

11-1-1998

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EXECUTIVE AGREEMENTS AND THE (NON)TREATY POWER

MICHAEL D. RAMSEY*

Executive agreements have played an increasingly important role in the foreign affairs of the United States in the twentieth century. These international agreements, sometimes involving obligations of great magnitude, are concluded solely by the President, without the assent of two-thirds of the Senate or a majority of Congress, and have been given the force of law domestically. Although the presidential power to enter into executive agreements has been upheld by the Supreme Court, the authority for executive agreements under the original understanding of the Constitution is commonly thought to be at best uncertain and perhaps entirely absent. In this article, Professor Ramsey concludes that the original constitutional design did include an independent presidential power to undertake international obligations through "nontreaty" agreements, but that this presidential authority was limited in two significant ways. First, in the original view, the power to conclude executive agreements extended only to minor and temporary matters. Second, executive agreements, unlike treaties, were not originally understood to be the supreme law of the land of their own force; rather, they required legislative implementation. Thus, as an original matter, Professor Ramsey concludes that although the President has the independent authority to enter minor agreements, the President does not have the sole authority to bind the United States to significant international obligations or alter domestic law without some form of legislative participation.

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Thanks to Michael Rappaport, John Yoo, Stuart Benjamin, Frank Partnoy, Arti Rai, and Christopher Wonnell for helpful comments.

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I. INTRODUCTION

Has the U.S. President the constitutional authority, without the benefit of any action by the Senate or House, to conclude international agreements on behalf of the United States? This power

has been widely assumed in theory¹ and widely exercised in practice,² but lacks a thorough explanation of its foundations. The U.S. Constitution, of course, grants the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"³ and provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."⁴ Undertakings such as the North American Free Trade Agreement, which have not commanded the assent of two-thirds of the Senate, have produced a vigorous debate as to whether the legislative power granted to the House and Senate together⁵ provides an alternate route for the approval of international agreements by a majority vote of the two chambers.⁶ The U.S. Supreme Court has also recognized a third avenue: by virtue of the President's independent power in foreign affairs, the President acting alone may enter into international obligations having the force of law.⁷ The constitutional viability of this third avenue has largely escaped detailed consideration.

The matter is one of constitutional and diplomatic significance. Important international commitments have been established on the independent authority of the President: the *de facto* U.S. protectorate over the Dominican Republic in 1905,⁸ the agreements leading to the diplomatic recognition of the Soviet Union in 1933,⁹

1. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1987) [hereinafter "RESTATEMENT (THIRD)"]; LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 219-24 (2d ed. 1996); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 51-53 (1993).

2. See HENKIN, *supra* note 1, at 219 ("Without the consent of the Senate (or authorization or approval by both houses of Congress), Presidents from Washington to Clinton have made many thousands of [international] agreements, differing in formality and importance, on matters running the gamut of U.S. foreign relations.").

3. U.S. CONST. art. II, § 2.

4. *Id.* art. VI.

5. See *id.* art. I, §§ 1, 8.

6. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 804 (1995); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1225-28 (1995).

7. See *Dames & Moore v. Regan*, 453 U.S. 654, 682-83 (1981); *United States v. Pink*, 315 U.S. 203, 229-30 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

8. See *Exchange of Notes at Santo Domingo Regarding Collection and Disbursement of Customs Revenues*, Mar. 31-Apr. 1, 1905, U.S.-Dom. Rep., 7 INTERNATIONAL AGREEMENTS OF THE UNITED STATES 1776-1949, at 193 (Charles I. Bevans ed., 1971).

9. See *Exchange of Notes at Washington Regarding General Relations*, Nov. 16,

the "destroyers-for-bases" arrangement with Great Britain in 1940,¹⁰ the Yalta Agreement in 1945,¹¹ and the U.S. undertakings relating to the peace settlement between Egypt and Israel¹² are a few of the more prominent examples. In more recent years, President Clinton's 1997 understanding with Russia regarding NATO expansion into Eastern Europe was reached (amid some criticism) without submission to the House or Senate.¹³ Thus the independent executive agreement presents a constitutional issue of some practical magnitude.¹⁴

This Article considers whether it is possible to identify an "executive agreement"¹⁵ power based upon the original understanding of the Constitution. As set forth below, I conclude that the original understanding did include an independent presidential power to undertake international obligations. I conclude, however, that this presidential power was limited in two respects. First, it extended only to minor, short term agreements. Second, unlike treaties, international obligations undertaken by the President alone lacked the status of law in the domestic legal system, and thus required legislative enactment for domestic

1933, U.S.-U.S.S.R., 11 Bevans 1249 [hereinafter Litvinov Agreement].

10. See Exchange of Notes at Washington Regarding Leasing of Naval Air Bases, Sept. 2, 1940, U.S.-U.K., 54 Stat. 2405; see also Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484 (1940) (advising that the President had the authority to make an executive agreement to exchange destroyers for bases).

11. See Report Signed at Crimea (Yalta) Conference, Feb. 11, 1945, U.S.-U.K.-U.S.S.R., 59 Stat. 1823, 3 Bevans 1005 [hereinafter Yalta Agreement].

12. See Memorandum of Agreement Regarding Assurances, Consultations, and U.S. Policy on Middle East Peace, Feb. 27, 1976, U.S.-Isr., 32 U.S.T. 2150; Memorandum of Agreement Regarding Middle East Peace, Feb. 27, 1976, U.S.-Isr., 32 U.S.T. 2160.

13. See Henry Kissinger, Editorial, *The Dilution of NATO*, WASHINGTON POST, June 8, 1997, at C9.

14. See Covey Oliver, *Speculations About the Future of Sole Executive Agreements in the Twenty-First Century*, 3 U.C. DAVIS J. INT'L L. & POL'Y 191, 192 (1997) (suggesting that presidential authority to make executive agreements may become a substantial point of interbranch controversy in the future).

15. Terminology is important but unfortunately not standardized in this area. I use the term "executive agreement" to refer to an international agreement concluded by the President without explicit approval or authorization by either two-thirds of the Senate or a majority of the two Houses. I use the term "congressional-executive agreement" to mean an international agreement approved by a majority of both Houses (but not two-thirds of the Senate) and "Article II treaty" to indicate an international agreement approved by two-thirds of the Senate as set forth in Article II, Section 2 of the Constitution. By "international agreement," I mean any understanding between the United States and a foreign nation, regardless of the domestic procedure by which it is approved.

implementation.¹⁶

This view is contrary to the conclusions of both sides of the conventional debate regarding executive agreements. On the one hand, originalist writings, most prominently associated with Raoul Berger, deny that executive agreements were part of the original constitutional design and assign an exclusive role in the formation of international accords to the treaty clause of Article II, Section 2.¹⁷ In contrast, the prevailing modern view, identified with such leading figures as Louis Henkin, bases an independent presidential power to enter into international agreements upon post-constitutional practice and the exigencies of modern diplomacy rather than upon a direct refutation of Berger and his allies.¹⁸ This modern view further assumes that, as executive agreements and Article II treaties have equal constitutional validity, their effect within the domestic legal system should similarly be equivalent.¹⁹ Thus, giving the President

16. I make no claim as to the conclusiveness of this result for the contemporary constitutionality of executive agreements—a matter I leave to general theorists of constitutional interpretation. However, I proceed from the widespread observation that the original understanding of the document is at least relevant as a starting point for our modern interpretation.

17. See *RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 140-56 (1974); Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 *MICH. L. REV.* 1, 55 (1972); see also David Gray Adler, *Court, Constitution and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 19, 27-32 (David Gray Adler & Larry George eds., 1996) (arguing that in the original understanding all international agreements required approval under the treaty clause).

18. See, e.g., *HENKIN, supra* note 1, at 219-24; see also *Dames & Moore v. Regan*, 453 U.S. 654, 678-81 (1981).

19. See, e.g., *Dames & Moore*, 453 U.S. at 678-81; *HENKIN, supra* note 1, at 219-24. In saying that an international agreement has “domestic legal effect,” I mean that it alters rights and obligations as a matter of U.S. law. This status is distinct from its creation as international law. Consider, as an example, a hypothetical rapprochement between the United States and Cuba that includes a settlement of U.S. claims arising from the post-revolutionary nationalizations of the Castro government. The U.S. President may be willing to accept a deeply compromised settlement of these claims in pursuit of diplomatic and geostrategic advantage. Suppose, however, that Congress is unwilling to support such a compromise. Can the President effect a settlement agreement without the participation of the House or Senate? Evidently the initial question is whether the President has independent authority to make an agreement with Cuba (and thus bind the United States in international law). But even if the President has that power, if unsatisfied private parties continue to hold claims against the Castro government under U.S. law, the claims would remain unsettled as a practical matter regardless of the formal content of the international agreement. To have truly independent power to achieve the settlement, the President also needs to terminate these private legal rights under U.S. law. Of course, the President could seek implementing legislation—but that requires the assent of Congress which, by hypothesis, may be unavailable. Thus, the President needs the settlement agreement—either by its own force or through an implementing executive order—to have “domestic legal effect”: i.e., to terminate existing private rights without the aid of implementing legislation. As described below, this effect is given “treaties” by the

the power to create international agreements is thought, more or less automatically, to carry with it corresponding domestic lawmaking power.

My thesis is that each of these views is flawed in important respects. The conventional originalist argument is far too quick to assign exclusivity to the procedure of Article II, Section 2, and the modern pro-executive view is far too quick to concede that point as an original matter and fall back upon arguments derived from practice and evolution. Rather, the text and structure of the Constitution, combined with the historical usage of the relevant phrases in international law, suggest that the founding generation recognized a class of nontreaty "agreements" falling within the President's independent power. This understanding is confirmed by diplomatic practice in the early years of the Constitution's operation, which accepted without debate such an independent presidential power. Moreover, the modern view is flawed (as an original matter) in assuming that the independent presidential power to conclude international agreements implies the independent presidential power to implement them domestically. The original understanding appears to have been otherwise. Indeed, the very evidence and arguments that indicate a presidential power to conclude international agreements within the original design also show that incorporation of those agreements into domestic law would have been understood to require the participation of the legislative branch. The executive power in this area, as originally conceived, is therefore greater than conventionally assumed in originalist writing yet less extensive than its modern assertion.

I begin in Part II with an overview of the present law. This discussion illustrates that the President's power to conclude and implement international agreements is generally assumed in the conventional modern analysis, but that this view is not based upon investigation of the original understanding of the Constitution. I next consider, as an original matter, the scope of the relevant presidential authority. In Part III, I argue that the treaty power as defined in Article II, Section 2 of the Constitution was not understood to encompass the entire range of agreements between the United States and foreign nations. Rather, I conclude that a class of agreements, which I will call "nontreaty" agreements, can be identified as well. In Part IV, I address the distinction between treaties and nontreaty

Supremacy Clause of Article VI; the question is whether a nontreaty agreement (such as the hypothetical agreement with Cuba) also has this effect.

agreements and conclude that, while the distinction may not be clear in all respects, general parameters may be identified which indicate that many of the nontreaty powers claimed by the modern President fall within the original understanding of the "nontreaty" power. Specifically, in the original design, short-term agreements, or ones with limited executory components, were not considered "treaties" subject to the procedures of Article II, Section 2. In Part V, I argue that the nontreaty power was understood to lie within the independent authority of the President. Finally, in Part VI, I show that each of the arguments supporting the President's nontreaty authority fail to support—and indeed directly refute—a claim that executive agreements were originally understood to affect the domestic legal system. I conclude, therefore, that the President's "nontreaty" power, as originally understood, did not include the power to preempt or supersede inconsistent state or federal law, or otherwise alter private legal rights.

II. EXECUTIVE AGREEMENTS AND THE MODERN CONSENSUS

A. Overview

Modern consensus lodges with the President the independent power, at least in some circumstances, to enter into international agreements and to incorporate those agreements into domestic law. Louis Henkin, the pre-eminent voice in the field, observes:

The President can ... make many [international] agreements on his own authority, including, surely, those related to establishing and maintaining diplomatic relations, agreements settling international claims, and military agreements within the Presidential authority as Commander in Chief. There are doubtless many other 'sole' agreements within the President's foreign affairs powers, but which they are is hardly agreed.²⁰

The Restatement of Foreign Relations Law confirms that "the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."²¹ Moreover, in this view, executive

20. HENKIN, *supra* note 1, at 229.

21. RESTATEMENT (THIRD), *supra* note 1, § 303(4) nn.7 & 11. The executive branch has asserted:

The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional

agreements, like treaties, are the supreme law of the land. "If one sees the Treaty Power as basically a Presidential power (albeit subject to check by the Senate) there is no compelling reason for giving less effect to agreements that [the President] has authority to make without the Senate."²²

The modern consensus rests largely upon three Supreme Court cases: *United States v. Belmont*²³ in 1937; *United States v. Pink*²⁴ in 1942; and *Dames & Moore v. Regan*²⁵ in 1981. Each held that, at least under the particular circumstances presented, an international agreement concluded solely upon the authority of the President was a constitutional exercise of power that altered domestic legal rights.²⁶ Other judicial discussions of the subject are limited. Lower courts have treated the matter summarily on the authority of *Pink* and *Belmont*, and thus have assumed a presidential power to enter into executive agreements²⁷ and to give those agreements domestic legal

authority. The constitutional sources of authority for the President to conclude international agreements include ... the President's authority as Chief Executive to represent the nation in foreign affairs.

The Prevention and Punishment of the Crime of Genocide: Hearing Before the Senate Comm. on Foreign Relations, 99th Cong. 178 (1985) [hereinafter *Committee on Foreign Relations Hearing*].

22. HENKIN, *supra* note 1, at 228; see also Monaghan, *supra* note 1, at 53 ("[T]he President's 'specific' constitutional powers, such as the Commander-in-Chief power and the powers 'implied' from presidential duties, now (whatever the original understanding) imply some independent presidential law-making power [by executive agreements].").

23. 301 U.S. 324 (1937).

24. 315 U.S. 203 (1942).

25. 453 U.S. 654 (1981).

26. See *infra* Part II.B.

27. See *United States v. Walczak*, 783 F.2d 852, 855-56 (9th Cir. 1986) ("The Supreme Court has recognized that of necessity the President may enter into certain binding agreements with foreign nations not strictly congruent with the formalities required by the Constitution's Treaty Clause. . . . [C]onstitutionally valid executive agreements are to be applied by the courts as the law of the land" (citing *Weinberger v. Rossi*, 456 U.S. 25, 30 (1982); *Pink*, 315 U.S. at 230)); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 812 (1st Cir. 1981) (relying on *Pink* and *Belmont* to uphold executive agreement between the United States and Iran); *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951) ("The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies." (citing *Pink* and *Belmont*)); *Security Pac. Nat'l Bank v. Iran*, 513 F. Supp. 864, 873 (C.D. Cal. 1981) ("This particular use of the executive agreement power has been affirmed both by the courts and by history." (citing *Pink* and *Belmont*)); *Unidyne Corp. v. Government of Iran*, 512 F. Supp. 705, 708 (E.D. Va. 1981) (citing *Pink* to uphold executive agreement between the United States and Iran); *Guerra v. Guajardo*, 466 F. Supp. 1046, 1055 (S.D. Tex. 1978) ("It has long been recognized that the President has the power to enter into international agreements without the need of acquiring the Senate's permission." (citing *Belmont*)), *aff'd mem.*, 597 F.2d 769 (5th Cir. 1979); *Dole v. Carter*, 444 F. Supp. 1065, 1069 (D. Kan.) (relying on *Pink* and *Belmont* to

effect at least to the extent of overriding inconsistent state law.²⁸ Similarly, academic commentary has for the most part not addressed the constitutional matter in detail. As indicated, influential commentators have assumed without elaborate inquiry the constitutionality of executive agreements, again in large part on the authority of *Pink* and *Belmont*.²⁹ To the extent that commentary endorsing such agreements has moved beyond a summary or description of existing practice, it has been largely confined to political rather than constitutional analysis.³⁰

Debate concerning the exclusiveness *vel non* of Article II,

uphold executive agreement between the United States and Hungary), *aff'd on other grounds*, 569 F.2d 1109 (10th Cir. 1977).

28. See *supra* note 27. At least two cases have suggested some limits on the executive agreement power to override inconsistent federal law. In *United States v. Guy W. Capps Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), the Fourth Circuit declined to give an executive agreement preemptive force over a pre-existing federal statute on the grounds that the subject matter in question—foreign commerce—was within the exclusive domain of Congress. See *id.* at 659-61. In *Swearingen v. United States*, 565 F. Supp. 1019 (D. Col. 1983), the court declined to give effect to an executive agreement that conflicted with the Internal Revenue Code, without any reference to *Belmont* and related cases. In material part, the court said only: "Treaty provisions are the supreme law of the land and, depending on the subject matter, may supersede prior inconsistent acts of Congress. . . . The same cannot be said of executive agreements which, unlike treaties, require no Senate ratification and are not directly authorized by or described in the Constitution." *Id.* at 1021 (citing *Guy W. Capps*, 204 F.2d at 659-61).

29. See HENKIN, *supra* note 1, at 228-29; Monaghan, *supra* note 1, at 51-53; see also Evan Todd Bloom, Note, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 COLUM. L. REV. 155, 168-75 (1985) (setting forth circumstances in which the President may use the settlement power).

30. See, e.g., LOCH K. JOHNSON, *THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE* 158-64 (1984) (recounting efforts by Congress to limit exercise of the executive agreement power); LAWRENCE MARGOLIS, *EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY* (1986) (discussing the political ramifications of the use of executive agreements); STEPHEN M. MILLET, *THE CONSTITUTIONALITY OF EXECUTIVE AGREEMENTS: ANALYSIS OF UNITED STATES V. BELMONT* (1990) (discussing the historical development of the executive agreement power in connection with the *Belmont* decision without rendering a comprehensive opinion upon its constitutionality); Honoré Marcel Catudal, *Executive Agreements: A Supplement to the Treaty-Making Procedure*, 10 GEO. WASH. L. REV. 653, 669 (1942) (arguing for the executive agreement as an effective instrument of foreign policy); Arthur W. Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 406-07 (1977) (same). An exception is MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 177-91 (1990), which considers the constitutional issues in some detail (although in a relatively brief passage). The most extensive constitutional treatment of executive agreements is Bloom, *supra* note 29; however, Bloom largely assumes the constitutionality of (some) executive agreements and is primarily concerned with whether the President has *exclusive* authority with respect to such agreements. See *id.* at 166-75. For a powerful functional critique of the modern use of executive agreements, see Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 678-81, 722-26 (1998).

Section 2 as a procedure for forming international accords has instead focused upon the constitutionality of so-called "congressional-executive agreements"—that is, international agreements concluded on the authority of the President plus a majority of both Houses of Congress, but lacking the two-thirds of the Senate putatively required by Article II, Section 2.³¹ These agreements became a substantial issue during and after World War II, driven by the perception that the agreements then envisioned to establish the postwar international order (principally the U.N. Charter, the IMF Agreement, and GATT) could command a majority of both Houses but not a supermajority of the Senate.³² While *Pink* and *Belmont*, and the executive agreement power generally, were discussed in the context of this debate, they were rightly seen as not directly relevant.³³ Defenders of the congressional-executive agreement did not need to establish an *independent* presidential power, because such advocates additionally relied upon the legislative powers of Congress, while opponents of the congressional-executive agreement for the same reason could not carry the day simply by discrediting sole executive agreements.

Nonetheless, the postwar debate is critical to the modern view of executive agreements. The proponents of the congressional-executive agreement—and thus of the nonexclusive view of Article

31. For arguments in favor of the congressional-executive agreement, see EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 234-47 (N.Y. Univ. Press 1984) (1940); WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* 254-64 (1941); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 186-88 (pt. 1), 534, 535-36 (pt. 2) (1945); Quincey Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 355 (1944). The counterattack is principally identified with Professor Edwin Borchard. See Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 666-67 (1944) [hereinafter Borchard, *Shall the Executive Agreement?*]; Edwin Borchard, *Treaties and Executive Agreements—a Reply*, 54 YALE L.J. 616, 624-28 (1945) [hereinafter Borchard, *Reply*]. Despite some loose terminology (especially in the titles), the focus of this debate was a presidential agreement concluded with the approval of Congress, not (as occurred in *Belmont*) one concluded solely upon presidential authority. The debate over congressional-executive agreements has been renewed in the context of the North American Free Trade Agreement. Compare Ackerman & Golove, *supra* note 6, at 804-05 (favoring congressional-executive agreements), with Tribe, *supra* note 6, at 1225-28 (opposing congressional-executive agreements).

32. See Ackerman & Golove, *supra* note 6, at 861-96.

33. See Borchard, *Shall the Executive Agreement*, *supra* note 31, at 680-82; McDougal & Lans, *supra* note 31, at 311-13; see also MCCLURE, *supra* note 31, at 354-64 (relying on the power of President-plus-Congress as an alternative to the Article II, Section 2 procedure for international agreement-making).

II, Section 2—generally prevailed: the U.N. Charter, the IMF Agreement, and GATT were approved as congressional-executive agreements without lingering constitutional objection.³⁴ Under cover of that victory, the assumed legitimacy of the sole executive agreement—and of *Pink* and *Belmont*—arose.³⁵ Yet there are considerable differences between the two types of agreements, as defenders of the congressional-executive agreements ultimately acknowledge.³⁶ Acceptance of one plainly does not compel acceptance of the other. The thorough scholarly defenses of the congressional-executive agreement (a matter beyond the scope of this Article) do not amount to authority for the constitutionality of sole executive agreements. Hence, the modern consensus concerning on executive agreements rests, largely unadorned, upon the triad of *Belmont*, *Pink*, and *Dames & Moore*.

The pre-eminence of *Belmont* and related cases is critical in two respects. First, as discussed below, these cases do not investigate the original understanding of the executive agreement power. Second, they do not make clear that the President asserted two distinct powers: (1) the authority to enter into international agreements, and (2) the authority to give those agreements legislative effect to alter rights and obligations established under domestic law.

These errors have infected much of the subsequent consensus with respect to executive agreements. First, most defenses of executive agreements essentially concede that, as Raoul Berger and his allies have argued, no original basis for the power exists. Instead, the conventional acceptance of executive agreements rests largely upon an argument from constitutional evolution and modern exigency.³⁷ The result, however, is that no consensus exists as to the

34. See Ackerman & Golove, *supra* note 6, at 873-96 (discussing evolution of the conventional view).

35. Indeed, the terms of the debate often obscured the distinction between the two types of agreements. Wallace McClure's *International Executive Agreements: Democratic Procedure Under the Constitution of the United States*, a major brief for the postwar accords, recounts the history of agreement-making outside the parameters of Article II, Section 2, yet does not acknowledge a serious constitutional distinction between agreements that had the approval of Congress and those that did not. See MCCLURE, *supra* note 31, at 35-100. See generally Paul, *supra* note 30, at 742-58 (recounting the growing acceptance of executive agreements and congressional-executive agreements during and after World War II).

36. See, e.g., Ackerman & Golove, *supra* note 6, at 919-24 (relying on power granted to Congress under Article I to support conclusion of agreements outside Article II, Section 2); McDougal & Lans, *supra* note 31, at 238-44 (appealing to power granted to Congress by the Constitution in support of congressional-executive agreements).

37. See HENKIN, *supra* note 1, at 219-24.

appropriate scope of the executive agreement power. Most observers would conclude, as does Henkin, that the executive agreement power cannot be fully interchangeable with the Article II, Section 2 power: "As a matter of constitutional construction . . . that view is unacceptable, for it would wholly remove the 'check' of Senate consent which the Framers struggled and compromised to write into the Constitution."³⁸ However, cut off from any original understanding of the scope of the executive agreement power by the premature concession of its original illegitimacy, the modern view has been unable to articulate any satisfactory limits upon it. "One is compelled to conclude," Henkin continues, "that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland [in *Belmont*] nor anyone else has told us which are which."³⁹

Second, most defenses of executive agreements follow *Belmont* in describing a single presidential power: the authority to enter into international obligations having (where necessary) the force of law.⁴⁰ It has not been systematically contemplated that—as I argue below—the President might have the power to enter into executive agreements but *not* have the power to implement them domestically. The unification of these powers is, however, by no means a logical necessity. In the case of treaties and congressional-executive agreements, these powers are in the U.S. system necessarily indiscrete, by operation of the Supremacy Clause in the case of treaties and, in the case of congressional-executive agreements, because the obligation is undertaken by the organs of government which also possess the ordinary legislative power. In other legal systems in which the power to undertake international obligations is separated from ordinary legislative powers, such obligations may not carry the force of law; they may be, in the language of international lawyers, not "self-executing."⁴¹ The error in *Belmont* of conflating the two powers obscures the importance of considering whether, with respect to independent executive agreements, this might not also have been our intended system.

38. *Id.* at 222; see also GLENNON, *supra* note 30, at 166-75 (arguing for limited scope of executive agreement power); Monaghan, *supra* note 1, at 51-53 (same).

39. HENKIN, *supra* note 1, at 222.

40. See *id.* at 226-30; McDougal & Lans, *supra* note 31, at 311-13.

41. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 95-99 (2d ed. 1993); see also *infra* Part VI (discussing non-self-executing treaties under English law).

B. *The Supreme Court and Executive Agreements*

Because the *Belmont-Pink-Dames & Moore* triad is central to the modern acceptance of executive agreements, some attention to the reasoning of that line of cases is warranted. As described below, none of these cases proceeds from an examination of the text, history, and structure of the Constitution. Therefore, one seeking to establish a defense of the executive agreement power in the original understanding of the Constitution cannot draw comfort from these decisions. Since these decisions constitute essentially the entire basis of the modern consensus concerning the legitimacy of executive agreements, that consensus is not derived from an original understanding of the Constitution.

Furthermore, consideration of these decisions illustrates the difficulty of conflating two distinct powers: (1) the power to create international obligations binding upon the United States as a matter of international law, and (2) the power to implement such international obligations as a matter of U.S. law, such that they supersede existing inconsistent U.S. law and provide the basis for altering private legal rights within the U.S. legal system. As developed in subsequent sections, that error flows from the failure to consider the original understanding of the executive agreement power, for that understanding illustrates that these are independent powers which may be (and were initially understood to be) structurally separated.

1. *United States v. Belmont*

In 1933, President Roosevelt recognized the government of the Soviet Union, which had been unacknowledged by the United States since the 1917 Bolshevik revolution.⁴² In connection with recognition, the two governments entered into an agreement to resolve a number of issues between them. Among these issues were the claims of the United States and U.S. citizens against the Soviet government and the claims of the Soviet government against the United States and U.S. residents. The former principally consisted of claims for U.S. property nationalized in the Soviet Union following the revolution; the latter principally consisted of claims against the U.S. government for its participation in the multilateral intervention in Siberia in 1918.⁴³ Critical to *Belmont*, the latter category also

42. For a detailed analysis of the events leading to *Pink* and *Belmont*, see MILLET, *supra* note 30, at 1-115.

43. See *id.* at 28.

included Soviet claims on property in the United States owned by Russian nationals that the Soviet Union had purportedly nationalized by post-revolutionary decree but over which it had been unable to secure physical control. Pursuant to the agreement accompanying recognition (known as the Litvinov Agreement after the principal Soviet negotiator),⁴⁴ the United States waived its claims against the Soviet Union in return for a Soviet waiver of the Siberian claims and an assignment to the U.S. government of the Soviet claims to purportedly nationalized property located in the United States.⁴⁵ Roosevelt never asked for or received authority from either house of Congress to conclude the Litvinov Agreement.

Some time after the signing of the Agreement, the U.S. government identified certain nationalized property in the custodianship of August Belmont,⁴⁶ a New York banker, and sought its recovery. However, the government faced a problem: under New York law, nationalization decrees operated only territorially. Property situated in New York (as was that held by Belmont) could not be affected by the Soviet nationalization decree, and title remained with its original owner.⁴⁷ Since the Litvinov Agreement assigned to the United States only the Soviet interest, and since the Soviets, under New York law, had no interest in the subject property, it appeared that the United States could not have succeeded to any interest. The United States responded that the conclusion of the Litvinov Agreement recognized the validity of the Soviet nationalization, giving the Soviets (and derivatively the United States) title to the property.⁴⁸ Belmont's motion to dismiss was granted by the lower court, and the case reached the U.S. Supreme Court as *United States v. Belmont*.⁴⁹

Without the Litvinov Agreement, Belmont's argument would have seemed unassailable: a private party purchasing all of the Soviet Union's interest in the subject property would have received

44. Maxim Litvinov, the Soviet Commissar for Foreign Affairs.

45. See Litvinov Agreement, *supra* note 9, 11 Bevans at 1257-58. The Agreement also covered a variety of other topics, including an agreement on trade credits and a Soviet commitment to curtail the circulation of revolutionary propaganda. See *id.* at 1248-53; MILLET, *supra* note 30, at 45-50.

46. Or, more precisely, in the custodianship of Belmont's executors, Belmont having died prior to the commencement of the case. See *United States v. Belmont*, 301 U.S. 324, 325-26 (1937). For convenience I call the defendant/respondent in the ensuing case "Belmont."

47. See *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 189 N.E. 456, 465 (N.Y. 1934).

48. See *Belmont*, 301 U.S. at 330.

49. See *id.* at 324-26.

the interest recognized by applicable (i.e., New York) law—namely, nothing. Had the Litvinov Agreement been concluded as a treaty under Article II, Section 2 of the Constitution, its terms would have preempted New York law pursuant to the Supremacy Clause of Article VI.⁵⁰ The *Belmont* case thus turned upon (1) whether the Litvinov Agreement represented a constitutional exercise of the President's power, and (2) if so, whether the Agreement had the force of a treaty in domestic law such that it preempted the New York rule on which Belmont sought to rely. The Court ruled in the affirmative on both points: "while this rule [supremacy over pre-existing law] in respect 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."⁵¹

Much of Justice Sutherland's opinion for the Court is not relevant to present purposes:⁵² the opinion devoted only three

50. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 209-10 (1796) (concluding that the 1783 treaty with Great Britain preempted inconsistent state laws relating to debts owed British citizens).

51. *Belmont*, 301 U.S. at 331.

52. The case raised two distinct issues which the Court separately addressed: whether the Litvinov Agreement superseded New York law and whether the Agreement constituted a taking under the Fifth Amendment. See *id.* at 327, 332 (identifying the two issues); *id.* at 332-33 (discussing the latter issue). The latter issue would, of course, have been present regardless of the method of approving the Agreement, see *Reid v. Covert*, 354 U.S. 1, 14 (1957) (concluding that individual rights protections of the Constitution apply to international agreements), and thus is not germane to the present inquiry. The later portions of Sutherland's opinion take up this issue. In addition, the initial portion of the opinion discusses the so-called "act of state" doctrine, which does not appear relevant to any issue raised in the case. See Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1, 18-22 (1990) (discussing *Belmont's* relationship to the act of state doctrine). Under the act of state doctrine, "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see also *Belmont*, 301 U.S. at 326 (paraphrasing *Underhill*, 168 U.S. at 252); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (quoting *Underhill*, 168 U.S. at 252). This doctrine meant that U.S. courts would accept wholly foreign nationalizations as valid transfers of title. New York courts applied a similar rule. See, e.g., *M. Salimoff & Co. v. Standard Oil Co.*, 186 N.E. 679 (N.Y. 1933). Thus a nationalization occurring wholly within the Soviet Union would have been recognized in New York. That issue was not relevant in *Belmont*: the property in question had been located in New York at all times, and that made the Soviet nationalization an extraterritorial act not subject to *Underhill's* protection. As Justice Stone said in concurrence: "If the subject of the transfer were . . . located in Russia, we may assume that the validity of the seizure would be recognized here." *Belmont*, 301 U.S. at 333 (Stone, J., concurring) (citing *Oetjen*, 246 U.S. at 302-03). Justice Stone continued: "But this Court has often recognized that a state may refuse to give effect to a transfer, made elsewhere, of property which is within its own territorial limits if the transfer is in conflict with its public policy." *Belmont*, 301 U.S. at 334 (Stone, J., concurring). In any event, the discussion is of no moment to the present inquiry: if the Soviet nationalizations had been protected by *Underhill*, then they would have been protected with or without

paragraphs⁵³ to the presidential power to enter into the Litvinov Agreement. That discussion is almost wholly *ipse dixit*. In the first paragraph, Sutherland stated without citation that the President's power to enter into the Agreement "may not be doubted."⁵⁴ In a similarly conclusory vein, Sutherland continued:

[I]n respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.⁵⁵

The paragraph contains no further discussion or explanation as to why advice and consent was not required.

In the second paragraph, Justice Sutherland cited two authorities in support of the conclusions of the preceding paragraph: the Court's prior decision in *B. Altman & Co. v. United States*⁵⁶ and a section of John Bassett Moore's *A Digest of International Law*.⁵⁷ *Altman*, a 1912 decision involving the construction of the word "treaty" in the Circuit Court of Appeals Act, at best implied approval of congressional-executive agreements.⁵⁸ Moore's 1906 *Digest* reported (without constitutional commentary) the *then-existing* presidential

the Litvinov Agreement; if not, nothing in the *Oetjen-Underhill* line of cases has any relevance to the constitutional procedures for making international agreements (since none of these cases even remotely implicated an international agreement). See generally Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 13-16, 22-23 (1998) (discussing application of the *Underhill* rule).

53. See *Belmont*, 301 U.S. at 330-32 (specifically, the three paragraphs following the discussion of *A.M. Luther v. James Sagor & Co.*, [1921] 3 K.B. 532 (Eng. C.A.), an act of state case, and preceding the discussion of the takings issue).

54. *Id.* at 330.

55. *Id.*

56. 224 U.S. 583, 600 (1912).

57. 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 210-21 (1906).

58. The Circuit Court of Appeals Act gave the Supreme Court jurisdiction over appeals involving, among other matters, the interpretation of "treaties." See Circuit Court of Appeals Act, 26 Stat. 826, 828 (1891). *Altman* involved the interpretation of an agreement entered into by the President under the authority of the Trade Act of 1897, but not approved pursuant to Article II, Section 2. See *Altman*, 224 U.S. at 583-602. The United States argued that the Court lacked jurisdiction over the appeal, as the subject agreement was not a "treaty" under the Circuit Court of Appeals Act; however, no party argued that the agreement was constitutionally invalid. See *id.* at 584-93. The Court determined that the word "treaty" in the Court of Appeals Act was intended by Congress to include the subject agreement. See *id.* at 600-01. This result says nothing about the meaning of "treaty" in the Constitution, and to the extent it implies approval of a process outside Article II, Section 2, it relates only to congressional-executive agreements, which are distinct from the matter under consideration. See *supra* note 15.

practice of entering into various minor agreements without Senate approval.⁵⁹ In short, neither authority indicates, as a matter of constitutional text, structure, or history, that the President had an independent power to conclude executive agreements.

In his third and final paragraph on the subject, Justice Sutherland addressed the domestic effect of the executive agreement. He began with the (uncontroversial) proposition that

the external powers of the United States are to be exercised without regard to state laws or policies. . . . Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.⁶⁰

In support, Sutherland adduced authority relating to the Article II, Section 2 treaty power: the Supremacy Clause, a comment by Madison on the importance of the supremacy of treaties, and three cases to the same effect.⁶¹ These authorities are, of course, beside the point: no one suggested that the Litvinov Agreement, had it been approved by the Senate, could not have preempted New York law. Despite Sutherland's efforts to characterize it otherwise, *Belmont* was not a case about federalism and state *versus* federal power. No one asserted that the New York law could be "an obstacle to the effective operation of a federal constitutional power;" and no one denied that the entry into a settlement agreement with the Soviet Union upon the procedure specified in Article II, Section 2 would have been a "federal constitutional power." The issue was whether the Litvinov Agreement, *despite* bypassing the Article II, Section 2 procedure, was an exercise of "federal constitutional power." That is an issue of *intrafederal* separation of powers: which federal institutions are allocated the ability to exercise a concededly federal

59. See 5 MOORE, *supra* note 57, at 210-21. Moore did not offer a constitutional defense of executive agreements, but merely described existing practice. See *id.* Few of Moore's examples of executive agreements reached even before the Civil War, and none extended to a period anywhere near the ratification of the Constitution. See *id.* Thus, Moore was authority for the proposition that *Belmont* did not claim a novel power of concluding international agreements, but his work did not provide any insight into an original understanding of the "nontreaty" power.

60. *Belmont*, 301 U.S. at 331-32.

61. See *id.* at 330-31.

power? The treaty power expressed in Article II, Section 2 thus actually tends to undermine Sutherland's conclusion (as it suggests that a Senate role might be required), and none of the references discussed by Sutherland lend his conclusion any material support.

The foregoing exhausts Sutherland's authorities, save one. That authority merits additional attention: the Supreme Court's decision in *United States v. Curtiss-Wright Export Co.*⁶² *Curtiss-Wright*, one of the Court's most widely cited (and widely criticized)⁶³ foreign affairs decisions, was not a case about international agreements. Rather, Sutherland cited it for the proposition—"that complete power over international affairs is in the national government"⁶⁴—which was not an issue in *Belmont* (the question there being not whether the *federal government* had the power to do what was done, but which part of that government—President or President-plus-Senate—had that power). But *Curtiss-Wright* is illustrative of the thinking that underlies *Belmont*. Decided less than a year earlier by essentially the same Court and also written by Sutherland, the decision concerned a congressional act giving the President discretion to impose arms embargoes on countries involved in hostilities.⁶⁵ The defendant, prosecuted for violation of an embargo, argued that this was an unconstitutional delegation of legislative power to the executive branch.⁶⁶ The Court, per Sutherland, thought otherwise. The President, Sutherland said, inherently had "plenary" power in foreign affairs, in which the President was (in a phrase reused in *Belmont*) the "sole organ" of the nation; because the President already had broad powers in foreign affairs, the nondelegation doctrine had limited application in the field.⁶⁷

This conclusion proceeded from two propositions. First, according to Sutherland, all powers related to foreign affairs are committed to the national government, not by the Constitution but by the inherent attributes of national sovereignty.⁶⁸ Second, within

62. 299 U.S. 304 (1936).

63. See, e.g., GLENNON, *supra* note 30, at 18-27; David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 478-97 (1946); Paul, *supra* note 30, at 689-92.

64. See *Belmont*, 301 U.S. at 331.

65. See *Curtiss-Wright*, 299 U.S. at 311-12.

66. See *id.* at 314-15 (discussing the defendant's nondelegation claim).

67. *Id.* at 320.

68. See *id.* This was the proposition for which Sutherland cited *Curtiss-Wright* in *Belmont*. See *Belmont*, 301 U.S. at 331-32. Whether true or not as a general matter, no one doubted that the power to preempt the New York law at issue in *Belmont* by international agreement was committed to the national government, at least by Article II, Section 2, combined with Article VI. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245-46

the national government, all of the foreign affairs power is vested in the President. For the first point, Sutherland adduced a historical account, much of which has been challenged⁶⁹—but which again is largely beside the point with respect to *Belmont* (and *Curtiss-Wright* as well). Neither *Belmont* nor *Curtiss-Wright* was a case about federal/state power, for in both cases the federal government had the requisite power—the question was solely *what part* of the federal government had that power.⁷⁰ In both cases the second proposition was the critical one—and in *Curtiss-Wright*, as in *Belmont*, it was largely assumed.⁷¹

Sutherland's principal authority in *Curtiss-Wright* is the now-familiar statement by John Marshall (in the U.S. Congress) that the executive is the "sole organ" of the United States in foreign affairs.⁷² A number of charges have been laid against Marshall's statement: that it was made in the context of partisan debate, that its premise was not widely accepted at the time, and that its import was considerably less sweeping than has been claimed.⁷³ For present purposes it should be sufficient to observe that Marshall did not speak in any context related to international agreements, and thus whatever force might be had for the general proposition of executive power, it cannot count as an endorsement of presidential power over international accords.⁷⁴

(1796) (concluding that the 1783 treaty with Great Britain preempted inconsistent state laws relating to debts owed British citizens).

69. See GLENNON, *supra* note 30, at 21-22; Levitan, *supra* note 63, at 478.

70. As discussed above, in *Belmont* the power to enter into an agreement preemptive of New York law was plainly held by the President-plus-Senate; the issue was whether the President alone had such power. See *Belmont*, 301 U.S. at 330-32. Similarly, in *Curtiss-Wright* the power to impose the arms embargo was plainly held by the President-plus-Congress, pursuant to Congress's power to regulate international trade under Article I, Section 8; the issue was whether the President alone could be given this power. See *Curtiss-Wright*, 299 U.S. at 314-16.

71. Foreshadowing *Belmont*, Sutherland claimed (without citation) in *Curtiss-Wright* that the President had an independent power to enter into international agreements—although curiously he did not cite that part of *Curtiss-Wright* in *Belmont*. See *Curtiss-Wright*, 299 U.S. at 317.

72. *Id.* at 319 (quoting 10 ANNALS OF CONG. 613 (1800)).

73. See Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 338-61 (1990) (discussing the context of Marshall's "sole organ" statement).

74. The context of Marshall's remark was the case of Jonathan Robbins, a British sailor wanted for murder on a British ship and seized in the United States. Robbins claimed to be a U.S. citizen wrongfully "impressed" into British service. The British government demanded his extradition pursuant to the terms of the 1794 U.S.-U.K. treaty. While extradition was pending, President Adams wrote to the presiding judge indicating (or, in a less-favorable interpretation, directing) that extradition was appropriate. This

Marshall's statement aside, Sutherland's only other historical authority is a quotation from an 1816 Senate report similarly irrelevant to executive agreements (and to foreign affairs power generally).⁷⁵ As a result, *Curtiss-Wright* provides no historical support for the *Belmont* result (or, indeed, for its own assertion of executive supremacy). It does, however, show the largely unstated premise of *Belmont*: once one accepts, with Sutherland in *Curtiss-Wright*, that the President has essentially unlimited powers in foreign affairs, the result in *Belmont* is self-evident. *Belmont* is fundamentally not an *analysis* of the President's power to make international agreements; rather, it is merely an application of a generalized theory of foreign affairs in which the President holds plenary power. That explains why Sutherland's opinion in *Belmont*, distilled to its essential parts, is conclusory and lacking in argument or authority: Sutherland thought it an obvious application of his broader theory about foreign affairs which did not call for individualized analysis.⁷⁶

action provoked a crisis in the House, where Adams's opponents accused him of exceeding his authority. Marshall's statement came in the course of defending Adams, arguing that the President's role in foreign affairs made such advice to the court appropriate. The events, and the ensuing debate, are recounted in detail in Wedgwood, *supra* note 73. Whatever one thinks of Marshall's defense of Adams (and it was not accepted by everyone at the time, *see id.* at 354), it seems apparent that Marshall was not thinking of anything like the executive agreement power. *See* CORWIN, *supra* note 31, at 216 ("Clearly, what Marshall had foremost in mind was simply the President's role as *instrument of communication* with other governments . . ."); GLENNON, *supra* note 30, at 24 (arguing that Sutherland's reliance on Marshall "mistakes policy *communication* with policy *formulation*"); Louis Fisher, *Evolution of Presidential and Congressional Powers in Foreign Affairs, in CONGRESS, THE PRESIDENCY, AND THE TAIWAN RELATIONS ACT 20* (Louis W. Koenig et al. eds., 1985) (arguing that Marshall intended only that Adams was acting pursuant to his duty to faithfully execute the treaty); Paul, *supra* note 30, at 690 ("Far from asserting the executive's discretion in foreign relations, Marshall characterized the executive as the agent or 'organ' of Congress. Sutherland twisted Marshall's statement to support the contrary proposition . . ."). Moreover, a decision of the Marshall Court, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), suggests that Marshall did not think executive power over foreign affairs unlimited. In *Little*, the Court deemed unconstitutional executive orders, taken without congressional authorization, to seize certain ships during the "undeclared war" with France. *See id.* at 177-79; *see also* GLENNON, *supra* note 30, at 26 (noting tension between *Little* and *Curtiss-Wright*).

75. In the language excerpted in *Curtiss-Wright*, the report states that "[t]he President is the constitutional representative of the United States with regard to foreign nations." *Curtiss-Wright*, 299 U.S. at 319 (quoting REPORTS OF COMMITTEE ON FOREIGN RELATIONS 1789-1901, S. DOC. NO., pt. 8, at 24 (1816)). Plainly, however, the Senate was discussing the President's *communicative* role, not responsibility for the content of what the President might communicate and certainly not what the President might undertake as an international obligation. *See* GLENNON, *supra* note 30, at 19, 24.

76. Sutherland had expressed similar views prior to his appointment to the Court. *See* GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 117-18,

Consequently, two conclusions may be advanced with respect to *Belmont*. First, it does not establish an original power of the President to enter international agreements. The closest Sutherland comes to an originalist argument is the suggestion, derived from *Curtiss-Wright*, that the President is invested with all of the nation's foreign affairs power. But this suggestion rests as a historical matter almost entirely on Marshall's "sole organ" statement, taken wholly out of context. Nothing is adduced to show any evidence of a specific original understanding with respect to international agreements.

Second, conflation of the power to conclude executive agreements and the power to incorporate them into domestic law allowed Sutherland to assume a power which was unprecedented even in *Belmont's* time. No court prior to *Belmont* had construed an executive agreement to preempt state law.⁷⁷ Sutherland's authorities included only *Altman*, a (backhanded) approval of a congressional-executive agreement that is not relevant to the President's independent power, and Moore's catalogue of minor executive agreements, none of which purported to preempt preexisting state law.⁷⁸ By casting the issue as one of state versus federal law, Sutherland was able to argue—once the presidential power over executive agreements was declared—that of course no state could interfere with national policy reflected in the executive agreement. That argument succeeds only if one does not acknowledge the potential separateness of the "agreement power" and the "preemptive power."⁷⁹ Once the two are separated, it becomes clear

172 (1919).

77. Only one pre-*Belmont* case addressed the matter, although its dicta generally support Sutherland's view. See *Watts v. United States*, 1 Wash. Terr. 288, 294 (1870). Speaking of an executive agreement respecting joint military occupation of San Juan Island, in Washington Territory, by the United States and Great Britain, the territorial court stated:

The power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and inheres where the executive power is vested. Such conventions are not treaties within the meaning of the constitution, and, as supreme law of the land, conclusive on the courts, but they are provisional arrangements . . . [which are] for the occasion an expression of the will of the people through their political organ, touching the matters affected; and to avoid unhappy collision between the political and judicial branches . . . such an expression to a reasonable limit should be followed by the courts and not opposed, though extending to the temporary restraint or modification of the operation of an existing statute.

Id. However, the court went on to hold (over a dissent) that the executive agreement did not in fact modify the existing statutes in the manner claimed by the appellant. See *id.* at 298.

78. See *supra* notes 52-62 and accompanying text.

79. By the "agreement power" I mean the power to enter into a binding international

that the debate with respect to the preemptive power is not between the state and federal governments, but between the President and Congress (or the Senate). Assuredly, the power of preemption in support of international agreements is a federal power, but its location within the federal government remains contested. Once the issue is stated in this manner, Sutherland's arguments regarding the primacy of federal over state power become wholly irrelevant, and one sees that *Belmont* simply adduces no authority for an independent presidential preemptive power.

2. *United States v. Pink*

Belmont did not quite settle the matter, for two reasons. First, Belmont was only a custodian and could assert no property interest in the subject assets; it was unclear whether this affected the Court's analysis.⁸⁰ Second, New York courts essentially ignored the *Belmont* decision, ruling against the United States on similar facts in *Moscow Fire Insurance Co. v. Bank of New York & Trust Co.*⁸¹ in 1939 and *United States v. Pink*⁸² in 1940. Like *Belmont*, these cases involved property purportedly nationalized by the Soviet government and conveyed to the United States by the Litvinov Agreement. The only substantive differences between *Belmont* on one hand and *Pink* and *Moscow Fire* on the other were that in the latter cases the property in question was tangible rather than money and the claimants were the

agreement on behalf of the United States; by the "preemptive power" I mean the power to give an international agreement preemptive effect over pre-existing law. The preemptive power is a subset of the larger "implementation power"—i.e., the power to give an international agreement the force of domestic law. This power is granted, in the case of treaties, in Article VI, and in the case of congressional-executive agreements, in the legislative power of Article I. The central question, which Sutherland evaded, is whether Article II conveys such independent power on the President.

80. The custodianship matter was principally relevant to the second, entirely distinct issue raised in the *Belmont* case: whether the Litvinov Agreement, even if concluded through constitutional procedures, substantively violated the "takings" clause of the Fifth Amendment. See U.S. CONST. amend. V; *Belmont*, 301 U.S. at 332 (discussing the "takings" issue and concluding that Belmont, as custodian, lacked standing to raise it). But Justice Stone, concurring in the *Belmont* judgment, indicated that this might affect the first issue as well, since (in his view) Belmont also lacked standing to object to the procedure of the assignment. See *Belmont*, 301 U.S. at 337 (Stone, J., concurring in the result) (stating that "[a] respondent debtor may not challenge the effect of the assignment to the United States, the judgment is rightly reversed" and noting that because "the reversal is without prejudice to the rights of any other parties to intervene, they should be left free to assert . . . such claims with respect to the amount due as are in accordance with the laws and policy of New York").

81. 20 N.E.2d 758 (N.Y. 1939), *aff'd without opinion by an equally divided court sub nom.*, *United States v. Moscow Fire Ins. Co.*, 309 U.S. 624 (1940).

82. 32 N.E.2d 552 (N.Y. 1940), *rev'd*, 315 U.S. 203 (1942).

original owners (or their successors) rather than a custodian. Nonetheless, the New York courts declined to find *Belmont* controlling. Each case held that the Soviet decrees lacked extraterritorial force—despite the existence of the Litvinov Agreement—and hence the United States had succeeded to no right under that Agreement because the Soviet Union itself had no right to the property.⁸³

An equally divided U.S. Supreme Court, for reasons that remain somewhat mysterious, affirmed the judgment against the United States in *Moscow Fire* without opinion.⁸⁴ Ultimately the Court reversed the judgment in *Pink* in 1942, confirming that the United States held title to the nationalized property by the preemptive effect of the Litvinov Agreement.⁸⁵

Justice Douglas's opinion for the Court in *Pink* treats the issue as essentially settled by *Belmont*. Effectiveness of the New York law, he wrote, "was denied New York in *United States v. Belmont*. . . . With one qualification, to be noted, the *Belmont* case is determinative of the present controversy."⁸⁶ (The qualification related to a Fifth Amendment claim, and thus is not relevant to the present inquiry).⁸⁷ Although Douglas added a number of citations, his argument is not materially distinct from Sutherland's, and each time he confronted the critical issue—the President's power to enter into and implement international agreements—he returned to a direct appeal to *Belmont*.

Justice Douglas first recited *Belmont*'s conclusion that "all international compacts and agreements' are to be treated with similar dignity [to treaties under the Supremacy Clause] for the reason that 'complete power over international affairs is in the national government,'" citing only *Belmont* itself.⁸⁸ He thus followed *Belmont* in wrongly describing the issue as a matter of state/federal power, rather than of intrafederal allocation of powers. Later, again

83. See *Pink*, 32 N.E.2d at 552 (summarily affirming judgment against the United States on the basis of *Moscow Fire*); *Moscow Fire*, 20 N.E.2d at 764 (distinguishing *Belmont*).

84. See *United States v. Moscow Fire Ins. Co.*, 309 U.S. 624 (1940). In light of *Belmont* and the subsequent decision in *Pink*, it is unclear what lay behind the Court's division in *Moscow Fire*.

85. See *Pink*, 315 U.S. at 222; *id.* at 241 (Stone, C.J., dissenting).

86. *Id.* at 222.

87. See *id.* at 226. The *Belmont* Court had declined to reach the takings claim because August Belmont was a custodian and the nonparty owners were not U.S. citizens. Because the party in *Pink* was both a claimant to title and a U.S. citizen, the issue unresolved in *Belmont* was squarely presented in *Pink*. See *supra* note 80.

88. *Pink*, 315 U.S. at 223 (quoting *Belmont*, 301 U.S. at 331).

citing only *Belmont*, he continued: "If the priority had been accorded American claims by treaty with Russia, there would be no doubt as to its validity. . . . As we have noted, the *Belmont* Court recognized that the Litvinov Assignment was an international compact which did not require the participation of the Senate."⁸⁹ In conclusion, Douglas wrote, "the power of a State to refuse enforcement of rights based on foreign law . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement," citing only *Santovincenzo v. Egan*⁹⁰ (a case concerning only treaty power) and *Belmont*.⁹¹ Therefore, on the issue under consideration, *Pink* reaffirmed *Belmont*, but essentially added nothing to it. As Chief Justice Stone wrote in dissent, "my brethren are content to rest their decision on the authority of the dictum in *United States v. Belmont*, without the aid of any pertinent decision of this Court."⁹²

3. *Dames & Moore v. Regan*

Forty years after *Pink*, the Court revisited the issue in *Dames & Moore v. Regan*,⁹³ in the context of the 1979 revolution in Iran. In the course of that revolution, Iranian militants seized U.S. embassy personnel in Tehran and held them as hostages; in response, President Carter froze Iranian assets in the United States.⁹⁴ The new Iranian regime also repudiated its predecessor's contracts with U.S. companies, including contracts with Dames & Moore. Dames & Moore filed suit against Iran under state law for breach of contract,

89. *Id.* at 228-29 (citation omitted). Justice Douglas further added: "A treaty is a 'Law of the Land' under the Supremacy Clause. . . . Such international compacts and agreements as the Litvinov Assignment have a similar dignity," citing only *Belmont* and Corwin's 1940 treatise on executive power, which in turn relied on *Belmont*. *Id.* at 230; see CORWIN, *supra* note 31, at 228-40.

90. 284 U.S. 30, 34 (1931). *Santovincenzo* concerned the preemptive effect of the Consular Convention of 1878 between the United States and Italy, which, while not denominated a treaty, was approved by the Senate in accordance with the procedure set forth in Article II, Section 2. See Privileges and Immunities of Consular Officers; Consular Convention, May 8, 1878, U.S.-Italy, 9 Bevans 91 (Senate resolution of advice and consent to ratification May 28, 1878).

91. *Pink*, 315 U.S. at 231 (citation omitted).

92. *Id.* at 242 (Stone, C.J., dissenting). Stone dissented on the ground suggested in his concurrence in *Belmont*: that the Litvinov Agreement was not intended to preempt state law, and thus should not be so read, regardless of the issue of the President's constitutional power to do so. See *id.* at 249 (Stone, C.J., dissenting) ("I assume for present purposes that these sweeping alterations of the rights of states and of persons could be achieved by . . . executive agreement, although we are referred to no authority which would sustain such an exercise of power . . . by mere assignment unratified by the Senate.").

93. 453 U.S. 654 (1981).

94. See *id.* at 662-63.

and ultimately obtained a default judgment and an attachment on Iranian assets in the jurisdiction.⁹⁵ However, this apparently successful litigation strategy was then overtaken by global events: the United States and Iran, after protracted maneuvering, defused the hostage crisis through a series of understandings known as the Algiers Declarations. In relevant part, this was the agreement: the United States would release the frozen assets, some \$1 billion of which would then be deposited with an international arbitration tribunal to be established to hear claims between the two countries; outstanding claims against Iran would be referred to the tribunal, and no further recourse to U.S. courts would be permitted; and Iran would secure release of the hostages.⁹⁶ As with the Litvinov Agreement, no congressional or Senate approval was sought or obtained.

President Carter then issued a series of executive orders implementing the Declarations which, among other things, dissolved Dames & Moore's attachment and terminated its rights under state law (with, of course, the opportunity to refile before the claims tribunal).⁹⁷ Dames & Moore objected, and the dispute became *Dames & Moore v. Regan*.⁹⁸

The similarities with *Pink* and *Belmont* are plain: the Algiers Declarations, like the Litvinov Agreement, had no constitutional authority beyond that of the President, and the private party claimed a right under state law that was opposed by the (asserted) preemptive effect of the international agreement. The Court reached the same

95. The full procedural history is set forth in *Dames & Moore*, 453 U.S. at 663-64.

96. See Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, U.S.-Iran-Alg., 20 I.L.M. 224 (1981); Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, U.S.-Iran-Alg., 20 I.L.M. 230 (1981); Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, U.S.-Iran-Alg., 20 I.L.M. 229 (1981).

97. See *id.* at 665 (citing Executive Order Nos. 12,276-12,285, 46 Fed. Reg. 7913-7932 (1981)). President Reagan, succeeding Carter in January of 1981, confirmed the relevant executive orders, such that the order actually at issue in *Dames & Moore* was that of the Reagan administration. See *id.* at 666 (citing Executive Order No. 12,294, 46 Fed. Reg. 14,111 (1981)).

98. The case that reached the Supreme Court was one of a number of similar claims arising in various federal districts. See, e.g., *Chas. T. Main Int'l, Inc. v. United States*, 651 F.2d 800, 811 (1st Cir. 1981); *Security Pac. Nat'l Bank v. Government and State of Iran*, 513 F. Supp. 864 (C.D. Cal. 1981); *Unidyne Corp. v. Government of Iran*, 512 F. Supp. 705, 708 (E.D. Va. 1981).

conclusions: the agreement was (1) constitutional and (2) preemptive.⁹⁹ Thus *Pink, Belmont*, and *Dames & Moore* implicate both aspects of the issue under consideration in this Article, and conclude that the President acting independently possesses constitutional authority to enter into (at least some) international agreements which (at least under some circumstances) supersede pre-existing domestic law. Put another way, these cases concluded that the President may exercise domestic law-making authority through executive agreements.

In his opinion for the Court in *Dames & Moore*, Justice Rehnquist declined to place much weight upon *Pink* and *Belmont*, although one might have thought them essentially dispositive. But *Curtiss-Wright* (and derivatively *Pink* and *Belmont*) had been undermined by the subsequent decision in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁰⁰ which expressed a less-comprehensive view of presidential power in foreign affairs.¹⁰¹ Following *Youngstown*, the *Dames & Moore* Court articulated a theory of overlapping powers of the President and Congress that gave prominent consideration to implicit congressional approvals or disapprovals of presidential action.¹⁰² This theory may or may not be convincing (again, a point upon which this Article takes no position), but it is not a theory based upon the original understanding of the executive agreement power.

"Crucial to our decision today," Rehnquist wrote in *Dames & Moore*, "is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."¹⁰³ This conclusion followed from two observations: first, the existence of "a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate" (citing, among other

99. *Dames & Moore*, 453 U.S. at 677-79. On *Dames & Moore*, see Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68 (1982); John E. Nowak & Ronald D. Rotunda, *A Comment on the Creation and Resolution of a "Nonproblem": Dames & Moore v. Regan, the Foreign Affairs Power and the Role of the Court*, 29 UCLA L. REV. 1129 (1982).

100. 343 U.S. 579 (1952).

101. In *Youngstown*, the Court held unconstitutional President Truman's seizure of steel mills during an impending strike. *See id.* at 585-88. The government defended the action, in part, as necessary to sustain the war effort in Korea. *See id.* at 582. The Court, avoiding reliance on *Curtiss-Wright*, concluded that the asserted foreign affairs nexus did not give the President any expanded unilateral power. *See id.* at 587-88; *id.* at 640-50 (Jackson, J., concurring in the judgment).

102. *See id.* at 640-50 (Jackson, J., concurring in the judgment); *infra* note 107 (noting that this theory of overlapping powers is based on Justice Jackson's concurrence in *Youngstown*).

103. *Dames & Moore*, 453 U.S. at 680.

things, Wallace McClure's study of executive agreements concluded between 1817 and 1917),¹⁰⁴ and second, "the enactment of legislation closely related to the question of the President's authority in a particular case" (referring to the International Claims Settlement Act of 1949).¹⁰⁵ The former, occurring without objection, showed congressional "acquiescence" in the practice; the latter (which established a procedure to distribute the proceeds of international settlement) "placed [Congress's] stamp of approval on such agreements."¹⁰⁶

The foregoing argument depends, however, upon actions occurring after (in most cases long after) the ratification of the Constitution. It assumes that Congress may, by processes other than legislation, approve a procedure (or at least waive objections to a procedure) not envisioned by the Constitution itself. Like *Curtiss-Wright*, it is an application of a generalized theory about foreign relations power, albeit a different one: the theory that the allocation of foreign relations powers depends upon the silence or implied acquiescence of one branch in the expansive assertions of another.¹⁰⁷ As such, it tells little about the original understanding of the President's power; it is an inquiry solely into that power's practical evolution.

Further, *Dames & Moore* continued the assumption that with respect to international accords, the power of entry and the power of implementation are indivisible. Once the Court established the President's power to agree to the Algiers Declarations, it treated the case as decided: the Declarations, if constitutionally valid, must preempt the inconsistent state law.¹⁰⁸ Moreover, in adducing diplomatic practice to sustain the constitutionality of the agreement, the Court relied indiscriminately upon prior agreements that had *not* raised any preemption issues.¹⁰⁹ In short, *Dames & Moore* is not authority for an original presidential power of entry and is not really authority at all (except in a declaratory sense) for a presidential power of preemption.

104. *Id.* at 679 & n.8.

105. *Id.* at 678 (citing 22 U.S.C. §§ 1621-1645 (1949)).

106. *Id.* at 679, 680.

107. As the *Dames & Moore* Court acknowledged, *see id.* at 679, the theory is based on Justice Robert Jackson's concurrence in *Youngstown*, which was self-consciously divorced from inquiry into the original understanding. *See Youngstown*, 343 U.S. at 637 & n.1 (Jackson, J., concurring in the judgment).

108. *See Dames & Moore*, 453 U.S. at 669-74.

109. *See id.* at 679-80 & n.8.

III. TREATIES AND NONTREATY AGREEMENTS AS DISTINCT CATEGORIES UNDER THE CONSTITUTION

I now turn to the possibility of constructing an argument based upon the original understanding of the Constitution for the President's independent powers to conclude and implement international agreements. The immediate difficulty confronted by an advocate of such powers is the language of Article II, Section 2, which states that the President "shall have the Power, *by and with the Advice and Consent of the Senate*, to make Treaties."¹¹⁰ This provision is, naturally, the centerpiece of Raoul Berger's strongly-worded 1972 article¹¹¹ opposing presidential power over international agreements. As Berger forcefully argues,¹¹² its negative implication is almost unmistakable: given the constitutional language, it is difficult to see how the President, acting alone, could have the general power to make treaties *without* the advice and consent of the Senate. This greater power, if given by some other part of the Constitution, would include the lesser power described in Article II, Section 2: a President capable of acting on independent authority surely would be capable of acting with the approval of another body. If another part of the Constitution conveys to the President the general power to make treaties, the enumerated power of Article II, Section 2 is wholly superfluous.

Moreover, public comment at the time of the framing and ratification of the Constitution confirms the natural reading of the text. Berger collects a range of statements to this effect,¹¹³ of which the following are illustrative. In *The Federalist*, Hamilton wrote:

[T]he vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

[I]t would be utterly unsafe and improper to intrust [the power of making treaties] to an elective magistrate The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and

110. U.S. CONST. art. II, § 2 (emphasis added).

111. See Berger, *supra* note 17.

112. See *id.* at 35.

113. See *id.* at 37-40; see also GLENNON, *supra* note 30, at 181-83 (collecting authorities).

circumstanced as would be a President of the United States.

It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either¹¹⁴

Similarly, James Wilson observed that “[n]either the President nor the Senate, solely can complete a treaty; they are checks upon each other, and are so balanced, as to produce security to the people.”¹¹⁵ And Roger Sherman stated: “The establishment of *every* treaty requires the voice of the Senate. . . . The Constitution contemplates the united wisdom of the President and Senate, in order to make treaties”¹¹⁶ Therefore, it seems an uncontroversial assertion that, in terms of the original understanding, the President as a general matter lacked an independent treaty power.

From the foregoing, Berger concludes that “the specific objective of the treaty clause was to preclude the President, acting alone, from entering into international agreements.”¹¹⁷ That conclusion, however, contains a substantial and unsubstantiated definitional step equating the word “treaty” with the phrase “international agreement.” The specific object of the treaty clause, we may concede, was to prevent the President, acting alone, from entering into *treaties*; to reach Berger’s conclusion, one must further demonstrate that the term “treaty” encompasses all undertakings between nations. The first component of an originalist defense of the *Belmont* powers is to demonstrate, *contra* Berger, that the term “treaty” was understood as a special case of the term “international agreement” rather than as its synonym.¹¹⁸

114. THE FEDERALIST NO. 75, at 425-26 (Alexander Hamilton) (Isaak Kramnick ed., Penguin Books 1987).

115. 2 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 507 (2d ed. 1836) (statement of James Wilson to the Pennsylvania ratifying convention).

116. 1 ANNALS OF CONG. 1085 (Joseph Gales ed., 1789) (statement of Roger Sherman in the First Congress) (emphasis added).

117. Berger, *supra* note 17, at 37.

118. It is worth noting the divergence of this argument from the question of the constitutionality of congressional-executive agreements (a matter not always fully distinguished by commentators). The negative implication of Article II, Section 2, supported by the contemporaneous interpretations of that language, overwhelmingly suggests that the *President* lacked independent power to enter into treaties. But an argument by negative implication that Congress lacks that power has less force. Concluding that some other provision of the Constitution gave Congress that power, *see* Ackerman & Golove, *supra* note 6, at 914, does not render Article II, Section 2 superfluous: the two methods of approving treaties would be complementary. *See id.* at 919-20. Similarly, the contemporary observations quoted above are for the most part

A. *Constitutional Text*

In addition to Article II, Section 2, the word "treaty" appears three times in the Constitution: in Article III, Section 2 (giving federal courts jurisdiction over cases arising under treaties);¹¹⁹ in the Supremacy Clause of Article VI (in a context not germane to the definitional inquiry);¹²⁰ and in Article I, Section 10.¹²¹ Article I, Section 10 states: "No State shall enter into any Treaty, Alliance, or Confederation. . . . No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, *or with a foreign Power . . .*"¹²² As several commentators have noted, this language suggests an understanding of "treaty" as a subclass of all possible international agreements.¹²³ By these provisions, treaty-making at the state level was absolutely banned, yet states might (with the consent of Congress) enter into *some* understandings with foreign nations. That formulation is simply impossible if one believes, with Raoul Berger, that the word "treaty" encompasses every conceivable international agreement.¹²⁴

Nor is it sustainable that this text arose through error. It derives from (but materially modifies) similar language in the Articles of Confederation. Under that document,

No State, without the consent of the United States in Congress assembled, shall . . . enter into any conference, *agreement*, alliance or treaty with any king, prince or state

addressed to the danger of investing one person—the President—with treaty power. While these authorities appear to assume that the Senate will perform a checking power through Article II, Section 2, most of their concerns would also be allayed by a checking power performed by the Congress as a whole. Thus the argument over congressional-executive agreements (or, put another way, the argument as to whether Congress may approve treaties) is distinct from the present inquiry. Even if one were to conclude that Article II, Section 2 wholly precludes the President acting alone from entering into understandings with foreign nations, that conclusion would not disprove a power of the President-plus-Congress to do so.

119. See U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

120. See *id.* art. VI, § 2 ("This 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."). This language could support either a comprehensive or a specialized meaning of the word "treaty" and thus is not material to the immediate inquiry. I consider the effect of the Supremacy Clause upon executive agreements in Part VI, *infra*.

121. See U.S. CONST. art. I, § 10.

122. *Id.* (emphasis added).

123. See, e.g., GLENNON, *supra* note 30, at 178; Paul, *supra* note 30, at 735; Tribe, *supra* note 6, at 1265-66.

124. See *supra* notes 113-17 and accompanying text.

....

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled
....¹²⁵

In other words, treaties *and agreements* between a state of the United States and a foreign nation required the consent of Congress, but as among the separate states treaties *but not agreements* required such consent.¹²⁶ Thus, the textual distinction between treaties and other types of agreements among sovereigns began with the Articles of Confederation.

In keeping with the purpose of the Constitution to strengthen the national government, Article I, Section 10 went beyond the Articles in limiting the diplomatic powers of the states: it precluded state treaties altogether and required congressional consent for all state/foreign and interstate agreements. In so doing, however, it retained the Articles' differential treatment of state "treaties" and state "agreements," while increasing the limitations upon both categories. Given this adoption-with-modification of the Articles' terminology, it seems plain that Article I, Section 10 reflects a conscious understanding that treaties did not encompass the entire field of international agreements.¹²⁷

125. ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS BAY, RHODE ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, AND GEORGIA, art. VI (1777) [hereinafter ARTICLES OF CONFEDERATION] (emphasis added); see also Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by 'Agreements or Compacts'?*, 3 U. CHI. L. REV. 453, 454-56 (1936) (tracing the development of the relevant language).

126. It is the differential substantive treatment of "treaties" and "agreements," in both the Articles of Confederation and in Article I, Section 10 of the Constitution, that is critical. Drafters of legal instruments frequently employ lists of synonyms to convey fully their intent. Thus the fact that the Constitution refers, for example, to "Treat[ies], Alliance[s] or Confederation[s]," see U.S. CONST. art. I, § 10, does not necessarily suggest that its drafters understood any pertinent distinction among the three; each is treated the same, and the repetition may have arisen only through an excess of caution. However, when two terms are treated differently—as are "treaties" and "agreements" in both Article I, Section 10 of the Constitution and Article VI of the Articles of Confederation—it is literally nonsensical, in the effect it produces on the document, to view them as synonyms.

127. The earliest interpretations of Article I, Section 10 confirm this view. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 715 (1833); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 309-10 (1803); see also

Moreover, with respect to state practice, the ordinary meaning of these phrases has been employed without controversy. Under the Articles of Confederation, states entered into agreements with each other without congressional assent (despite the ban on unapproved "treaties");¹²⁸ under the Constitution, states have entered into agreements with foreign governments (with congressional approval) despite the complete preclusion of "treaties."¹²⁹ None of these practices would make sense, of course, if "treaty" meant every form of understanding between sovereigns.

Berger recognizes the force of these arguments and responds only by arguing that the word "treaty" in Article I does not mean the same thing as the word "treaty" in Article II.¹³⁰ But this seems insufficient. Even if there were two ordinary understandings of the word "treaty"—one technical and limited, the other comprehensive—and even if it is reasonable to suppose that the framers and ratifiers *might* have understood the term differently in successive articles of the same Constitution, at best this only establishes ambiguity. The text at least suggests—if it does not actually compel—an understanding of "treaty" as a subclass of "international agreement."

B. *Pre-Constitutional Usage*

Pre-constitutional usage of the term "treaty" further suggests that it was understood as a subclass of, rather than a synonym for, "international agreement." In ordinary speech, it is true, the understanding of the relevant terms was—as it is today—imprecise. However, in the more technical writing of eighteenth-century international law not all "international agreements" were considered "treaties." Since use of "treaty" as a restricted term of art in international law would have been familiar to the drafters of the

Weinfeld, *supra* note 125, at 454-56 (discussing these commentators).

128. See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 694 (1925); Weinfeld, *supra* note 125, at 464.

129. See HENKIN, *supra* note 1, at 153 & nn.15-17 (discussing, among others, agreements between New York and Canada and agreements among various Canadian provinces and neighboring U.S. states).

130. See Berger, *supra* note 17, at 42. In Berger's view:

[T]here is no place in the treaty clause for the more restricted reading of 'treaty' as it is used in the 'compact' clause It is familiar learning that the same words may have different meanings in the different contexts of the same statute when they are directed to different purposes.

Id.

Articles and of the Constitution,¹³¹ it is reasonable to suppose that they would have adopted that usage.

English dictionaries of the time are not helpful in clarifying the understanding of the relevant terms. Nicholas Bailey's 1729 dictionary, for example, defines "treaty" to mean "'an agreement between two or more distinct Nations concerning Peace, Commerce, Navigation, etc.'" ¹³² Berger concludes from this definition that the term "treaty" is comprehensive.¹³³ That is not the only interpretation. Bailey might have meant (as Berger supposes) to define treaties as "[all] agreements between nations [including for example those] concerning Peace, Commerce Navigation, etc." But he also might have meant "[certain kinds of] agreements between nations [such as those] concerning Peace, Commerce, Navigation, etc." Bailey's "etc." is fatally ambiguous; it could include all other agreements, or only those similar (in respects not yet identified) to agreements of peace, commerce, and navigation. Samuel Johnson's 1756 dictionary is even less helpful, defining "treaty" as a type of "compact" without indicating whether it includes all agreements (or even all "compacts") between nations.¹³⁴ Little can be concluded as to ordinary English usage, and it is not unlikely that the usage was itself ambiguous.

Presumably the ordinary eighteenth-century English usage did not pursue a refined distinction among various types of international understandings because, in English law, nothing turned upon such a distinction. All international agreements worked the same way: their formation was part of the prerogative of the English monarch, and they were negotiated directly by the crown or, more usually, by a designated representative subject to crown approval ("ratification").¹³⁵ There was, therefore, no need for precisely delineated multiple terms.

The language of eighteenth-century international law was,

131. See *supra* note 136 and *infra* notes 156-57.

132. Berger, *supra* note 17, at 35 (quoting BAILEY'S DICTIONARY 1729).

133. See *id.* (arguing that Bailey's dictionary shows that "[a]t the adoption of the Constitution, the word 'treaties' had a broad connotation").

134. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1756). Johnson unhelpfully defines "treaty" to mean: "A compact of accommodation relating to publick affairs"; "compact" to mean: "A contract; an accord; an agreement"; and "Agreement" to mean: "Compact; bargain." See *id.* It is impossible to tell from these definitions whether Johnson thought the word "treaty" included all "agreements" between nations. See Weinfeld, *supra* note 125, at 454 (concluding that "[Johnson's] dictionary obviously throws no light on the question").

135. See 1 WILLIAM BLACKSTONE, COMMENTARIES *252.

however, another matter. From a U.S. perspective, the writings of Hugo Grotius and Emmerich de Vattel were leading sources of international law in the constitutional period.¹³⁶ As elaborated below, both Grotius, the seventeenth century so-called "father" of modern international law,¹³⁷ and Vattel, the most widely read eighteenth-century writer in the field,¹³⁸ used the equivalent of "treaty" to indicate a subset of, not as a general term for, agreements among nations. Given the extent to which U.S. lawyers and political writers at the time cited and relied on Grotius and Vattel in matters of international law,¹³⁹ it seems inconceivable that this usage would not have been recognized.¹⁴⁰

Differentiation among classes of international agreements dates to Roman times. Roman practice recognized three types of agreements. The *foedus* was a formal undertaking of the Roman state whose conclusion required specified ceremonies and whose violation was said to risk divine retribution. The *sponsio* was a contract undertaken by a Roman officer in the field on that officer's own authority and initiative and subject to ratification or rejection by the sovereign power (at various times lodged in the Senate or the Emperor). A third designation, *alias pactiones*, was apparently a catch-all phrase for agreements not included in either of the foregoing categories.¹⁴¹

This differentiation among international agreements was likely known to educated persons of the eighteenth century who were

136. On the influence of Vattel and Grotius, see PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 1776-1814*, at 11 (1993); Adler, *supra* note 17, at 133, 137-38 & nn.27-30; Weinfeld, *supra* note 125, at 457-59; and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 242-43 (1996).

137. See Christopher A. Ford, *Preaching Propriety to Princes: Grotius, Lipsius, and Neo-Stoic International Law*, 28 CASE W. RES. J. INT'L L. 313, 315 (1996).

138. On the influence of Vattel, see *infra* notes 156-57 and accompanying text.

139. See *infra* notes 156-57 and accompanying text (discussing influence of Vattel and Grotius during constitutional period).

140. I speak here only of the usage of eighteenth century international law. Modern international law usage generally recognizes the word "treaty" as encompassing international obligations generally. See Vienna Convention on the Law of Treaties between States and International Organizations, Mar. 20, 1986, U.N. Doc. A/Conf. 129/15 (defining a treaty as any written agreement governed by international law).

141. See Peter Haggenmacher, *Some Hints on the European Origins of Legislative Participation in the Treaty-Making Function*, 67 CHI-KENT L. REV. 313, 321 & n.35 (1991) (discussing Roman practice). The principal Roman sources are Titus Livius (Livy), author of the principal history of Rome, and Domitius Ulpianus (Ulpian), quoted extensively in Justinian's Digest of Roman law.

acquainted with the Roman sources themselves,¹⁴² but in any event, the differentiation had been reproduced by the widely-read Grotius in the prior century. Grotius, writing in Latin, adopted the Roman terms to describe international agreements: *foedus* (or *fedus*), *sponsio*, and *alias pactiones*.¹⁴³ The conventional English translation of *foedus* was "treaty";¹⁴⁴ *sponsio* (which had largely passed out of practice by that point) had no obvious translation into ordinary English, and *alias pactiones* would have been rendered as "other agreements." A reader of Grotius would have in mind a hierarchy of international agreements in which "treaty" designated but one (albeit the most important) category: the entire class consisted of "treaties, *sponsios*, and other agreements."

Vattel is to similar effect. Writing in French, he distinguished between the "*traité*" on the one hand, and "*Accords, Conventions, Pactions*" on the other.¹⁴⁵ Vattel specifically equated the Latin *foedus* with the French *traité*,¹⁴⁶ and it is of course associated with its English

142. See Yoo, *supra* note 136, at 243 & n.368 (remarking on the influence of Roman sources).

143. See HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk. II, ch. XV, § 2 (1625) (Carnegie Endowment ed. 1925) ("*Publius has conventiones . . . dividere possumus in federa, sponsiones, pactiones alias*" (translation: Public conventions may be divided into treaties (*federa*, from *fedus*), *sponsiones* and other agreements (*pactiones alias*)). Moreover, Grotius maintains a distinction among the terms in his subsequent analysis. In speaking of the interpretation of international agreements, he uses *pactio/pactiones* (agreement) in speaking of interpretation generally and uses *fedus/federa* in reference to particular agreements or particular types of agreements. See *id.* bk. II ch. XVI, §§ 3-4 (speaking generically, using *pactio*); see *id.* bk. II, ch. XVI, § 13 (speaking specifically of alliances, using *fedus*); see *id.* bk. II, ch. XVI, § 14 (speaking of a specific agreement between Rome and Carthage, using *fedus*); see *id.* bk. II, ch. XVI, § 16 (speaking generically, using *pactio*). As indicated, Grotius's Roman sources were Ulpian and Livy. See *id.* bk. II, ch. XV, §§ 1-3; *supra* note 141. On Grotius's use of classical sources, see David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli ac Pacis*, 10 EMORY INT'L L. REV. 1 (1996).

144. See, e.g., James Madison, Letters of Helvidius, No. 1 (1793), in 1 JAMES MADISON, *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 607, 614 (J.B. Lippincott & Co. ed. 1867) (using *foedus/foedera* to mean "treaty"); see also HUGO GROTIUS, *LE DROIT DE LA GUERRE ET DE LA PAIX* (Jean Barbeyrac trans., 1724) (rendering *foedus* as *traité*—which is conventionally equated with "treaty").

145. EMMERICH DE VATEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* bk. II, § 153 (James Brown Scott ed., 1983) (1758) [hereinafter VATEL, *LE DROIT DES GENS*]; see also EMMERICH DE VATEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, bk. II, § 152 (Joseph Chitty ed. & trans., 1863) (1758) (describing the *traité*); *id.* § 153 (describing *pactions, accords, conventions*) [hereinafter VATEL, *THE LAW OF NATIONS*].

146. See *id.* VATEL, *LE DROIT DE GENS*, *supra* note 145, bk. II, § 152 ("*Un Traité, en Latin Foedus*").

quasi-cognate "treaty." *Accords, conventions, pactions* would conventionally be translated as "arrangements [or compacts], agreements, conventions."¹⁴⁷ Again "treaty" or its equivalent is not used as a comprehensive term, but as a subset of the larger class of international understandings, which is composed of treaties *and other agreements*.

In the development of European writing upon international law, the leading intermediary between Grotius and Vattel was Christian de Wolff. Wolff, a German writer in the intellectual tradition of Grotius, published his principal work (like Grotius, in Latin) in 1749;¹⁴⁸ Vattel's 1758 treatise was, to a large extent, a popularized version of Wolff in French.¹⁴⁹ Wolff himself was less widely cited by U.S. writers, and it is unclear whether his work was known in the United States prior to 1793.¹⁵⁰ However, his writings are critical in tracing the evolution of the international law terminology from Grotius to Vattel and are indicative of eighteenth-century European international law usage which, as a general matter, was likely familiar to those of the framers of the Constitution who had experience in international circles.¹⁵¹

Like Grotius, Wolff outlined three categories of agreements: the *foedus*, the *sponsio* (which he described in accordance with Grotius and the Roman sources), and a third category he designated *pactiones*.¹⁵² Further, Wolff stated, "*Gentes enim earumque Rectores pactiones inire possunt, quae foederibus contradistinguuntur*" ("Nations and their rulers can enter into agreements [*pactiones*])

147. See Weinfeld, *supra* note 125, at 460 & n.30.

148. CHRISTIAN DE WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTACTATUM* (J.B. Scott ed., 1983) (1749).

149. On the influence of Wolff on Vattel, see Weinfeld, *supra* note 125, at 463. See also VATTEL, *THE LAW OF NATIONS*, *supra* note 145, at x-xv (discussing Wolff as a source).

150. The earliest U.S. citation to Wolff of which I am aware is in Madison's work. See Madison, *supra* note 144, at 614 (citing as international law authorities "Wolfius, Burlamaqui and Vattel"). Jefferson had earlier written to Madison, evaluating international law sources: "Vattel has been most generally the guide. Bynkershoek often quoted, Wolf [sic] sometimes." Letter from Thomas Jefferson to James Madison (August 5, 1793), in 15 *THE PAPERS OF JAMES MADISON* 50-51 (Robert Rutland ed., 1985). See also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796) (opinion of Chase, J.) (citing and quoting the "Baron De Wolfuis [sic]").

151. See, e.g., Weinfeld, *supra* note 125, at 459 (discussing international law background of James Wilson, Oliver Ellsworth, and John Rutledge).

152. See WOLFF, *supra* note 148, § 369 (entitled "*Foedera quid sunt; quid pactiones*" (translation: "What *foedera* are; what are *pactiones*")); *id.* § 464 (entitled "*De Pactionibus Gentium*" (translation: "Of the *pactiones* of nations")); *id.* § 465 (entitled "*Sponsio quid est*" (translation: "What is a *sponsio*"))).

which are distinguishable from treaties [*foedera*].").¹⁵³ In sum, Wolff, like Vattel and Grotius, saw the *foedus*/treaty as a subset of international agreements. Vattel's French rendition of Wolff's thought retained the distinction between *foedus* (which he translated as *traité*) and *pactiones* (which he naturally associated with the French *paction* ("arrangement" or "compact") and its French synonyms *accords* and *conventions*). Thus, Vattel was likewise repeating the Roman terminology, passed through Grotius and Wolff.

For the Romans, the categories of agreements mattered because different types of agreements required the authority of different actors within the Roman polity.¹⁵⁴ By the eighteenth century these practical effects had largely disappeared. Generally, as in England, the eighteenth-century monarchs possessed absolute diplomatic power which they exercised through fully-empowered representatives. Consequently, some eighteenth-century international writers, including the widely-cited Bynkershoek, ignored the technical distinctions.¹⁵⁵ However, the historical terminology remained available through Grotius and Vattel, and would have held interest for those, such as the drafters of the Articles and of the Constitution, who were engaged in distributing the theretofore absolute diplomatic power of the conventional eighteenth-century monarch between state and federal governments and among the branches of the federal government.

This in turn is critical because Grotius and Vattel were well-known and widely consulted by the constitutional generation in the United States. As one might expect in the context of the creation of a new nation from revolution and the guidance of that nation in its

153. *Id.* § 464.

154. See GROTIUS, *supra* note 143, bk. II, ch. XV; Haggemacher, *supra* note 141, at 321.

155. See 1 CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* 251-59 (Carnegie Endowment ed., 1930) (1737). Bynkershoek nonetheless confirms the foregoing analysis. In keeping with the actual practice of the eighteenth century, he considered only a single classification of international agreement to which all of his observations applied. However, his word for this generic category was *pactio/pactiones* ("agreement," from *pacisor/pactus sum*, "to agree") rather than *foedus* ("treaty"), which he did not use at all. See *id.* Wolff, it will be recalled, also used the word *pactiones* to signify "agreements" and further stated that some "agreements" (*pactiones*) could be distinguished from the more specialized "treaty" (*foedus*). See WOLFF, *supra* note 148, § 464; *supra* note 153 and accompanying text. Similarly, Grotius used *pactio/pactiones* as a generic term and *fedus* as a specific term. See GROTIUS, *supra* note 143, bk. II, ch. XV-XVI. Bynkershoek apparently recognized that *foedus*/treaty was a specialized word, and since he intended to discuss all international agreements and not just treaties, he used the generic *pactiones* instead.

difficult diplomacy with the established powers, questions of international law were often in the forefront of debate; the authorities cited on these occasions were the European treatise writers, in particular Vattel:

During the Founding period and well beyond, Vattel was, in the United States, the unsurpassed publicist on international law.

....

From the day Vattel's treatise arrived in America in 1775, it was invariably invoked as authoritative on matters of international law by the likes of Alexander Hamilton, James Madison, James Wilson, Edmund Randolph, Thomas Jefferson, John Marshall, Joseph Story and James Kent, among others. Moreover, it was relied upon by the Second Continental Congress, the Constitutional Convention and the U.S. Congress.¹⁵⁶

A leading commentary on international law practice in the United States confirms:

In ascertaining principles of the law of nations, lawyers and judges of that era [the eighteenth century] relied heavily on continental treatise writers, Vattel being the most often consulted by Americans. An essential part of a sound legal education consisted of reading Vattel, Grotius, Pufendorf, and Burlamaqui, among others. Quotations from these sources appeared not only in briefs and opinions, but also in discussions of critical foreign policy matters by the President's Cabinet and in the popular press.¹⁵⁷

156. Adler, *supra* note 17, at 137-38; see also ONUF & ONUF, *supra* note 136, at 11 (stating that Vattel's work "was unrivaled . . . in its influence on the American founders"); Paul, *supra* note 30, at 736 & nn. 328-29 (discussing Vattel's influence and concluding that Vattel "was the most authoritative contemporary source of international law among the thirteen States"). There was at the time, moreover, little independent literature upon what we would today call "international relations"; writers upon the "law of nations" such as Grotius and Vattel were concerned alike with how nations did behave, should behave, and were obligated to behave. Their scope, in short, was broader—and their appeal more general—than might be suggested by the modern connotation of "international law." Cf. Ford, *supra* note 137, at 359-63 (noting that Grotius did not focus exclusively on what today would be referred to as legal matters); Yoo, *supra* note 136, at 242-43 (suggesting that international law had broader appeal during the late 1700s than it does today).

157. Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 823 (1989). The other treatise writers mentioned by Professor Jay—Pufendorf and Burlamaqui—did not discuss the nature of treaties in any relevant manner. See JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* (Thomas Nugent trans., Arno Press 1972) (1807); see also Weinfeld, *supra* note 125, at 457.

In short, one would expect that the founding generation, concerned with such an important matter as the power of international agreements, would have consulted the European publicists of international law, and that Vattel and Grotius would have been most in mind. Vattel and Grotius thought a treaty was only one kind of international agreement.¹⁵⁸ Thus, it is reasonable to suppose that the drafters of Article VI of the Articles of Confederation and Article I of the Constitution employed the international law terminology to differentiate the states' power over the various kinds of international accords, and that the word "treaty" in Article II, Section 2 of the Constitution would have been understood, following Vattel, Wolff, and Grotius, to describe only a particular category of international accords. Since the word was used as a term of art derived from international law in Article I, Section 10, it would seem incongruous to embrace an imprecise colloquial meaning in Article II, Section 2.

C. *Post-Constitutional Usage*

Raoul Berger rests much of his case against executive agreements upon post-drafting statements by principal framers and commentators.¹⁵⁹ Most of these statements (some of which I have quoted above)¹⁶⁰ specifically address the repository of the *treaty* power with the President and the Senate as opposed to the President alone. Berger quotes James Wilson's statement, for example, that "[n]either the president nor the Senate, solely, can complete a treaty;"¹⁶¹ similarly he relies on Story's comment that "[i]t is too much to expect that a free people would confide to a single magistrate . . . the sole authority to act conclusively, as well as exclusively, upon the subject of treaties."¹⁶² As argued above, these observations should conclusively refute (if the constitutional text alone were not enough) the suggestion that the President has an independent comprehensive treaty-making authority. But the argument for executive agreements turns not upon the location but upon the scope of the treaty power. If the treaty power is comprehensive as to all international agreements, assuredly the adduced statements are powerful evidence against any independent

158. See *supra* notes 143-47 and accompanying text.

159. See Berger, *supra* note 17, at 37-40.

160. See *supra* text accompanying notes 114-16.

161. Berger, *supra* note 17, at 38 n.206 (quoting James Wilson, *reprinted in* 2 ELLIOT, *supra* note 115, at 507).

162. *Id.* at 38 n.210 (quoting 2 STORY, *supra* note 127, § 1512, at 343-44).

presidential agreement-making ability; if it is not—as the Constitution itself and the terminology of Vattel, Wolff, and Grotius suggest—these statements simply do not speak to the power to conclude *nontreaty* agreements.

Most of the surviving discussion of the constitutional generation concerning the power over international agreements is confined to a discussion of the *location* of the treaty power without consideration of its scope—and thus is largely irrelevant to the matter at hand. The principal exception among Berger's authorities is Hamilton's statement that the treaty power is "'competent to all the stipulations which the exigencies of national affairs might require; competent to the making of treaties of alliance, . . . treaties of peace, and *every other species of convention usual among nations.*'"¹⁶³ Unlike the foregoing authorities, this observation appears directed to the *scope* of the treaty power and suggests that it is comprehensive.

The context of Hamilton's statement, however, shows that great reliance should not be placed upon it. It comes in the last of the thirty-eight "Camillus" essays written by Hamilton in defense of the 1794 treaty with Great Britain (known as the Jay Treaty after its negotiator, John Jay). The treaty was widely condemned by leaders of the Francophile Republican party for too closely aligning the United States with Britain in the Anglo-French disputes of the 1790s. Once it was ratified by the Senate, debate turned to the House (where implementing legislation was still necessary to provide requisite funding). As a "Law of the Land" under the Supremacy Clause, its supporters argued, the treaty commanded the allegiance of the House, which could therefore not thwart it by declining to fund it. Not so, rejoined opponents, for the treaty itself was unconstitutional: it purported to regulate commerce, commit the United States to expenditures, and limit war—all of which transgressed the powers of Congress under the Constitution. The proper scope of a treaty, the opponents further argued, was confined by the scope of the powers committed to Congress.¹⁶⁴

163. *Id.* at 35 (emphasis added) (quoting Letters of Camillus, No. 38, in 6 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 183 (H. Lodge ed., 1904)); see also GLENNON, *supra* note 30, at 182 (citing Camillus 38 and concluding that "Hamilton apparently regarded the advice-and-consent power of the Senate as encompassing every international agreement"). To the same effect, see Letters of Camillus, No. 36, in 6 HAMILTON, *supra*, at 168 ("The power of treaty . . . is the power by *agreement, convention or compact*, to establish rules binding upon two or more nations . . .").

164. See Letters of Camillus, Nos. 36 & 37, in 6 HAMILTON, *supra* note 163, at 166-67, 171-72 (restating the Republican argument); 5 MOORE, *supra* note 57, at 224 (recounting the Jay Treaty controversy).

Camillus 38 (and its immediate predecessors) were a response to this argument. In Camillus 36 and 37, Hamilton pointed out the structural difficulty of the Republican contention: by virtue of Congress's power over war, commerce, and expenditure, the proposed limitation would leave effectively nothing to the treaty power.¹⁶⁵ The first part of Camillus 38, to which the critical quote belongs, is a summary of that argument: the treaty power was not intended to be circumscribed, Hamilton repeated—meaning that the treaty power was not intended to be circumscribed by the enumerated powers of Congress in Article I, Section 8.

So understood, it is difficult to see the Camillus essay as relevant to the issue of presidential power. The question was whether matters ordinarily thought encompassed within a treaty (such as peace, navigation, and commerce)¹⁶⁶ were removed therefrom by the design of the Constitution. It was, in other words, about the division of power between the Senate and the House, not between the Senate and the President, and it was about whether power over matters ordinarily understood to be within the province of treaties was limited by other provisions of the Constitution. Added to the usual tendency for rhetorical overstatement in the course of partisan debate, the entirely distinct context makes Hamilton's observation an unreliable indicator of the view of the executive agreement power.

Hamilton's statement aside, there is little commentary of a post-constitutional nature that is relevant to the present inquiry. Indeed, the subject of nontreaty agreements seems not to have been widely discussed in that era. Thus, post-constitutional views may be discovered more readily from what was done rather than what was said. Accordingly, I next turn to the early history of the nontreaty agreement.

D. Nontreaty Agreements in Practice

The historical pedigree of the nontreaty agreement has become an article of faith in modern comprehension. As discussed above, the Court in *Dames & Moore* relied upon the "longstanding practice of claim settlement by executive agreement."¹⁶⁷ McDougal and Lans, writing in 1945, repeatedly referred to "150 years" of history supporting nontreaty agreements.¹⁶⁸ Ackerman and Golove, while

165. See Letters of Camillus, Nos. 36 & 37, in 6 HAMILTON, *supra* note 163, at 167-82.

166. See *supra* note 132 and accompanying text (giving dictionary definition).

167. *Dames & Moore v. Regan*, 453 U.S. 654, 682 n.10 (1981).

168. McDougal & Lans, *supra* note 31, at 212, 214, 216, 229, 232. To the same effect is MCCLURE, *supra* note 31, at 3-4, 35-99.

disputing some of McDougal and Lans's conclusions, confirm that "there were hundreds of unilateral executive agreements between the American Revolution and the First World War."¹⁶⁹ Even Professor Tribe, although generally skeptical of the power to conclude nontreaty agreements, agrees that "[f]rom the nation's earliest days, the President has been understood to have inherent power to make limited types of agreements with foreign nations"¹⁷⁰

Though such statements are not inaccurate, their tenor vastly overstates the historical record relevant to the present inquiry. To an inquiry concerning original understanding, the post-constitutional record is only indirect evidence; the further removed from the constitutional period, the less suggestive it will be of that period's understanding.¹⁷¹ What interpreters in, say, 1910 thought of nontreaty agreements may (depending upon one's theory of constitutional interpretation) be relevant to the *present* understanding, but given its remoteness from the constitutional period it is not particularly good evidence of the *original* understanding. Because the *Dames & Moore* Court, McDougal and Lans, and others were expressly not conducting an inquiry into the original understanding (but rather into the evolution of the understanding), they gave equal weight and consideration to all past practice, and from an undifferentiated evaluation of all such practice pronounced that history supported their view. But their conclusion is distinct from a claim that history indicates an *original* (i.e., 1787-89) understanding embracing nontreaty agreements. Such a claim must focus upon *immediately* post-constitutional practice and strongly devalue historical evidence remote from the period under inquiry.

Once the inquiry is recast in this fashion, the historical evidence becomes less overwhelming than is commonly suggested. For the first fifty years of post-ratification history (i.e., through 1839), compilations of U.S. international agreements¹⁷² contain a total of *at*

169. Ackerman & Golove, *supra* note 6, at 820.

170. Tribe, *supra* note 6, at 1265.

171. The use of post-ratification events to demonstrate the original meaning of a text is, of course, subject to substantial objections. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550-51 (1994) ("[T]he Constitution's postenactment 'legislative' history . . . is, after all, the history that is least likely to reflect the original understanding. It is better to examine exhaustively the pre-ratification material first and only look at the post-ratification material if it is absolutely necessary to do so."); *id.* at 554 (explaining that post-ratification history is unreliable because "there can be no guarantee that a later lawmaker's understanding in fact bears on the intent animating an earlier enactment"). Remoteness of the events from the ratification sharply compounds these difficulties.

172. The most complete compilation for the relevant period is TREATIES AND OTHER

most twelve agreements that rest upon the independent authority of the executive branch. They are: (1) the 1799 claims settlement agreement with the Netherlands involving the ship *Wilmington Packet*,¹⁷³ (2) an agreement with Britain relating to exchange of prisoners during the War of 1812,¹⁷⁴ (3) the 1817 Rush-Bagot Agreement demilitarizing the Great Lakes,¹⁷⁵ (4) and (5) agreements settling claims with Russia and Colombia in 1825,¹⁷⁶ (6) and (7) commercial agreements with Hawaii and Tahiti in 1826,¹⁷⁷ (8) and (9) claims settlement agreements with Brazil and Colombia in 1829,¹⁷⁸ (10) a claims settlement agreement with Portugal in 1832,¹⁷⁹ (11) a claims settlement agreement with the Netherlands in 1839,¹⁸⁰ and (12) a commercial agreement with Samoa in 1839.¹⁸¹

Moreover, a number of these are subject to substantial difficulties as precedent for the recognition of nontreaty agreements. To support the executive's argument in this regard, authoritative

INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA (Hunter Miller ed., 1931-1948) [hereinafter Miller]. Also useful is INTERNATIONAL AGREEMENTS OF THE UNITED STATES 1776-1949 (Charles I. Bevans ed., 1968-1974).

173. Note of Maarten van der Goes, Minister of Foreign Relations of the Batavian Republic [The Netherlands], to William Vans Murray, Minister Resident of the United States, and answering Note of the Minister Resident, Dec. 7-12, 1799, U.S.-Neth., 5 Miller 1075 [hereinafter *Wilmington Packet* Agreement].

174. Cartel for the Exchange of Prisoners of War, May 12, 1813, U.S.-Gr. Brit., 2 Miller 557 [hereinafter Prisoner of War Agreement].

175. Exchange of Notes Relative to Naval Forces on the American Lakes, Apr. 28-29, 1817, 18(2) Stat. 296, 2 Miller 645 [hereinafter Rush-Bagot Agreement].

176. Exchange of Notes for the Settlement of the Claims in the Case of the Brig *Pearl*, Apr. 19-22, 1825, U.S.-Russ., 3 Miller 201 [hereinafter Russian Claims Settlement]; Convention for Adjusting Certain Claims, Mar. 16, 1825, U.S.-Colom., 3 Miller 195 [hereinafter 1825 Colombian Claims Settlement].

177. Articles Agreed on with the King, Council, and Head Men of Tahiti (O Taheite), Sept. 6, 1826, U.S.-Tahiti, 3 Miller 249 [hereinafter Tahiti Articles]; Articles of Arrangement with the King of the Sandwich Islands (Hawaii), Dec. 23, 1826, U.S.-Sandwich Islands (Hawaii), 3 Miller 269 [hereinafter Hawaii Articles]. McClure's historical summary of the executive agreement power includes an additional agreement signed with the king of Raiatea, nominally a dependency of Tahiti. See MCCLURE, *supra* note 31, at 56. Miller's compilation, however, does not list this as a separate agreement. See 3 Miller at 256-60, Notes.

178. Convention for Adjusting Certain Claims, Nov. 25, 1829, U.S.-Colom., 3 Miller 523 [hereinafter 1829 Colombian Claims Settlement]; Confirmation of Thirteen Claims Agreements and of an Agreement Regarding the Rate of Exchange, June 15, 1829, U.S.-Braz., 3 Miller 485 [hereinafter Brazilian Claims Settlement].

179. Settlement of Claims, Agreement, Jan. 19, 1832, U.S.-Port., 3 Miller 653 [hereinafter Portugal Claims Settlement].

180. Settlement of the Claim for the Ship *Mary* and Her Cargo, Mar. 25, 1839, U.S.-Neth., 4 Miller 179 [hereinafter 1839 Netherlands Claims Settlement].

181. Commercial Regulations, signed by the Chiefs of the Samoan Islands, Nov. 5, 1839, U.S.-Samoan Islands, 4 Miller 241 [hereinafter Samoa Regulations].

precedent should encompass only those incidents in which the U.S. executive asserted a unilateral power to make promises to foreign nations on behalf of the United States. A number of the foregoing "agreements" do not meet this standard in all respects.

For convenience of discussion we may divide the twelve candidates between claims settlement agreements (of which there are seven) and other agreements. Of the agreements other than settlement agreements, four of the five require significant qualification. For example, the Rush-Bagot Agreement, although often cited as a critical early nontreaty agreement,¹⁸² received a belated Senate approval under the Article II, Section 2 procedure.¹⁸³ President Monroe initially proposed to make the agreement on his own authority (perhaps fearing that, in light of the just-concluded war with Great Britain, it might encounter opposition). However, he was persuaded otherwise, in part by his own advisers and in part by the British, who wanted to avoid controversy as to the agreement's binding effect.¹⁸⁴ Monroe accordingly submitted the agreement to the Senate with a note asking whether this was the type of agreement requiring Senate approval; the Senate (implicitly answering in the affirmative) gave its advice and consent to the agreement, in accordance with Article II, Section 2, approximately a year after it was first signed.¹⁸⁵ Thus, although Monroe apparently believed he might have some independent power with respect to some types of international agreements, the incident is not evidence for a common understanding of such a power.

Another three of the agreements are problematic for a different reason: they do not appear, upon close examination, actually to be undertakings of the United States. The commercial agreements with Hawaii and Tahiti were negotiated by a single naval captain, Thomas Jones, operating without specific instructions, and do not appear to have been approved or ratified by any U.S. President.¹⁸⁶ The

182. See, e.g., MCCLURE, *supra* note 31, at 49-50; 5 MOORE, *supra* note 57, at 214-15; McDougal & Lans, *supra* note 31, at 247 n.138.

183. Rush-Bagot Agreement, *supra* note 175, 18(2) Stat. 296, 2 Miller 645 (Senate resolution of approval and consent on Apr. 16, 1818).

184. See 2 Miller at 647-48, Notes.

185. See 18(2) Stat. 296 (1818) (reflecting Senate resolution of advice and consent dated April 16, 1818); 2 Miller 645 (same); see also Ackerman & Golove, *supra* note 6, at 816-17 & n.57 (questioning relevance of Rush-Bagot Agreement to history of the exercise of executive agreement power).

186. See Tahiti Articles, *supra* note 177, 3 Miller 249; Hawaii Articles, *supra* note 177, 3 Miller 269. Miller adds that

it seems that Captain Jones regarded the articles, to the extent that they constituted an agreement, as provisional and operative only "until the

arrangement with Samoa suffers similar difficulties. It was likewise the work of a single naval captain, John Wilkes, again operating without specific instructions as to the making of agreements.¹⁸⁷ It is styled more as an enactment of local law than as an international agreement: the document is entitled "Commercial Regulations" and carries the signature of Wilkes as a "witness" rather than as an agent signing on behalf of the United States.¹⁸⁸ Although it imposes obligations upon U.S. commercial ships in Samoa (as would be expected as a matter of local law), it does not appear to impose international obligations upon the United States as a nation.¹⁸⁹ As with the Hawaii and Tahiti agreements, there is no record of any U.S. President embracing the Samoa arrangement as an international act of the United States.¹⁹⁰

With respect to the settlement agreements, at least two of the seven are subject to serious objections. Each of the seven involved individualized private claims by U.S. citizens against a foreign government arising from the detention or seizure of a U.S. merchant ship in alleged violation of treaty obligations or customary international law.¹⁹¹ Nineteenth-century rules of jurisdiction and immunity made suit by a private party against a foreign sovereign essentially impossible;¹⁹² realistically the only way a U.S. citizen's private claim against a foreign government might be vindicated was by negotiation through the U.S. embassy. The private party typically requested State Department assistance, and the U.S. minister in the relevant nation raised the claim with that government and secured

President's pleasure could be known." So far as the record shows, the pleasure of the President never was made known in the matter; no record appears of any official notice of the articles

Tahiti Articles, *supra* note 177, 3 Miller at 256, Notes. These objections would also apply to Jones's agreement with the king of Raiatea, *see* McClure, *supra* note 31, at 56, were one inclined to count that as a separate executive agreement.

187. *See* Samoa Regulations, *supra* note 181, 4 Miller at 252, Notes.

188. Wilkes himself apparently saw the incident as an enactment of local law at the behest of the United States, rather than an international agreement; he stated that his object was "to procure the formal enactment of laws and regulations which might secure to our whaleships a certainty of protection and security." *Id.* at 252, Notes (citing Wilkes's report of his voyage).

189. *See* Samoa Regulations, *supra* note 181, 4 Miller 241.

190. *See id.* at 244, Notes.

191. *See* 1839 Netherlands Claims Settlement, *supra* note 180, 4 Miller 180; Portugal Claims Settlement, *supra* note 179, 3 Miller 659; 1829 Colombian Claims Settlement, *supra* note 178, 3 Miller 528; Brazilian Claims Settlement, *supra* note 178, 3 Miller 487; Russian Claims Settlement, *supra* note 176, 3 Miller 205; 1825 Colombian Claims Settlement, *supra* note 176, 3 Miller 197; *Wilmington Packet Agreement*, *supra* note 173, 5 Miller 1075.

192. *See The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812).

what payment could be negotiated. The agreements entered into in connection with such events involved an undertaking by the foreign government to pay a sum of money and an undertaking by the United States to accept that sum as a final settlement of the claim.¹⁹³ Where the claim was paid in full, the "settlement" involved only a one-sided obligation to pay; the United States and the private claimant effectively surrendered no asserted right. As a result, such "agreements" may not be said to involve an undertaking on the part of the United States and might not serve as meaningful precedents. Two of the seven agreements under study, the 1829 settlement with Colombia and the 1832 settlement with Portugal, involved full payment.¹⁹⁴

Subtracting these doubtful entrants, one is left with one military agreement¹⁹⁵ and five settlements of claims¹⁹⁶—not an impressive record for 50 years of practice. Further, the bulk of these agreements occurred near the end of the period. Aside from the *Wilmington Packet* settlement in 1799, the first twenty-four years of post-constitutional practice saw no such agreements, and in the first thirty-six years there was only one, and that during the exigencies of wartime.

Nonetheless, U.S. presidents did sometimes make international promises on their own authority. Consider President Madison's 1813 agreement with Great Britain regarding prisoners of war. The operative sections outlined, among other things, where prisoners of war were to be housed, how they were to be treated, upon what terms they would be exchanged, details of their conditions of parole, and even how costs of exchanges were to be allocated.¹⁹⁷ Plainly,

193. See *supra* note 191 (citing agreements).

194. As to the Colombian agreement, Miller's editorial notes reflect that "the amounts of the claims were not questioned; the calculations were according to the figures of the claimants." 1829 Colombian Claims Settlement, *supra* note 178, 3 Miller at 196, Notes. With respect to the Portuguese settlement, President Jackson's message to Congress describing the settlement states that the claims were to be paid in full. See Portugal Claims Settlement, *supra* note 179, 3 Miller at 657, Notes.

195. See Prisoner of War Agreement, *supra* note 174, 2 Miller 557.

196. See 1839 Netherlands Claims Settlement, *supra* note 180, 4 Miller 179; Brazilian Claims Settlement, *supra* note 178, 3 Miller 485; Russian Claims Settlement, *supra* note 176, 3 Miller 201; 1825 Colombian Claims Settlement, *supra* note 176, 3 Miller 195; *Wilmington Packet* Agreement, *supra* note 173, 5 Miller 1075.

197. See Prisoner of War Agreement, *supra* note 174, 2 Miller 557, arts. II-IX. For example: "All noncombatants that is to say surgeons and surgeons mates, Pursers, secretaries, chaplains and Schoolmasters . . . if taken shall be immediately released without exchange . . ." (art. II); "British prisoners taken and brought into the United States shall be stationed at [list of ports] and at no other ports or places in the United States." (art. III); "Whenever a Prisoner is admitted to parole the form of such parole

therefore, by this instrument the United States promised performance of certain acts to Great Britain. If one believes (as the constitutional generation appeared to) that the President lacked unilateral power to enter into a "treaty" by the negative implication of Article II, Section 2, and if one believes (as Raoul Berger asserts) that the term "treaty" encompasses every species of international agreement, Madison's agreement would appear to be constitutionally infirm. But there is no record that anyone at the time raised such an objection.

Further, in five of the post-constitutional settlement agreements the President did make promises to foreign nations on behalf of the United States. For example, in the 1825 settlement with Russia, the Russian government was willing to recognize only a portion of the damages asserted. The U.S. government (on the authority of President John Quincy Adams) agreed that if Russia would pay that reduced amount, the U.S. government would make no further assertion of claims in respect of the subject injury.¹⁹⁸ Similarly, in the 1839 agreement with The Netherlands, the U.S. government not only agreed to accept a compromised payment as full settlement of the claim, but also assumed responsibility for any further claims against the Dutch government (including claims by non-U.S. parties) arising out of the relevant incident.¹⁹⁹ Again, if "treaty" encompasses all agreements with foreign nations, it is hard not to see these agreements as "treaties"—and yet apparently no suggestion was made that they be approved through the Article II, Section 2 procedure. While these incidents may not amount to the

shall be as follows—[a specific form is attached]." (art. IV); "No prisoner shall be struck with the hand, whip, stick or any other weapon whatever . . ." (art. VII); "To carry on a regular exchange of prisoners between the two countries, four vessels shall be employed, two of which shall be provided by the British government and two by the government of the United States." (art. IX). *Id.* at 557-63.

198. See Russian Claims Settlement, *supra* note 176, 3 Miller at 201, Notes (giving historical background).

199. See 1839 Netherlands Claims Settlement, *supra* note 180, 4 Miller 179. By the terms of that settlement:

I do hereby assume, [wrote the U.S. representative] in the name of the Government of the United-States the obligation . . . to Answer all demands or applications which may in [the] future be addressed to the Government of his Said Majesty [King of the Netherlands] . . . whenever such demands or applications may be referred for that purpose by the Netherlands' Government to that of the United States; the latter engaging to Stand in the place and Stead of the Netherlands' government, in all respects and for all purposes and liabilities connected with, or arising from the Seizure and detention of the property referred to.

4 Miller 179, 179.

commanding historical record modern authorities often suggest, there is some historical evidence that, in the post-ratification period, some species of international agreement in addition to a "treaty" was recognized.

This evidence may be strengthened somewhat by two further observations. First, the experience of the *next* twenty years—extending the historical period under examination essentially up to the beginning of the Civil War—affords considerably more precedent. Continuing the trend of the 1820s and 1830s, the volume of unilateral executive agreements increased, for a total of around thirty-five agreements between 1840 and 1860.²⁰⁰ It is noteworthy, moreover, that the Presidents during this period, with the exception of James Polk, were advocates of neither strong executive powers nor an expansive reading of the Constitution.²⁰¹ For example, James Buchanan—who in four years concluded as many executive agreements (twelve) as were concluded in the first fifty years after ratification²⁰²—manifested an extraordinarily cautious interpretation

200. See Miller, *supra* note 172, vols. 5-8. My own count is 38 executive agreements, but as with the 1789-1839 period, there may be some dispute as to which international accords concluded during this period are appropriately counted as executive agreements.

201. See SAMUEL FLAGG BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 309-39 (4th ed. 1955) (discussing diplomacy of the relevant period).

202. See (1) Convention for the Settlement of the Case of George W. Johnston, Oct. 18, 1860, U.S.-Venez., 8 Miller 577 [hereinafter Johnston Settlement Agreement]; (2) Settlement of the Case of Walter Dickson, Dispatch of James Williams, American Minister Resident in Turkey, to Secretary of State, reflecting terms of oral agreement, July 19, 1860, U.S.-Turk., 8 Miller 519 [hereinafter Dickson Settlement Agreement]; (3) Settlement of the Claims of Hemenway & Co. and Alsop & Co., Notes of Geronimo Urmeneta, Chilean Minister of Foreign Affairs, to John Bigler, American Minister, and answering note of American Minister, Jan. 16-28, 1860, U.S.-Chile, 8 Miller 449 [hereinafter Hemenway & Co. Settlement Agreement]; (4) Agreement Concerning the Joint Occupation of San Juan Island, Correspondence between Lt. Gen. Winfield Scott, General in Chief of the U.S. Army, and James Douglas, C.B., Governor of the Colony of Vancouver, Oct. 25-Nov. 9, 1859, U.S.-Gr. Brit., 8 Miller 281 [hereinafter San Juan Island Agreement]; (5) Settlement of the Case of Edward Newton Perkins, Notes of John P. Stockton, American Minister Resident, to Giacomo Cardinal Antonelli, Papal Secretary of State, and answering note of the Papal Secretary of State to the American Minister Resident, June 24-July 26, 1859, U.S.-Papal States, 8 Miller 267 [hereinafter Perkins Settlement Agreement]; (6) Settlement of the Case of the American Bark *Mermaid*; Note of William L. G. Smith, American consul at Shanghai, to Sieh, *taotai* at Shanghai, and answering note of the *taotai*, Oct. 26, 1858, 8 Miller 13 [hereinafter 1858 China Claims Settlement]; (7) Convention for the Settlement of the Case of the American Whaling Ship *Franklin*, Sept. 10, 1858, U.S.-Chile, 8 Miller 3 [hereinafter 1858 Chile Claims Settlement]; (8) Convention for the Settlement of the Case of the Brig *Horatio*, Feb. 27, 1858, U.S.-Venez., 7 Miller 727; (9) Settlement of the Case of the Brig *Esmerelda*, Note of John Appleton, Acting Secretary of State, to Comte de Sartiges, Minister of France, and answering note to the Minister of France, June 10-Dec. 26, 1857, U.S.-France, 7 Miller 591 [hereinafter 1857 French Claims Settlement]; (10) Agreement for a Mixed

of executive power both in international affairs and with respect to the impending secession crisis.²⁰³ Moreover, Congress during this time had a number of powerful leaders—Webster, Clay, Calhoun and others—who gave attention to its prerogatives (as shown, for example, in the sharp criticism of Polk for his supposedly unconstitutional provocation of the Mexican War).²⁰⁴ Thus, limitation of executive power was a topic of attention, the congressional leadership was powerful and presidential claimants weak; yet there is no record of concern over the expanding use of unilateral executive agreements.²⁰⁵ To be sure, these agreements were for the most part of no great significance, but the fact that they occurred essentially unremarked suggests that no one saw the practice as ahistorical or inconsistent with earlier assumptions.

Second, a number of international accords were concluded in the early years of constitutional history on the authority of the President

Commission for the Case of the Whaling Ship *George Howland*, Nov. 13, 1857, U.S.-Ecuador, 7 Miller 707 [hereinafter 1857 Ecuadorian Claims Settlement]; (11) Settlement of the Case of John Adams, June 4, 1857, U.S.-Peru, 7 Miller 587 [hereinafter Adams Settlement Agreement]; (12) Settlement of the Case of American Shipmasters at the Chincha Islands, Note of Manuel Ortiz de Zavallos, Minister of Foreign Affairs of Peru, to John Randolph Clay, Minister of the United States, and answering note of the Minister of the United States, Apr. 8-9, 1857, U.S.-Peru, 7 Miller 503 [hereinafter Chincha Islands Settlement Agreement].

203. On Buchanan, see generally PHILIP S. KLEIN, *PRESIDENT JAMES BUCHANAN, A BIOGRAPHY* (1962); ELBERT B. SMITH, *THE PRESIDENCY OF JAMES BUCHANAN* (1975). See also BEMIS, *supra* note 201, at 327 (discussing Buchanan's deference to Congress in U.S.-Mexico relations); James Buchanan, Second Annual Message to Congress, December 6, 1858, reprinted in 8 *THE WORKS OF JAMES BUCHANAN: COMPRISING HIS SPEECHES, STATE PAPERS, AND PRIVATE CORRESPONDENCE* 246 (John Bassett Moore ed., 1910) (showing highly limited interpretation of executive war power). Buchanan had, moreover, served as Secretary of State under President James Polk and Minister to Great Britain under President Franklin Pierce, so the exercise of executive authority in international affairs no doubt received his considered attention.

204. Polk, on his own initiative, ordered U.S. military forces into territory disputed with Mexico; after the Mexican army attacked these forces, Polk asked Congress to declare war. Although Congress acceded to the request, numerous voices during the debate protested Polk's action as inconsistent with Congress's constitutional war power. See Cong. Globe, 29th Cong., 1st Sess. 784-86 (1846) (statements of Senators Calhoun, Morehead, Archer and Clayton). Two years later, the House approved (by an 85-81 vote) a resolution describing the conflict as "a war unnecessarily and unconstitutionally begun by the President of the United States." Cong. Globe, 30th Cong., 1st Sess. 95 (1848). See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 31-34 (1995) (discussing constitutional criticism of Polk's unilateral action).

205. See BEMIS, *supra* note 201, at 309-39. The Senate was, moreover, well aware of the practice. See, e.g., James Buchanan, Message to the Senate, Feb. 9, 1860, 8 Miller at 143, Notes (submitting a claims settlement agreement for advice and consent but noting that "[u]sually it is not deemed necessary to consult the Senate in regard to similar instruments relating to private claims of small amount when the aggrieved parties are satisfied with their terms").

plus a majority of both houses of Congress. The leading examples are a number of postal agreements authorized by acts of Congress²⁰⁶ and concluded between the U.S. Postmaster General and various European powers to regularize international mail delivery.²⁰⁷ A few additional examples beyond the postal agreements may also be identified, but the practice was otherwise not widespread.²⁰⁸

Of course it may be argued that Congress has an independent implicit treaty-making power conveyed by Article I of the Constitution and that these agreements were constitutionally concluded as "congressional treaties."²⁰⁹ If so, their existence adds nothing to the present inquiry. But at least some of the Constitution's framers apparently did not share this view. Hamilton, in the *Camillus* essays, attacked the idea that Congress (as opposed to the Senate) had any Article I treaty power.²¹⁰ Nonetheless,

206. See, e.g., Act of Feb. 20, 1792, 1 Stat. 236 (1792) (authorizing Postmaster General to enter into agreements respecting foreign mail delivery); Act of June 15, 1844, 5 Stat. 718 (1844) (directing that "the Postmaster General be . . . authorized to make such arrangements as may be deemed expedient with the Post Office Department of the British government for the transmission of the British mail . . . between Boston and Canada"); *id.* (authorizing postal agreements with Germany and France).

207. See MCCLURE, *supra* note 31, at 38-40 & n.16 (describing early postal agreements); see also 19 Op. Att'y Gen. 513, 520 (1890) (noting that the Constitution "has been interpreted to mean that the power vested in the President to make treaties, with the concurrence of two-thirds of the Senate, does not exclude the right of Congress to vest in the Postmaster-General power to conclude conventions with foreign government for the . . . carriage of foreign mails") (opinion of William H. Taft).

208. The only agreements plainly falling into this category during the relevant periods are (1) Protocol of the Cession of Horseshoe Reef, Dec. 9, 1850, U.S.-Gr. Brit., 18(2) Stat. 325, 5 Miller 905, approved by Act of Mar. 3, 1849, 9 Stat. 38 (1849) and Act of Mar. 3, 1851, 9 Stat. 627 (1851) [hereinafter *Horseshoe Reef Agreement*]; and (2) Settlement of Claims, Note of the Rt. Hon. Richard Pakenham, Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty, to James Buchanan, Secretary of State, and answering note of the Secretary of State, Nov. 10-26, 1845, U.S.-Gr. Brit., 4 Miller 779 [hereinafter *1845 British Claims Settlement*], approved by Congress pursuant to the Appropriations Act of May 8, 1846, 9 Stat. 6 (1846). McClure identifies several additional informal trade reciprocity arrangements authorized by Congress and implemented by the President, including an arrangement with Austria in 1829 and one with Great Britain in 1830; Miller's compilation, however, declines to recognize these as formal agreements. See MCCLURE, *supra* note 31, at 57-59; cf. 3 Miller at 521, Notes (describing the arrangement with Austria).

209. See Ackerman & Golove, *supra* note 6, at 919 (arguing for independent Article I power to conclude international agreements).

210. See Letters of *Camillus*, No. 36, in 6 HAMILTON, *supra* note 163, at 168-69. Washington appeared to agree. See George Washington, Message to Congress, Mar. 30, 1796, reprinted in 5 MOORE, *supra* note 57, at 225 ("[T]he power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate." (emphasis added)). Yet Washington's Postmaster General, Timothy Pickens, concluded the first postal convention (with Canada) outside of the Article II, Section 2 process. See MCCLURE, *supra* note 31, at 38-39.

Hamilton and those who shared his view apparently did not think that congressionally-approved agreements such as the postal conventions required supermajority approval by the Senate. Presumably that was because Hamilton thought they were not treaties: as Congress lacked treaty power, congressional approval would not have been constitutionally relevant otherwise. Thus, Hamilton and his allies must have recognized a category of nontreaty international agreements.

Accordingly, post-constitutional practice seems to provide some support for the idea that "treaty" was not understood to encompass every international agreement. Taken with the textual evidence that, at least with regard to state practice, some kinds of international agreements were accorded treatment different from "treaties," and the pre-1789 international law terminology (with which the constitutional generation was conversant) distinguishing between "treaties" and other international agreements, the first step of the executive's argument is fairly obtained: the treaty clause of Article II, Section 2 does not, as an original matter, seem to encompass every form of international agreement.

IV. THE DIFFERENCE BETWEEN TREATIES AND OTHER INTERNATIONAL AGREEMENTS

The foregoing shows an understanding of the constitutional text that recognized a class of nontreaty agreements distinct from the "treaties" encompassed by Article II, Section 2. The next step, therefore, is to identify the difference between treaties and nontreaty agreements.²¹¹

In the ensuing section, I argue first that the difference must lie in the substance of the undertaking. Other differences have been suggested. International understandings could be classified according to their form or the manner in which they are concluded, such that (for example) one category might encompass understandings

211. Much modern commentary treats identifying this difference as an impossible task. McDougal & Lans state:

[T]here are no significant criteria, under the Constitution of the United States or in the diplomatic practice of this government, by which the *genus* 'treaty' can be distinguished from the *genus* 'executive agreement,' other than the single criterion of the procedure or authority by which the United States' consent to ratification is obtained.

McDougal & Lans, *supra* note 31, at 199. In Professor Tribe's view, "[w]hat the Founders saw as the precise definitions of treaties, alliances, confederations, agreements and compacts is largely lost to us now. Consequently, line-drawing in this area is especially complex." Tribe, *supra* note 6, at 1266.

undertaken with elaborate formalities while another category might include informal arrangements achieved by an exchange of diplomatic notes.²¹² Alternatively, international understandings could be classified according to their effect—that is, their status (or lack of status) as binding obligations under international or domestic law. Commentators have suggested, for example, that only “treaties,” and not other forms of agreements, have the attributes of international law.²¹³ I argue, however, that substantial structural and historical considerations exclude the non-substantive categories as realistic candidates for the constitutional distinction, and therefore that the distinction recognized by the constitutional generation must turn upon the subject matter of the agreements.

In considering the substantive distinction between treaties and nontreaty agreements, I conclude that structure, history, and usage suggest a distinction based upon the length and importance of the agreement. The uniqueness of international agreements, as compared to mere policy or even to legislation, is that typically they cannot easily be undone without cost, even if the policymaking authorities of the United States are convinced that they should be. Violating an international commitment may carry substantial diplomatic and reputational consequences as well as the potential for military confrontation.²¹⁴ Thus, international agreements are limitations of sovereignty in that they prospectively limit the nation's freedom of action. This feature underlies the “check” of Senate advice and consent, for it is this attribute that commends international agreement-making—and not other forms of policymaking—to supermajority limitations. However, with respect to agreements that are of limited duration in all but minor respects (and thus in which the prospective limitation of sovereignty is minimal), one might expect the supermajority check to be of less importance. This structural supposition is supported by international

212. See, for example, the statement of Chief Justice Taney in *Holmes v. Jennison*, 39 U.S. 540, 571 (1840): “For when we speak of ‘a treaty’ we mean an instrument written and executed with the formalities customary among nations.” Similarly, a State Department Report observed “[a]n exchange of diplomatic notes has often sufficed, without any further formality . . . to effect purposes more usually accomplished by the more complex machinery of treaties.” Report of Secretary of State Foster to President Cleveland, December 7, 1892, reprinted in 5 MOORE, *supra* note 57, at 215. As noted, McDougal's view appears to distinguish solely on the method of entry—i.e., whether or not Senate advice or consent was obtained. See McDougal & Lans, *supra* note 31, at 199.

213. See *infra* notes 225-26.

214. See THE FEDERALIST NO. 3, at 95 (John Jay) (Isaak Kramnick ed., Penguin Books 1987) (discussing the dangers of war arising from treaty violations).

law usage and by post-constitutional diplomatic practice, both of which saw the "treaty" as an important, long-term, sovereignty-limiting undertaking.

A. *Why the Differences Between "Treaties" and "Nontreaty Agreements" Cannot Be Matters of Mere Form and Effect*

1. Failure of the Distinction Based on Form

As indicated above, some modern views have dismissed the distinction between treaties and nontreaty agreements as merely a matter of form. In its less sophisticated version, this view would simply assign the term "treaty" to agreements approved through the Article II, Section 2 procedure, and the term "agreement" to those which are not.²¹⁵ A more refined version would assert that understandings accompanied by elaborate formalities (formal instruments, signing ceremonies, etc.) should be denominated "treaties" while less formal arrangements (oral agreements, understandings accomplished by the exchange of diplomatic notes, etc.) are properly labeled simply "agreements."²¹⁶ Neither view, however, is supported by the constitutional text read as a whole, by historical usage, or by diplomatic practice.

If the characterization of an agreement as treaty or nontreaty depended solely upon form or upon the manner in which it was concluded, presumably the President (as chief negotiator) could substantially control the form and hence the designation of an agreement for constitutional purposes. If the President had that power, however, it would render the treaty clause essentially meaningless, for the President could evade the clause simply by a

215. See, e.g., JOSEPH E. KALLENBACH, *THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP* 503 (1966).

216. Suggestive of this view, there was undoubtedly an element of formality in the old Roman law distinction, repeated by Grotius, between the *foedus* and *alias pactus*. As described, see *supra* notes 143-44 and accompanying text, the *foedus* involved ritual ceremonies while other Roman agreements did not. Moreover, the third Roman/Grotian category, *sponsio*, was primarily distinguished by its form, or more precisely the manner in which the agreement was concluded: that term referred to an agreement concluded by an agent but beyond the agent's authority and thus involved a wholly discretionary decision by the principal whether to accept it. Wolff stated:

[S]ponsions do not differ in their subject-matter from treaties, but only in the respect that the latter are made by right of sovereign power, and of the one having its mandate, but the former are made without this right and without a mandate. Therefore the subject-matter of sponsions can be as varied as that of treaties [*foedera*].

WOLFF, *supra* note 148, § 467.

change in form—a matter over which the Senate would appear to have no control and in which the foreign party would ordinarily have little interest.²¹⁷ Had that been the understanding, the statements in the ratifying conventions and elsewhere²¹⁸ that the power to make treaties had been purposefully denied the President because of the dangers of placing such power in a single person become nonsensical: if the President could accomplish the same result by a different instrument, the protection applauded by the founding generation would be entirely ineffective.

Moreover, the antifederalist attack on Article II, Section 2 contended that approval of treaties was too easy: somewhat fancifully, the opponents of the Constitution argued that because Article II, Section 2 required only two-thirds of the Senators present to approve, and because a majority constituted a quorum, then a treaty could be approved by only two-thirds of half the Senators, which in practice meant only ten Senators representing five states.²¹⁹ On the other hand, not one antifederalist discussion of the treaty power mentioned the danger that the President *alone* might accomplish what they feared ten Senators could do. Yet if presidential “agreements” differ from treaties only in formality, that would be the result. Had this been an available interpretation, assuredly the antifederalists—who strained to produce the contorted and paranoid argument concerning betrayal by ten Senators—would have mentioned it.²²⁰

The “formality” argument also entirely ignores Article I, Section 10. If “treaties” are distinguished only by form, then states may (with

217. A later example of this sort of manipulation was the 1905 Dominican protectorate. President Roosevelt initially negotiated the U.S. role in the Dominican Republic as a treaty that he submitted to the Senate. When the Senate refused to consent to ratification, Roosevelt concluded essentially the same substantive agreement with the Dominicans on his own authority; two years later, he resubmitted the formal agreement to a more cooperative Senate and received its consent. See MCCLURE, *supra* note 31, at 30-31.

218. See *supra* notes 113-18 and accompanying text.

219. See 3 ELLIOTT, *supra* note 115, at 500-15 (recording statements of Patrick Henry to Virginia ratifying convention); FORREST McDONALD, *THE AMERICAN PRESIDENCY* 197 (1994) (discussing the antifederalist position); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 150 (1996) (discussing the speculative nature of antifederalist objections).

220. Again, it is worth noting the divergence of the argument with respect to executive agreements and the argument with respect to congressional-executive agreements. Because McDougal and related writers were actually advocating congressional-executive agreements, their distinction based on the form of ratification did not materially encounter the objection noted in the text. The congressional-executive agreement procedure gives the President some flexibility, but not unchecked power.

congressional approval) enter into any understanding with foreign governments so long as those understandings remain informal.²²¹ But there is no reason to think that the drafters would have employed the elaborate scheme of Article I, Section 10 (no state treaties; state agreements only with congressional approval) merely to force states to adopt informal, rather than formal, diplomacy.

Post-constitutional practice also does not support a distinction based on form. While some of the early nontreaty agreements, such as the *Wilmington Packet* settlement, are reflected in an informal exchange of diplomatic notes,²²² others have the physical appearance of a treaty, with ceremonial recitations, contractual forms, and dual signatures.²²³ Moreover, some agreements submitted to the Senate for ratification, such as the 1817 Rush-Bagot Agreement, have an informal appearance.²²⁴ As a result, it seems implausible to argue that the constitutional distinction turned on the form of the agreement, as that argument is not supported by constitutional text, constitutional structure, international law usage, or post-constitutional practice.

2. Failure of the Distinction Based on Effect

With respect to effect, one could argue that nontreaty agreements are understood to lack the force of treaties under either international law or domestic law. However, neither of the proposed distinctions withstands scrutiny. First, consider international law. Professor Borchard, in the course of his debates in the 1940s with Myres McDougal and others concerning the treaty power, asserted that nontreaty agreements (unlike treaties) are not binding under international law.²²⁵ Similarly Justice Sutherland, author of *Belmont*,

221. See U.S. CONST. art. I, § 10; *supra* notes 121-27 and accompanying text (noting that under Article I, Section 10, states cannot enter into treaties but may enter into agreements with congressional consent).

222. See, e.g., *Wilmington Packet* Agreement, *supra* note 173, 5 Miller 1075.

223. See, e.g., Convention for the Settlement of the Cases of the Schooner *Economy*, the Schooner *Ben Alam* and the Vessels *San Jose*, *Carolta* and *Gertrudis*, May 1, 1852, U.S.-Venez., 5 Miller 1063 [hereinafter 1852 Venezuelan Claims Settlement]; Convention for the Settlement of the Case of the Brig *Native*, Nov. 16, 1846, U.S.-Venez., 5 Miller 103 [hereinafter 1846 Venezuelan Claims Settlement]; 1829 Colombian Claims Settlement, *supra* note 178, 3 Miller 523; Prisoner of War Agreement, *supra* note 174, 2 Miller 557.

224. See, e.g., Rush-Bagot Agreement, *supra* note 175, 18(2) Stat. 296, 2 Miller 645 (agreement effected by exchange of diplomatic notes).

225. See Borchard, *Reply*, *supra* note 31, at 628-29, 639-41; *id.* at 641 ("[W]hile it is perhaps a moral obligation of the signing President to observe the executive agreement during his administration, no such obligation, moral or legal, rests upon his successor."); Borchard, *Shall the Executive Agreement*, *supra* note 31, at 678-80 & nn.48-60.

spoke of "protocols," unlike treaties, as "constituting only a moral obligation" in international practice.²²⁶ This distinction has structural appeal: it leaves the President free to negotiate informal arrangements without committing the nation and allows for the check of Senate ratification when binding obligations are to be undertaken. It is not unreasonable to suppose that the framers might have designed such a system.

Undoubtedly, the Borchard/Sutherland view is correct up to a point. An essential attribute of a treaty under international law is that it is binding.²²⁷ This binding nature was recognized at the time the Constitution was written, as it is today.²²⁸ Similarly, international practice recognizes (however reluctantly) the idea of a nonbinding arrangement between nations, and such arrangements have at times been an important part of U.S. diplomatic practice.²²⁹ Surely, as Borchard maintained, such nonbinding arrangements are not treaties in the Article II, Section 2 sense, and, if one accepts the model of the President as the primary actor in shaping U.S. foreign policy,²³⁰ such arrangements would be within the President's constitutional power.

However, these observations do not fully identify the constitutional distinction between treaties and nontreaty agreements. Rather, the original presidential nontreaty power, properly understood, is broader than Borchard would allow. Recall the arguments upon which that constitutional distinction is founded: the constitutional text (principally Article I, Section 10), international law usage, and post-constitutional practice.²³¹ All of these sources indicate the existence of a category of nontreaty agreements binding

226. SUTHERLAND, *supra* note 76, at 120.

227. See JANIS, *supra* note 41, at 9-15. Recall that the word "treaty" equates to the Latin *foedus*, which was an obligation carrying the penalty of divine retribution if violated. See *supra* text accompanying note 144.

228. See GROTIUS, *supra* note 143, bk. II, ch. XV; VATTEL, *THE LAW OF NATIONS*, *supra* note 145, bk. II, § 163.

229. See Borchard, *Shall the Executive Agreement*, *supra* note 31, at 679 & n.54 (discussing the exercise of U.S. diplomacy through nonbinding agreements, especially the Open Door Policy in China in 1900 and the Root-Takahira and Lansing-Ishii "agreements" between the United States and Japan in 1908 and 1917). A leading modern example is the set of human rights understandings between the United States and the Soviet Union known as the Helsinki Accords. See Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, DEP'T ST. BULL., Sept. 1, 1975, at 323, 14 I.L.M. 1292 [hereinafter Helsinki Accords]; Statement of President Gerald Ford on signature of the Helsinki Accords, DEP'T ST. BULL., Aug. 11, 1975, at 204, 205 ("I would emphasize that the document I will sign is neither a treaty nor is it legally binding on any participating state." (emphasis added)).

230. See *infra* Part V.

231. See *supra* Part III.

in international law.

First, with respect to text, the primary evidence is that Article I, Section 10 permits states to enter into "agreements" but not "treaties" with foreign nations.²³² Borchard's view would require an interpretation permitting states to enter only *nonbinding* agreements with foreign nations (and to require congressional approval even for those). This view seems implausible on several grounds. It disregards the ordinary meaning of the word "agreement," which connotes a binding obligation. Despite the ordinary meaning, *some* "agreements" may be nonbinding.²³³ However, it is a remarkable interpretation to assert—as a proponent of Borchard's view must do—that the *sine qua non* of an "agreement" under Article I, Section 10 is that the parties do not, in fact, agree to anything. Moreover, it seems odd that, if the only understandings states may achieve with foreign countries are nonbinding, the drafters of the Constitution would have thought congressional approval should be required. The danger of an international agreement is, of course, that it cannot be broken without international consequences; that being so, a state-initiated international agreement is a partial qualification of congressional sovereignty.²³⁴ However, these concerns are not present with respect to a nonbinding agreement; thus it is not clear why, if state activity is so restricted, Congress need be involved. Finally, in practice no one has ever interpreted Article I, Section 10 (or its predecessor, Article VI of the Articles of Confederation) to limit states to *nonbinding* international agreements.²³⁵ Thus any interpretation of Article II, Section 2 suggesting that agreements concluded without the consent of the Senate are nonbinding in

232. See U.S. CONST. art. I, § 10; see *supra* Part III. Relatedly, Article VI of the Articles of Confederation, on which this provision was based, required congressional approval of "treaties" and "agreements" with foreign nations but only of "treaties"—and not "agreements"—among states. See *supra* notes 127-28 and accompanying text.

233. See *supra* note 225.

234. Absent the agreement, Congress generally could preempt state foreign relations activity, but with the agreement, Congress might not be able to preempt that activity without forcing the state to violate the agreement and thus incur the international consequences.

235. See HENKIN, *supra* note 1, at 153 & nn. 15-17. Such an interpretation would also pose difficulties for interstate compacts under Article I, Section 10. These compacts are, after all, described not only in the same clause but by the same words: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State or with a foreign Power." U.S. CONST. art. I, § 10. If "treaties" are binding and "agreements" are not, this language suggests that states may enter only nonbinding agreements with each other. See *id.* Yet interstate compacts, before and after the Constitution, have always been thought to be binding. See Frankfurter & Landis, *supra* note 128, at 691-704.

international law seems inconsistent with the ordinary reading of Article I, Section 10.

Second, the international law parlance of Vattel, Wolff, and Grotius that distinguished between "treaties" and "other agreements" did not do so on the basis of their binding effect. Rather, each of these authors thought that *all* of the international agreements they discussed were of a binding nature. In Vattel's view, for example:

The public compacts, called conventions, articles of agreement, &c., when they are made between sovereigns, differ from treaties only in their object. What we have said of the validity of treaties, of their execution, of their dissolution, *and of the obligations and rights that flow from them*, is all applicable to the various conventions which sovereigns may conclude with each other.²³⁶

Thus, if the framers had the Vattel/Wolff/Grotius terminology in mind in drafting the Constitution (as seems likely), they would not have been thinking of nontreaty agreements as nonbinding.

Third, post-constitutional practice does not support the proposition that nontreaty agreements were seen as nonbinding. Many of the nontreaty agreements undertaken at that time contain the language of binding commitment. The 1813 executive agreement between the United States and Great Britain concerning prisoners of war states, for example:

This cartel is to be submitted for ratification to the secretary of State for and in behalf of the government of the United States and to the Right Honourable the Lords Commissioners of the Admiralty for and in behalf of the Government of Great Britain . . . and it is further agreed that after the mutual ratification of the cartel, either of the parties on six months notice to the other may declare and render the same null and *no longer* binding.²³⁷

236. VATTEL, *THE LAW OF NATIONS*, *supra* note 145, bk. II, § 206 (emphasis added); see also GROTIUS, *supra* note 143, bk. II, ch. XVI (discussing the binding nature of international "promises" without distinguishing among types of agreements); VATTEL, *THE LAW OF NATIONS*, *supra* note 145, bk. II, § 163 ("Nations, therefore, and their conductors, ought inviolably to observe their promises and their treaties."); WOLFF, *supra* note 148, § 376 ("Nations and their rulers are bound to observe treaties *and promises* [*foedera et promissae*], and are bound by nature not to violate a promise given." (emphasis added)).

237. Prisoner of War Agreement, *supra* note 174, 2 Miller at 565 (emphasis added); see also 1852 Venezuelan Claims Settlement, art. 3, *supra* note 223, 5 Miller at 1065 ("By the fulfillment of the stipulations in the preceeding articles, all damages . . . shall remain completely and absolutely indemnified."); 1846 Venezuelan Claims Settlement, art. 1,

None of the nontreaty agreements in this period contain any language disclaiming binding effect. Moreover, as noted above, a number of the early nontreaty agreements were of formal appearance no different (on their face) from what one would expect in a treaty.²³⁸ It seems unusual to employ contractual formalities for something considered nonbinding (particularly without any disclaimer as to binding effect).

Finally, the binding nature of the early agreements was not disputed. There does not appear to be any record in the early years of U.S. diplomacy of an assertion that the terms of an international understanding were not obligatory.²³⁹ Rather, the frequent use of nonbinding arrangements as instruments of policy—as noted by Sutherland and Borchard—seems to be a more recent development.²⁴⁰

Consequently, while Borchard was likely correct that Article II, Section 2 did not preclude the President alone from entering into nonbinding arrangements,²⁴¹ that does not explain the framers' distinction between treaties and nontreaty agreements. Some nontreaty agreements likely are nonbinding, but it appears that the original understanding also encompassed some nontreaty agreements that nonetheless amounted to international obligations.

Distinguishing treaties from nontreaty agreements solely on the basis of their domestic effect is even less plausible. One could argue that although any sort of international agreement can be made, in any form, by the President alone, it cannot become "the law of the land" (by operation of the Supremacy Clause) unless it is approved as

supra note 223, 5 Miller at 104 (providing that the United States "shall have no right hereafter to prefer any new claim that may have origin in the circumstances of this case"); 1829 Colombian Claims Settlement, *supra* note 178, 3 Miller at 525 (reserving the "right" of the United States to make certain additional claims in the future).

238. See *supra* note 223 and accompanying text.

239. The 1829 agreement with Colombia recited that it constituted a compromise and settlement of certain claims. See 1829 Colombian Claims Settlement, *supra* note 178, 3 Miller 523. When some of those same claims were reasserted before a subsequent arbitral tribunal, they were disallowed—presumably on the grounds that they had been relinquished in a prior binding agreement—and the United States did not object to this result. See *id.*; 2 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1418 (1898) (recording results of subsequent arbitration); 3 Miller at 529-30, Notes (discussing subsequent history of the claims).

240. Borchard's earliest example is from 1894, concerning the termination of an 1890 tariff arrangement with Brazil. See Borchard, *Reply*, *supra* note 31, at 639-40 & n.90.

241. Or, by similar reasoning, agreements which impose no obligations upon the United States.

a treaty.²⁴² While such an argument is consistent with the language of the Supremacy Clause, it accords poorly with the concerns of the constitutional generation. The diminution of sovereignty associated with an international agreement and its effect upon U.S. interests are not driven by the agreement's status as domestic law. Many important agreements lack domestic effect either because they concern largely nondomestic issues (such as the NATO Treaty)²⁴³ or because they are not intended to have domestic effect (such as certain articles of the U.N. Charter).²⁴⁴ Affording the President unilateral control over entry into such agreements—which would be the effect of the distinction under discussion—would award substantial power to the President and would be inconsistent with the emphasis on the checking power of the Senate.

As a result of the controversy in the 1780s over navigation rights on the Mississippi River, purely external agreements were much in the framers' contemplation in the drafting of the Constitution. A substantial concern at the time was that the national government would by agreement with Spain concede rights to free navigation of the Mississippi (a matter of great moment in the South and West but of little interest to New York and New England).²⁴⁵ The Continental Congress had in fact entered into negotiations for such a treaty in 1786 but lacked the supermajority support needed to approve it under the Articles of Confederation.²⁴⁶ This incident has been attributed a substantial role in the decision to retain the supermajority requirement in the new Constitution drafted soon afterward.²⁴⁷ Yet, such an agreement relinquishing the (asserted)

242. See U.S. CONST. art. VI, § 2.

243. See North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, 4 Bevans 828.

244. See *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373-76 (7th Cir. 1985) (concluding that Articles 55 and 56 of the U.N. Charter are not intended to have legal effect in the United States); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (same).

245. Spain at that time controlled both banks of the Mississippi at New Orleans; hence, it could close the Mississippi to U.S. navigation if it wished. The United States asserted a right in international law (with little support in practice) of free navigation by upstream nations. On the controversy, see BEMIS, *supra* note 201, at 73-81.

246. See *id.* at 78-79; see also McDONALD, *supra* note 219, at 196-97 (discussing sectional rift on this issue); Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 285 (1934) (identifying a majority—but not a supermajority—in favor of accommodating Spain, composed of Connecticut, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island).

247. See BEMIS, *supra* note 201, at 79-80. Bemis states:

A few months later [after the Spanish negotiations] when the delegates to the

rights of the United States under international law would not have needed to have domestic effect, since it did not govern the actions of U.S. parties but of Spain (which was not constrained by U.S. domestic law in any event). Only the international law implications of a Spanish agreement would have mattered; an interpretation that would distinguish "treaties" under Article II, Section 2 solely by domestic effect would permit the President alone to relinquish the Mississippi navigation rights (as well as to approve NATO, the U.N. Charter, etc.). That does not seem plausible in light of the founding generation's particular concern to protect sectional interests from adverse international (and purely external) arrangements. Again, given the implausible attacks on Article II, Section 2 mounted by the antifederalists,²⁴⁸ it seems inconceivable that, were this a plausible interpretation, it would have gone unmentioned.

Moreover, distinguishing "treaties" as only those agreements having domestic effect makes no sense in the context of the Article I limitations upon the states.²⁴⁹ Such a view would allow the states to enter any arrangement with a foreign power (if Congress approved) unless the agreement would have legal effect in the United States, in which case it could not be entered into even with the consent of Congress. But one would expect that a state could always (subject to federal law) give its agreements domestic effect over its own laws by implementing legislation (even if the treaty itself lacked such effect), and could never give its agreements domestic effect over federal law (by virtue of the Supremacy Clause) no matter what the treaty purported to provide. It is therefore nonsensical to suppose that a state agreement purporting to have domestic effect should be singled out for constitutional prohibition.

Finally, there is no post-constitutional evidence of a "domestic effect" distinction. Many treaties ratified by the Article II, Section 2

Philadelphia Convention of 1787 were drawing up the new Constitution the men from the southern states remembered the dangers, so recently presented to them, of any constitution which would allow a bare majority to ratify a treaty The Jay-Gardoqui negotiations [concerning the Mississippi River] are responsible for that clause in the Constitution of 1787 which requires a two-thirds majority of senators present for the ratification of any treaty.

Id.; accord Warren, *supra* note 246, at 293-97. During the ratification debates, Patrick Henry and other opponents of the Constitution argued that even the two-thirds requirement of Article II, Section 2 was insufficient to protect the Mississippi navigation rights while proponents of the Constitution replied that it was sufficient: plainly no one contemplated that the Senate check of Article II, Section 2 would not even apply to an external agreement. See *supra* notes 219-20 and accompanying text.

248. See *supra* notes 219-20 and accompanying text.

249. See U.S. CONST. art. I, § 10.

process in the pre-Civil War period concerned purely external matters without effect upon domestic law.²⁵⁰ Accordingly, we may conclude that if the founding generation understood a distinction between treaties and nontreaty agreements, it turned neither upon the form nor the effect of the agreement in question. This suggests that the distinction was understood to be substantive—a matter I consider below.

B. The Substantive Distinction Between Treaties and Nontreaty Agreements

1. Purposes of the Treaty Clause

Identification of the substantive difference between treaties and nontreaty agreements begins with the observation that the Constitution provides substantial limitations upon the power to enter treaties, while (textually or by hypothesis) it affords materially fewer restrictions upon the ability to enter into nontreaty agreements. With respect to state practice under Article I, Section 10, *treaties* between states and foreign nations are expressly prohibited, while *nontreaty agreements* between states and foreign nations are permitted with the consent of Congress.²⁵¹ With respect to federal practice, *treaties* require a supermajority vote of the Senate²⁵² (or alternatively, if one credits McDougal's view, approval of a majority of both Houses of Congress), whereas *nontreaty agreements*, it is asserted, may be concluded on the authority of the executive alone. This structure provokes inquiry as to why the framers sought protection from treaties: if they did not seek such protections from nontreaty agreements, there must be a substantive component to treaties that is more threatening (or, more precisely, militates for greater caution) than the substance of nontreaty agreements.

A conventional conclusion would be that treaties involve important matters, while nontreaty agreements involve unimportant

250. See, e.g., Convention for Further Regulating the Intercourse of American Citizens within the Empire of Japan, June 17, 1857, U.S.-Japan, 18(2) Stat. 448, 7 Miller 595 (matters occurring in Japan); Convention for Discontinuance of the Sound Dues, Apr. 11, 1857, U.S.-Den., 18(2) Stat. 173, 7 Miller 519 (matters occurring in Danish coastal waters); Treaty for the Free Navigation of the Rivers Parana and Uruguay, July 10, 1853, U.S.-Arg., 18(2) Stat. 15, 6 Miller 211 (matters occurring in Argentina); Convention for Facilitating and Protecting the Construction of a Ship Canal between the Atlantic and Pacific Oceans, and for other Purposes [the Clayton-Bulwer Treaty], Apr. 19, 1850, U.S.-Gr. Brit., 18(2) Stat. 222, 5 Miller 671 (matters occurring in Nicaragua).

251. See U.S. CONST. art. I, § 10.

252. See *id.* art. II, § 2.

matters.²⁵³ No doubt there is an element of truth to this suggestion: the 1780s controversy over Mississippi River navigation rights assumed prominence due to the almost complete dependence of certain parts of the country upon free navigation of the Mississippi.²⁵⁴ That any agreement affecting a matter of such importance should be subjected to a full panoply of procedural safeguards is a natural conclusion.²⁵⁵ Conversely, if the drafters (and, more importantly, the antifederalists) were willing to accept unconstrained presidential action with respect to certain international accords, presumably that was because they thought these accords to be of little importance.

However, the important/unimportant distinction is not fully satisfactory. Many "important" results that can be accomplished by international agreement can be accomplished equally well by presidential action or inaction without an international agreement. For example, rather than attempting to incorporate an agreement over Mississippi navigation into a formal instrument, President Washington could simply have announced that U.S. policy would henceforth be not to contest Spain's navigational prerogatives. Similarly, the United States's withdrawal of armaments from the Great Lakes under the Rush-Bagot Agreement²⁵⁶ could have been accomplished by President Monroe ordering, in his capacity as Commander-in-Chief, the withdrawal of U.S. forces for such time as the British likewise limited their forces.²⁵⁷ True, these presidential initiatives may be subject to congressional override — but treaties are likewise subject to congressional override.²⁵⁸ Thus, looking purely at subject matter, it is hard to see why elaborate approval processes were thought necessary for treaties when frequently the same effect could be accomplished, without any procedural protections, by the President acting alone.

The critical difference, however, between a treaty and a presidential action, even though affecting the same substance, is the

253. See, e.g., GLENNON, *supra* note 30, at 183 (suggesting that Senate advice and consent is necessary for international agreements of "unusual importance"); Tribe, *supra* note 6, at 1268 (suggesting that the Article II, Section 2 procedure is required for treaties that "constrain[] federal or state sovereignty").

254. See *supra* notes 245-47 and accompanying text.

255. See Paul, *supra* note 30, at 722-26 (emphasizing functional benefits of the Constitution's treaty provisions).

256. See Rush-Bagot Agreement, *supra* note 175, 2 Miller 645.

257. One may speculate that this apparently constitutional alternative was what led Monroe to believe the Rush-Bagot Agreement did not require Senate approval.

258. See *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870) (concluding that a subsequent act of Congress supersedes a prior inconsistent treaty).

former's prospective effect. Consider the Rush-Bagot Agreement.²⁵⁹ Presumably, Monroe could have accomplished demilitarization by unilateral presidential order. But that would not have amounted to a commitment to the future. Had a subsequent President decided to remilitarize (or had Congress decided to alter the policy by statute), there would have been no international obstacle to doing so. However, by incorporating demilitarization into an international agreement, it became a binding commitment under international law. Of course, international law generally is not (and plainly in 1817 was not) subject to supranational enforcement mechanisms, and as a practical matter is (and was) subject to violation on a regular basis. If Congress or a future President had decided to violate the Rush-Bagot Agreement, the violation might have occurred without domestic consequences—but it could not have occurred without international implications, for there can be substantial diplomatic (and even military) consequences to a violation of international law.²⁶⁰ An international agreement is not an absolute limitation on future action—but it is a partial limitation. Therein lies both its promise and its danger. By erecting obstacles to the remilitarization of the Great Lakes through the formal agreement, Monroe at once made it more likely that the British would reciprocate and made it more difficult to alter U.S. policy.²⁶¹ Likewise, if President Washington by proclamation had declined to contest Spain's sovereignty over the Mississippi, he could have been persuaded to change his mind, congressionally overridden, or replaced; had that decision been incorporated into an international agreement, it would have become somewhat more difficult to alter the policy (because it would have entailed dishonoring an international commitment). Thus, a central concern of the treaty power was the *prospective* constraint of future

259. See Rush-Bagot Agreement, *supra* note 175, 2 Miller 645.

260. Hamilton, for example, viewed treaties as imposing substantial (though not absolute) practical limitations on future action. See Letters of Camillus, No. 37, in 6 HAMILTON, *supra* note 163, at 181-83.

261. Similarly, consider another Monroe action that was not reflected in a treaty: the Monroe Doctrine of 1823, by which the United States declared itself opposed to European intervention anywhere on the American continents. See BEMIS, *supra* note 201, at 208-09. Although obviously a substantial event in U.S. diplomatic history, the Doctrine would have been more momentous if reflected in a treaty (a course of action encouraged by Great Britain and the South American republics). However, Monroe and his successor Adams resisted formalization of the policy to maintain flexibility. See *id.* at 204-09. Based on the idea of prospective commitment, one can understand why the constitutional system might permit Monroe to announce the policy on his independent authority but require Senate participation should the (nonbinding) policy be formalized into a (binding) treaty.

action—in effect, the partial limitation of sovereignty—accomplished by the agreement's binding effect in international law.

Conversely, an agreement performed by an immediate act is difficult to distinguish from a unilateral presidential action. To use a modern example, in 1977 President Carter agreed to return the Hungarian crown (which the United States had acquired after World War II) to the government of Hungary. This agreement was challenged in federal court by Senator Robert Dole on the ground that it should have been submitted to the Senate in accordance with Article II, Section 2. The court held (with little analysis) that the understanding had been properly concluded as an executive agreement.²⁶² But consider the effect of a decision to the contrary: presumably the President could simply have returned the crown (of which the United States was only a custodian) as an exercise of diplomatic goodwill, without incorporating that action into an agreement. Since the relevant act would have been completed upon delivery, there would have been no question of binding effect upon future Presidents or future Congresses. Viewed in light of the purposes of the treaty clause, it seems immaterial whether the President entered into an agreement, because he did not, in any event, enter into an agreement with *prospective* effect.

An analysis of the purposes of the treaty clause therefore suggests a concern about *prospective* commitments upon important matters. An international commitment—as opposed to a mere policy decision—is a weighty matter because it limits national sovereignty. In practice, however, serious sovereignty-limiting concerns arise only when the subject matter is important (else the limitation is immaterial) *and* only when the commitment purports to bind future action (else the commitment is not materially distinct from a policy decision). As a result, if substantial procedural protections were given only to certain kinds of international accords, one might expect the distinction to rest upon this basis.

2. Substance and International Usage

As indicated above, the usage extant in the constitutional period distinguishing between treaties and other international agreements lay in the works of Grotius, Wolff, and Vattel.²⁶³ These authors

262. See *Dole v. Carter*, 444 F. Supp. 1065, 1068-69 (D. Kan.) (relying on *Belmont* without substantial discussion), *aff'd on other grounds*, 569 F.2d 1109 (10th Cir. 1977) (per curiam).

263. See *supra* notes 136-53 and accompanying text.

suggest a substantive distinction. Grotius does not specifically undertake to describe a difference in substance, but his terminology flows from the Roman conception of *foedera* (formal treaties), *sponsio* (agreements concluded by subordinates subject to ratification), and *pactus alias* (typically local agreements concluded on delegated authority).²⁶⁴ On the surface this terminology appears to distinguish the agreements by the manner of entry, a procedural element not relevant to constitutional considerations.²⁶⁵ However, substance underlies it. The full ceremony of the *foedera* was reserved for elaborately negotiated agreements of great importance; as one moved down through the terminology procedurally, importance lessened as well.²⁶⁶ Grotius gives few examples; as his is a work on the international law of war, not surprisingly he concentrates on wartime agreements. He discusses, for example, the truce—which seems characteristic of a temporary, localized agreement lacking long-term significance. Grotius thought the truce was binding in international law, and he thought (as did the Romans) that it could be concluded on behalf of the sovereign by a local commander without the formalities of the *foedus*.²⁶⁷ A localized agreement of peace apparently required ratification (which was sometimes refused), because the local commander was not given (and perhaps could not be given) authority over such an important matter. Full-scale (and long-term) alliances were concluded as *foedera*.²⁶⁸ Thus, although not explicit, the Grotian terminology suggests a substantive hierarchy of international agreements in which the word *foedus* (“treaty”) was reserved for the most important.

Vattel presents a more explicit distinction:

A treaty, in Latin *foedus*, is a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time.

The Compacts which have temporary matters for their object are called agreements, conventions, and pactions [*Accords, Conventions, Pactions*]. They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution once for all: treaties receive a successive execution whose duration equals that of the

264. See GROTIUS, *supra* note 143, bk. II, ch. XV.

265. See Weinfeld, *supra* note 125, at 457-58 (suggesting that Grotius's distinctions lack constitutional relevance).

266. See Haggemacher, *supra* note 141, at 321 & nn.34-35.

267. See GROTIUS, *supra* note 143, bk. III, ch. XXI.

268. See *id.* bk. II, ch. XV-XVI.

treaty.²⁶⁹

Wolff is to similar effect. In his view:

A treaty [*foedus*] is defined as a stipulation entered into reciprocally by supreme powers for the public good, to last forever or at least for a considerable time. But stipulations which contain temporary promises or those not to be repeated, retain the name of compacts [*pactiones*].

For example, if two nations reciprocally agree to furnish troops to each other in time of war, this stipulation is called a treaty [*foedus*]; but if one nation permits another, on account of the high price of grain, to purchase in its territory, this will be a compact [*paction*]. A compact [*paction*] of that sort, also, is the truce made after a battle for the purpose of burying the dead.²⁷⁰

The general idea suggested by the international law authorities—that treaties are a special class composed of important long-term agreements—is consistent with constitutional structure and purpose. It is, moreover, consistent with (though not compelled by) contemporary dictionary definitions and discourse. As noted, Bailey's English dictionary defined "treaty" as "an agreement between two or more distinct Nations concerning Peace, Commerce, Navigation, etc."²⁷¹ In light of the international law usage, it now

269. VATTEL, *THE LAW OF NATIONS*, *supra* note 145, bk. II, §§ 152-53. There has been some debate about the correct translation of the second paragraph. An earlier edition rendered it as follows:

The pacts with a view to transitory affairs are called agreements, conventions, and pactions. They are accomplished by one single act, and not by irritated oaths. These pacts are perfected in their execution, the duration of which equals that of the treaty.

M. DE VATTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, bk. II, § 153 (Luke White ed., 1787) (1758). Not only does this version appear garbled on its own terms, but it seems to mistake the grammatical structure of the final sentence, which consists of two independent clauses (one referring to "pactes" and the other to "traités") connected by a colon. The original reads:

Les Pactes qui ont pour objet des affaires transitoires, s'appellent Accords, Conventions, Pactions. Ils s'accomplissent par un acte unique, & non point par des prestations réitérées. Ces Pactes se consomment, dans leur exécution, une fois pour toutes: Les Traités reçoivent une exécution successive, dont la durée égale celle du Traité.

VATTEL, *LE DROIT DES GENS*, *supra* note 145, at bk. II, § 153. The translation given in the text, or something similar, is generally preferred, and appears to be a more accurate rendition of the original. See Weinfeld, *supra* note 125, at 459-60 & n.30 (giving a similar translation of the relevant sections).

270. WOLFF, *supra* note 148, § 369.

271. See *supra* note 132 and accompanying text.

seems more probable that Bailey thought of a treaty as an *important* international agreement—and gave as examples three categories of important agreements. Similarly, the spokesmen of the founding generation, in emphasizing the importance of dividing the treaty power between President and Senate,²⁷² are in no way undercut by the observation that the Constitution may be thought to vest in the President alone the power to make minor and temporary agreements.²⁷³

3. Substance and Post-Constitutional Agreements

Post-constitutional practice is also consistent with the substantive distinction proposed above. Almost the entire universe of pre-Civil War international agreements concluded outside Article II, Section 2 can be classified as (1) settlement agreements; (2) postal conventions; (3) localized or temporary military agreements; and (4) agreements under which the United States undertook no material obligation.²⁷⁴ All seem describable, consistent with a generalized reading of Vattel, Wolff, and Grotius, as nontreaty “other agreements.” None is of long-term importance to U.S. interests.

The settlement agreements (which, as noted, make up the bulk of the nontreaty agreements concluded in this period) are

272. See *supra* notes 114-17 and accompanying text.

273. Professor Paul's recent critique of executive agreements, which proceeds along somewhat similar lines as the argument in this section, may overstate the matter in asserting that eighteenth-century international law usage limited nontreaty agreements to contemporaneous exchanges. See Paul, *supra* note 30, at 736-37. The collective sense of Grotius, Wolff, and Vattel seems to be that a nontreaty agreement was of limited importance and duration, but was not necessarily confined to a contemporaneous exchange. Moreover, as set forth below, post-constitutional practice does not support limiting nontreaty agreements to contemporaneous exchanges. See *infra* Part IV.B.3.

274. See Miller, *supra* note 172, vols. 2-8. The arguable exception to this categorization is the 1850 agreement concerning Horseshoe Reef. See Horseshoe Reef Agreement, *supra* note 208, 18(2) Stat. 325, 5 Miller 905. By that agreement, Great Britain ceded an islet in the Niagara River to the United States provided the United States maintained a lighthouse upon it. In a sense this is a long-term agreement, albeit not an especially important one. However, two observations may be made in response. First, the Horseshoe Reef arrangement was, in effect, approved by Congress, which may at the time have been thought sufficient authorization. See 5 Miller at 917-18, Notes (discussing appropriation by Congress for the project). Second, the agreement may be read not to impose any actual obligations on the United States. It does not appear that the British affirmatively wanted a lighthouse (since Britain declined to build one). See *id.* at 914, Notes. More likely, the British agreed to cede the reef *for so long as* the United States maintained a lighthouse: thus the United States (it appears) could discontinue the lighthouse and allow the reef to revert to Britain without violating any international obligations. So read, the arrangement is more properly classified as an agreement imposing no material obligations upon the United States.

particularly instructive in this regard. In *Dames & Moore*, the Court observed that historically some settlement agreements had been concluded by treaty and some by nontreaty agreement.²⁷⁵ The Court attached little importance to the dual approach. But it failed to make the historical inquiry necessary to see that the choice of instruments was by no means random. Early practice shows a clear line between settlements done by treaty and settlements done by executive agreement. Essentially every pre-Civil War settlement (some forty-three of them) which involved a small number of claims and which was liquidated by an agreed-upon payment to particular parties was handled by an executive agreement.²⁷⁶ Essentially every settlement

275. See *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981).

276. See Johnston Settlement Convention, *supra* note 202, 8 Miller 577; Dickson Settlement Agreement, *supra* note 202, 8 Miller 519; Hemenway & Co. Settlement Agreement, *supra* note 202, 8 Miller 449; Perkins Settlement Agreement, *supra* note 202, 8 Miller 267; 1858 China Claims Settlement, *supra* note 202, 8 Miller 13; 1858 Chile Claims Settlement, *supra* note 202, 8 Miller 3; 1857 French Claims Settlement, *supra* note 202, 7 Miller 591; Adams Settlement Agreement, *supra* note 202, 7 Miller 587; Chincha Islands Settlement Agreement, *supra* note 202, 7 Miller 503; Settlement of the Claim of Stephen H. Weems, Note of John L. Marling, Minister Resident of the United States, to Pedro de Aycinena, Minister of Foreign Affairs of Guatemala, and answering note of the Minister of Foreign Affairs, Oct. 26-29, 1855, U.S.-Guat., 7 Miller 325; Engagement to Pay Claims with Other Promises, Oct. 23, 1855, U.S.-Fiji, 7 Miller 283; Adjustment of the Dillon Case, Note of John Y. Mason, Minister of the United States, to Comte Walewski, Minister of Foreign Affairs of France, and answering note of the Minister of Foreign Affairs, Aug. 3-7, 1855, U.S.-Fr., 7 Miller 147 [hereinafter Dillon Settlement]; Settlement of the Case of the Steamer *Black Warrior*, Two notes of Claudio Anton de Luzuriaga, Minister of Foreign Affairs of Spain, to Horatio J. Perry, Charge d'Affaires of the United States, and note of Augustus Caesar Dodge, Minister of the United States, to Juan de Zarala, Minister of Foreign Affairs of Spain, Feb. 21-June 28, 1855, U.S.-Spain, 7 Miller 31; Settlement of the Claim of John B. Phillips and George M. Eichelberger, Note of the Swiss Federal Council to Theodore S. Fay, Minister Resident of the United States, and answering note of the Minister Resident, Mar. 9-16, 1855, U.S.-Switz., 7 Miller 113; Convention for the Payment of the Claims of Citizens of the United States Proceeding from the Venezuelan Law of Espera, June 1, 1853, U.S.-Venez., 6 Miller 197; Convention for the Settlement of the Case of the Brig *Native*, Feb. 5, 1853, U.S.-Ecuador, 6 Miller 105; Agreement for the Settlement of the Claim of Samuel Franklin Tracy, Aug. 6, 1852, U.S.-Peru, 6 Miller 59; Settlement of the Claim of Zimmerman, Frazier & Co., Note of Florentino Castellano, Minister of Foreign Affairs of the Oriental Republic of Uruguay, to Robert M. Hamilton, Consul of the United States, and answering note of the Consul, June 23-24, 1852, U.S.-Uru., 6 Miller 45; 1852 Venezuelan Claims Settlement, *supra* note 223, 5 Miller 1063; Convention for the Settlement of the Case of the Brig *Morris*, Feb. 9, 1850, U.S.-Ecuador, 5 Miller 665; Convention upon the Claim relative to the American Brig *Mount Vernon*, July 7, 1849, U.S.-Venez., 5 Miller 587; Convention for the Final Settlement of the Cases of the Brig *Josephine* and the Schooner *Ranger*, June 15, 1849, U.S.-Ecuador, 5 Miller 581; Convention for the Settlement of the Case of the Brig *Native*, Apr. 25, 1848, U.S.-New Granada (Colom.), 5 Miller 437; Convention upon the Claim Relative to the American Brig *Sarah Wilson*, Apr. 12, 1848, U.S.-Venez., 5 Miller 429; 1846 Venezuelan Claims Settlement, *supra* note 223, 5 Miller 103; Convention for the Settlement of the Claim for Interest and Other Losses in Favor of the Owners and

(some twenty-one of them) that involved a large number of claims paid in undivided lump sums or that provided for referral to an arbitral panel for *future* fixing of the payment amounts was handled by treaty.²⁷⁷ The distinction cannot have been predicated upon the

Persons Interested in the Brig *Josephine*, May 16, 1846, U.S.-New Granada (Colom.), 4 Miller 813; 1845 British Claims Settlement, *supra* note 208, 4 Miller 779; Convention for the Settlement of Claims Arising out of the Seizure of the Schooner *Yankee*, Mar. 29, 1845, U.S.-New Granada (Colom.), 4 Miller 741; Convention for the Settlement of the Case of the Brig *Morris*, Nov. 5, 1844, U.S.-New Granada (Colom.), 4 Miller 663; Convention for the Settlement of the Claim of Arising out of the Loss of Part of the Cargo of the Schooner *Henrietta*, Apr. 22, 1844, U.S.-New Granada (Colom.), 4 Miller 555; Arrangement for the Settlement of the Case of the Brig *Morris*, Feb. 26-Mar. 1, 1844, U.S.-Venez., 4 Miller 523; Convention for the Adjustment of the Claim for the Detention and Seizure of the Schooner *John S. Bryan*, June 12, 1843, U.S.-Braz., 4 Miller 507; Convention for the Settlement of Claims Arising out of the Confiscation of Part of the Cargo of the Schooner *By Chance*, Feb. 9, 1843, U.S.-New Granada (Colom.), 4 Miller 499; Basis of the Agreement with Mr. Pollard for the Indemnity of the Money Belonging to the Owners of the Brig *Macedonian* (undated memorandum), July 1840, U.S.-Chile, 4 Miller 287; 1839 Netherlands Claims Settlement, *supra* note 180, 4 Miller 179; Portugal Claims Settlement, *supra* note 179, 3 Miller 653; 1829 Colombian Claims Settlement, *supra* note 178, at 523; Brazilian Claims Settlement, *supra* note 178, 3 Miller 485; Russian Claims Settlement, *supra* note 176, 3 Miller 201; 1825 Colombian Claims Settlement, *supra* note 165, 3 Miller 195; *Wilmington Packet* Agreement, *supra* note 173, 5 Miller 1075. During this period only two such settlement agreements were presented to the Senate for its consent. In 1838, a settlement with the Republic of Texas was presented to the Senate in conjunction with a treaty fixing the boundaries between Texas and the United States. See Convention for Marking the Boundary between the United States of America and the Republic of Texas, Apr. 25, 1838, U.S.-Tex., 18(2) Stat. 754, 4 Miller 133 (submitted to Senate May 7, 1838); Convention to Terminate Reclamations of the Government of the United States, Apr. 11, 1838, U.S.-Tex., 18(2) Stat. 753, 4 Miller 125 (submitted to Senate May 7, 1838). In 1859, an agreement with Venezuela was presented to the Senate, apparently at the request of the U.S. private party. See Convention for Settlement of the Aves Island Claims, Jan. 14, 1859, U.S.-Venez., 18(2) Stat. 796, 8 Miller 137. President Buchanan included in his transmission to the Senate the statement previously quoted, *see supra* note 205, indicating that Senate action was generally not considered necessary for such agreements.

277. See Convention for the Adjustment of Claims of Citizens of the United States Against the Government of the Republic of Costa Rica, July 2, 1860, U.S.-Costa Rica, 18(2) Stat. 163, 8 Miller 469 (Senate resolution of advice and consent passed Jan. 16, 1861); Special Convention between the United States of America and the Republic of Paraguay Relating to the Claims of the United States and Paraguayan Navigation Co. Against the Paraguayan Government, Feb. 4, 1859, U.S.-Para., 18(2) Stat. 592, 8 Miller 259 (Senate resolution of advice and consent Feb. 16, 1860) [hereinafter Paraguay Settlement]; Convention Between the United States of America and the Republic of Chile (for arbitration of the case of the Brig *Macedonian*), Nov. 10, 1858, U.S.-Chile, 18(2) Stat. 114, 8 Miller 117 (Senate resolution of advice and consent Mar. 8, 1859) [hereinafter *Macedonian* Agreement]; Convention for the Adjustment of Claims, Nov. 8, 1858, U.S.-China, 18(2) Stat. 146, 8 Miller 93 (Senate resolution of advice and consent Mar. 1, 1859); Claims Convention Between the United States of America and the Republic of New Grenada, Sept. 10, 1857, U.S.-New Grenada (Colom.), 18(2) Stat. 564, 7 Miller 661 (Senate resolution of advice and consent Mar. 8, 1859); Convention Extending the Duration of the Commission on Claims Authorized by the Convention of Feb. 8, 1853,

status of the other contracting party: the United States entered executive settlement agreements with great powers such as France and Britain, and treaty settlements with minor powers such as Paraguay and Costa Rica.²⁷⁸ Nor can the distinction be predicated

July 17, 1854, U.S.-Gr. Brit., 18(2) Stat. 333, 6 Miller 787 (Senate resolution of advice and consent July 21, 1854); Convention for the Settlement of Claims, Feb. 8, 1853, U.S.-Gr. Brit., 18(2) Stat. 326, 6 Miller 111 (Senate resolution of advice and consent Mar. 15, 1853); Convention Relative to Claims of American Citizens, Feb. 26, 1851, U.S.-Port., 18(2) Stat. 639, 5 Miller 929 (Senate resolution of advice and consent Mar. 7, 1851); Convention for the Satisfaction of Claims of Citizens of the United States on the Brazilian Government, Jan. 27, 1849, U.S.-Braz., 18(2) Stat. 90, 5 Miller 507 (Senate resolution of advice and consent Jan. 14, 1850); Convention Further to Provide for the Payment of Awards in Favor of Claimants Under the Convention Between the United States and the Mexican Republic of the 11th of April, 1839, Jan. 30, 1843, U.S.-Mex., 18(2) Stat. 490, 4 Miller 479 (Senate resolution of advice and consent Mar. 2, 1843); Convention for the Satisfaction of Claims of American Citizens, Mar. 17, 1841, U.S.-Peru, 18(2) Stat. 611, 4 Miller 329 (Senate resolution of advice and consent Jan. 5, 1843); Convention for the Adjustment of Claims of Citizens of the United States of America on the Government of the Mexican Republic, Apr. 11, 1839, U.S.-Mex., 18(2) Stat. 487, 4 Miller 189 (Senate resolution of advice and consent Mar. 17, 1840); Convention for the Settlement of Claims Between the United States of America and Her Catholic Majesty, Feb. 17, 1834, U.S.-Spain, 18(2) Stat. 718, 3 Miller 811 (Senate resolution of advice and consent May 13, 1834); Convention Between the Government of the United States of America and His Majesty the King of the Kingdom of the Two Sicilies to Terminate Reclamations, Oct. 14, 1832, U.S.-Two Sicilies, 18(2) Stat. 771, 3 Miller 711 (Senate resolution of advice and consent Jan. 19, 1833); Convention Relative to Claims and Duties on Wines and Cottons, July 4, 1831, U.S.-Fr., 18(2) Stat. 245, 3 Miller 641 (Senate resolution of advice and consent Jan. 27, 1832) [hereinafter Convention on Wines and Cottons]; Convention between the United States of America and His Majesty the King of Denmark, Mar. 28, 1830, U.S.-Den., 18(2) Stat. 170, 3 Miller 531 (Senate resolution of advice and consent May. 29, 1830); Convention Relative to Indemnity Under the Treaty of July 12, 1822, Nov. 13, 1826, U.S.-Gr. Brit., 18(2) Stat. 308, 3 Miller 261 (Senate resolution of advice and consent Dec. 26, 1826); Convention Relative to Indemnity under the Award of the Emperor of Russia, July 12, 1822, U.S.-Gr. Brit., 18(2) Stat. 303, 3 Miller 91 (Senate resolution of advice and consent Jan. 3, 1823); Convention for the Payment of Sums Due by France to Citizens of the United States, Apr. 30, 1803, U.S.-Fr., 18(2) Stat. 236, 2 Miller 516 (Senate resolution of advice and consent Oct. 20, 1803); Convention between His Catholic Majesty and the United States of America for the Indemnification of Those Who Have Sustained Losses, Damages, or Injuries in Consequence of the Excesses of Individuals of Either Nation During the Late War, Aug. 11, 1802, U.S.-Spain, 18(2) Stat. 711, 2 Miller 492 (Senate resolution of advice and consent Jan. 9, 1804); Additional Convention to Treaty of Amity, Commerce and Navigation of Nov. 19, 1794, Jan. 8, 1802, U.S.-Gr. Brit., 18(2) Stat. 285, 2 Miller 488 (Senate resolution of advice and consent Apr. 26, 1802).

The lone exception is a referral to arbitration of a claim against Ecuador by executive agreement in 1857. See 1857 Ecuadorian Claims Settlement, *supra* note 202, 7 Miller 707. However, the private U.S. party did not pursue the arbitration, and the claim was included in a subsequent settlement (by arbitration) established by treaty. See *id.* at 712, Notes. Thus, in fact, no obligations were actually undertaken by the United States by the 1857 Agreement.

278. See Convention for the Adjustment of Claims of Citizens of the United States of America against the Government of Costa Rica, July 7, 1860, U.S.-Costa Rica, 18(2) Stat.

upon the local practice of particular embassies, because the United States entered into both treaty settlements and executive agreement settlements with the same countries at roughly the same time. This occurred, for example, with Chile (treaty providing for arbitration in 1853, executive settlement of single claim in 1858), China (treaty providing for arbitration in 1858, executive settlement of single claim also in 1858), and Brazil (treaty providing for lump sum payment in 1849, executive settlement of particularized claims in 1843).²⁷⁹ In short, it seems inescapable that the treaty/nontreaty agreement distinction was a matter of conscious national policy based upon the substantive character of the settlement.

This substantive difference is consistent with the distinction suggested by the international law terminology: the less important, short-term understanding is handled by executive agreement; the more significant agreement involving substantial executory obligations upon the part of the United States is resolved by treaty. With respect to the arbitration treaties, the executory character is apparent: the United States is to participate in, and be bound by, the decisions of an as-yet unconstituted arbitral panel. With respect to the lump-sum settlements, the executory character may be less clear. However, the United States undertook future obligations in the sense that its government assumed the responsibility of dividing the lump sum among multiple contending claimants.²⁸⁰ Moreover, because the private parties did not participate in or agree to these settlements, grievances remained outstanding—and thus the obligation not to further press claims assumed considerable importance.²⁸¹ Finally, because these settlements involved multiple claims, they typically involved substantial sums of money (and frequently substantial

163, 8 Miller 469 (Senate resolution of advice and consent January 16, 1861); Paraguay Settlement, *supra* note 277, 18(2) Stat. 592, 8 Miller 259 (Senate resolution of advice and consent Feb. 16, 1860); Dillon Settlement, *supra* note 276, 7 Miller 147 (executive agreement); 1845 British Claims Settlement, *supra* note 208, 4 Miller 779 (executive agreement).

279. See *Macedonian Agreement*, *supra* note 277, 18(2) Stat. 114, 8 Miller 117 (Senate resolution of advice and consent Mar. 8, 1859); *Convention for the Adjustment of Claims*, Nov. 8, 1858, U.S.-China, 18(2) Stat. 146, 8 Miller 93 (Senate resolution of advice and consent March, 1, 1859); 1858 China Claims Settlement, *supra* note 202, 8 Miller 13 (executive agreement); 1858 Chile Claims Settlement, *supra* note 202, 8 Miller 3 (executive agreement); *Convention for the Settlement of Claims*, Jan. 27, 1849, U.S.-Braz., 18(2) Stat. 90, 5 Miller 507 (Senate resolution of advice and consent Jan. 14, 1850); *Convention for the Adjustment of the Claim for the Detention and Seizure of the Schooner John S. Bryan*, June 12, 1843, U.S.-Braz., 4 Miller 507 (executive agreement).

280. See, e.g., *Convention on Wines and Cottons*, *supra* note 277, 18(2) Stat. at 245, 3 Miller at 642 (arts. I & II) (Senate resolution of advice and consent Jan. 27, 1832).

281. See *id.*

compromises).²⁸² For all these reasons, the practitioners of post-constitutional diplomacy thought these settlements rose to the status of treaties.²⁸³

By contrast, the executive settlements were of lesser importance, as they involved less money, fewer parties, and less contention.²⁸⁴ Typically, the only on-going obligation the United States assumed was not to assert further claims (since the amount of payment and identity of the receiving party was specified).²⁸⁵ Because the injured party participated in and (happily or not) assented to the settlement, this was not a material obligation. Indeed, it may have been thought that because the individual party relinquished its legal rights, the settlement was fully executed upon consummation and thus contained *no* on-going obligations.²⁸⁶ In any event, it seems clear that the post-constitutional diplomats thought these agreements by their nature did not amount to treaties in the constitutional sense.

Examination of agreements not involving settlement of claims confirms the idea of long-term importance as the key to the definition of a treaty. Several of the nontreaty agreements concluded in the relevant period concerned relatively important matters: for example, the 1813 Prisoner of War Agreement covering, among other matters, treatment of prisoners, exchanges, and paroles;²⁸⁷ the 1847 armistice ending hostilities in the Mexican War;²⁸⁸ and the 1859 agreement regarding occupation of San Juan Island (which placed a nontrivial amount of U.S. territory under British military occupation).²⁸⁹ However, each of these agreements was understood to be temporary. The war between the United States and Britain was

282. See Conventions on Wines and Cottons, *supra* note 277, 18(2) Stat. 245, 3 Miller 641; see also 3 Miller at 650, Notes (stating that in settlement with France claims of over \$50 million settled for an ultimate payment of \$5.2 million, to be distributed by the U.S. government).

283. This observation, of course, casts substantial doubt upon the holding of *Dames & Moore*, at least as an original matter. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The Algiers Declarations, upheld in *Dames & Moore*, plainly fall into the category of settlements which, in the pre-Civil War period, would have been concluded as a treaty.

284. See, e.g., 1825 Colombian Claims Settlement, *supra* note 176, 3 Miller at 194-95 (showing total of less than \$100,000 at issue, paid to four parties identified in the agreement itself).

285. See *id.*

286. See Vattel, *THE LAW OF NATIONS*, *supra* note 145, bk. II, § 192 (stating that "as soon as a right is transferred by a lawful convention, it no longer belongs to the state that has ceded it; the affair is concluded and terminated").

287. See Prisoner of War Agreement, *supra* note 174, 2 Miller at 558-63 (arts. II-IX).

288. See 5 Miller at 278-80, Notes (discussing 1847 armistice).

289. San Juan Island Agreement, *supra* note 202, 8 Miller 281; see also *Watts v. United States*, 1 Wash. Terr. 288, 292-95 (Wash. 1870) (discussing the validity of this agreement).

not expected to continue, for peace negotiations were already underway and most major issues had been resolved; the 1847 truce was similarly thought to be temporary pending negotiation of a definitive treaty, as was the San Juan Island agreement.²⁹⁰ In contrast, it is difficult to identify *any* treaty concluded during this period that concerned purely temporary matters. Similarly, to the extent any nontreaty agreement had long-term implications, the subject matter was extraordinarily non-controversial. The various postal agreements discussed above are perhaps the leading examples, as they did contemplate on-going obligations.²⁹¹ Those obligations (typically relating to cooperation with foreign postal authorities and recognition of foreign postage) were so minor, however, that they apparently did not rise to the level of treaties in the eyes of diplomats. In short, temporary agreements were concluded outside of Article II, Section 2; agreements involving long-term commitments were concluded within Article II, Section 2 unless their subject matter was minor.²⁹²

V. THE NONTREATY POWER AS PRESIDENTIAL POWER

Having established an identifiable class of "nontreaty" agreements independent of Article II, Section 2, the next step in the

290. See BEMIS, *supra* note 201, at 159-69 (discussing the diplomacy of the War of 1812); *id.* at 281-83 (discussing San Juan Islands controversy); 5 Miller at 278-80, Notes (discussing diplomacy of the Mexican War); 8 Miller at 409-23, Notes (discussing proposals for treaty made after San Juan Island Agreement).

291. See *supra* notes 206-07.

292. This conclusion raises a structural difficulty for Article I, Section 10. Since states can enter into agreements (with congressional approval) but not treaties, defining "treaties" as suggested in this section might seem to preclude states from entering into any long-term understandings, even with congressional approval. With respect to understandings with foreign nations, this seems a reasonable conclusion—any such sovereignty-limiting actions should be taken only by the federal government, subject to the supermajority check of the Senate. However, states commonly enter into long-term interstate "compacts" among themselves, and this has not been thought to pose a constitutional problem. Nor should it: interstate compacts, even if long term, do not limit the sovereignty of the federal government, for they can presumably be preempted by a subsequent Congress. The solution, I suggest, is that an agreement between two states under the Constitution would not have been thought to be a "treaty" in any event, because a treaty is an accord between sovereign nations which is governed by international law. See, e.g., *supra* note 132 and accompanying text (noting that the eighteenth-century dictionary definition of "treaty" includes the requirement that it be "between two or more distinct Nations"). Interstate compacts, as agreements *within* a federal system, are not between "distinct Nations" nor are they governed by international law. Thus, states may enter into agreements among themselves under the "agreement" clause of Article I, Section 10 without regard to their duration, because no interstate agreement, no matter its subject, can be a treaty.

presidential argument is to show that the Constitution granted the President power over such agreements. Nontreaty agreements at the federal level are not specifically discussed in the Constitution.²⁹³ However, Article II, Section 1 (the Executive Vesting Clause) states that "the executive power shall be vested in a President of the United States of America."²⁹⁴ As I discuss below, the presidential argument depends upon construing this text as a grant of foreign relations powers to the President, including the power over nontreaty agreements.

A. *The Executive Vesting Clause and the Dilemma of Foreign Policy Power*

1. Overview

I begin with some familiar background. In the eighteenth century, "executive power" was a common term in political writing that was understood to encompass, among other matters, authority over relations with foreign nations.²⁹⁵ That accorded with political practice at the time—particularly in England, where, despite focus on the division of powers between the crown and parliament, the whole of foreign relations power was part of royal prerogative (which, in turn, was associated with "executive power" in English political/legal theory). Thus Blackstone described the English constitutional structure as follows:

We are next to consider those branches of the royal prerogative, which invest [the king] . . . with a number of

293. It seems clear from the structure of the Constitution that the power to make nontreaty agreements on behalf of the United States would have been understood to be lodged somewhere within the federal government. By explicit text, a power to make important international agreements (that is, treaties) was given to the President with the consent of two-thirds of the Senate, while each individual state had a power to make lesser nontreaty agreements on their own behalf (with the consent of Congress). Were the national government denied the ability to make nontreaty agreements on its own account, such lesser agreements could be concluded only by simultaneous agreement of *all* of the states (acting pursuant to the power reserved in Article I, Section 10) *plus* the approval of Congress. In short, it would require greater consensus and be procedurally more cumbersome to make minor agreements than to make major ones. That is an absurd structure which could not have been contemplated. Nor is it likely that such a structure occurred through inadvertence: the phrasing of Article I, Section 10 shows that the framers had nontreaty agreements in mind, and thus, in deciding to omit the phrase "and other agreements" from the grant of treaty power in Article II, Section 2, some rational procedure for achieving minor agreements must have been contemplated.

294. U.S. CONST. art. II, § 1.

295. See generally Yoo, *supra* note 136, at 196-217 (discussing the eighteenth-century view of executive power).

authorities and powers; *in the exertion whereof consists the executive part of government.*

....

The prerogatives of the crown ... respect either this nation's intercourse with foreign nations, or its own domestic government and civil polity.

With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community In the king therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagements that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation; what is done without the king's concurrence is the act only of private men.²⁹⁶

Jean de Lolme, whose treatise *Constitution of England* was a well-known authority,²⁹⁷ stated in the section entitled "Of the Executive Power" that "the king remains charged with the execution of [the laws] and is supplied with the necessary power for that purpose."²⁹⁸ In listing these powers, de Lolme continued: "He is, with regard to foreign nations, the representative and the depository of all the power and collective majesty of the nation."²⁹⁹ Similarly Montesquieu, whom Madison called "[t]he oracle who is always consulted" on separation-of-powers matters,³⁰⁰ listed within the executive power the power "by [which] he [the chief executive] makes peace or war, sends or receives embassies, establishes the public security and provides against invasions."³⁰¹ These observations derive from the earlier writing of John Locke, who on this subject observed:

296. 1 BLACKSTONE, *supra* note 135, at *250-252 (emphasis added).

297. See Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1598 (1997) (listing de Lolme as an important reference during the constitutional period).

298. JEAN LOUIS DE LOLME, *CONSTITUTION DE L'ANGLETERRE* 70-71 (Dublin, P. Byrne & J. Moore ed. 1793) (1775).

299. *Id.* at 73.

300. THE FEDERALIST, NO. 47, at 303 (James Madison) (Isaak Kramnick ed., Penguin Books 1987).

301. CHARLES DE MONTESQUIEU, *THE SPIRIT OF LAWS* bk. XI, ch. 6, at 69 (R. Hutchins ed., 1952) (1748).

There is another *Power* in every Commonwealth . . . [which] contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth, and may be called *Federative*

These two Powers, *Executive* and *Federative*, though they be really distinct in themselves, yet one comprehending the *Execution* of the Municipal Laws of the Society *within* its self, upon all that are parts of it; the other the management of the *security and interest of the publick without*, with all those that it may receive benefit or damage from, yet they are almost always united.³⁰²

Locke continued:

Though, as I said, the *Executive* and *Federative Power* of every Community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct Persons. For both of them requiring the force of the Society for their exercise, it is almost impracticable to place the Force of the Commonwealth in distinct, and not subordinate hands; or that the *Executive* and *Federative Power* should be placed in Persons that might act separately, whereby the Force of the Publick would be under different Commands: which would be apt sometime or other to cause disorder and ruine.³⁰³

Thus, English political theory placed the full power of foreign relations in the hands of the crown, and in the eighteenth century denominated it an aspect of the crown's "executive power." This power included the ability to conclude treaties and alliances³⁰⁴ and, *a fortiori*, lesser agreements.

The English system was not the only example familiar to the constitutional generation. Not all continental systems vested the full foreign relations power with the chief executive. Sweden, Switzerland, and the Netherlands, for example, referred certain important decisions (including, in some cases, important treaties) to a council or popular assembly for approval.³⁰⁵ However, these systems,

302. JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 145-147, at 383 (P. Laslett ed., 1988) (1698).

303. *Id.* at 384.

304. See, e.g., 1 BLACKSTONE, *supra* note 135, *257; DE LOLME, *supra* note 298, at 73.

305. See Haggemacher, *supra* note 141, at 328-29, 334-35. These forms of government were familiar in the United States. See 1 JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1777) (surveying forms of government in Europe); VATTTEL, THE LAW OF NATIONS, *supra* note 145, bk. IV, § 10 (discussing Sweden). See also VATTTEL, THE LAW OF NATIONS, *supra*

like the English system, began with the idea that foreign relations power was (as Blackstone and others described) an aspect of executive power, and then qualified that power in certain specific respects.³⁰⁶ The remainder of the foreign relations power—including, for example, the power to enter into treaties and agreements other than those specifically requiring additional approvals—lay with the organ credited with executive power.

Although the drafters of the Constitution expressed appreciation for English constitutional structure (and relied heavily on Blackstone, Montesquieu, and Locke), they declined to adopt that system in foreign affairs. The Constitution instead specifically allocated important aspects of foreign relations power away from the President: in addition to the obvious example of the treaty power,³⁰⁷ the Constitution gave the Congress the power to declare war and to raise, support, and regulate armed forces,³⁰⁸ and conferred on the Senate a shared power in naming ambassadors.³⁰⁹ In addition, the text conveyed certain particularized foreign relations powers upon the President—namely, the power to receive ambassadors and the status of Commander-in-Chief of the armed forces.³¹⁰ Thus the constitutional text, building upon the divided foreign relations power then existing in some continental systems, appeared to take the unified foreign relations power described by Blackstone and distribute it among the constituent elements of the federal government.³¹¹

2. Executive Power and “Unallocated” Foreign Relations Powers

The difficulty with regarding the Constitution’s explicit allocation of foreign relations powers as a self-contained system is that a number of critical foreign relations powers are not addressed by the constitutional text. To take perhaps the leading example, what of the authority to establish foreign policy?³¹² True, foreign policy is

note 145, bk. II, § 211 (indicating Roman practice of Senate approval of treaties).

306. See Haggemacher, *supra* note 141, at 328-29, 334-35.

307. See U.S. CONST. art. II, § 2.

308. See *id.* art. I, § 8.

309. See *id.* art. II, § 2.

310. See *id.*

311. Indeed, early drafts of the Constitution gave even less foreign relations power to the President. The treaty power, for example, initially was given to the Senate alone, while Congress had the power to “make war,” not merely to “declare war.” See RAKOVE, *supra* note 219, at 263-66.

312. By “foreign policy” power, I mean the authority to announce publicly the views of the United States (and thus direct the moral and diplomatic force of the United States) with respect to important international issues. I think it significant to distinguish the

sometimes set by treaty (allocated by Article II, Section 2), may involve war or commerce (perhaps encompassed by Article I, Section 8), and may relate to military matters (perhaps encompassed by the Commander-in-Chief power of Article II, Section 2). However, that leaves quite a bit unexplained. Consider the Monroe Doctrine of 1823, which placed the United States in opposition to further European imperialist ventures on the American continents.³¹³ The power to make such a declaration fits poorly within any textually allocated category of foreign relations powers: it was not a prospective declaration of war and did not relate to military dispositions, it was not achieved through international agreement, and it was not even a diplomatic initiative set forth through U.S. ambassadors.³¹⁴ It was simply a public declaration of non-military policy in a presidential message to Congress—a power not immediately identifiable in the constitutional text. Other related examples may be identified in the post-constitutional period. For example, when Great Britain asserted the right to stop U.S. merchant ships to search for and recapture (“impress”) British seamen, the United States chose noisily to oppose that policy, contributing to years of strained relations with Britain.³¹⁵ Similarly, Britain claimed a right to seize cargo of U.S. ships belonging to Britain’s enemies where the United States was not involved in the hostilities, and again

foreign *policy* power (which I use in a fairly narrow sense to mean the announcement of, in effect, the U.S. opinion on international matters) from the foreign *relations* power (meaning, as Blackstone described it, all of the interaction between one nation and others, and of which the foreign policy power is but one small aspect). In the U.S. constitutional system, unlike the English system, it is not meaningful to speak of a single foreign *relations* power, since one of the substantial structural innovations of the Constitution was to divide among various components of government that power which Blackstone and Locke, among others, had seen as essentially indivisible. Hence in speaking of the U.S. system I use the phrase foreign relations *powers*, of which the foreign policy power is one (and the power to conclude nontreaty agreements is another).

313. See James Monroe, Message to Congress, December 2, 1823, 41 ANNALS OF CONG. 11, 22-23 (1856), reprinted in BEMIS, *supra* note 201, at 210-11. As summarized by Bemis, Monroe’s statement indicated that “[t]he United States would regard as the manifestation of an unfriendly disposition to itself the effort of any European power to interfere with the political system of the American continents, or to acquire any new territory on these continents.” BEMIS, *supra* note 201, at 208. The declaration came in response to the specific threat of a Franco-Spanish alliance to reconquer the newly independent South American nations. See *id.*

314. One might think of the foreign policy power as encompassed by the power to appoint ambassadors. See U.S. CONST. art. II, § 2. However, that would make it a shared power of the President-plus-Senate, an interpretation that does not appear to have been seriously contemplated during the relevant period. Moreover, as with the Monroe Doctrine, even in the early history of the nation foreign policy was not necessarily announced through ambassadors.

315. See BEMIS, *supra* note 201, at 126-38.

the United States made a diplomatic issue of the matter at serious cost to Anglo-American relations.³¹⁶ The constitutional authority to make these decisions seems ill-encompassed by the particularized textual allocations.

Textually, the most satisfactory solution to the dilemma of the "unallocated" foreign policy power is the Executive Vesting Clause. Under the English system, the foreign policy power was encompassed within the "executive power" of the crown. This structure was likewise true even of continental systems in which foreign relations powers were somewhat more diffused; as discussed above, these systems identified the executive as the general repository of foreign relations powers and also required the participation of other branches in important foreign relations decisions.³¹⁷ Accordingly, one may see the "executive power" that is "vested" in the President by Article II, Section 1 as including the foreign relations powers of the English crown (understood to be within the term of art "executive power" as used by Blackstone and de Lolme), less those substantial matters conveyed to the other branches by the Constitution.³¹⁸ If so, the power to set foreign policy would be

316. See *id.* The U.S. position was that "free ships make free goods": for example, if the flag of the ship is that of a noncombatant nation, the cargo should generally be similarly considered noncombatant (and thus not subject to seizure) even if owned by nationals of a nation involved in the hostilities. The British position was that goods owned by belligerents were subject to seizure anywhere on the high seas.

317. See Haggmacher, *supra* note 141, at 328-35.

318. This view was expressed most clearly by Hamilton in 1793:

The second article of the Constitution of the United States, section first, establishes this general proposition that "the Executive Power shall be vested in a President of the United States of America."

The same article, in a succeeding section, proceeds to delineate particular cases of executive power.

It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations The difficulty of a complete enumeration of all the cases of executive authority would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the Constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are: "All legislative powers herein granted shall be vested in a Congress of the United States." In that which grants the executive power, the expressions are: "*The executive power* shall be vested in a President of the United States."

The enumeration ought therefore to be considered as intended merely to specify the principal articles implied in the definition of executive power; leaving

allocated to the President.³¹⁹ This view solves the textual dilemma of “unallocated” foreign policy power; it is, moreover, consistent with post-constitutional history, for in each case described above the President set important nonmilitary policies regarding impressment, neutral shipping, and the Monroe Doctrine.³²⁰

Against this proposition is the familiar argument that the “executive power” of Article II of the Constitution, far from being unlimited, extends only to those matters specifically enumerated as executive powers in Article II; otherwise, one might inquire, why bother to list those matters specifically? This view has a substantial pedigree, dating at least to the Pacificus/Helvidius exchange in 1793,

the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.

The general doctrine of our Constitution, then, is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.

Alexander Hamilton, Letters of Pacificus, No. 1 (1793) (quoting the Constitution), in 4 HAMILTON, *supra* note 163, at 437-38 (second emphasis added). See also McDONALD, *supra* note 219, at 200, 202 (discussing similar views expressed by James Wilson and James Iredell during the ratification debates).

319. Some confirmation of this view of executive power is found in the course of the constitutional convention. At one point the delegates considered specifying a Council of State (essentially a cabinet) to assist the President. See 1 ELLIOTT, *supra* note 115, at 250 (minutes of the convention, Aug. 20, 1787). One of the offices proposed was Secretary of Foreign Affairs, to be “appointed by the President during pleasure,” who would be empowered “to correspond with all foreign ministers, prepare plans of treaties, and consider such as may be transmitted from abroad, and generally to attend to the interests of the United States in their connections with foreign powers.” *Id.* (emphasis added). This broad description of a power “to attend to the interests of the United States” in foreign affairs would seem to include what I have called the “foreign policy power” as well as other foreign relations powers not explicitly allocated by the final text of the Constitution. Since the Secretary was appointed by and answerable to the President, ultimate control over those matters apparently was identified with the President. This proposal was, of course, not adopted; however, since it assumed that generalized foreign relations powers were identified with the President, and since this aspect of the proposal provoked no comment, this suggests that, as a general matter, the executive was thought to have such powers.

320. See BEMIS, *supra* note 201, at 126-38, 196-214. It is, moreover, hard to see where the President would get foreign policy power if not from the executive vesting clause. One might say that it comes from the power to receive (and thus communicate with) ambassadors, or perhaps from an ill-defined “inherent” power. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). However, either of these propositions will depend heavily upon the executive power of the English crown to give it content. The principal reason one would think that the power to receive ambassadors included the power to establish and communicate policy is that such power traditionally inhered in the chief executive, and the reason one might think the President had an inherent power to set foreign policy is that chief executives traditionally had that power. So described, these arguments seem no more than semantically distinct: the substance is that the traditional executive power in foreign relations provides (where not textually overridden) the basis for the U.S. executive’s power.

in which Hamilton took the executive view and Madison expressed the rejoinder.³²¹ In Madison's view, "[t]he natural province of the executive magistrate is to execute the laws, as that of the legislature is to make the laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed."³²² The only executive powers not derivative of a particular enactment, Madison continued, are those such as the pardon power and the Commander-in-Chief power explicitly allocated to the executive by Article II of the Constitution.³²³ Thus foreign relations powers, such as the power to declare war and make treaties, were not executive and would not be executive even if the Constitution had not specifically allocated them to other branches.³²⁴ Madison explicitly criticized the identification of "royal prerogative" in the British government with "executive power" as understood in the Constitution.³²⁵

But Madison's view has serious consequences, illustrated by the dilemma of the foreign policy power. If the executive is limited to the particularized powers of Article II, significant foreign relations powers, including the foreign policy power, are not executive powers and indeed are not mentioned at all in the text. Yet, obviously the foreign policy power must exist in the national government; the Constitution could hardly have been understood to establish a government incapable of setting and articulating a national foreign policy, especially when strengthening the union's hand in foreign affairs was a matter of great concern to the framers. Under the

321. See 4 HAMILTON, *supra* note 163, at 432; James Madison, Letters of Helvidius (1793), in 1 MADISON, *supra* note 144, at 614-15; see also *supra* note 319 (discussing Hamilton's view as to the scope of the executive power). In 1793, President Washington issued a proclamation declaring U.S. neutrality in the recently resumed warfare between Britain and France. It was widely debated whether the President in fact had this power, or whether it belonged to Congress as ancillary to the power to declare war conveyed by Article I, Section 8 of the Constitution. Hamilton's "letters," published under the pseudonym "Pacificus," defended Washington's executive power to issue the proclamation, on the basis of the Executive Vesting Clause. Madison, writing in reply as "Helvidius," argued that the President had invaded a power of Congress.

322. Letters of Helvidius, No. 1, in 1 MADISON, *supra* note 144, at 614-15.

323. See *id.* at 618.

324. See *id.* at 618-19.

325. *Id.* at 618-19. This view has support in the context of post-revolutionary political thought, which manifested what Professor Rakove calls a "reactionary . . . animus against the executive." RAKOVE, *supra* note 219, at 250. That outlook was reflected prominently in the early state constitutions and in the Articles of Confederation. See *id.* at 245-56; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1788-92 (1996). The issue, of course, is whether the counter-trend in U.S. political thought after the mid-1780s, see RAKOVE, *supra* note 219, at 250-68, led to a reinstatement of the traditional executive power, at least as a starting point, in constitutional thinking, see Calabresi & Prakash, *supra* note 171, at 544-46.

constitutional structure, Congress would be the only serious alternative to the President within the national government. Taking this view to its logical extent, Helvidius would need to rest the foreign policy power with Congress and argue that the President and ambassadors were merely ministerial messengers of Congress's decisions.

That interpretation is subject to substantial objection. Congress also lacks a comprehensive, textually explicit power over foreign policy. While some aspects of foreign policy, such as those relating to war and commerce, might be seen as adjuncts to the particularized powers of Congress, others (exemplified by the Monroe Doctrine) seem as disconnected from Congress's particularized powers as they do from those of the President. Madison would need to argue that the general grant of "legislative power" in Article I, Section 1 encompassed a generalized foreign policy power (and, moreover, excluded it from "executive power").³²⁶ This argument runs directly counter to the terminology of then-contemporary political philosophy (which saw foreign policy encompassed by—or at least allied with—executive power) and to then-contemporary English and continental practice (in which the chief executive established foreign policy).³²⁷ Of course, the Constitution did take substantial steps in reallocating some foreign relations powers, such as war power and treaty power; however, if a reallocation of foreign policy power was intended, one would expect the text and its explicators to be specific, as they were elsewhere.

Furthermore, placing the power exclusively with Congress raises yet another dilemma: whether only *enacted* foreign policy could be pursued. It would be a peculiar view that the United States could not express a position on international matters unless that position was reflected in legislation. To escape this problem, one would need to read the grant of "legislative power" to include the power to set foreign policy nonlegislatively—a construction lacking any textual,

326. Madison/Helvidius in fact never reached these issues. Since Madison argued that the "neutrality power" was encompassed within Congress's war power, *see supra* note 324 and accompanying text, he finessed (but in no way resolved) the dilemma of textually unallocated foreign relations powers.

327. I do not suggest here that the President's power was necessarily regarded as exclusive: Congress might have the power to regulate foreign policy as part of the "necessary and proper" clause. But, as that power would be derivative of the President's power, this proposition assumes that the President in fact has the power—and the source of that power would be the Executive Vesting Clause. Whether the power is exclusive or concurrent is beyond the scope of the present inquiry. *Cf.* Bloom, *supra* note 29, at 167 (discussing exclusivity).

historical, or theoretical precedent. In short, the implications of Madison's view produce a substantially greater stretch of the text than Hamilton's. Madison's view is, moreover, entirely inconsistent with post-constitutional practice, as indicated above. No President (including Madison and his ally Monroe) took the Helvidius view seriously once in office, and despite Madison's theoretical writings, Congress never attempted to assert sole power to set foreign policy.³²⁸

B. The Allocation of the Nontreaty Power

Whatever one thinks of the Helvidius/Pacificus debate, the critical point for the present inquiry is that the presidential argument for a nontreaty power depends upon identification with Pacificus. Once Hamilton's Executive Vesting Clause argument is accepted, it is a short step to recognizing presidential power over nontreaty agreements. The traditional chief executive possessed that power under both the English and continental systems.³²⁹ If we understand that the power is not encompassed within the treaty power (and hence not explicitly conveyed to the President-plus-Senate by Article II, Section 2),³³⁰ then it remains, with the foreign policy power, an element of the "unallocated" foreign relations powers and thus an aspect of the "residual"³³¹ executive authority of the President. Given the substantive limits upon the subject matter of nontreaty agreements discussed above,³³² the power does not seem a great one—certainly not as great as the power to set foreign policy. Thus there does not seem to be available a structural objection based on the conveyance of disproportionate power to the executive.³³³

This view accords as well with post-constitutional practice. As discussed above, the substantial majority of nontreaty agreements in the post-constitutional period were concluded on the independent authority of the President.³³⁴ Most (in particular the settlement

328. See generally BEMIS, *supra* note 201, at 85-319 (recounting diplomatic history of the early nineteenth century).

329. See *supra* note 304 and accompanying text.

330. See *supra* Part III.

331. The phrase is from CORWIN, *supra* note 31, at 115.

332. See *supra* Part IV.

333. There are, moreover, important structural reasons in favor of allocation to the President alone. As a practical matter, one might not wish to subject minor, short-term agreements to the protracted approval process of Article II, Section 2, either because—as short-term agreements—they would need to be concluded more quickly, or because—as unimportant agreements—they would not merit the expenditure of scarce senatorial resources.

334. See *supra* Part III.D.

agreements) concerned matters unrelated to any explicit power of the President. None was challenged on constitutional grounds. The best textual explanation for the practice is that the constitutional generation understood the power to conclude such agreements to be among the foreign relations powers vested in the President by Article II, Section 1—an explanation that similarly resolves the broader difficulty of unallocated foreign relations powers.

Moreover, there is simply no other satisfactory argument from the President's perspective. Executive agreements (as I have defined them) are not made in execution of a particular enactment, and thus lie outside of the enactment-based executive power identified by Helvidius. In particular cases, the President might claim a power over nontreaty agreements as ancillary to one of the explicit powers of Article II. Indeed, this argument appears, among others, in *Pink* and *Belmont*. The executive agreement at issue in those cases was concluded as part of the recognition of the Soviet Union by the United States.³³⁵ The power to receive ambassadors has been interpreted to include the recognition power.³³⁶ Hence, if the executive agreements arose from the recognition, perhaps they can be founded upon the recognition power.³³⁷ However, aside from factual implausibility in *Pink* and *Belmont* themselves,³³⁸ this argument is inadequate as a general matter from the presidential perspective. The textually particularized powers of the President are

335. See *supra* Part II.B.1-2.

336. See HENKIN, *supra* note 1, at 43; see also Letters of Pacificus, No. 1, in 4 HAMILTON, *supra* note 163, at 441 (arguing that the recognition power is included in the right to receive ambassador). But see Adler, *supra* note 17, at 134 (arguing that under the original understanding the President lacked discretionary authority to decline to receive ambassadors in most cases).

337. See *United States v. Pink*, 315 U.S. 203, 227-29 (1942).

338. On the disconnection between the assumption of Soviet claims and the recognition, see MILLET, *supra* note 30, at 1-116. The Soviet Union had no interest in having the claims actually collected, and in many cases, it was not even known the extent of the claim, or the obligor. At most, the Soviet Union wanted an offset of its claims against the claims asserted by the United States. Whether the United States actually collected the offset claims from private obligors was a matter of complete indifference to the Soviets. Indeed, as Millet argues, it appears that at the time neither the United States nor the Soviets were interested in Soviet claims against private parties. The principal claims settlement was to offset the United States claims against the Soviet claims based on the U.S. occupation of Siberia. The claims later pursued in *Belmont* and *Pink* were added essentially as an afterthought. It is a substantial stretch of the facts to suggest that validating (much less enforcing) the Soviet claims was critical to recognition. Certainly the Soviet Union would have accepted diplomatic normalization without any attention to the claims. Thus even *Pink* and *Belmont*, the standard citations for the power to conclude executive agreements ancillary to recognition, cannot be justified by the assertion of that limited power.

few. Military affairs and recognition would be the principal areas in which nontreaty agreements would be permitted (derivative of the Commander-in-Chief clause and the power to receive ambassadors). An argument for nontreaty power based on such powers would leave outside its scope many executive agreements, including most of the agreements concluded in the post-constitutional period. In particular, settlement agreements, the most widely used and accepted species of executive agreement, would largely be excluded; even if one grants that the executive agreement in *Belmont* can be described as ancillary to recognition, most settlements cannot.³³⁹ Nor do settlement agreements ordinarily concern military affairs, or any other power specifically allocated to the President. There is simply no way to describe them as executive power consistent with the views of Helvidius.³⁴⁰

As a result, the executive argument for nontreaty power depends upon Pacificus, and hence upon three critical points in Pacificus's favor: first, that English (and other continental) practice placed the nontreaty power (along with most or all of the foreign relations powers) with the executive; second, that reading the Executive Vesting Clause to confer on the President those traditional foreign relations powers of the executive not allocated elsewhere is the clearest textual solution to the dilemma of unallocated foreign relations powers; and third, that post-constitutional practice confirms this view by providing examples of uncontested unilateral executive action in respect of unallocated foreign relations powers (including the power over nontreaty agreements). Yet each of these points turns against the executive—and proves the ultimate failure of the executive's position—in the next (and final) step of the argument.

VI. NONTREATY AGREEMENTS AS THE LAW OF THE LAND

The final step in the defense of a *Belmont*-type power under the original Constitution is to show that nontreaty agreements had the force of law within the domestic legal system—or, put another way, that nontreaty agreements, like treaties, do not require legislative implementation to function as domestic law.³⁴¹ On this issue,

339. This observation includes essentially all of the settlements listed *supra* Part III.D.

340. Thus, while conventional defenses of the executive agreement begin by asserting a power ancillary to the executive's textually explicit powers, they typically end with an appeal to a broader executive foreign relations power that permits executive agreements on a comprehensive range of subjects. See, e.g., *Committee on Foreign Relations Hearing*, *supra* note 21, at 178; HENKIN, *supra* note 1, at 219-24.

341. In international law terminology, this question is phrased as the inquiry as to

however, the matters on which the executive's argument has previously relied now point in the opposite direction. The argument has been developed as follows: (1) because the word "treaty" is not all-encompassing, there exist a class of agreements outside its reach (and thus outside the scope of Article II, Section 2);³⁴² (2) because the power of the traditional eighteenth-century chief executive was comprehensive as to international agreements, one may posit that the U.S. President's "executive power" conveyed by Article II, Section 1 is similarly extensive, except as limited (with respect to the subcategory "treaties") by Article II, Section 2;³⁴³ and (3) post-constitutional practice confirms that the U.S. executive was understood to have independent power to conclude nontreaty agreements.³⁴⁴ The President's nontreaty power, as an original matter, depends upon these propositions. Yet each of these points argues strongly *against* giving nontreaty agreements the force of law.

A. *The Textual Difficulty*

First, consider the textual argument. In *Belmont*, Justice Sutherland argued that since treaties had legislative force and since the term "treaty" was, as a practical matter, used loosely to describe international agreements generally, one could conclude that all international agreements had the status of treaties.³⁴⁵ But this is because Sutherland also assumed, rather than proving, that the President had independent power to make international agreements.³⁴⁶ As discussed above, the problem with this assumption is that the Constitution specifically gives treaty power to the President-plus-Senate, and, as the authorities adduced by Raoul Berger show, there seems little doubt that the constitutional

whether the agreement is "self-executing"—as is a treaty by operation of Article II, Section 2—or "non-self-executing"—meaning that, as is true of treaties in many legal systems, implementing legislation is required before it has domestic legal force. See JANIS, *supra* note 41, at 95-98. I generally avoid this terminology in the subsequent discussion, since in the domestic terminology of constitutional law we think of "execution" meaning the enforcement of existing law (e.g., the President's power to execute the laws). Thus, to avoid confusion, it may be preferable to speak of "incorporation" of treaty obligations into law, whereas in an international law context it would be appropriate to say "execution" of treaty obligations as law. But the inquiry is the same, by whatever name.

342. See *supra* Parts III & IV.

343. See *supra* Part V.

344. See *supra* Parts IV.B.3 & V.

345. See *United States v. Belmont*, 301 U.S. 324, 330-32 (relying on *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) and *B. Altman & Co. v. United States*, 224 U.S. 583 (1912)).

346. See *supra* Part II.B.1.

generation understood Article II, Section 2 to exclude independent presidential power with respect to treaties.³⁴⁷ From this Berger concluded (*contra* Sutherland) that the President had no independent power over *any* international agreements.³⁴⁸ As we have further seen, the executive can escape Berger's conclusion by attacking *its* central assumption: that "treaty" is synonymous with "international agreement." Once that assumption is defeated, Berger's argument collapses: though the President has no independent *treaty* power by operation of Article II, Section 2, that says nothing about the President's *nontreaty* power—and thus Sutherland's view of the President's power to make international agreements can be defended.

The difficulty is that this argument depends upon upholding a firm distinction between "treaties" and "other international agreements" (thus avoiding Berger's claim based on Article II, Section 2). That distinction, in turn, is fatal to *Belmont's* argument regarding supremacy. The Supremacy Clause encompasses only the Constitution itself, statutes, and treaties.³⁴⁹ A mushy definition of "treaty" such as Sutherland used in *Belmont* can finesse the fact that nontreaty agreements are not mentioned in Article VI. But once one is committed to a precise definition of "treaty" as a term of art in Article II, Section 2, one is effectively driven to a similarly precise definition in Article VI. And a precise distinction between treaties and nontreaty agreements excludes the latter from the scope of the Supremacy Clause. The only recourse is the unpersuasive claim that "treaty" means one thing in Article II and another in Article VI—the strained argument for which Berger (in the Article II, Section 2 context) can be justly criticized.³⁵⁰

Moreover, there is substantial evidence that Article VI was viewed as the *only* mechanism by which treaties became the "law of the land." Under the Articles of Confederation, there was no comparable clause, and state governments routinely flouted

347. See Berger, *supra* note 17, at 37-40.

348. See Berger, *supra* note 17, at 37.

349. See U.S. CONST. art. VI ("This 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 . . .").

350. See *supra* Part III. As discussed, it is important to the refutation of Berger's position to argue that the word "treaty" has the same meaning in Article I, Section 10 and in Article II, Section 2 (since it clearly has a technical meaning in Article I, Section 10). See *supra* notes 119-30 and accompanying text. Having so argued, it is decidedly awkward for the executive to next contend, in support of *Belmont*, that the word "treaty" in Article VI has a *different* meaning than the word "treaty" in Articles I and II.

provisions of federal treaties.³⁵¹ It is almost a cliché to say that one of the reasons behind the move to a stronger federal government under the Constitution was to respond to international complaints about the United States failing to honor international obligations.³⁵² Clearly this concern underlay the inclusion of treaties in Article VI.³⁵³ During the ratification debates, the Supremacy Clause was identified as the mechanism according treaties the status of superior law and thus resolving the difficulty of state government noncompliance. Defenders of the Constitution explained the clause on this ground, and opponents of the Constitution attacked it on this basis; no one suggested that *another* mechanism within the text or structure of the Constitution accomplished such a result.³⁵⁴

Similarly, the early courts, in enforcing treaties as the “law of the land” and preemptive of state law, credited Article VI as the basis for that power. The 1796 case *Ware v. Hylton*³⁵⁵ is illustrative. Ware sued Hylton, a Virginia debtor, on behalf of a British creditor. Hylton defended on the ground that a Virginia statute, enacted during the revolution, discharged the debt. The 1783 treaty ending the revolutionary war had, among other things, agreed that pre-revolutionary debts would be honored. The issue was whether the treaty overrode the state statute.³⁵⁶ In the view of Justice Iredell, himself a member of the constitutional convention:

[T]he Plaintiff could not have recovered in a Court of Justice in the State, as the law stood, previous to the ratification of the present Constitution of the *United States*.

...

[T]he stipulation in favour of creditors [in the 1783 treaty], so as to enable them to bring suits, and recover the full value of their debts, could not at that time be carried into

351. See, e.g., RAKOVE, *supra* note 219, at 27-28; STORY, *supra* note 127, at 686. Although the Continental Congress asserted that federal treaties overrode inconsistent state law under the Articles of Confederation, and at least one lower court so held, see RAKOVE, *supra* note 219, at 28 (citing *Rutgers v. Waddington*, 1 Am. State Papers, Foreign, Bost. Ed. 1819, 369, 370), that view was not widely credited. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 271-72 (1796) (opinion of Iredell, J.) (discussing congressional view and response); STORY, *supra* note 127, at 686.

352. See, e.g., RAKOVE, *supra* note 219, at 28; STORY, *supra* note 127, at 686.

353. See RAKOVE, *supra* note 219, at 28; STORY, *supra* note 127, at 686.

354. See McDONALD, *supra* note 219, at 196-97 (discussing views of the anti-federalists); *id.* at 202-03 (discussing views of the federalists). On the central importance of the Supremacy Clause to the structure of the Constitution, see RAKOVE, *supra* note 219, at 171-77.

355. 3 U.S. (3 Dall.) 199 (1796).

356. See *id.* at 235.

effect in any other manner, than by a repeal of the statutes of the different States, constituting the impediments to their recovery, and the passing of such other acts as might be necessary to give the recovery entire efficacy, in execution of the treaty.³⁵⁷

Thus, the pre-constitutional system required legislative implementation of treaties. However, Iredell continued,

The extreme inconveniencies felt from such a system dictated the remedy which the constitution has now provided, that "all treaties made or which shall be made under the authority of the *United States*, shall be the *Supreme law of the land*; and that the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of *moral obligation*, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the *Supreme law*³⁵⁸

As a result of that constitutional clause (and *only* that particular clause), the plaintiff in *Ware* had a valid claim: "The provision [i.e., the Supremacy Clause] extends to subsisting as well as to future treaties. I consider, *therefore*, that *when this constitution was ratified*, the case as to the treaty in question stood upon the same footing, as if every act constituting an impediment to a creditor's recovery has been expressly repealed" ³⁵⁹

357. *Id.* at 271 (opinion of Iredell, J.) (emphasis in original).

358. *Id.* at 277 (quoting U.S. CONST. art. VI) (emphasis in original).

359. *Id.* (emphasis added). Iredell initially delivered this opinion sitting as circuit justice in the court of appeals. He further concluded that, although the treaty overrode inconsistent statutes as a general matter, the Virginia law did not constitute a barrier to recovery of an existing debt within the meaning of the treaty (since Hylton's debt had been extinguished by law prior to the treaty). The Supreme Court reversed Iredell on the latter point, holding that the Virginia law did constitute an "impediment" within the meaning of the treaty. However, the Court reaffirmed Iredell's general view of the status of treaties. Justice Chase, for example, suggested that prior to ratification of the Constitution, treaties may have been preemptive of preexisting state law, but continued: "If doubts could exist before the establishment of the present national government, they must be entirely removed by the 6th article of the Constitution" for it is "apparent on a view of this 6th article of the National Constitution . . . that the Constitution, or laws, of any of the States so far as either of them shall be found contrary to [the 1783 treaty] are by force of the said article, prostrated before the treaty." *Id.* at 236-37 (opinion of Chase, J.) (emphasis added). Similarly, Justice Cushing, paraphrasing Article VI of the Constitution, relied on the fact that the treaty had been "sanctioned, in all its parts, by the Constitution of the United States, as supreme law of the land." *Id.* at 282 (opinion of Cushing, J.). Justice Wilson, whose views could be construed as contrary, had nonetheless elsewhere expressed a view of the Supremacy Clause similar to Iredell's, *see infra* note

John Marshall, as Chief Justice, expressed a similar view:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently, to be regarded in the courts of justice as equivalent to an act of the legislature, . . . without the aid of any legislative provision.³⁶⁰

Justice Story's constitutional commentaries are to the same effect. In discussing the Supremacy Clause, Story identified the two different views of treaties (as requiring legislative implementation, or as being part of domestic law of their own force) and identified Article VI as the mechanism shifting the U.S. practice from the former to the latter:

In regard to treaties, there is equal reason, why they should be held, when made, to be the supreme law of the land. . . . [T]hey ought to have a positive binding efficacy, as laws, upon all the states, and all the citizens of the states. The peace of the nation, and its good faith, and moral dignity, indispensably require, that all state laws should be subject to their supremacy. The difference between considering them as laws, and considering them as executory, or executed contracts, is exceedingly important in the actual administration of public justice. If they are supreme laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied, in opposition to all state laws, as we all know was done in the case of the British debts secured by the treaty of 1783, after the constitution was adopted [a reference to *Ware v.*

371 and accompanying text, and a fifth justice, Patterson, did not address the matter. Thus there was substantial consensus that the inclusion of "treaties" as a part of supreme law in Article VI was decisive to the result in *Ware*. Subsequent citations of *Ware* read the case to hold that the supremacy of treaties is established by Article VI. See *infra* note 361 and accompanying text.

360. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); see also *Chirac v. Chirac*, 15 U.S. (1 Wheat.) 259, 270-71 (1817) (concluding that the 1778 treaty between the United States and France became legally effective through the Supremacy Clause upon ratification of the Constitution); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801) ("The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted." (emphasis added)).

Hylton]. If they are deemed but solemn compacts, promissory in their nature and obligation, courts of justice may be embarrassed in enforcing them, and may be compelled to leave the redress to be administered through other departments of the government. It is notorious, that treaty stipulations (especially those of the treaty of 1783) were grossly disregarded by the states under the [articles of] confederation. They were deemed by the states, not as laws, but like requisitions, of mere moral obligation, and dependent upon the good will of the states for their execution. . . . *It was probably to obviate this very difficulty, that this clause [the Supremacy Clause] was inserted in the constitution; and it would redound to the immortal honour of its authors, if it had done no more, than thus to bring treaties within the sanctuary of justice, as laws of supreme obligation.*³⁶¹

However, if treaties are part of domestic law as a result of the Supremacy Clause, nontreaty agreements (not encompassed by the Supremacy Clause, under the argument set forth above) would seem excluded from domestic law. No constitutional mechanism is discernible that would have made nontreaty agreements, *but not treaties*, part of supreme law. Any mechanism (other than the Supremacy Clause itself) that made treaties *and* nontreaty agreements part of the law of the land would render the Supremacy Clause surplusage and would render the reasoning of *Ware v. Hylton*, as well as the view of the clause expressed in the ratifying debates and in Story's commentaries, fundamentally misguided. In short, the importance attached to the Supremacy Clause, and the inability to identify a mechanism outside the clause that might apply to nontreaty agreements but not treaties, suggests that once nontreaty agreements are excluded from the Supremacy Clause they are shown to lack domestic legal effect.

This view, moreover, comports with the use of the word "treaty" in Article III, Section 2. Since treaties were made supreme law by Article VI, it made sense to give jurisdiction over their interpretation to the federal courts. If executive agreements were also supreme law (by operation of some provision other than Article VI), they too should have been included in the jurisdictional grant of Article III.³⁶² Thus the executive must either concede that an executive agreement

361. STORY, *supra* note 127, at 685-86 (emphasis added).

362. Cf. 2 ELLIOT, *supra* note 115, at 468-69 (recording statement of James Wilson to the Pennsylvania ratifying convention that the purpose of granting federal jurisdiction over treaties in Article III was to secure federal enforcement).

is a federal law that does not give rise to federal jurisdiction (a peculiar result), or again resort to the argument that the word "treaty" has different meanings in different parts of the document. On the other hand, giving "treaty" a single (limited) meaning in all four instances in which it is used in the Constitution produces a sensible reading: nontreaty agreements exist but are not part of domestic law, and therefore are not part of federal jurisdiction.

As a textual matter, therefore, the executive cannot have it both ways. The executive must insist on a rigorous and limited definition of "treaty" to escape the negative implication of Article II, Section 2 and the conventional view during the ratification debates that *all* treaties required the approval of President-plus-Senate. But to insist upon a rigorous and limited definition of "treaty" precludes reliance on the Supremacy Clause to establish the supremacy of nontreaty agreements, and no other avenue is available. The textual arguments establishing a nontreaty power themselves defeat the argument for nontreaty agreements as domestic law.

B. Pre-Constitutional Practice

The foregoing view is confirmed by the most important precedent available to the founding generation: the English system. While the royal prerogative encompassed complete control of foreign relations, including the power to make all international agreements (treaties and nontreaty agreements alike),³⁶³ agreements made pursuant to that power had no status as English domestic law unless implemented by legislation passed in Parliament. As an English court recently described the longstanding practice:

[T]he Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.³⁶⁴

363. See *supra* notes 295-304 and accompanying text.

364. *Australia & New Zealand Banking Group Ltd. v. Australia*, 29 I.L.M. 670, 694 (1990) (H.L. 1989). In *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326, 347-48, Lord Atkin noted:

[W]ithin the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. . . . Once [treaties] are created, while they bind the State as against the other contracting

As early as 1674, it was held that treaties created no domestic rights cognizable by English courts.³⁶⁵ The routine eighteenth-century practice was to enact implementing legislation. For example, in the United States the controversial 1794 treaty with Great Britain (Jay's Treaty) was said to be automatically implemented by the Supremacy Clause; in Britain the treaty was enacted by Parliament, and English cases thereafter looked to the implementing legislation as the basis for enforcement authority.³⁶⁶

Although Parliament rarely refused to enact a treaty (and indeed was thought to have a moral obligation not to refuse),³⁶⁷ such refusals did occur. As recounted by Henry Wheaton, one of the earliest U.S. writers on international law, the Treaty of Utrecht (establishing commercial reciprocity between Britain and France) "was never carried into effect, the British parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation so as to adapt them to the stipulations of the treaty."³⁶⁸

Moreover, Parliament's power in this regard was understood and taken into account in conducting British foreign policy. The matter arose most frequently with respect to subsidies. A central feature of British foreign policy in the eighteenth century was the use of subsidies to support (or one might say to buy the support of) second-tier European powers such as Portugal and the German and Italian states. But negotiations with respect to those subsidies were conducted with an eye to Parliament, for it was understood that the funds the crown might promise the Portuguese or the Prussians by

parties, Parliament may refuse to perform them and so leave the State in default. *Id.* at 347-48 (opinion of Atkin, L.J.); *see also* The Parlement Belge, [1878-1879] 4 P.D. 129, 154 (Eng.) (concluding that recognition of unenacted treaty as giving rise to legal rights would be "a use of the treaty-making prerogative of the Crown which I believe to be without precedent"); JANIS, *supra* note 41, at 95-96 ("[M]ost other common law countries deny the very possibility of self-execution; that is, they do not permit treaties to take effect in their municipal legal systems without legislative enactment.").

365. *See* *Blad v. Bamfield*, 36 Eng. Rep. 992 (Chancery 1674).

366. *See* Act of 37 Geo. 3, ch. 97, 41 Stat. 320 (1796); *Sutton v. Sutton*, 39 Eng. Rep. 255, 259 (Chancery 1830). To the same effect is *In re Besset*, 1 New Sess. Cas. 337, 341-42 (Q.B. 1844), which involved the 1843 extradition treaty between Britain and France, and the English statute enacting it, 6 & 7 Vict., ch. 75(a) (1843). In *Besset*, the court looked only to the statute, not the treaty, and stated: "We have not any power over the prisoner . . . but that which the late act of Parliament has conferred. . . . We have not any power but under this statute." *Id.*

367. *See* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 273 (1796) (opinion of Iredell, J.).

368. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 188 (1836) (De Capo reprint 1972).

treaty could be delivered only with parliamentary approval.³⁶⁹ The entry into an international accord did not alter the ordinary mechanisms for approving expenditures under English law.³⁷⁰

This feature of English law was generally understood in the United States. James Wilson observed:

In England, if the king and his ministers find themselves . . . to be embarrassed because an existing law is not repealed, or a new law is not enacted, they give notice to the legislature of their situation, and inform them that it will be necessary, before the treaty can operate, that some law be repealed, or some be made.³⁷¹

Patrick Henry, in objecting to the scope of the Supremacy Clause, argued that “[t]reaties rest . . . on the laws and usages of nations. To say that they are municipal [i.e., that they take effect as domestic law] is to me a doctrine totally novel. To make them paramount to the Constitution and laws of the states, is unprecedented.”³⁷²

369. See JEREMY BLACK, *BRITISH FOREIGN POLICY IN THE AGE OF WALPOLE* 75-89 (1985).

370. The issue of monetary support of a treaty has an instructive sequel in U.S. practice. After the Jay Treaty was approved by the Senate, it remained for Congress to appropriate money for certain aspects of it. The pro-treaty faction argued that Congress was bound to make the appropriation by the Supremacy Clause; the antitreaty party relied on the above-cited English practice to say that treaty appropriations were discretionary to the legislature. See *supra* notes 164-66 and accompanying text. In short, each side was fully cognizant of English practice, and the issue was whether the Supremacy Clause changed it.

371. 2 ELLIOT, *supra* note 115, at 506-07 (statement of James Wilson to the Pennsylvania ratifying convention). Wilson further suggested, perhaps disingenuously, that this practice would be largely continued under the Constitution, at least to the extent of giving the House some involvement in treaty implementation.

372. 3 *id.* at 500 (statement of Patrick Henry to the Virginia ratifying convention). Henry adduced English practice as evidence of his view that the Supremacy Clause was “a doctrine totally novel.” 3 *id.* at 502-03. The ratifying debates are at times quite confused in their citation of English practice. Opponents of the Constitution, for example, at times asserted that Parliament had the right to ratify treaties (a point clearly not accurate except perhaps with respect to treaties ceding English territory); defenders replied, citing Blackstone, that the crown’s power to enter into international agreements was unqualified (correct)—and at times went on to suggest (perhaps disingenuously) that by virtue of this power, treaties in England were part of supreme law in the sense that they displaced existing law of their own force. But when compelled to address specifics, it seems clear that in general the federalists also understood the English system, although they were reluctant to make that plain. For example, Francis Corbin, a Virginia federalist, when challenged to give an example of an English treaty being supreme law, argued that the 1783 peace treaty between the United States and Great Britain had given the United States the right of access to the Newfoundland fisheries, and although that right had not been ratified by the English Parliament or enacted into English law, no one doubted that it was a valid right. That of course was true, as the crown would not have needed Parliament’s accession to such an agreement, but it does not demonstrate that

Subsequently, Iredell in *Ware* described English practice as follows:

The King of *Great Britain* certainly represents the sovereignty of the whole nation, as to foreign negotiations His power, as to declaring war and making peace, is as unlimited as the respective authorities for those purposes in the *United States*.—The whole nation of *Great Britain* speaks as effectually, and as completely through him, as all the people of the *United States* can now speak through Congress, as to a declaration of war, or through the President and Senate as to the making of peace Yet, I believe it is an invariable practice in that country, when the King makes any stipulation of a legislative nature, that it is carried into effect by an act of Parliament. The Parliament is considered as bound, upon a principle of moral obligation, to preserve the public faith, pledged by the treaty, by passing such laws as its obligation requires; *but until such laws are passed, the system of law, entitled to actual obedience, remains de facto, as before.*³⁷³

English practice is damaging to the executive's argument for two reasons. First, it confirms the role of the Supremacy Clause as *changing* existing practice as to treaties—and since the Supremacy Clause does not cover nontreaty agreements, one may conclude that, as to them, the prior practice continued. More critically, identification of the nontreaty power with the U.S. President in the original understanding depends upon a Hamiltonian construction of the executive power as including the foreign policy prerogatives of a

English treaties were self-executing, as the right in question did not involve a matter governed by parliamentary law. On the other hand, Corbin acknowledged that "a commercial treaty [in England] must be submitted to the consideration of Parliament, because such treaties will render it necessary to alter some laws, add new clauses to some, and repeal others." 3 *id.* at 511. Similarly, Madison asked rhetorically, "Would it not be constituted a dangerous principle in the British government were the king to have the same power in internal regulation as he has in the external business of treaties?" 3 *id.* at 515.

373. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 273-74 (1796) (opinion of Iredell, J.) (final emphasis added). Iredell cited the example of a commercial treaty between Britain and France signed in 1786, which purported to establish duties on certain imports, and in execution of which the King requested (and the Parliament enacted) implementing legislation adjusting the tariff; Iredell concluded that:

[N]o man living will say that a bare proclamation of the King, upon the ground of the treaty, would be an authority for the levying of any duties whatever; *but it must be done in the constitutional mode*, by act of parliament, which affords an additional proof, that where any thing of a legislative nature is in contemplation, it is constantly implied and understood, (without express words) that it can alone be effected by the medium of the legislative authority.

Id. at 275.

traditional chief executive (most evidently, the English crown).³⁷⁴ Yet the foreign policy prerogatives of the English crown did *not* include the power to supersede existing domestic law by international agreement. In claiming that power in *Belmont*, the executive sought a power *greater* than that possessed by George III. That is doubly problematic. First, it requires an interpretation of the Executive Vesting Clause more expansive than any claimed by Hamilton (or any other executive advocate of the constitutional generation). Hamilton, famously the exponent of the strong executive, identified the executive power as that possessed by the traditional executive under English theory, less that (such as war and treaty power) specifically given to other branches by the Constitution.³⁷⁵ Even in this view, Hamilton was strongly opposed by other prominent members of the constitutional generation.³⁷⁶ Yet a defense of *Belmont* power requires the President to claim *more* than the traditional chief executive possessed.

It is, moreover, inconsistent with the general view of executive power at the time to think powers greater than the royal prerogative were intended to be conveyed to the President. To the contrary, the constitutional generation, including Hamilton, sought to reduce the royal prerogative (particularly in foreign affairs) by distributing aspects of it to other branches.³⁷⁷ This approach was driven by a substantial suspicion of executive authority, which arose from practical experiences with the overreaching of George III.³⁷⁸ That does not necessarily show that no expansion upon any axis was intended, but it does make it difficult to believe that the Constitution would have been understood *implicitly* to grant to the President powers greater than the royal prerogative, or that this grant would not have been remarked upon.

C. *Post-Constitutional Practice*

The view that executive agreements lack the status of law is further confirmed by post-constitutional practice. An important element in the case for executive nontreaty power is post-constitutional practice: in the eighteenth and early nineteenth centuries, Presidents exercised without objection an independent

374. See *supra* Part V.

375. See *supra* note 318.

376. See *supra* notes 321-25 and accompanying text.

377. See THE FEDERALIST NO. 69, at 379-99 (Alexander Hamilton) (Isaak Kramnick ed., Penguin Books 1987).

378. See *supra* notes 321-25 and accompanying text.

power to enter into minor or temporary understandings with foreign nations. This confirms the constitutional understanding that the procedure of Article II, Section 2 did not extend to the entire universe of international agreements.³⁷⁹

On the subject of domestic legal effect, however, this element of the case likewise turns against the executive. *None* of the pre-Civil War claims settlements concluded by independent executive action had any effect on domestic law.³⁸⁰ There is, in other words, no historical support for self-executing claims settlements; it appears that the first assertion of the domestic legal effect of a settlement agreement was made in *Belmont* in 1937. The record with respect to nontreaty agreements other than claims settlements is similar. As indicated above, there were relatively few of these in the nineteenth century. No legislative effect appears to have been claimed for any of them prior to 1870, more than eighty years after ratification,³⁸¹ and no such agreement was actually held to have legislative effect prior to the decision in *Belmont*.

Most nontreaty agreements concluded in the pre-Civil War period did not require implementation into domestic law, as they

379. See *supra* Part III.D.

380. All of the claims in question were directed against the government of a foreign nation. Under the holding of *Schooner Exchange v. M'Faddon*, 11 U.S. (1 Cranch) 116, 122-24 (1812), foreign governments had immunity from suit in U.S. court. Thus the only remedy available was through discretionary diplomatic channels; once the United States agreed, through the settlement agreement, not to pursue such claims beyond a certain compromise, the claimant's recourse was entirely foreclosed without resort to any change in the domestic legal regime. One possible exception is the 1839 Netherlands Claims Settlement, see *supra* note 180, 4 Miller 179, an executive agreement by which the United States agreed to assume future claims against the Netherlands with respect to a particular incident. This agreement does appear to give rights to foreign parties. However, these rights could not have been vindicated in U.S. court because the United States would have had sovereign immunity against such a claim. See *United States v. Clarke*, 33 U.S. (1 Pet.) 436, 444 (1834). In any event, no one ever claimed that this agreement attained the status of domestic law.

381. In that year the Washington territorial court apparently concluded (in dicta) that a nontreaty agreement might supersede federal law (although it further concluded that the agreement in question—the 1859 agreement regarding joint occupation of San Juan Island—did not have that effect). See *Watts v. United States*, 1 Wash. Terr. 288, 293-95 (1870) (discussing the San Juan Island Agreement, *supra* note 202, 8 Miller 281). In the course of litigation, the United States pressed the argument that the agreement regarding San Juan Island displaced the jurisdictional authority of the Territory (which was conveyed by an act of Congress). See *id.* at 296. This appears to be the first assertion that an executive agreement could displace existing law (although since made by a local U.S. attorney in response to a technical jurisdictional argument of a criminal defendant, its philosophical basis may be doubted). The territorial court ruled against the United States on the facts, but concluded that executive agreements *might* have that effect under certain circumstances. See *id.* at 299-300.

involved matters beyond the cognizance of domestic law. However, one variety of executive agreement *did* require domestic effect: the postal agreements. These agreements established postal rates and imposed obligations on U.S. post offices. They, unlike almost all other pre-Civil War executive agreements, were approved by acts of Congress.³⁸² Of course, it could be argued that the relevant parties believed (1) that these agreements were "treaties" and (2) that approval by Congress constituted a constitutional alternative to approval by the Senate under Article II. But, as discussed above, that interpretation has some difficulties.³⁸³ A more plausible view is that the postal agreements were thought to be within the class of unimportant agreements that might be concluded on independent presidential authority, but that they required congressional authorization to take effect within the domestic legal system. That would explain why they (and essentially no other executive agreements during the relevant period) were approved by the legislative branch.³⁸⁴

Thus there is no pre-Civil War practice of giving legislative stature to nontreaty agreements. To the extent the executive argument for nontreaty power rests upon historical practice to inform original understanding, the legislative effect of such agreements remains unsustained.

D. Practical Considerations

The principal objection to excluding nontreaty agreements from the "law of the land" is that it makes little sense (and indeed is diplomatically self-destructive) to afford the President some power to conclude international agreements yet deny legislative effect to those agreements. The result may well be an inability to carry out international obligations (which are no less obligatory in

382. See, e.g., Act of Feb. 27, 1861, ch. 57, 12 Stat. 151 (1861); Act of Feb. 20, 1792, ch. 7, 1 Stat. 232 (1792).

383. See *supra* notes 209-10 and accompanying text.

384. The view of executive agreements as non-legislative in effect is, moreover, consistent with the codification practice of the early nineteenth century. Article II treaties were published as part of the statutes-at-large. See 11 Stat. 573-749 (1859) (citing various treaties); 8 Stat. 6-613 (1846) (citing various treaties). That, of course, is consistent with a view of treaties as equivalent to enacted law. Executive agreements, on the other hand, were not published (and indeed typically were not even publicly proclaimed). See 8 Stat. at ix-xii (containing index entitled "List of the Treaties Between the United States and Foreign Nations" reflecting no executive agreements). This practice would be peculiar if executive agreements were thought (like treaties) to be equivalent to enacted law; but it would be quite normal if executive agreements lacked such status.

international law despite domestic barriers to implementation).³⁸⁵ Indeed, this result is precisely the problem that the constitutional generation confronted (and that the Supremacy Clause resolved) with respect to treaties.³⁸⁶ Is it therefore plausible, one might ask, whether the difficulty was not similarly recognized and resolved with respect to nontreaty agreements?

Several responses may be made to this objection. First, the issue may not have been thought of great importance; nontreaty agreements (such as the truces mentioned by Wolff and Grotius) less often require implementation as domestic law. Indeed, most of the nontreaty agreements actually concluded during the pre-Civil War period did not require any domestic implementation.³⁸⁷ Moreover, were a change in law required, it could have been accomplished through Congress (which assuredly was understood to have the power to legislate as would be "necessary and proper" to effectuate executive agreements).³⁸⁸ As a result, nontreaty agreements were not *less* capable of implementation than treaties. Just as a President negotiating a treaty would need to be mindful of the need to secure Senate ratification, a President negotiating a nontreaty agreement would need to be mindful (if domestic effect would be necessary) of the need for implementing legislation in Congress. In addition, the English practice—which created precisely this division between domestic and international obligations—was familiar to the constitutional generation and was not subject to widespread theoretical objections or practical difficulties.³⁸⁹ Indeed, that system was retained in the United States at least with respect to international obligations requiring appropriations: the executive (or executive-plus-Senate) can enter into a fully binding international agreement that nonetheless cannot be implemented as a domestic matter without action by Congress as a whole.³⁹⁰ There is no reason to think that the drafters of the Constitution eschewed a system in which international obligations might depend upon legislative implementation. The problem with the Articles of Confederation

385. See JANIS, *supra* note 41, at 83-84 (stating that a state cannot excuse compliance with international law obligations on the basis of domestic legal constraints).

386. See RAKOVE, *supra* note 219, at 27 (noting that the critical difficulty of treaty-making under the Articles of Confederation was that it "placed Congress in the awkward position of guaranteeing what it lacked the constitutional authority to deliver").

387. See *supra* Part III.D.

388. See U.S. CONST. art. I, § 8, cl. 18.

389. See *supra* Part VI.B.

390. See U.S. CONST. art. I, § 9, cl. 7 (requiring congressional approval of appropriations).

was not that international obligations required legislative enforcement (true also in England) but that, because of the narrow grant of power to the Congress (and the lack of federal courts), there was (quite unlike England) *no* federal legislative power to implement international obligations at a national level.³⁹¹

Put another way, the ordinary path (in pre-constitutional thinking) by which to make international obligations part of domestic law was by majority vote of the whole of the legislature. This was the English system. The Articles of Confederation adopted this system but relied upon the states for legislative implementation (which the states failed to provide).³⁹² The Constitution shifted the power of implementation to the federal government and deviated from the ordinary English practice with respect to treaties to require a *supermajority* vote of *part* of the legislature for, in effect, implementation. But this approach is not a reason to imply any intent to dispense with legislative participation altogether with respect to nontreaty agreements; it seems more likely that, with respect to these agreements, the Constitution retained the customary practice of implementation by a majority of the legislature.

Nor does subsequent history suggest that this is an unworkable system. The principal reasons why congressional implementation might be thought ill-advised (aside from Congress's disapproval of presidential action) are that (1) executive agreements are too numerous and unimportant to warrant Congress's attention and (2) executive agreements may need to be concluded too quickly to allow congressional participation. Neither objection seems substantial. With respect to the first point, even in modern practice the number of executive agreements that would require legislative implementation is small. In 1933, for example, the Litvinov Agreement was the *only* executive agreement concluded by the President for which domestic effect was claimed; there was no practical reason why President Roosevelt could not have submitted it to Congress for implementation.³⁹³ The second argument seems more properly directed against the allocation of the treaty power,

391. Cf. *supra* note 386 (discussing Congress's lack of authority to carry out its international obligations under the Articles of Confederation).

392. See *supra* note 386.

393. Of course, Congress might have declined to implement it (particularly in light of then-existing popular suspicion of the Soviet Union). Perhaps Congress should not have the power to block such an accord. But this argument is about allocation of power, not about practicalities. There is no reason to suppose that, merely because we think power should be allocated one way, the constitutional generation did not adopt another, equally viable, approach.

rather than the domestic effect of the nontreaty power. As argued above, the *sine qua non* of the nontreaty power is that the resultant agreement not be of long-term importance. Essentially by definition, it is unlikely that a situation will arise in which implementation of an executive agreement is so critical that Congress would not have time to consider it. A matter of such importance would entail a treaty, rather than an executive agreement. True, that may suggest an argument that the President should have some "emergency" treaty power independent of the Senate. That argument, however, seems to have been decisively rejected by the constitutional generation (whatever we may think of it in light of modern circumstances). In any event, it is not an argument for legislative effect of executive agreements (which should not concern important matters). Consequently, it is difficult to argue that the system which appears to be adopted by the Constitution is so irrational in practice as to suggest an alternative interpretation.

As a result, the executive is undone by the executive's own argument. The constitutional existence of presidential nontreaty power depends upon a narrow definition of the word "treaty," identification of "executive power" as granted in Article II with the foreign relations prerogatives of the English crown, and confirmation by unremarked historical practice. But each of these arguments cuts against giving legislative effect to nontreaty agreements. A strict definition of "treaty" forecloses reliance upon the Supremacy Clause, the only textually apparent avenue for achieving independent domestic legal effect. The royal prerogative did not contain a power to incorporate international agreements into domestic law, and thus the Hamiltonian argument—that the President succeeded to prerogative powers in foreign affairs where the Constitution is otherwise silent—cannot support an assertion of such a power. Finally, there is no historical evidence of the exercise of this power in the post-constitutional period. It therefore seems, as an original matter, that *Belmont* was simply wrong: the President may have had the power to conclude undertakings such as the Litvinov Agreement,³⁹⁴ but that agreement would have provided no source of

394. Or at least the part of it relevant to *Belmont*. In accepting the assignment of the Soviet claims in return for recognition, the President did not commit the United States to any continuing obligation (since the extension of recognition was, in Vattel's terminology, fully executed by a single act); the President did not commit to *continue* the recognition indefinitely, nor to actually collect upon the Soviet claims. Other parts of the agreement—specifically the waiving of U.S. claims against the Soviet Union—may or may not have been within the original nontreaty power.

rights in U.S. law until it was (as it presumably could have been) enacted by Congress.

VII. CONCLUSION (AND REFLECTIONS ON MODERN PRACTICE)

The modern executive agreement power remains under-examined perhaps because, from a conventional perspective, it is a bit of a constitutional embarrassment. On the one hand, requiring approval of every international understanding through the cumbersome supermajority procedure of Article II, Section 2 seems fatally inconsistent with modern diplomatic practice. At minimum, as political scientist Joseph Kallenbach has argued, modern practice depends upon "numerous understandings and arrangements worked out at lower diplomatic levels in the course of resolving relatively minor questions. . . . [including] for example, the particular manner of enforcement of customs or immigration laws and regulations. . . ." ³⁹⁵ An inflexible adherence to the exclusivity of Article II, Section 2—as demanded by the conventional originalist reading ³⁹⁶—seems largely irrelevant to any nontheoretical debate concerning appropriate diplomatic conduct.

On the other hand, once constitutional constraints are relaxed in the interest of practicality, the limits of that flexibility become difficult to discern. Kallenbach, for one, largely abandons the pursuit of constitutional limitations, trusting instead the realities of the political process to constrain executive action. ³⁹⁷ The result has been that diplomatic initiatives of considerable magnitude are accomplished through independent executive agreements when exigency, convenience, or congressional opposition make the Article II, Section 2 procedures appear burdensome. ³⁹⁸ Moreover, giving executive agreements equal status with treaties constitutes them as supreme law of the land—thus affording the President an independent lawmaking ability. ³⁹⁹ Yet if used too widely, or recognized too openly, these powers subvert the constitutional design, which envisions a checking function for the Senate ⁴⁰⁰ to preclude unwise international commitments and a checking function

395. KALLENBACH, *supra* note 215, at 502.

396. See Adler, *supra* note 17, at 27-32; Berger, *supra* note 17, at 35-48.

397. See KALLENBACH, *supra* note 215, at 501-05; cf. HENKIN, *supra* note 1, at 222 (arguing that there must be some limits on the executive agreement power but concluding that they remain unidentified at present).

398. See, for example, the agreements set forth in *supra* notes 8-12.

399. See HENKIN, *supra* note 1, at 228.

400. Or, perhaps, Congress. See Ackerman & Golove, *supra* note 6, at 801-05.

for Congress (or the Senate in the case of Article II treaties) to preclude inappropriate creation or extinguishment of domestic legal rights. We thus have an uneasy constitutional compromise: the President is liberated from the constraints of Article II, Section 2 as a practical necessity (else the everyday business of modern diplomacy simply could not be conducted), and we trust that political constraints will, in substitution, prevent the President from using this liberation to become a wholly unconstrained diplomatic actor.

This article has argued that, as an original matter, the foregoing is a false difficulty. The original design did not have the inflexibility claimed for it. Because the terminology of the founding generation recognized a class of international agreements in addition to "treaties," the approval process designated for "treaties" in Article II, Section 2 did not extend to all international understandings.⁴⁰¹ Rather, as argued above, minor, temporary agreements were not included. If one further accepts the President as the repository of residual unallocated foreign relations power (by operation of Article II, Section I),⁴⁰² the President is thus afforded power over these minor agreements.

This reading mitigates the practical difficulty of the ordinary conduct of low-level diplomatic relations: the "arrangements worked out at lower diplomatic levels in the course of resolving relatively minor diplomatic questions"⁴⁰³ that worried Kallenbach would almost assuredly fall within the President's independent power. For example, the principal such arrangement in early diplomatic practice—the settlement of private claims—was accomplished, without constitutional objection, through the President's independent authority.⁴⁰⁴

As set forth in this Article, attention to the original design allows recognition of this practical power without permitting material, unchecked presidential authority contrary to the purpose of Article II, Section 2. First, as discussed above, the original view of the nontreaty power can only be read to extend to minor and temporary (or nonexecutory) agreements. This reading is, in fact, generally consistent with usual modern practice. Most modern independent executive agreements are of this nature, and, despite broad theoretical assertions of executive power, State Department

401. See *supra* Parts III & IV.

402. See *supra* Part V.

403. KALLENBACH, *supra* note 215, at 502.

404. See *supra* Part III.D.

guidelines for choosing between treaties and nontreaty agreements generally have suggested that minor temporary agreements may be concluded on the President's independent authority while agreements of greater magnitude require Senate (or congressional) acquiescence.⁴⁰⁵ It is often assumed that modern practice represents a deviation from (or, if one prefers, an evolution of) the original design, extending to the President a power necessary in light of modern realities upon which the original Constitution gave no guidance. This assumption, I suggest, we have been too quick to accept: the nontreaty power, in a form similar to that ordinarily exercised today, can be defended on the basis of an original reading of the Constitution.⁴⁰⁶

The difficulty in modern practice is, instead, that the ordinary exercise of the nontreaty power in nonmaterial matters has been used to justify less frequent, yet diplomatically significant, extraordinary exercises of that power. *Dames & Moore* is illustrative.⁴⁰⁷ The agreements at issue (the Algiers Declarations) bound the United States to establish jointly with Iran an arbitral tribunal, submit the claims of its citizens to that tribunal, prosecute them according to its

405. See, e.g., *State Department Circular to All Diplomatic Posts Concerning Criteria for Deciding what Constitutes an International Agreement*, reprinted in MICHAEL GLENNON & THOMAS FRANCK, 1 FOREIGN RELATIONS LAW 14 (1980); *Department of State Circular No. 175*, reprinted in 50 AM. J. INT'L L. 784, 784 (1956).

406. Some more substantial executive agreements may also be justifiable under the original design. The word "treaty" in the original understanding seemed to encompass agreements that entailed a long-term surrender of sovereignty. A number of subsequent controversial executive agreements may not fit this category. Consider two examples. First, under President Roosevelt's "destroyers for bases" arrangement in 1940, the United States agreed to send several "over-age" destroyers to the British navy for use in World War II, in return for the option to lease various British bases in the Western Hemisphere. See *supra* note 10. Professor Borchard, among others, criticized this procedure for circumventing the requirements of Article II, Section 2. See Edwin Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690, 690-97 (1940). In light of the foregoing discussion, it is not clear that Borchard was correct. The principal U.S. obligation—delivery of the destroyers—was accomplished immediately upon signature of the agreement. The ongoing obligation—making the bases available—fell only upon Britain. From the U.S. perspective, the agreement was fully performed immediately, so arguably it did not amount to an ongoing surrender of sovereignty which would need to be reflected in a "treaty." Thus it may, even under the original understanding, be defensible as an exercise of the President's nontreaty power. A similar argument can be made for the central provisions of the Litvinov Agreement upheld in *Pink and Belmont*. See *supra* note 9. The principal U.S. obligation—extension of diplomatic recognition—lay within the President's independent authority and was accomplished upon signature. Again, from the U.S. perspective no material executory obligations were undertaken. Thus, it may have been permissible to accomplish the understanding through a nontreaty agreement.

407. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

procedures, and accept the ultimate result.⁴⁰⁸ These are material nonexecutory obligations that, under the original design, likely would not have been included within the nontreaty power.⁴⁰⁹ In upholding the agreement, the Court looked to the historical practice and practicalities of the *ordinary* exercise of the nontreaty power. If one assumes—as the Court seemed to—that this ordinary exercise is itself a departure from the original design, it is less easy to identify a difference of constitutional magnitude between those ordinary agreements and the one at issue in *Dames & Moore*. An understanding of the original nontreaty power, on the other hand, reveals that the agreement in *Dames & Moore*, *but not the usual diplomatic practice*, was a departure from the original design. Thus the Algiers Declarations needed to be justified on some extraordinary ground and not merely by reference to a supposed general relaxation of constitutional restrictions.⁴¹⁰

Second, I have argued that a material (and heretofore largely unrecognized) limitation upon the nontreaty power under the original design is that nontreaty agreements lack legislative effect. Modern practice generally assumes (and the Court has confirmed) that an executive agreement has legislative effect in the manner of a treaty under Article VI.⁴¹¹ That assumption is, I suggest, an

408. See *id.* at 664-66.

409. See *supra* note 283 and accompanying text.

410. Viewed in isolation, the Algiers Declarations may be thought a poor case for deviation from the Article II, Section 2 procedures. There was no serious argument that the Senate would not have had time to consider the agreement, and there is no material indication that the Senate would not have approved it. Similar arguments can be made with respect to other extraordinary nontreaty agreements. This is particularly true of the Yalta Agreement, which (among other matters) essentially gave U.S. approval of Soviet post-war preeminence in Eastern Europe and parts of Asia. See Yalta Agreement, *supra* note 11. The only real reason for bypassing the Senate was that the President wished to pursue an independent foreign policy without senatorial oversight; this approach was justified by reference to the ordinary practice of nontreaty agreements, but would have been quite difficult to justify in isolation (other than by a frontal attack on the constitutional design reflected in Article II, Section 2). Assuming the Yalta Agreement is seen as an ongoing commitment, it evidently amounts to an executory obligation of considerable importance. The advisability of Roosevelt's concessions to Stalin at Yalta has, of course, been widely and inconclusively debated. The merits of this debate are immaterial to the present inquiry. The point is, rather, that an agreement of this importance—by which Roosevelt bound the Cold War diplomacy of succeeding administrations—under the original design should have been subject to the check of the Senate. True, the Senate might well not have approved, and thus Roosevelt might not have been able to secure full Soviet cooperation in the closing part of the war. That possibility, however, is precisely the point of the original design: this was a decision which, the constitutional generation believed, one person should not make alone.

411. See HENKIN, *supra* note 1, at 228.

outgrowth of the modern assumptions about the nontreaty power in general. If the nontreaty power itself is thought to be an evolution from constitutional understanding not grounded in the original document, there may be reason for a similar evolution of the legislative effect of nontreaty agreements—so this effect is granted to treaties *and* to the other types of international agreements that have evolved. In short, our assumption that nontreaty agreements are not part of the original understanding has made us (quite naturally) indifferent to the original understanding of their legislative effect; that effect would of course not have been in the contemplation of a generation that did not recognize nontreaty agreements in the first place. However, if we accept that nontreaty agreements were part of the original design (as I have argued), we are (again quite naturally) drawn to examine whether such agreements were, in the original design, accorded legislative effect. As argued above, they were not. Given the historical and textual evidence, it is essentially impossible to describe a consistent argument that sustains both the existence *and* the legislative effect of nontreaty agreements; the evidence in support of the former directly refutes the latter.⁴¹²

This important limitation further reconciles the nontreaty power, as originally understood, with the general constitutional purpose of checking executive power in foreign affairs. The dispute in *Belmont* is illustrative. *Belmont* posed two questions: whether the Litvinov Agreement was a constitutional exercise of presidential power, and, if so, whether it preempted New York law. As to the first, at least the components of the Agreement at issue in *Belmont* seem to fall within the original conception of the nontreaty power. Answering the initial *Belmont* question in the affirmative does not lead to a material imbalance in the conduct of foreign affairs: the President, in making the Agreement, did not commit the United States to a material course of action (other than what could have been accomplished by presidential policymaking outside the context of an agreement).

In contrast, the President's decision to enforce the Soviet claims as a matter of U.S. law was an assertion of presidential lawmaking authority deviating from usual constitutional procedures: in the ordinary case, the Constitution imposes its checking design upon lawmaking, so that laws do not represent the decree of a single person. Roosevelt's independent enforcement of the Litvinov Agreement—and the Supreme Court's approval of that enforcement in *Pink* and *Belmont*—seem contrary to that design. It is this element

412. See *supra* Part VI.

of *Belmont* that makes it particularly powerful and particularly problematic.

Thus the modern difficulties with executive agreements arise from a misperception of the original design. The constitutional generation recognized that "treaties" did not include all international agreements. In drafting Article II, Section 2, they could have said that "treaties *and other international agreements*" required supermajority Senate consent—but they were concerned in particular with the sovereignty-limiting role of treaties, and did not include the less-important "other agreements." This constitutional design left the President with the flexibility of the "nontreaty" power to conduct ordinary low-level diplomacy. Similarly, Article VI could have been drafted to say that "treaties *and other international agreements*" were supreme law of the land. To do so, however, would have created an independent presidential lawmaking authority; treaties, but not the other agreements, were to be concluded with legislative participation. By omitting the "other agreements" from Article VI, the framers assured that presidential lawmaking by executive agreement would require legislative participation.

Thus the constitutional design is both simple and practical: the President has independent authority to enter minor agreements in order to conduct routine affairs—a power little open to abuse—but a legislative check is required, either through the Senate or Congress as a whole, if the President wishes to undertake a material long-term obligation or alter domestic law.