation and the laws of diplomatic and consular immunity depend upon the practice of a nation's diplomatic corps, an entity for which the president possesses administrative responsibility.⁶⁰ The recognition of governments is considered an almost exclusively presidential function, both for reasons of administrative practicality and because of the constitutional provision stating that the president "shall receive Ambassadors and other public Ministers."⁶¹ Once officially received, such foreign diplomats are deemed the authorized representatives of a recognized nation-state. Furthermore, the laws of diplomatic and consular immunity, which govern how foreign nations treat official US representatives abroad and how the United States treats official representatives of other nations during their stay in the United States, are under the nearly plenary authority of the Department of State. As with the president's choice of a preratification pathway for treaties, the courts have not intervened on Congress's behalf in any disputes between the legislature and the executive over presidential authority.

III. IS CUSTOM OR TREATY A MORE PROMINENT INSTRUMENT OF INTERNATIONAL POLICY FOR THE UNITED STATES?

The iterative perspective predicts that the executive (acting as an agent for the entire nation and seeking efficient international cooperation) will use treaties to pursue international cooperation, while the public choice perspective posits that an influence-maximizing executive (guarding its own interests and especially preserving its own freedom of action) will employ customary law. This Section argues that empirical observation demonstrates the primacy of treaties as instruments of international cooperation, thereby supporting the iterative perspective over the public choice perspective.

A. TREATY AND CUSTOM

Any effort to determine whether custom or treaty is the primary instrument of international cooperation for the United States entails considerable subjectivity. Additionally, in the context of this particular inquiry,

to enforce Freedom of Navigation by sailing warships through areas where the United States believes another state is making an excessive claim. See William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship between Law and Politics*, 19 *Hastings Intl & Comp L Rev* 259 (1996).

⁶⁰ US Const, art II, § 2, cl 2.

⁶¹ US Const, art II, § 3.

the dichotomy between custom and treaty may not allow for an entirely precise appraisal of the public choice perspective.

With regard to subjectivity, it bears note that no precise measure of primacy can be readily employed. One could use a quantitative approach for treaties by simply calculating how many of them exist. But a minor modification to a status-of-forces agreement should ordinarily not receive the same weight as NAFTA. Furthermore, even if one did count the number of treaties, constructing a corresponding objective measure on the customary law side of the balance would be untenable since customary rules are by their nature not aggregated into discrete instruments. Alternatively, one could count the number of rules contained in all treaties signed within a set period and then compare that sum to the number of customary rules in force during that period. Even ignoring practical problems, such as the time necessary to tally the rules in thousands of current treaties, one would be hard pressed to find a suitable means of counting customary legal rules. Such rules are formulated in a decentralized fashion, with imprecise contours, and are thus not susceptible to quantification. The effort to judge whether treaty or custom is the primary instrument of international cooperation for the United States thus inherently involves a substantial amount of subjectivity.

As to whether drawing the line precisely between custom and treaty is the fairest test of the public choice perspective, the difficulty arises because executive discretion is quite high in sole-executive agreements and much lower in agreements involving congressional participation, even though *both* categories involve treaties as the instrument in question. From the iterative perspective, the important characteristics involve precision, formality of process at the international level, centralization of the rules' reification, and so on—characteristics with respect to which the divide between custom and treaty accurately captures a break point in the relevant qualities. From the public choice perspective, however, an influence-maximizing executive might classify customary law *and* sole-executive agreements in one category while placing agreements involving congressional participation in another. Customary law features almost unfettered executive discretion while sole-executive agreements allow the president to act without seeking support from another branch of government. In contrast, agreements premised on unicameral or bicameral congressional approval sharply circumscribe executive discretion. After preliminarily accepting the custom/treaty divide, I therefore examine a bifurcation between custom and sole-executive agreements, on the one hand, and agreements with congressional approval, on the other.

If one considers the line between custom and treaty to be the relevant division, then treaty law appears to be the predominant mode employed by the United States to effect international policy. Tangible and controversial manifestations (or causes) of globalization, like NAFTA and the agreements

constituting the WTO, have been enshrined in the treaty form. The Canada-US Free Trade Agreement preceding NAFTA was likewise a treaty.⁶² The General Agreements on Tariffs and Trade, predating the WTO, were certainly written instruments, even if their status as a binding treaty remained ambiguous until their incorporation into the WTO's formal system.⁶³ Tax treaties and investment treaties also contribute to international economic regulation.⁶⁴ The regulation of intellectual property, which constitutes a crucial component of globalized businesses, occurs through a series of institutions and agreements embodied in treaties.⁶⁵ Except for the treatment of expropriation in situations not covered by treaty, few customary laws apply to national policies regarding economic activities.

In the environmental realm, customary law governs monetary liability for transboundary pollution and has resulted in virtually no cases.⁶⁶ Treaty law governs international whaling, the production and consumption of ozone-depleting substances, the discharge of oil into the ocean from vessels, and the transportation of hazardous materials across international borders and on the

⁶² Canada-United States Free Trade Agreement (Jan 2, 1988), 27 ILM 281; see also North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (Dec 17, 1992), 32 ILM 289 (1993).

⁶³ General Agreement on Tariffs and Trade (Oct 30, 1947), 61 Stat A11; see David Kennedy, *Receiving the International*, 10 Conn J Intl L 1, 12 (1994) (“[W]hat has distinguished the international trade regime is the vague, loose, open-textured nature of its legal regime. Maybe the GATT is an international institution, maybe it is not; maybe the GATT is a binding treaty, maybe not.”). But see John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 Wash & Lee L Rev 1227, 1269 (1992) (“Despite some occasional misguided or misinformed statements to the contrary, the GATT is a binding treaty obligation accepted by the nations which are Contracting Parties.”).

⁶⁴ See generally David B. Oliver, *The David R. Tillinghast Lecture: Tax Treaties and the Market-State*, 56 Tax L Rev 587 (2003); Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Nw J Intl L & Bus 327 (1994).

⁶⁵ See, for example, Agreement on Trade-Related Aspects of Intellectual Property Rights (Apr 15, 1994), 1869 UNTS 299 (1995); Universal Copyright Convention as revised at Paris (July 24, 1971), 25 UST 1341 (1974); World Intellectual Property Organization: Copyright Treaty (Dec 20, 1996), 36 ILM 65 (1997). For general reviews of international intellectual property law, see Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 Yale J Intl L 1 (2004); Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 Geo Wash Intl L Rev 277 (2001).

⁶⁶ See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L J 931, 932–33 (1997) (“The customary international law of transboundary pollution . . . is based on a very small number of inconclusive adjudications and a mountain of official declarations and unofficial commentary seeking to make something out of them.”).

high seas.⁶⁷ These are intricate, repeatedly amended treaties that govern the behavior of dozens and dozens of nations in the vast international commons.

A mix of customary law and treaty law applies in security matters. The law of humanitarian intervention is driven by customary law, as no treaty exists to guide a nation considering whether to send its armed forces to a turbulent country to protect refugees, or to guard food shipments or humanitarian aid workers.⁶⁸ While the North Atlantic *Treaty* constituted the North Atlantic Treaty Organization (“NATO”),⁶⁹ some of NATO’s recent post-Cold War forays⁷⁰ have contributed to evolving customs.⁷¹ The laws for conducting war were customary for many centuries, but they are now embodied in the comprehensive combinations of the Hague and Geneva Conventions.⁷² The laws for justifying a

⁶⁷ International Convention for the Regulation of Whaling (Dec 2, 1946), 62 Stat 1716 (1948); Vienna Convention for the Protection of the Ozone Layer (Mar 22, 1985), 1513 UNTS 293 (1988); Montreal Protocol on Substances that Deplete the Ozone Layer (Sept 16, 1987), 1522 UNTS 3 (1989); International Convention for the Prevention of Pollution of the Sea by Oil (May 12, 1954), 12 UST 2989 (1961); Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and Their Disposal (Mar 22, 1989), 28 ILM 649; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (May 3, 1996), 35 ILM 1406.

⁶⁸ See generally Leslie A. Burton, *Kosovo: To Bomb or Not to Bomb? The Legality is the Question*, 7 Ann Surv Intl & Comp L 49, 54–61 (2001); Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 Cal W Intl L J 203, 258–59 (1974).

⁶⁹ See, for example, North Atlantic Treaty (Apr 4, 1949), 63 Stat 2241; Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces (June 19, 1951), 4 UST 1792 (1953); Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey (Oct 17, 1951), 3 UST 43 (1952); Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany (Oct 23, 1954), 6 UST 5707 (1955). For a complete list of protocols and amendments, see US Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003* at 432 (2003).

⁷⁰ NATO has intervened militarily in the past ten years in Bosnia-Herzegovina, Croatia, and the province of Kosovo in the Federal Republic of Yugoslavia.

⁷¹ See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 Am J Intl L 757, 785 (2001) (“The fluidity of custom is demonstrated by the present debate over whether NATO’s intervention in Kosovo has formed the basis for an emerging customary right to unilateral humanitarian intervention.”); see also Herman Reinhold, *Target Lists: A 1923 Idea with Applications for the Future*, 10 Tulsa J Comp & Intl L 1, 38 (2002) (“[T]he U.S. and NATO . . . can build international law through practice and custom, while encouraging others to adopt the same rules. . . . The U.S. and NATO are in the best position to build positive custom in the international Law of War.”).

⁷² For the Geneva Conventions, see Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Aug 12, 1949), 6 UST 3114 (1955); Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (Aug 12, 1949), 6 UST 3217 (1955); Convention Relative to the Treatment of Prisoners of War (Aug 12, 1949), 6 UST 3316 (1955); Convention Relative to the Protection of Civilian Persons in Time of War (Aug 12, 1949), 6 UST 3516 (1955).

war were likewise customary but have to some extent been replaced by the provisions of the United Nations Charter.⁷³

Arms control has proceeded through a multitude of intricate agreements. Complex bilateral treaties with the Soviet Union have been transformed into complex multilateral agreements. The Anti-Ballistic Missile Treaty continues as a focal point of debate in connection with the possibility of a National Missile Defense system.⁷⁴ The international effort to prevent the spread of weapons of

On the Hague Conventions, see Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 *Air Force L Rev* 1, 45 (2000) (“The conventions adopted in 1899 and 1907 at the Hague provide, to this day, the backbone of international regulation governing the means and methods of warfare.”). The relevant Hague conventions are Convention (I) Regarding the Pacific Settlement of International Disputes (July 29, 1899), 32 Stat 1779 (1901–03); Convention (II) with Respect to the Laws and Customs of War on Land (July 29, 1899), 32 Stat 1803 (1901–03); Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (July 29, 1899), 32 Stat 1827 (1901–03); Declaration Respecting the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases (July 29, 1899), 187 CTS 453; Declaration Respecting the Prohibition of Discharge of Projectiles from Balloons (July 29, 1899), 32 Stat 1839 (1901–03); Declaration Respecting the Prohibition of the Use of Expanding Bullets (July 29, 1899), 187 CTS 459; Convention (I) for the Pacific Settlement of International Disputes (Oct 18, 1907), 36 Stat 2199 (1909–11); Convention (II) Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Oct 18, 1907), 36 Stat 2241 (1909–11); Convention (III) Relative to the Opening of Hostilities (Oct 18, 1907), 36 Stat 2259 (1909–11); Convention (IV) Respecting the Laws and Customs of War on Land (Oct 18, 1907), 36 Stat 2277 (1909–11); Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Oct 18, 1907), 36 Stat 2310 (1909–11); Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (Oct 18, 1907), 205 CTS 305; Convention (VII) Relating to the Conversion of Merchant Ships into War-ships (Oct 18, 1907), 205 CTS 319; Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines (Oct 18, 1907), 36 Stat 2332 (1909–11); Convention (IX) Concerning Bombardments by Naval Forces in Time of War (Oct 18, 1907), 36 Stat 2351 (1909–11); Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (Oct 18, 1907), 36 Stat 2371 (1909–11); Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Oct 18, 1907), 36 Stat 2396 (1909–11); Convention (XII) Relative to the Creation of an International Prize Court (Oct 18, 1907), 205 CTS 381; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War (Oct 18, 1907), 36 Stat 2415 (1909–11); and Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons (18 October 1907), 36 Stat 2439 (1909–11).

⁷³ Indicative of the ongoing balance between treaty law and customary law is Article 2(4) of the UN Charter, which explicitly and innovatively prohibits the use or threat of armed force against another state, and Article 51, which preserves the “inherent” right of self-defense long recognized in customary international law.

⁷⁴ Treaty on the Limitation of Anti-Ballistic Missile Systems (May 26, 1972), US–USSR, 23 UST 3435; see Robert F. Turner, *National Missile Defense and the 1972 ABM Treaty*, 36 *New Eng L Rev* 807 (2002).

mass destruction depends in part upon the Chemical Weapons Convention,⁷⁵ the Biological Weapons Convention,⁷⁶ and the Nuclear Non-Proliferation Treaty.⁷⁷

With respect to human rights, most evidence points to custom as the primary US instrument of international policy. Although the United States could choose to be bound by the existing treaty law, a combination of presidential reluctance and senatorial recalcitrance has assured that the United States is bound to only a few multilateral human rights treaties. The US State Department's listing of "Treaties in Force" for the United States shows the International Covenant on Civil and Political Rights as the only multilateral treaty in its "Human Rights" category.⁷⁸ Customary law thus remains the primary instrument of US policy in the human rights arena.

On balance, then, it would appear that treaty law is the primary instrument of international policy for the United States in the realms of security, economics, and the environment, while custom serves as the principal instrument in the human rights realm. While these various categories might in some sense be incommensurable, the overall picture demonstrates that treaty law dominates international cooperative efforts in the United States.

B. CONGRESSIONAL PARTICIPATION VERSUS CONGRESSIONAL NONPARTICIPATION

The picture is somewhat more complex if, in deference to the cleavage implied by the analysis of an influence-maximizing executive, we place customary law and sole-executive agreements together on one side of the balance with Article II treaties on the other. The sole-executive agreement accounts for a tremendous percentage of US treaties.⁷⁹ Even in the form of bilateral investment treaties or agreements reducing a variety of tariffs, they provide the alert executive with the opportunity to bargain with concentrated and wealthy interest groups. However, many of these agreements possess a

⁷⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Jan 13, 1993), 1974 UNTS 45 (1997). For a summary of the chemical weapons regime, see Lilly R. Sucharipa-Behrmann and Thomas M. Franck, *Preventive Measures*, 30 NYU J Intl L & Pol 485, 523–24 (1998).

⁷⁶ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and On Their Destruction (Apr 10, 1972), 26 UST 583 (1975).

⁷⁷ Treaty on the Non-Proliferation of Nuclear Weapons (July 1, 1968), 21 UST 483 (1970).

⁷⁸ *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003* at 394 (cited in note 69).

⁷⁹ Since 1939, sole-executive agreements have accounted for more than 90 percent of the United States' international agreements. Congressional Research Service, Library of Congress, 106th Cong, *Treaties and Other International Agreements: The Role of the United States Senate* 38–41 (2001).

highly limited scope, having been made pursuant to a narrow, statutory delegation from Congress. This factor mitigates the degree to which an influence-maximizing executive would consider such agreements to allow him great discretion.⁸⁰ Additionally, the politically high-profile agreements—NAFTA, the WTO, the Kyoto Protocol—remain multilateral treaties that have been (or would be) submitted to at least one chamber of Congress. On balance, I believe (though with less certainty than was the case when custom versus treaty was the dividing line) that those agreements involving congressional participation still account for the lion's share of US policymaking in the international realm in comparison to the legislature-free process occurring after the president formulates a rule of customary international law or signs a sole-executive agreement. In any case, I am confident that the continuing prevalence of congressional consultation provides a puzzle that the influence-maximizing model explains poorly.

IV. CONCLUSION

This paper has examined whether US behavior in the use of international law is more consistent with an iterative or an influence-maximizing perspective on national executive decision making. The paper has concluded that the iterative perspective suggests the national executive will favor treaties over custom as the preferred form for international cooperation, while the influence-maximizing perspective suggests a preference for custom—and that the evidence, at least for the United States in the latter half of the twentieth century, is more consistent with the predictions of the iterative perspective. Avenues of further inquiry might include a comparative analysis of the incentives facing executives in other nation-states, as well as an analysis of other factors that might enter into a treaty-versus-custom choice.

⁸⁰ Such a statement assumes that Congress is inclined to become aware of the situation and accordingly to withdraw the delegated authority.