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DOMESTICATING SOLE EXECUTIVE AGREEMENTS

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INTRODUCTION

SUPPOSE President Bush—without seeking or receiving authorization from either House of Congress—made a sole executive agreement with the Prime Minister of Iraq purporting to extinguish all federal and state-law claims arising out of the conduct of the Iraqi government, Iraqi corporations, coalition forces, and private contractors hired to rebuild Iraq. Would such an agreement bind federal and state courts, notwithstanding the availability of an otherwise viable claim under existing law? Until recently, many observers would have expressed serious doubts, on the theory that such an agreement exceeds the scope of the President's authority and evades the Constitution's carefully crafted checks and balances.[1] A recent Supreme Court decision, however, appears to endorse just such a sweeping vision of presidential power. In *American Insurance Association v. Garamendi*, the Court invalidated California's Holocaust Victim Insurance Relief Act ("HVIRA") on the ground that it was preempted by the policy underlying a sole executive agreement between President Clinton and German Chancellor Schröder that had set up a fund to compensate Holocaust victims.[2] In order to assist Holocaust victims to identify insurance policies lost or confiscated during the Nazi regime, the California Act required insurance companies doing business in California to disclose all policies issued in Europe between 1920 and 1945.[3] Although the executive agreement was neither approved by the Senate as a treaty nor enacted by Congress as a stat-

[1] See, e.g., Harold Hongju Koh, The National Security Constitution: Sharing Power after the Iran-Contra Affair 139–40 (1990) (criticizing sole executive agreements); Michael D. Ramsey, Executive Agreements and the (Non)Treaty Power, 77 N.C. L. Rev. 133 (1998) (same).

[2] 539 U.S. 396 (2003).

[3] Id. at 409–10.

ute, the Court nonetheless stated that such agreements are generally "fit to preempt state law, just as treaties are."[4]

Our constitutional history suggests that the President has incidental power to make nontreaty agreements as a means of implementing his independent constitutional and statutory authority, although the precise line between proper and improper agreements may be difficult to draw under the Treaty Clause. The Supreme Court's broad endorsement of unilateral presidential power to override legal rights under existing state and federal law, however, appears to contradict key aspects of the constitutional structure. The Supremacy Clause recognizes only the "Constitution," "Laws," and "Treaties" of the United States as "the supreme Law of the Land."[5] The Constitution provides precise procedures to govern the adoption of each source of law recognized by the Clause. Significantly, none of these procedures permits the President—acting alone—to adopt, amend, or repeal supreme federal law. To the contrary, each set of procedures requires the participation of multiple actors and, more specifically, each requires the assent of the states themselves or their representatives in the Senate. Accordingly, if taken at face value, the Court's suggestion that sole executive agreements qualify as "the supreme Law of the Land" would unduly expand the Supremacy Clause and permit the President to evade the political and procedural safeguards of federalism built into the Constitution.[6] For this reason, a critical reassessment of *Garamendi* is relevant not only to a proper understanding of sole executive agreements, but also to an evaluation of other broad assertions of executive power in foreign affairs.[7]

[4] Id. at 416. For a thoughtful examination of *Garamendi* and sole executive agreements, see Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi* and Executive Preemption In Foreign Affairs, 46 Wm. & Mary L. Rev. 825 (2004).

[5] U.S. Const. art. VI, cl. 2.

[6] See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954) (suggesting that the Constitution's political and structural safeguards protect federalism to an even greater extent than judicial enforcement of limits on the scope of federal authority).

[7] Consider in this regard President Bush's recent attempt to direct Texas courts to review and reconsider the convictions of fifty-one Mexican nationals in order to comply with a decision by the International Court of Justice. See Ex parte Medellin, 223

In the modern era, the Supreme Court has made no real attempt to explain the omission of sole executive agreements from the Supremacy Clause. Instead, the Court has emphasized two historical precedents that it believes support inherent presidential power to make agreements with the force of federal law. First, the Court has invoked the "longstanding practice" of using "executive agreements to settle claims of American nationals against foreign governments."[8] Second, the Court has cited its prior decisions in *United States v. Belmont*[9] and *United States v. Pink*,[10] which endorsed a sole executive agreement made by President Roosevelt in the course of recognizing the Soviet Union.[11] At first glance, these precedents appear to support the Court's view that the President has constitutional power to make sole executive agreements with the force of federal law.

Placing these precedents in their full historical and legal contexts, however, refutes the conclusion that Article II permits the President to alter preexisting rights under state and federal law simply by making a sole executive agreement. The practice of executive claims settlement must be viewed in light of the historical reality that foreign states enjoyed absolute immunity from suit until well into the twentieth century. Practically speaking, this meant that presidential espousal and settlement of claims in the course of diplomatic relations was the only way for U.S. nationals to receive compensation from foreign states for most of our history. Accordingly, making settlement agreements was simply the means by which the President exercised his undisputed power to espouse and settle claims barred by foreign sovereign immunity. Once Congress abrogated such immunity in 1976, however, unilateral presidential attempts to settle claims permitted by the statute raise distinct constitutional concerns. Similarly, in *Belmont* and *Pink*, President Roosevelt's agreement with the Soviet Union did not itself preempt state law. Rather, the President's simultaneous recognition of

S.W.3d 315 (Tex. Crim. App. 2006), cert. granted sub nom. Medellin v. Texas, 127 S. Ct. 2129 (2007).

[8] *Garamendi*, 539 U.S. at 415; see also Dames & Moore v. Regan, 453 U.S. 654, 679–80 (1981) (relying in part on historical practice to uphold a sole executive agreement made by President Carter to resolve the Iranian hostage crisis).

[9] 301 U.S. 324 (1937).

[10] 315 U.S. 203 (1942).

[11] See *Garamendi*, 539 U.S. at 416–17; *Dames & Moore*, 453 U.S. at 682–83.

the Soviet Union triggered the act of state doctrine, which validated the acts of the Soviet government taken within its territory and overrode contrary state law. The modern Court has taken cases like these out of their full historical and legal contexts and thus has mistakenly assumed that the Constitution authorizes the President to make sole executive agreements with the force of federal law.

Distinguishing between sole executive agreements and the President's underlying constitutional and statutory authority not only helps to explain important historical and judicial precedents, but also suggests a way to reconcile sole executive agreements with the constitutional structure. Simply put, courts should permit a sole executive agreement to override preexisting legal rights only when the President has independent authority to do so. In such instances, it is the President's exercise of his underlying power—rather than the agreement itself—that alters preexisting legal rights and duties. Permitting the President to expand his authority unilaterally by the simple expedient of making a sole executive agreement has little constitutional or historical support and would circumvent the carefully crafted checks and balances built into the constitutional structure.

This Article will proceed in four parts. Part I will examine the status of treaties and nontreaty agreements under the Constitution. In addition, it will explain why the Supreme Court's modern view of the domestic effect of sole executive agreements appears to contradict the Supremacy Clause, constitutionally prescribed lawmaking procedures, and the political safeguards of federalism. Part II will examine the claim that Presidents have historically used sole executive agreements to settle private claims against foreign governments and will conclude that, in light of Congress's abrogation of foreign sovereign immunity in 1976, this practice cannot support an unlimited presidential power to settle claims authorized by existing state and federal law. Part III will review the Court's landmark decisions in *Belmont* and *Pink* and will conclude that these rulings are best understood to rest on the President's recognition of the Soviet Union and the consequent application of the act of state doctrine, rather than on the mere existence of a sole executive agreement. Finally, Part IV will reassess sole executive agreements and suggest a workable approach—consistent with the constitu-

tional structure and historical precedent—for determining when the Constitution permits the President to override preexisting legal rights.

I. THE CONSTITUTIONAL STRUCTURE

On its face, the Constitution distinguishes between two categories of international agreements: "Treaties" and nontreaty "Agreement[s] and Compact[s]." The first category consists of agreements made by the President and the Senate pursuant to the Treaty Clause.[12] The second category consists of nontreaty agreements made by states with the consent of Congress[13] and presumably congressional-executive agreements and sole executive agreements. Both categories raise two constitutional issues. First, what steps must be taken and by whom in order to "make" the international agreement in question? Second, what is the effect of such agreements as a matter of domestic law? In the case of treaties, these two inquires essentially go hand in hand. The Constitution prescribes precise procedures governing how the United States may make treaties—the President must obtain "the Advice and Consent of the Senate, . . . provided two thirds of the Senators present concur."[14] Once a treaty is made pursuant to these procedures, it both becomes a binding international agreement under the Treaty Clause and qualifies as "the supreme Law of the Land" under the Supremacy Clause.[15]

[12] U.S. Const. art. II, § 2, cl. 2.

[13] Id. at art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ."). Although the Constitution does not specify the form that such consent must take, the established congressional practice has been to give consent by law using the ordinary constitutional process of bicameralism and presentment. For a list of interstate compacts approved by Congress between 1789 and 1925, see Felix Frankfurter & James M. Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L.J. 685, 735–48 (1925). A review of the compacts cited in this study reveals that each was approved by legislation passed by both Houses of Congress and presented to the President. Congress appears to have continued this practice. See Edward T. Swaine, Does Federalism Constrain the Treaty Power?, 103 Colum. L. Rev. 403, 508 (2003) (stating that "in practice the President's role in approving compacts has been honored as in ordinary legislation").

[14] U.S. Const. art. II, § 2, cl. 2.

[15] Id. at art. VI, cl. 2.

The Constitution is less explicit concerning both the process by which the United States may make nontreaty agreements with foreign nations and their effect as a matter of domestic law. Article I, Section 10 expressly permits states to make nontreaty agreements with foreign nations with "the Consent of Congress,"[16] and such agreements, once approved, override contrary state law.[17] By contrast, the Constitution is essentially silent concerning the two remaining types of nontreaty agreements: congressional-executive agreements and sole executive agreements. In practice, Congress and the President generally make the former using the lawmaking procedures set forth in Article I, Section 7, and the President makes the latter by himself without the participation or assent of either House of Congress. This Part considers several constitutional questions raised by these types of agreements.

Because the process used to adopt treaties differs from (and is more onerous than) the process used to adopt congressional-executive and sole executive agreements, commentators have raised the possibility that such agreements may improperly circumvent the Treaty Clause. In order to evaluate this claim, one must have a workable definition of "Treaties" as used in the Clause and be able to draw a meaningful distinction between treaties and nontreaty agreements. To date, no consensus has emerged on these questions. In the end, however, courts may not have to resolve them in order to decide most actual disputes as a matter of domestic law. To the extent that Congress and the President make congressional-executive agreements by enacting federal statutes, such agreements bind courts as "the supreme Law of the Land." The question whether such agreements also qualify as binding international agreements under the Treaty Clause is unclear, but may have little practical significance. Similarly, in resolving cases involving sole executive agreements, courts need only decide whether such agreements qualify as "the supreme Law of the

[16] Id. at art. I, § 10, cl. 3. States rarely make such agreements, and the discussion in the text focuses on how the United States may make nontreaty agreements and the effect of such agreements as a matter of domestic law.

[17] See New York v. New Jersey, 523 U.S. 767, 811 (1998) (stating that "congressional consent 'transforms an interstate compact within [the Compact] Clause into a law of the United States'" (quoting Cuyler v. Adams, 449 U.S. 433, 438 (1981)) (alteration in original)).

Land" under the Supremacy Clause. Courts need not resolve the more difficult question whether they circumvent the Treaty Clause.

A. The Treaty Clause

The Constitution draws a distinction between treaties, on the one hand, and agreements or compacts, on the other. The Treaty Clause authorizes the President to make "Treaties" with the consent of two-thirds of the Senate.[18] At the same time, Article I, Section 10 absolutely prohibits states from "enter[ing] into any Treaty,"[19] but conditionally permits them to "enter into any Agreement or Compact with . . . a foreign Power" with "the Consent of Congress."[20] States rarely make such agreements with foreign nations,[21] but the President and Congress have increasingly made two distinct types of nontreaty agreements: sole executive agreements and congressional-executive agreements.

Traditionally, the political branches have used such agreements for relatively less important matters and reserved treaties for more significant international agreements.[22] In recent years, however, the political branches have increasingly relied on nontreaty agreements to make important agreements. At least some commentators contend that this development threatens to circumvent the Treaty Clause—that is, Congress and the President are now using nontreaty agreements to resolve matters that the Constitution requires be handled by treaties. This claim is sustainable, however,

[18] U.S. Const. art. II, § 2, cl. 2.

[19] Id. at art. I, § 10, cl. 1.

[20] Id. at art. I, § 10, cl. 3.

[21] Instead, states have tended to make lesser "subcompact" agreements that arguably fall outside the prohibition of Article I, Section 10. See *Cuyler*, 449 U.S. at 440 ("Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause."). But see Detlev F. Vagts, International Agreements, the Senate and the Constitution, 36 Colum. J. Transnat'l L. 143, 151 (1997) (stating that the Supreme Court has created this category "[m]ore or less out of whole cloth"). Professor Edward Swaine has suggested that the "dormant treaty power" should bar states from bargaining with foreign powers, at least with respect to some matters. See Edward T. Swaine, Negotiating Federalism: State Bargaining and the Dormant Treaty Power, 49 Duke L.J. 1127 (2000).

[22] See Vagts, supra note 21, at 153 (noting that "the executive and legislative branches have not considered treaties and executive agreements to be fully interchangeable" and "have looked to tradition" to distinguish between the two).

only if one can develop a workable definition of the term "Treaties" as used in the Constitution.

1. Nontreaty Agreements

Commentators have defended the use of nontreaty agreements, in part, by arguing that if states can make them with the consent of Congress, then presumably the President and Congress may make them as well.[23] A contrary conclusion would mean that while states can make nontreaty agreements with the consent of Congress, the federal government must use treaties to make all international agreements. This conclusion seems textually, structurally, and historically unsound.

a. Sole Executive Agreements

Presidents have long made sole executive agreements, without the participation or assent of either House of Congress.[24] Originally, Presidents employed such agreements infrequently. For example, during the first fifty years under the Constitution, Presidents entered into at most "27 international acts without invoking the consent of the Senate."[25] By contrast, more "recent occupants of the White House have concluded nearly 15,000 such 'sole executive agreements' in the last fifty years."[26] Despite their increasing numbers, the vast majority of such agreements are unobjectionable under the Treaty Clause to the extent that Presidents have used

[23] See Myres S. McDougal & Asher Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I, 54 Yale L.J. 181, 221–23 (1945); cf. Laurence H. Tribe, 1 American Constitutional Law § 4–4, at 649 (3d ed. 2000) ("*Someone* in the United States Government must have authority to enter for the nation as a whole those types of agreements that Article I permits the states to enter for their own purposes with congressional consent.") But see John C. Yoo, Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements, 99 Mich. L. Rev. 757, 769 (2001) ("The canon of *expressio unius est exclusio alterius* . . . suggests that the Framers understood all of the federal government's power to make international agreements to rest in the Treaty Clause.").

[24] See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1444 (2001).

[25] Wallace McClure, International Executive Agreements 4 (1941). There may have been fewer than twenty-seven sole executive agreements during this period because McClure arguably included several congressional-executive agreements in his count.

[26] Michael P. Van Alstine, Executive Aggrandizement in Foreign Affairs Lawmaking, 54 UCLA L. Rev. 309, 319 (2006).

them solely as a means of exercising their independent statutory or constitutional powers, such as the power to receive ambassadors, to issue pardons, or to command military forces.[27] Historically, Presidents have used sole executive agreements in just this way.

For example, in the famous case of the *Wilmington Packet* in 1799, the Adams Administration espoused a claim against the Dutch government for its allegedly wrongful seizure of cargo onboard a ship sailing to the Danish West Indies and then entered into a sole executive agreement to settle the claim.[28] As discussed below, resolving private claims with foreign states on behalf of U.S. citizens arguably falls within the traditional scope of the President's independent power to receive Ambassadors and conduct diplomatic relations.[29] When the President chooses to espouse such a claim, he is telling the country in question that its failure to resolve the dispute may hinder its amicable relations with the United States.[30] Agreements resolving private claims remove a source of

[27] See Ingrid Brunk Wuerth, The Dangers of Deference: International Claim Settlement by the President, 44 Harv. Int'l L.J. 1, 12 (2003) ("Explicit textual grants of authority to the President provide one way of defining the President's power to enter into sole executive agreements."); John Yoo, Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation, 89 Cal. L. Rev. 851, 910 (2001) (book review) (observing that sole executive agreements "can be made pursuant to pre-existing authorization by treaty or statute, or they can be made within the President's commander-in-chief or other executive authority"); infra notes 30–31 and accompanying text.

[28] See Settlement of the Case of the Schooner "Wilmington Packet," U.S.-Neth., Dec. 12, 1799, *reprinted in* 5 Treaties and Other International Acts of the United States of America 1075 (Hunter Miller ed., 1937) [hereinafter Treaties]; McClure, supra note 25, at 43–44 (summarizing the facts of the dispute).

[29] See infra notes 261–72 and accompanying text.

[30] Historically, espousal by a sovereign of a claim by one of its citizens against a foreign state "rendered it a public claim on the international plane, and the [claimant's] sovereign could lawfully wage war to vindicate the espoused claim." Thomas H. Lee, The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States, 104 Colum. L. Rev. 1765, 1856 (2004) (citations omitted). The Framers were aware of the doctrine of espousal, see id. at 1858–59, and even cited state reluctance to treat claims by foreign citizens fairly as providing foreign sovereigns with a "just cause[]" for declaring war against the United States, see The Federalist No. 3, at 44–45 (John Jay) (Clinton Rossiter ed., 1961). See also Lee, supra, at 1860 (noting that "the espousal problem in its eighteenth-century incarnation was one of life or death for a weak, agrarian, and heavily indebted republic in a world of powerful monarchies"). In the twentieth century, nations adopting the Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract

friction between nations and thus facilitate the President's conduct of foreign relations.

Similarly, during the War of 1812, the Madison Administration made a sole executive agreement with Great Britain to govern matters within the President's independent authority as Commander in Chief. The "Cartel for the Exchange of Prisoners of War" called for an exchange of prisoners, governed prisoners' living conditions, and obligated the parties to release all "non combatants" as defined by the agreement.[31] Because the Cartel governed matters within the President's constitutional powers as Commander in Chief, Madison was free to make it without seeking either ratification by the Senate as a treaty or legislative enactment. Under the circumstances, the agreement merely facilitated the President's exercise of his underlying Article II powers.

Even in the exercise of the Commander in Chief power, however, early Presidents did not feel free to make sole executive agreements on all matters. For example, following the War of 1812, President Monroe made two agreements with Great Britain concerning the demilitarization of the Great Lakes, known as the Rush-Bagot Agreements. The first simply provided for the suspension of "further augmentation" of naval forces on the Great Lakes,[32] and Monroe saw no need to submit the agreement to the Senate as a treaty. The second limited the naval forces that each nation could deploy on the Great Lakes indefinitely and required each country to dismantle all other armed vessels forthwith.[33] Although President Monroe initially believed he could make the second agreement on his own, he subsequently submitted it to the Senate with the following message: "I submit it to the consideration of the Senate, whether this is such an arrangement as the Executive is competent to enter into, by the powers vested in it by the Constitution, or is such an one as requires the advice and consent

Debts art. 1, Oct. 18, 1907, 36 Stat. 2241, 2251, generally abandoned their right to wage war to vindicate private contract claims. See Lee, supra, at 1855–56.

[31] See Cartel for the Exchange of Prisoners of War, U.S.-G.B., May 12, 1813, *reprinted in* 2 Treaties, supra note 28, at 558.

[32] Exchange of Notes Relative to Naval Forces on the American Lakes, U.S.-G.B., Nov. 4, 1816, *reprinted in* 2 Treaties, supra note 28, at 651–52.

[33] Exchange of Notes Relative to Naval Forces on the American Lakes, U.S.-G.B., Apr. 29, 1817, *reprinted in* 2 Treaties, supra note 28, at 645.

of the Senate . . . ."[34] The Senate responded by ratifying the agreement as a treaty.[35] To some commentators, this episode "suggests how narrowly early Presidents construed their leeway under the Treaty Clause."[36]

The President's limited and infrequent use of sole executive agreements in the early Republic posed few constitutional difficulties. Because such agreements were restricted to matters that fell within the scope of the President's independent constitutional and statutory authority, it is hard to conclude that in making them Presidents were circumventing either the Treaty Clause or the Supremacy Clause. By the twentieth century, however, sole executive agreements became both more frequent and more ambitious in scope and effect.[37] Only recently, however, have such agreements attempted to alter the preexisting legal rights of U.S. citizens without congressional approval. These attempts, discussed below, consist of the Algiers Accords (resolving the Iranian hostage crisis)[38] and the German Foundation Agreement (settling Holocaust-era claims).[39] To the extent that such agreements concern matters traditionally governed by treaties, they are potentially inconsistent with the Treaty Clause. In addition, to the extent that such agreements override rights under state and federal law, they arguably contradict the Supremacy Clause.

b. Congressional- Executive Agreements

Congressional-executive agreements are generally negotiated by the President and approved by both Houses of Congress through

[34] Message from President James Monroe to the Senate of the United States (Apr. 6, 1818), *reprinted in* 3 Journal of the Executive Proceedings of the Senate of the United States of America 132 (Washington, Duff Green 1828).

[35] S. Res. of Apr. 16, 1818, 15th Cong., *reprinted in* 3 Journal of the Executive Proceedings of the Senate of the United States of America, supra note 34, at 134; see Samuel B. Crandall, Treaties: Their Making and Enforcement 102–03 (2d ed. 1916).

[36] Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799, 817 (1995).

[37] See Vagts, supra note 21, at 146 (noting that "such President-only arrangements as the destroyer-bases deal of 1940 and the Yalta Agreement of 1945" were seen at the time as "the most dangerous threat to the legislative branch").

[38] See infra note 159 and accompanying text.

[39] See infra note 188 and accompanying text.

ordinary legislation adopted pursuant to Article I, Section 7.[40] Like sole executive agreements, congressional-executive agreements do not violate the Treaty Clause to the extent that they do not rise to the level of "Treaties." Using congressional-executive agreements for all purposes, however, would arguably circumvent the Treaty Clause and its elaborate checks and balances designed to prevent the United States from undertaking unwise international obligations.

Modern commentators are divided concerning the extent to which the political branches may use congressional-executive agreements in place of treaties. Some argue that treaties and congressional-executive agreements should now be treated as fully interchangeable. On this view, the President has absolute discretion to decide whether to submit an international agreement to the Senate as a treaty or to Congress as a congressional-executive agreement.[41] Proponents of this position, such as Professors Bruce Ackerman and David Golove, maintain that "there is no significant difference between the legal effect of a congressional-executive agreement and the classical treaty approved by two thirds of the Senate."[42] They rely primarily on the Necessary and Proper Clause[43] and on Ackerman's theory of constitutional amendment

[40] See Ackerman & Golove, supra note 36, at 804–05. Congressional-executive agreements may also be approved by joint resolution. See id. But cf. Yoo, supra note 23, at 765–66 (identifying three types of congressional-executive agreements: agreements made pursuant to Congress's ex ante authorization of the President to negotiate with foreign nations on discrete subjects, agreements that serve as a factual determination triggering the effect of a preexisting statute, and agreements that do not involve delegation of authority from Congress to the President).

[41] See Restatement (Third) of Foreign Relations Law of the United States § 303 cmt. e (1987) (characterizing the "prevailing view" as permitting the President to use congressional-executive agreements "as an alternative to the treaty method in every instance"); Louis Henkin, Foreign Affairs and the United States Constitution 217 (2d ed. 1996) (stating that "it is now widely accepted that the Congressional-Executive agreement . . . is a complete alternative to a treaty: the President can seek approval of any agreement by joint resolution of both houses of Congress rather than by two-thirds of the Senate" (internal footnotes omitted)).

[42] Ackerman & Golove, supra note 36, at 805.

[43] Id. at 811. Professor Yoo questions such reliance on the ground that "*McCulloch*'s reading of the Necessary and Proper Clause only countenances expansions in federal powers, vis-à-vis the states," but does not allow Congress to deploy the Clause "so as to rearrange the separation of powers." Yoo, supra note 23, at 770.

outside of Article V to conclude that interchangeability became "part of the living Constitution" after World War II.[44]

Other commentators believe that complete interchangeability contradicts the constitutional text and would render the Treaty Clause superfluous. In their view, the Treaty Clause requires at least some subset of international agreements to be adopted as treaties rather than as congressional-executive agreements.[45] For example, writing shortly after the adoption of the North American Free Trade Agreement ("NAFTA"), Professor Laurence Tribe examined the text, history, and structure of the Constitution and concluded that "the Article II treatymaking procedure is exclusive."[46] Tribe did not attempt to define "Treaties" with specificity or to resolve whether NAFTA itself constituted a "treaty" within the meaning of the Treaty Clause. Rather, he merely stressed that "the *specific terms* of any international agreement and its effects on state and national sovereignty—not simply whether it touches foreign commerce or some other subject that Congress may regulate under Article I—are of central relevance to the issue whether the rigors of the Treaty Clause must be followed for entering into that agreement."[47]

[44] Ackerman & Golove, supra note 36, at 896. For critiques of this approach, see Vagts, supra note 21, at 154, and Yoo, supra note 23, at 779–88.

[45] At a minimum, congressional-executive agreements may not be a complete substitute for treaties to the extent that the Constitution places greater substantive constraints on the former than the latter. See Missouri v. Holland, 252 U.S. 416, 432–35 (1920) (assuming that Congress lacked power to enact a particular statute in the absence of a treaty, but upholding the statute as a necessary and proper means of executing a treaty); cf. Yoo, supra note 23, at 818–20 (discussing the interchangeability thesis and *Missouri v. Holland*).

[46] Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1226 (1995); see also 1 Tribe, supra note 23, § 4–4, at 653 (arguing that "in light of the Treaty Clause's requirement of ratification by two thirds of the Senate, bicameral, simple-majority approval of agreements that would otherwise fall within the constitutional 'treaty' category appears inconsistent with the Constitution's design").

[47] Tribe, supra note 46, at 1277–78. Professor Golove subsequently published a vigorous response to Professor Tribe in which he concluded that Tribe's "arguments collapse in contradiction and indeterminacy" and should essentially be dismissed as "free-form formalism." David M. Golove, Against Free-Form Formalism, 73 N.Y.U. L. Rev. 1791, 1797 (1998).

2. The Exclusivity of the Treaty Clause

Tribe's approach draws support from the text, history, and structure of the Constitution. The Founders seriously debated the proper method of adopting treaties and settled on a precise system of checks and balances involving both the President and the Senate. The history of the Treaty Clause reveals that the Founders did not trust any single actor to make treaties on its own. The drafters denied both the Senate and the President sole power to make treaties. Instead, they assigned the power to the President acting in conjunction with a supermajority of the Senate. This carefully considered procedure thus tends to rebut any suggestion that the President has unilateral power to make "Treaties" simply by calling them "agreements."

Moreover, distinguishing between "Treaties" and "Agreement[s]" remains necessary under Article I, Section 10. That provision absolutely prohibits states from "enter[ing] into any Treaty,"[48] but allows them to "enter into any Agreement or Compact with another State, or with a foreign Power" with "the Consent of Congress."[49] If agreements and treaties are now fully interchangeable, then there is no limit on the types of agreements that states can make with the consent of Congress. This conclusion would flatly contradict the distinction drawn by Article I, Section 10. Elsewhere, the Constitution permits the President to make "Treaties," but only with the consent of two-thirds of the Senators present.[50] Presumably, the Constitution uses the term "Treaties" in the same sense in both Article I and Article II. If so, then the President can make international agreements of the sort that the states are prohibited from making (that is, "Treaties") only with the concurrence of two-thirds of the Senate.

The history and structure of the Constitution lend Tribe additional support. During the Convention, the Committee of Detail assigned the power to make treaties exclusively to the Senate.[51] Be-

[48] U.S. Const. art. I, § 10, cl. 1.
[49] Id. at art. I, § 10, cl. 3.
[50] Id. at art. II, § 2, cl. 2.
[51] James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), *reprinted in* 2 The Records of the Federal Convention of 1787, at 183 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (recording the Committee of Detail's proposal that "[t]he Senate of the United States shall have power to make treaties").

cause "the Senate represented the States alone," however, James Madison thought "it was proper that the President should be an agent in Treaties."[52] There was spirited debate, and the Convention initially failed to reach consensus on the issue.[53] Instead, the delegates referred the matter to a Committee tasked with considering "such parts of the Constitution as have been postponed."[54] As Professor Jack Rakove recounts, "[t]he Committee had considered the range of arguments that could be advanced in favor of making either the Senate *or* the House *or* the Congress *or* the President the appropriate repository of this authority."[55] In the end, the Committee proposed the now familiar procedure whereby the "President by and with the advice and Consent of the Senate, shall have power to make Treaties,"[56] provided that "no Treaty shall be made without the consent of two-thirds of the members present."[57]

The Convention unanimously approved vesting the treaty power jointly in the President and the Senate,[58] but debated the supermajority requirement. James Wilson opposed the requirement because it "puts it in the power of a minority to controul the will of a majority."[59] Rufus King agreed on the ground that "the Executive was here joined in the business," and would serve as a sufficient "check" on the Senate.[60] Notwithstanding such arguments, the Convention declined "to strike out the clause requiring two-thirds

[52] James Madison, Notes on the Constitutional Convention (Aug. 23, 1787), *reprinted in* 2 Farrand's Records, supra note 51, at 392 (comments of James Madison).

[53] See id. at 392–94.

[54] See Journal of the Constitutional Convention (Aug. 31, 1787), *reprinted in* 2 Farrand's Records, supra note 51, at 473.

[55] Jack N. Rakove, Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study, 1 Persp. in Am. Hist., New Series 233, 243 (1984).

[56] James Madison, Notes on the Constitutional Convention (Sept. 4, 1787), *reprinted in* 2 Farrand's Records, supra note 51, at 498.

[57] Id. at 499.

[58] James Madison, Notes on the Constitutional Convention (Sept. 7, 1787), *reprinted in* 2 Farrand's Records, supra note 51, at 538; see Rakove, supra note 55, at 249 ("Nothing in the recorded comments of the delegates suggests that they had consciously fashioned a special role for the President to play; he had simply been given a share in the treatymaking process.").

[59] James Madison, Notes on the Constitutional Convention (Sept. 7, 1787), *reprinted in* 2 Farrand's Records, supra note 51, at 540 (comments of James Wilson).

[60] Id. (comments of Rufus King).

of the Senate for making Treaties."[61] The remaining debate focused on whether to *strengthen* the supermajority requirement in the Senate by increasing the size of a quorum.[62] These attempts also failed and the Convention ultimately adopted the Treaty Clause in the form proposed by the Committee. In light of the foregoing, recognizing "Treaties" and "Agreement[s]" as fully interchangeable would arguably undermine the checks and balances so carefully incorporated into the constitutional structure.

Remarks by influential commentators during the ratification period mirror the evident structural prominence of the checks and balances built into the treatymaking process. For example, in contrasting the President's shared power to make treaties with the unilateral power of the British monarch, Alexander Hamilton stressed that "there is no comparison" because "[t]he one can perform alone what the other can only do with the concurrence of a branch of the legislature."[63] Hamilton defended the Convention's work by highlighting the shortcomings of potential alternatives. Vesting the treaty power in the President alone, he argued, "would be utterly unsafe and improper" because the President "might sometimes be under temptations to sacrifice his duty to his interest."[64] According to Hamilton,

> [t]he 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 circumstanced as would be a President of the United States.[65]

Conversely, Hamilton believed that assigning "the power of making treaties to the Senate alone would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations."[66] Thus, Hamilton thought it clear

[61] James Madison, Notes on the Constitutional Convention (Sept. 8, 1787), *reprinted in* 2 Farrand's Records, supra note 51, at 549.
[62] Id. at 549–50.
[63] The Federalist No. 69 (Alexander Hamilton), supra note 30, at 420.
[64] The Federalist No. 75 (Alexander Hamilton), supra note 30, at 451.
[65] Id.
[66] Id.

"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 either of them."[67]

Hamilton also defended the Convention's decision to require the concurrence of "two thirds of the [Senators] *present*" as opposed to "two thirds of all the members composing the senatorial body."[68] Because of nonattendance, the latter requirement would "amount in practice to a necessity of unanimity."[69] Such necessity, he suggested, would lead to "impotence, perplexity, and disorder."[70] At the same time, the proposed Constitution would provide ample safeguards against unwise treaties. Indeed, the supermajority requirement in the Senate, combined with "the cooperation of the President," would give "the people of America . . . greater security against an improper use of the power of making treaties, under the new Constitution, than they now enjoy under the Confederation."[71]

In sum, Hamilton believed that the Treaty Clause struck just the right balance between expedience and security. Both at the Convention and during the ratification debates, the Founders considered a variety of alternatives, including giving the Senate and the President power to make treaties on their own. In the end, the Founders rejected each alternative and instead adopted a precise procedure that allows the President to check the Senate,[72] and the Senate to check both the President (through the advice and consent requirement)[73] and itself (through the supermajority requirement). Both the precision of this procedure and the prohibition on treatymaking by the states suggest that the Constitution denies

[67] Id. at 452. Hamilton also dismissed the idea of giving the House of Representatives "a share in the formation of treaties" because of the "fluctuating and . . . multitudinous composition of that body." Id.

[68] Id. at 453.

[69] Id.

[70] Id.

[71] Id. at 454.

[72] See Swaine, supra note 21, at 1181–82 ("References to the President's value as a check on the Senate abound in the Convention records, period correspondence, pamphlets and articles, and the ratification debates." (citations omitted)); see also id. at 1174 (concluding that "the President seems to have been added to the mix largely because leaving treaties to the Senate alone would too closely resemble the ineffective treaty regime administered by the Continental Congress").

[73] See id. at 1184 (noting that "the Senate's control over treaty approval could ultimately check any diplomatic excesses").

government officials the option of making "Treaties" outside the procedures set forth in the Treaty Clause.[74]

3. Defining "Treaties"

The exclusivity of the Treaty Clause requires those who would apply the Clause as a constitutional constraint to undertake the difficult tasks of defining "Treaties" with precision and distinguishing treaties from the various nontreaty agreements contemplated elsewhere in the Constitution. As discussed, Article I, Section 10's distinct use of the terms "Treaty"[75] and "Agreement or Compact"[76] suggests that "the Constitution's distinction between treaties, international agreements and compacts was deliberate, well-understood, and intended by the Framers in 1789."[77] Although the

[74] See Clark, supra note 24, at 1331 ("Both the specificity of, and the purposeful variations among, the procedures prescribed by the Constitution for adopting the 'Constitution,' 'Laws,' and 'Treaties' suggest exclusivity."); John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L.J. 1663, 1702 (2004) (arguing that "textual precision should be understood to reflect the adopters' willingness or ability to go so far and no farther in pursuit of the desired constitutional objective").

[75] U.S. Const. art. I, § 10, cl. 1.

[76] Id. at art. I, § 10, cl. 3.

[77] Joel R. Paul, The Geopolitical Constitution: Executive Expediency and Executive Agreements, 86 Cal. L. Rev. 671, 737 (1998); see U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460 (1978) ("The Framers clearly perceived compacts and agreements as differing from treaties."); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 571–72 (1840) (observing that because the words "agreement" and "compact" "could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty"); see also Tribe, supra note 23, § 4–4, at 650 (noting that Clauses 1 and 3 of Article I, Section 10, when read in combination, provide "[c]ompelling evidence that the Constitution draws an important distinction between these categories"); Ramsey, supra note 1, at 164–65 ("Since use of 'treaty' as a restricted term of art in international law would have been familiar to the drafters of the Articles [of Confederation] and of the Constitution, it is reasonable to suppose that they would have adopted that usage." (internal footnote omitted)); Abraham C. Weinfeld, Comment, What Did the Framers of the Federal Constitution Mean By "Agreements or Compacts"?, 3 U. Chi. L. Rev. 453, 457 (1936) (suggesting that the only reasonable explanation for the ease with which the Founders adopted the distinction found in Article I, Section 10 "is that the words 'agreements or compacts' in contrast to 'treaties' were used as technical terms taken from the field of international dealings, that they were words of art, carried a definite meaning and therefore called for no discussion").

line between treaties and nontreaty agreements may have been apparent to the Founders, time has obscured this distinction.[78]

In attempting to recover the Constitution's distinction between treaties and nontreaty agreements, courts and scholars have relied primarily on the work of eighteenth-century writers, such as Emerich de Vattel.[79] The Founders were familiar with Vattel's treatise, *The Law of Nations*,[80] and there is evidence that they relied on it in drafting the Constitution's provisions governing foreign relations.[81] Indeed, according to the Supreme Court, Vattel was the "international jurist most widely cited in the first 50 years after the Revolution."[82]

Vattel's treatise drew an important distinction between "treaties," on the one hand, and "compacts, agreements or conventions," on the other. Section 152 defined a "treaty" as "a pact made with a veiw [sic] to the public welfare by the superior power, either for perpetuity, or for a considerable time."[83] Section 153 defined "agreements, conventions, and pactions" as "pacts with a view to transitory affairs."[84] Specifically, they "are accomplished by one single act," and "are perfected in their execution once for all."[85] By contrast, "treaties receive a successive execution, the duration of

[78] See Wuerth, supra note 27, at 11 ("Generations of scholars have struggled to clarify what power the President has to enter into international agreements other than treaties.").

[79] See, e.g., *Holmes*, 39 U.S. (14 Pet.) at 572 (characterizing Vattel as "an eminent writer on the laws of nations" and quoting his treatise to help explain the difference between "Treaties" and "Agreement[s]" as used in the Constitution); Ramsey, supra note 1, at 167–71.

[80] Emmerich de Vattel, The Law of Nations (London, J. Newberry et al. 1760).

[81] See, e.g., Weinfeld, supra note 77, at 458–59 (detailing the circumstances under which the Founders came to rely on Vattel's treatise); see also David Gray Adler, The President's Recognition Power, *in* The Constitution and the Conduct of Amercian Foreign Policy 133, 137 (David Gray Adler & Larry N. George eds., 1996) ("During the Founding period and well beyond, Vattel was, in the United States, the unsurpassed publicist on international law."); Paul, supra note 77, at 736 ("The Framers relied upon Vattel in constructing the Constitution's foreign relations powers."); Ramsey, supra note 1, at 169 (noting that Vattel was "well-known and widely consulted by the constitutional generation in the United States").

[82] *U.S. Steel*, 434 U.S. at 462 n.12.

[83] Vattel, supra note 80, §152, at 171.

[84] Id. § 153, at 171.

[85] Id.

which equals that of the treaty."[86] On this account, the Founders may have understood "Treaties" to encompass "treaties of peace, of amity and commerce, consular conventions, [and] treaties of navigation."[87] At the same time, they may have understood nontreaty agreements and compacts to encompass matters such as "settlements of boundary lines with attending cession or exchange of strips of land."[88]

The modern proliferation and expanded subject matter of international agreements leave many unanswered questions regarding the precise meaning of "Treaties" under the Treaty Clause. As Tribe points out, "line-drawing in this area is especially complex."[89] Similarly, the Supreme Court has acknowledged that "[w]hatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost."[90] Some commentators have attempted to reconstruct these meanings, but at a relatively high level of generality. For example, Professor Michael Ramsey finds the "general idea suggested by [Vattel and other] international law authorities" to be "that treaties are a special class composed of important long-term agreements."[91] Likewise, Tribe suggests that "one key should be the degree to which an agreement constrains federal or state sovereignty and submits United States citizens or political entities to the authority of bodies wholly or partially separate from the ordinary arms of federal or state government."[92]

[86] Id.; see also *U.S. Steel*, 434 U.S. at 462 n.12 (suggesting that Vattel's "distinction between supposedly ongoing accords, such as military alliances, and instantaneously executed, though perpetually effective, agreements, such as boundary settlements, may have informed the drafting in Art. I, § 10").

[87] Weinfeld, supra note 77, at 460.

[88] Id. at 464; see also Ramsey, supra note 1, at 199 (concluding "that treaties are a special class composed of important long-term agreements").

[89] Tribe, supra note 23, § 4–4, at 651.

[90] *U.S. Steel*, 434 U.S. at 463; see Swaine, supra note 13, at 499 (noting that the Framers' understanding was uncertain and that "the meaning of any such distinction was lost to the ages"); Vagts, supra note 21, at 151 (explaining that "Vattel's distinctions are not of much use nowadays").

[91] Ramsey, supra note 1, at 199.

[92] Tribe, supra note 23, § 4–4, at 651. Yoo, by contrast, offers an approach based "upon the record of practice by the political branches, rather than [one] making normative claims derived simply from different theories of constitutional interpretation." Yoo, supra note 23, at 762–63. Specifically, he argues that "the normal statutory mode must be used to approve international agreements that regulate matters within Congress's Article I powers" (such as international trade and finance) and that treaties

Notwithstanding these formulations, there appears to be no consensus among today's courts and commentators as to how to draw a clear line between "Treaties" and nontreaty "agreements."

4. Judicial Competence

The difficulties associated with defining "Treaties" may be compounded by traditional limitations on judicial competence. These limitations may lead courts to conclude that they are simply unable to ascertain precisely where "Treaties" end and other agreements begin without unduly interfering with the political branches' conduct of foreign relations. In the face of constitutional uncertainty, courts may be reluctant to hold that Presidents lack power to make sole executive agreements under the Treaty Clause. On one view, courts may consider challenges under the Clause to present nonjusticiable political questions. Courts may conclude that they lack "judicially discoverable and manageable standards" to govern the issue[93] or that such challenges would impermissibly inject the courts into a dispute between the political branches in the sensitive area of foreign relations.[94]

For example, in *Goldwater v. Carter*,[95] a plurality of the Supreme Court rejected the claim that the Treaty Clause prevents the President from unilaterally terminating a treaty, relying on the ground that the claim involved a political question.[96] It would seem to fol-

"must be used if the nation seeks to make agreements outside of Congress's competence or bind itself in areas where both President and Congress exercise competing, overlapping powers." Id. at 764.

[93] Baker v. Carr, 369 U.S. 186, 217 (1962); see Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1280–97 (2006) (discussing the branch of the political question doctrine involving judicially manageable standards).

[94] See Vagts, supra note 21, at 152 ("History and case law suggest . . . that the question [whether a particular agreement must be ratified as a treaty or may instead be enacted as a non-treaty agreement] lies outside the jurisdiction of the courts."). See generally Linda Champlin & Alan Schwarz, Political Question Doctrine and Allocation of the Foreign Affairs Power, 13 Hofstra L. Rev. 215 (1985) (evaluating the political question doctrine in the context of foreign relations); Jide Nzelibe, The Uniqueness of Foreign Affairs, 89 Iowa L. Rev. 941 (2004) (defending a broad application of the political question doctrine in foreign affairs). But see Wuerth, supra note 27, at 46–50 (questioning the application of the political question doctrine to sole executive agreements).

[95] 444 U.S. 996 (1979).

[96] Id. at 1002–06 (Rehnquist, J., plurality opinion).

low "that the Supreme Court would not decide the question whether an agreement that was approved *ex post* by the House and Senate is improper" under the Treaty Clause.[97] In fact, a federal appellate court recently held that "with respect to international commercial agreements such as NAFTA, the question of just what constitutes a 'treaty' requiring Senate ratification presents a non-justiciable political question."[98]

Even if courts were to find challenges under the Treaty Clause to be justiciable, a real or perceived lack of institutional competence might lead them to accord substantial deference to the political branches' decision to make an agreement rather than a treaty.[99] As Professor Lawrence Lessig has explained, courts operate under institutional constraints that lead them to shy away from rules that appear to yield inconsistent results. Such inconsistency gives rise to the perception that "the judges might [be] guided by something other than law—that their decision, that is, might be political."[100] Using an amorphous standard to invalidate some but not all nontreaty agreements might create just such a perception.

The nondelegation doctrine may provide an analogy of sorts. Although the Supreme Court has long maintained in principle that the Constitution "permits no delegation of [legislative] powers,"[101] the Court has arguably underenforced this norm in practice by upholding any statute in the face of a nondelegation challenge so long as it provides "an intelligible principle" to guide executive discretion.[102] The Court recently defended its deferential approach on the

[97] See Vagts, supra note 21, at 153.

[98] Made in the USA Found. v. United States, 242 F.3d 1300, 1302 (11th Cir. 2001).

[99] Cf. Regan v. Wald, 468 U.S. 222, 242 (1984) (relying on the "classical deference to the political branches in matters of foreign policy" to uphold the President's decision to restrict travel to Cuba).

[100] Lawrence Lessig, Translating Federalism: *United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 174; see also id. ("A sense of institutional cost will guide the Court to select rules that minimize the political cost of the rules it selects, which means that as the legal culture renders a rule political, this sense of institutional cost will guide the Court to trade away from that rule.").

[101] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); see also Field v. Clark, 143 U.S. 649, 692 (1892) (stating that "Congress cannot delegate legislative power to the President").

[102] J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); see Vikram David Amar, Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment, 49 Vand. L. Rev. 1347, 1365 (1996) ("In part because the line between lawmaking and law administering is so difficult to draw, most observers

ground that it has "'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[103] Courts may feel even less competent to set aside nontreaty agreements under the Treaty Clause because they involve the political branches' conduct of foreign relations.[104] Thus, in the end, it seems unlikely that courts will vigorously enforce the Treaty Clause.

Plaintiffs may not face the same hurdles when challenging sole executive agreements under the Supremacy Clause. While congressional-executive agreements (if enacted as "Laws") qualify as "the supreme Law of the Land," sole executive agreements do not obviously enjoy the same status. To be sure, the difficulties associated with applying the Treaty Clause to sole executive agreements remain, but the Supremacy Clause provides courts with an alternative, judicially manageable ground for disregarding such agreements as a matter of domestic law. Under the Supremacy Clause, courts need not undertake the difficult substantive inquiry of whether a particular agreement rises to the level of a "Treaty."[105] Rather, courts need only conduct the relatively straightforward procedural inquiry into whether the agreement in question was in fact adopted using either the procedures set forth in the Treaty Clause or the lawmaking procedures specified by Article I, Section 7. If either procedure was used, then the agreement constitutes "the supreme Law of the Land." If not, courts have an independent

are rightfully pessimistic about a serious resurrection of the [nondelegation] doctrine."); Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 338 (2000) (characterizing the nondelegation doctrine as "a judicially underenforced norm").

[103] *Whitman*, 531 U.S. at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)); see also Clark, supra note 24, at 1374 ("The Court's reluctance to enforce the nondelegation doctrine more vigorously appears to stem from the judiciary's limited institutional competence rather than any fundamental disagreement with the doctrine's goal of maintaining 'the constitutional processes of legislation which are an essential part of our system of government.'" (quoting Pan. Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935))); cf. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 548 (1985) (questioning whether "courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States" due in part to "the elusiveness of objective criteria for 'fundamental' elements of state sovereignty").

[104] See, e.g., Champlin & Schwarz, supra note 94.

[105] See Wuerth, supra note 27, at 13 ("Whatever the appropriate line between sole executive agreements and treaties, the text of the Constitution seems clear that only treaties have the force of domestic law.").

constitutional basis for disregarding the agreement regardless of whether it also violates the Treaty Clause. In other words, the Supremacy Clause—unlike the Treaty Clause—provides courts with clear, judicially manageable standards for deciding when, if ever, a sole executive agreement is capable of overriding preexisting legal rights under state and federal law.

B. The Supremacy Clause

The Supremacy Clause represents an important compromise reached by the Founders to resolve conflicts between state and federal law. Significantly, the Clause does not provide that any and all conceivable forms of federal law trump contrary state law. Rather, the Clause recognizes only three specific sources of law as "the supreme Law of the Land"—the "Constitution," "Laws," and "Treaties" of the United States.[106] Not coincidentally, the Constitution prescribes precise procedures to govern the adoption of each source of law recognized by the Clause and thus supplies courts with clear procedural rules of recognition for identifying "the supreme Law of the Land." All of these procedures require the participation and assent of the states or their representatives in the Senate acting in conjunction with at least one additional actor (the President, the House of Representatives, or both). These exclusive procedures safeguard federalism both by making "the supreme Law of the Land" more difficult to adopt and by giving the states or their representatives in the Senate the opportunity to veto each and every proposal to adopt such law. Not surprisingly, the Supremacy Clause does not identify sole executive agreements as a source of "the supreme Law of the Land." Such agreements are made by the President alone and—unlike constitutional amendments, laws, and treaties—cannot be vetoed by either the Senate or the states.

This omission does not mean that the Constitution precludes Presidents from making sole executive agreements. Rather, it simply means that the Constitution does not recognize such agreements—in and of themselves—as a basis for altering preexisting le-

[106] U.S. Const. art. VI, cl. 2.

gal rights.[107] This conclusion allows courts to resolve conflicts between sole executive agreements and existing law without undertaking to decide the difficult substantive question whether a particular agreement—because of its subject matter, scope, or duration—offends the Treaty Clause. Instead, courts need only ascertain whether the agreement was in fact adopted according to the procedures set forth in the Constitution for adopting the "Constitution," "Laws," and "Treaties" of the United States. If so, then the agreement qualifies as "the supreme Law of the Land" under the Supremacy Clause and overrides contrary state and federal law.[108] If not, then preexisting law remains unaffected.

Assessing sole executive agreements under the Supremacy Clause rather than the Treaty Clause would provide courts with clear, judicially manageable standards. Courts now routinely en-

[107] Of course, when the President has independent constitutional or statutory power to alter preexisting legal rights, he may use a sole executive agreement as a means of implementing that power. In such instances, it is the President's exercise of his underlying authority—rather than the agreement itself—that operates to override preexisting legal rights. See supra notes 24–36 and accompanying text.

[108] By tradition, not all treaties are self-executing as a matter of domestic law; some require implementation by statute. See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). Compare John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955, 2092 (1999) (arguing in favor of a "presumption of non-self-execution"), with Carlos Manuel Vazquez, Laughing at Treaties, 99 Colum. L. Rev. 2154 (1999) (arguing that the Constitution supports a presumption in favor of self-execution). See also Tim Wu, Treaties' Domains, 93 Va. L. Rev. 571, 576 (2007) (suggesting that "courts should understand the problem of self-execution as a question of institutional deference"). In addition, there may be some constitutional limits on the scope of the treaty power. For example, although the Supreme Court suggested in *Missouri v. Holland* that treaties are not subject to the same constitutional constraints as laws, it also suggested that there may be "qualifications to the treaty-making power." 252 U.S. 416, 433 (1920). Subsequently, in *Reid v. Covert*, the Court stated that "no agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution." 354 U.S. 1, 16 (1957). For a thorough scholarly exchange on the scope of the treaty power, compare Curtis A. Bradley, The Treaty Power and American Federalism (pts. 1 & 2), 97 Mich. L. Rev. 390 (1998), 99 Mich. L. Rev. 98 (2000) (challenging the nationalist position that the treaty power is limited neither by subject matter nor by the reserved powers of the states), with David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 Mich. L. Rev. 1075 (2000) (defending the nationalist view of the treaty power). See also Nicholas Quinn Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1868 (2005) (arguing that the powers of Congress are fixed by the Constitution and may not be expanded by treaty).

force constitutionally prescribed lawmaking procedures, such as bicameralism and presentment.[109] Accordingly, they should have little difficulty ascertaining whether a particular international agreement was made in accordance with the procedures set forth in the Constitution for adopting the "Constitution," "Laws," and "Treaties" of the United States.[110]

1. Incorporating Federal Lawmaking Procedures

The Supremacy Clause was the product of careful and deliberate compromise. It recognizes only three sources of law as "the supreme Law of the Land"—"[t]his *Constitution*, and the *Laws* of the United States which shall be made in Pursuance thereof; and all *Treaties* made, or which shall be made, under the Authority of the United States."[111] Thus, courts must identify an applicable source of such law before they can apply the Clause. The Constitution assists courts in this endeavor by prescribing distinct procedures to govern the adoption of each source of law recognized by the Supremacy Clause. Both the history of the Clause and several important features of the constitutional structure suggest that these procedures constitute the exclusive means of adopting "the supreme Law of the Land."

A brief examination of the various procedures established for adopting "the supreme Law of the Land" highlights important similarities and differences. For example, as used in the Supremacy Clause, "[t]his Constitution" refers to the original Constitution

[109] See, e.g., Clinton v. City of N.Y., 524 U.S. 417 (1998) (invalidating the line item veto); INS v. Chadha, 462 U.S. 919 (1983) (invalidating the legislative veto).

[110] Although the Supreme Court has declined to review the official attestation of Congress and the President that a bill was enacted according to the procedures prescribed by Article I, Section 7, see Field v. Clark, 143 U.S. 649, 672 (1892) (stating that the "respect due to coequal and independent departments requires the judicial department to act upon that assurance"), the Court has not hesitated to review open and notorious attempts by Congress and the President to depart from Article I, Section 7's "finely wrought and exhaustively considered . . . procedure." *Chadha*, 462 U.S. at 951. Moreover, the recent trend has been toward greater judicial review of federal lawmaking procedures. See United States v. Munoz-Flores, 495 U.S. 385 (1990) (rejecting the application of the political question doctrine and proceeding to review a provision of the Victims of Crime Act to determine whether it was a "Bill for raising Revenue" within the meaning of Article I, Section 7 and thus required to originate in the House).

[111] U.S. Const. art. VI, cl. 2 (emphasis added).

adopted in accordance with Article VII and to subsequent amendments adopted in accordance with Article V.[112] Article VII established the procedure for ratifying the original Constitution: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of *this Constitution* between the States so ratifying the Same."[113] Likewise, Article V establishes precise procedures for adopting constitutional amendments. According to these procedures, amendments proposed by two-thirds of the House and the Senate take effect when three-fourths of the states (acting through their legislatures or through conventions) ratify them.[114] Once adopted pursuant to these procedures, such amendments "shall be valid to all Intents and Purposes, as part of *this Constitution*."[115]

Similarly, as used in the Supremacy Clause, "the *Laws* of the United States which shall be made in Pursuance" of the Constitution[116] evidently refers to "Laws" produced by the procedures set forth in Article I, Section 7.[117] Under these procedures, before a

[112] See Clark, supra note 24, at 1332–33.

[113] U.S. Const. art. VII (emphasis added).

[114] Id. at art. V. As an alternative to proposal of constitutional amendments by the House and Senate, Article V instructs Congress to "call a Convention for proposing Amendments" "on the Application of the Legislatures of two thirds of the several States." Id. To date, this method has never been used.

[115] Id. (emphasis added).

[116] Id. at art. VI, cl. 2 (emphasis added).

[117] See Clark, supra note 24, at 1334–36. Broad conceptions of modern "federal common law" arguably contradict this understanding. Federal common law usually refers to rules of decision that purport to have the force of federal law, but whose content cannot be traced by traditional methods of interpretation to the Constitution, laws, and treaties of the United States. See Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1247 (1996). Even with respect to such rules, however, the pull of the Supremacy Clause is in evidence. The Supreme Court has repeatedly rejected open-ended federal common lawmaking and attempted to confine judicial lawmaking to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes . . . , and admiralty disputes." Tex. Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981). Moreover, as I have argued elsewhere, many of the rules that make up these enclaves have arguably been mischaracterized because they are actually "consistent with, and frequently required by, the constitutional structure" and thus encompassed by the Supremacy Clause. Clark, supra, at 1251. On the other hand, certain modern federal common law rules—like some in admiralty—remain problematic. See, e.g., Am. Dredging Co. v. Miller, 510 U.S. 443, 459 (1994) (Stevens, J., concurring in part and concurring in the judgment) (suggesting that the Court's modern admiralty doctrine represents "an unwarranted assertion of judicial authority to strike down or con-

"Bill," "Order, Resolution, or Vote"[118] may "become a Law," it must "have passed the House of Representatives and the Senate," and it must have been "presented to the President of the United States."[119] If the President signs the proposal, it becomes a "Law."[120] If he vetoes the proposal, it becomes a "Law" only with the approval of two-thirds of both Houses.[121]

Finally, as used in the Supremacy Clause, the phrase "*Treaties* made, or which shall be made, under the Authority of the United States"[122] refers to preexisting treaties made under the Articles of Confederation,[123] and to "Treaties" made under the Constitution pursuant to the procedures set forth in Article II.[124] Specifically, the Treaty Clause provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make *Treaties*, provided two-thirds of the Senators present concur."[125]

Although different in key respects, all of the procedures for adopting each form of "the supreme Law of the Land" share two essential elements. First, all require the participation and assent of multiple actors who are subject to the "political safeguards of federalism."[126] These actors function as veto players, and if any player withholds its consent, the proposal will not become part of "the supreme Law of the Land." Second, all of these procedures expressly require the participation and assent of the Senate or the states themselves in order to augment "the supreme Law of the Land." The Senate was designed to represent the states in the new federal government. Thus, as discussed below, the Supremacy Clause and

fine state legislation . . . without any firm grounding in constitutional text or principle"); Clark, supra, at 1332–60 (suggesting that at least some federal common law in admiralty is inconsistent with *Erie* and the constitutional structure).

[118] U.S. Const. art. I, § 7, cl. 3.

[119] Id. at art. I, § 7, cl. 2.

[120] Id.

[121] Id.

[122] Id. at art. VI, cl. 2 (emphasis added).

[123] See James Madison, Notes on the Constitutional Convention (Aug. 25, 1787), *reprinted in* 2 Farrand's Records, supra note 51, at 417 (noting that the words "or which shall be made" were added after the words "all Treaties made" in order to "to obviate all doubt concerning the force of treaties preexisting").

[124] See Clark, supra note 24, at 1337–38.

[125] U.S. Const. art. II, § 2, cl. 2 (emphasis added).

[126] The phrase, "political safeguards of federalism," refers to the role of the states "in the composition and selection of the central government." Wechsler, supra note 6, at 543.

its associated procedures reveal an important compromise embedded in the constitutional structure: the states agreed to the supremacy of federal law only on the condition that they or their representatives in the Senate would have the opportunity to veto any and all proposals capable of displacing state law.

2. The Exclusivity of the Supremacy Clause

As I have argued elsewhere, there is a strong case to be made that the Supremacy Clause establishes the exclusive constitutional basis for displacing state law and that the precise procedures set forth in the Constitution are the exclusive means of adopting "the supreme Law of the Land."[127] Extending supremacy to measures adopted outside these procedures—such as sole executive agreements—would upset the precise compromise between federal and state law struck by the Constitution. This suggests that the President lacks unilateral power to override preexisting rights under state and federal law unless he is authorized to do so by a duly adopted provision of the "Constitution," "Laws," or "Treaties" of the United States. From this perspective, the fact that the President enters into a sole executive agreement with another nation neither adds to, nor subtracts from, his ability to alter preexisting legal rights.

The Constitution is careful to restrict both *who* may adopt "the supreme Law of the Land" and *how* they may do so. The procedures prescribed by the Constitution for adopting the "Constitution," "Laws," and "Treaties" of the United States assign lawmaking responsibility solely to actors subject to the political safeguards of federalism. These actors include the President, the Senate, and the House of Representatives. As Madison explained, the role of the states in their selection and composition ensures that "each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments."[128] In this way, the Constitution is structured to retard "new intrusions by the center on the domain of the states."[129]

[127] See Clark, supra note 24.
[128] The Federalist No. 45 (James Madison), supra note 30, at 291.
[129] Wechsler, supra note 6, at 558.

In addition, the Constitution magnifies the effect of these political safeguards in two important ways. First, it denies any single federal actor the power to make supreme federal law by itself and instead requires the participation and assent of multiple actors subject to the political safeguards of federalism. Although changed circumstances have undoubtedly undermined the effectiveness of these safeguards over time,[130] such changes do not alter the fact that federal lawmaking procedures were designed to implement these safeguards and thus were meant to be exclusive. To be sure, the states' interests are no longer represented as directly in the federal lawmaking process because state legislatures no longer appoint the Senate. Nonetheless, federal lawmaking procedures continue to protect the governance prerogatives of the states simply by establishing numerous "veto gates,"[131] and by making "the supreme Law of the Land" more difficult to adopt.[132] If any of the specified veto players withholds its consent, then no new federal law is created and preexisting state and federal law remains in effect.[133]

[130] For example, the Seventeenth Amendment has reduced the states' influence in the Senate by replacing appointment of Senators by state legislatures with popular elections. See U.S. Const. amend. XVII. Changes in constitutional law have also limited the states' ability to influence the House of Representatives through control over voter qualifications and districting. See id. at amend. XV (race); id. at amend. XIX (sex); id. at amend. XXIV (poll tax); id. at amend. XXVI (age). Finally, the states' modern practice of appointing presidential electors on the basis of winner-take-all popular elections has reduced the role of state legislatures in selecting the President and all but eliminated the possibility that the President will be selected by the House of Representatives voting by states.

[131] See McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 Geo. L.J. 705, 707 & n.5 (1992).

[132] Such procedures effectively impose a supermajority requirement. See John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 74–75 (2001); William T. Mayton, The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies, 35 Duke L.J. 948, 956 (1986); Michael B. Rappaport, Amending the Constitution to Establish Fiscal Supermajority Rules, 13 J.L. & Pol. 705, 712 (1997).

[133] See Ernest A. Young, Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments, 46 Wm. & Mary L. Rev. 1733, 1792 (2005) ("A national government that can act only with difficulty, after all, will tend to leave considerable scope for state autonomy."). Some commentators and judges have even pointed to the existence of the political safeguards of federalism as a reason to curtail judicial review of the scope of federal powers. See United States v. Morrison, 529 U.S. 598, 647–52 (2000) (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting); id. at 660–61 (Breyer, Stevens, Souter, & Ginsburg, JJ., dissenting); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–54 (1985); Jesse H. Choper, Judicial Review and the

In addition, the Constitution reinforces the effect of the political safeguards of federalism by singling out the Senate to participate in the adoption of all forms of "the supreme Law of the Land." This was no accident. The Founders specifically designed the Senate to represent the states in the new federal government. Each state is entitled to equal suffrage in the Senate, and Senators were originally appointed by state legislatures.[134] By requiring the participation and assent of the Senate to adopt "the supreme Law of the Land," the Founders effectively gave the states (through their representatives in the Senate) the opportunity to veto all measures capable of preempting state law. As George Mason explained at the Constitutional Convention:

> The State Legislatures . . . ought to have some means of defending themselves agst. encroachments of the Natl. Govt. In every other department we have studiously endeavored to provide for its self-defence. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment.[135]

In other words, the Senate's power to veto all three sources of law recognized by the Supremacy Clause was designed to give the states a means of preventing unwanted federal regulation.

Although state legislatures no longer choose the Senate, the original constitutional structure suggests that the lawmaking procedures prescribed by the Constitution were meant to be the exclusive means of adopting "the supreme Law of the Land." Because of the Senate's central role, its composition was a contested issue at

National Political Process 175 (1980); Jesse H. Choper, The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review, 86 Yale L.J. 1552, 1557 (1977). Whatever the merits of this suggestion, see Bradford R. Clark, The Supremacy Clause as a Constraint on Federal Power, 71 Geo. Wash. L. Rev. 91 (2003), it suggests that there is widespread agreement that the political safeguards built into the original constitutional structure were meant to preserve the governance prerogatives of the states.

[134] See U.S. Const. art. I, § 3, cl. 1.

[135] James Madison, Notes on the Constitutional Convention (June 7, 1787), *in* 1 Farrand's Records, supra note 51, at 155–56 (comments of George Mason).

the Constitutional Convention of 1787.[136] Although the Convention quickly agreed that state legislatures would appoint Senators,[137] it deadlocked over the proper basis for representation in the Senate. The large states favored proportional representation, while the small states sought equal representation.[138] The debate was protracted, and the issue brought the Convention to the brink of collapse.[139] The delegates ultimately broke the impasse only by agreeing to grant the states equal suffrage in the Senate.[140] The proponents of equal suffrage even succeeded in exempting this feature of the constitutional structure from ordinary amendment under Article V.[141] As Jack Rakove has observed, following these developments, "no one could deny that the Senate was intended to embody the equal sovereignty of the states and to protect their rights of government against national encroachment."[142]

Significantly, the day after approving the states' equal suffrage, the Convention adopted the Supremacy Clause.[143] The Clause was originally suggested by supporters of equal suffrage in the Senate as an alternative to the congressional negative,[144] and reflects an important, if overlooked, bargain inherent in the original constitutional structure. By conferring supremacy only on sources of law that require the Senate's approval (that is, the "Constitution," "Laws," and "Treaties" of the United States), the Supremacy Clause restricts federal supremacy to measures approved by the states' representatives in the Senate or the states themselves. In other words, under the compromise reached at the Constitutional Convention, the states' representatives agreed to the supremacy of federal law (and the corresponding displacement of state law) only on the condition that the Senate (structured to represent the

[136] See Clark, supra note 24, at 1359–67.
[137] Id. at 1359.
[138] Id. at 1360.
[139] Id. at 1362–63.
[140] Id. at 1363–64. In exchange for granting the states equal suffrage in the Senate, the Convention required bills for raising revenue to originate in the House. Id.
[141] See U.S. Const. art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").
[142] Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 170 (1996).
[143] See Journal of the Constitutional Convention (July 17, 1787), *in* 2 Farrand's Records, supra note 51, at 22.
[144] See Clark, supra note 24, at 1348–55.

states) would have the opportunity to veto all forms of supreme federal law.[145] The Founders understood that these internal constraints would make it more difficult to adopt "the supreme Law of the Land," but thought that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."[146]

Although the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties,"[147] it does not expressly grant or deny the President power to make sole executive agreements. The Founders were aware of nontreaty agreements, since they made this very distinction in placing restrictions on states in Article I, Section 10.[148] While this distinction suggests that the President may make sole executive agreements under certain circumstances, the precise question addressed by this Article is whether such agreements are capable of overriding preexisting legal rights as a matter of domestic law. Because the Founders understood there to be a distinction between "Treaties" and nontreaty agreements, their decision to recognize only the former as "the supreme Law of the Land" strongly suggests that other international agreements (not adopted as "Laws" or "Treaties") do not have this status.[149] In addition, if the President could unilaterally adopt sole executive agreements capable of altering legal rights under state and federal law, he could circumvent the political and procedural safeguards of federalism built into the Supremacy Clause. First, he could evade the checks and balances

[145] See id. at 1339.

[146] The Federalist No. 73 (Alexander Hamilton), supra note 30, at 444. Of course, federal lawmaking procedures make it difficult not only to adopt, but to repeal federal law. The Founders recognized this danger, but thought that Congress could draft around it if necessary. See James Madison, Notes on the Constitutional Convention (Sept. 12, 1787), *reprinted in* 2 Farrand's Records, supra note 51, at 587 (comments of James Madison) ("As to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take place of limiting the duration of laws as to require renewal instead of repeal.").

[147] U.S. Const. art. II, § 2, cl. 2.

[148] See id. at art. I, § 10, cl. 1 ("No State shall enter into any Treaty . . . ."); id. at art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power . . . .").

[149] As discussed, to the extent that interstate compacts and congressional-executive agreements are enacted into law, they qualify as "the supreme Law of the Land." See supra notes 12–17, 105 and accompanying text.

provided by the requirement that multiple actors adopt each and every form of "the supreme Law of the Land." Second, he could entirely deprive the states of their structural right to have the Senate approve all federal measures capable of preempting state law.[150] Thus, in the absence of persuasive counterevidence, the Supremacy Clause, federal lawmaking procedures, and the political safeguards of federalism counsel against the Court's current assumption that sole executive agreements are "fit to preempt state law, just as treaties are."[151]

C. The Modern Position

The Supreme Court's modern position—that the President may unilaterally make executive agreements with the force of the supreme law of the land—arguably took hold in *Dames & Moore v. Regan*, in which the Court upheld a sole executive agreement designed to resolve the Iranian hostage crisis.[152] Although permitting the President to suspend state-law claims, the Court essentially limited its decision to the facts and disavowed any sweeping endorsement of sole executive agreements as a source of presidential power to settle claims in other contexts. Subsequently, in *American Insurance Association v. Garamendi*,[153] the Court more broadly proclaimed that "the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress,"[154] and that such agreements generally "are fit to preempt state law, just as treaties are."[155] Each decision warrants brief elaboration.

[150] The Founders understood that the Senate's essential role in the lawmaking process would not only preserve the governance prerogatives of the states, see The Federalist No. 62 (James Madison), supra note 30, at 378 (noting "that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty"), but also provide an "additional impediment . . . against improper acts of legislation," id.

[151] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416 (2003); see Denning & Ramsey, supra note 4, at 940 (arguing that "the Court essentially amended Article VI to make executive agreements, and executive policy more broadly, the supreme law of the land").

[152] 453 U.S. 654 (1981).

[153] 539 U.S. 396.

[154] Id. at 415.

[155] Id. at 416.

1. Dames & Moore

In *Dames & Moore*, the Supreme Court upheld a sole executive agreement designed to resolve the Iranian hostage crisis of 1979 by suspending the state-law claims of U.S. creditors.[156] Although this is an important precedent permitting the President to override private claims, the Court went out of its way to stress the narrowness of its decision and to avoid holding "that the President possesses plenary power to settle claims, even as against foreign governmental entities."[157] Thus, although a significant decision, *Dames & Moore* appeared to be limited to its extraordinary facts.

On November 4, 1979, Iranians seized control of the U.S. embassy in Tehran and took sixty-six U.S. diplomats and citizens hostage. The hostage crisis gripped the nation for over a year and consumed the remainder of the Carter presidency.[158] After launching a failed rescue attempt and losing his bid for re-election, President Carter concluded a sole executive agreement with Iran, known as the "Algiers Accords," on his last full day in office. Under the agreement, Iran agreed to release the hostages in exchange for President Carter's promise to bring about the transfer of all Iranian assets held by American banks by July 19, 1981, and "to terminate all litigation as between the Government of each party and the nationals of the other" by settling such claims through binding arbitration before an international claims tribunal to be established for that purpose.[159] To implement the agreement, President Carter issued a series of executive orders (1) requiring banks holding Iranian assets to transfer them to the Federal Reserve Bank of New York and (2) declaring that all U.S. claims covered by the agreement "shall have no legal force or effect in any action now pending in any court of the United States."[160]

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[156] 453 U.S. 654.

[157] Id. at 688.

[158] The crisis even spawned what was to become the long-running ABC News Program, "Nightline," originally entitled "America Held Hostage." See John Giuffo, Nightline Is Spawned Out of the Hostage Crisis, Colum. Journalism Rev., Nov./Dec. 2001, at 86.

[159] *Dames & Moore*, 453 U.S. at 665.

[160] Id. at 665–66 (internal quotations and citation omitted); see Exec. Orders Nos. 12276–85, 3 C.F.R. 104–18 (1981). On February 24, 1981, President Reagan issued an order "ratif[ying]" President Carter's Orders of January 19, 1981. Exec. Order No. 12294, 3 C.F.R. 139 (1981); see also *Dames & Moore*, 453 U.S. at 666.

Dames & Moore had been pursuing just such a claim in federal district court against Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks.[161] Dames & Moore alleged breach of contract and sought more than $3 million for services rendered.[162] The district court issued orders of attachment against the defendants' property in order to secure any judgment that might be entered against them.[163] The district court granted summary judgment in favor of Dames & Moore, but stayed execution of the judgment pending appeal. On April 28, 1981, Dames & Moore filed a separate action for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the executive orders and Treasury Department regulations implementing President Carter's sole executive agreement with Iran.[164] The district court dismissed the complaint, but enjoined the United States pending appeal from transferring any property subject to any writ of attachment or judgment issued by any court in favor of Dames & Moore.[165] The Supreme Court took the unusual step of granting certiorari before judgment near the end of its term because "the issues presented here are of great significance and demand prompt resolution."[166] The Court heard argument less than two weeks later, on June 24, 1981, and issued its opinion just eight days later, on July 2, 1981.

There were essentially two questions before the Supreme Court. First, did the President have authority to nullify attachments of Iranian assets and direct the custodians of such assets to transfer them to the Federal Reserve Bank for ultimate transfer to Iran? Second, did the President have authority to suspend claims of Americans against Iran and refer them to an international claims tribunal for final resolution? The Court resolved both questions in the President's favor. As to the first question, the Court held that the International Emergency Economic Powers Act ("IEEPA")[167] "constitutes specific congressional authorization to the President to

[161] *Dames & Moore*, 453 U.S. at 663–64.
[162] Id. at 664.
[163] Id.
[164] Id. at 666–67.
[165] Id. at 667.
[166] Id. at 668.
[167] Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C.A. §§ 1701–1706 (West 2003 & Supp. 2007)).

nullify the attachments and order the transfer of Iranian assets" out of the country.[168] The second question was more difficult because the Court found that neither of the potentially applicable statutes—IEEPA and the Hostage Act[169]—"constitutes specific authorization of the President's action suspending claims."[170] Notwithstanding this lack of statutory authorization, the Court upheld the President's actions.

The Court gave several explanations for its decision to allow the President to settle claims by U.S. nationals against Iran. First, the Court stressed as "[c]rucial" to its decision "the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."[171] Second, the Court noted that its prior cases had "also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."[172] In support, the

[168] *Dames & Moore*, 453 U.S. at 675.

[169] 22 U.S.C. § 1732 (2000).

[170] *Dames & Moore*, 453 U.S. at 677. Thus, although IEEPA's broad grant of authority made Dames & Moore's judgment more difficult to enforce, the statute did not alter Dames & Moore's underlying right to sue or to obtain a judgment against Iran.

[171] Id. at 680. The Court thought this conclusion was "best demonstrated," id., by Congress's enactment and subsequent amendment of the International Claims Settlement Act of 1949 ("ICSA"), Pub. L. No. 81-455, 64 Stat. 12 (1950) (codified as amended at 22 U.S.C. §§ 1621–1627). According to the Court, "[b]y creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements." *Dames & Moore*, 453 U.S. at 680. There are several reasons to question the Court's conclusion that the Act reflects implicit congressional approval of subsequent executive settlement agreements. 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, 90–92 (1982) (noting that the Act gave the President no discretion or authority to settle claims, that the Algiers Accords contravened the Act's goal of providing equal treatment to all U.S. claimants, and that the Act is more plausibly read to cover the field of executive claim settlement rather than to endorse broad executive authority in the area). In any event, the practice to which Congress arguably gave its assent in 1949 was the President's practice of settling claims otherwise barred by foreign sovereign immunity. Congress's subsequent enactment of the Foreign Sovereign Immunities Act of 1976 ("FSIA")—with its careful exceptions allowing suits like the one brought by Dames & Moore against Iran—suggests that Congress no longer acquiesced (if it ever had) to an absolute presidential power to settle any and all claims against foreign states (including those specifically authorized by the FSIA). See infra notes 258–83 and accompanying text.

[172] *Dames & Moore*, 453 U.S. at 682.

Court discussed its decision in *United States v. Pink*[173] upholding the Litvinov Agreement, under which the United States recognized the Soviet Union and the Soviet Union assigned its claims against American nationals to the United States. According to the Court, "the resolution of such claims was integrally connected with normalizing United States' relations with a foreign state."[174] Third, the *Dames & Moore* Court stressed that "Congress has not disapproved of the action taken here."[175]

Finally, the Court repeatedly stressed the narrowness of its decision. At the outset, the Court emphasized "the necessity to rest decision on the narrowest possible ground capable of deciding the case"[176] and to avoid laying down "general 'guidelines' covering other situations not involved here."[177] Likewise, at the end of its opinion, the Court reiterated that it did "not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities."[178] Rather, the Court tied its holding to the facts of the case:

> But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.[179]

In some ways, the Court's approach in *Dames & Moore* is reminiscent of the political question doctrine.[180] For example, rather than affirmatively recognize broad inherent presidential power, the Court more cautiously stressed that it was not prepared to say that

[173] 315 U.S. 203 (1942).
[174] *Dames & Moore*, 453 U.S. at 683.
[175] Id. at 687. The Court noted that "Congress has held hearings on the Iranian Agreement itself," but "has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement." Id. Thus, the Court concluded that it was "not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority." Id. at 688.
[176] Id. at 660.
[177] Id. at 661.
[178] Id. at 688.
[179] Id.
[180] See Clark, supra note 24, at 1451 n.830.

the President lacked the power to settle the claims at issue.[181] Perhaps this negative formulation reflects the Court's discomfort with second-guessing the President's resolution of "a major foreign policy dispute"—an area in which courts traditionally defer to the political branches. Indeed, in reviewing the legality of the Algiers Accords, the Court might have felt that there was "an unusual need for unquestioning adherence to a political decision already made."[182] In any case, it seems clear that the *Dames & Moore* Court intended to render a narrow, context-specific decision in the midst of a major foreign policy crisis.[183]

2. Garamendi

Notwithstanding the *Dames & Moore* Court's attempt to limit its holding, the Supreme Court recently read the decision broadly to support inherent presidential power to make sole executive agreements capable of overriding preexisting legal rights.[184] *Garamendi*

[181] See *Dames & Moore*, 453 U.S. at 688; see also id. at 686 ("In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.").

[182] Baker v. Carr, 369 U.S. 186, 217 (1962). In addition, the timing of the Court's consideration of the case left almost no time to refer the matter to Congress for legislative approval. The case was argued on June 24, 1981, and the Solicitor General had previously informed the Court that "unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement." *Dames & Moore*, 453 U.S. at 660.

[183] Despite the Court's efforts to write narrowly, *Dames & Moore* remains problematic. Ordinarily, courts do not give congressional inaction authoritative legal effect. Under the constitutional structure, Congress may alter legal rights and duties outside the legislative branch only by following the "finely wrought and exhaustively considered" procedures set forth in Article I, Section 7. INS v. Chadha, 462 U.S. 919, 951 (1983). Treating congressional inaction as tacit approval would flip the burden of inertia built into the constitutional scheme. See Koh, supra note 1, at 140 (concluding that "by finding legislative 'approval' when Congress had given none, [*Dames & Moore*] not only inverted the *Steel Seizure* holding . . . but also condoned legislative inactivity at a time that demanded interbranch dialogue and bipartisan consensus").

[184] Some lower federal courts have gone even farther by not only recognizing the President's power to make sole executive agreements, but also imposing a clear statement rule on congressional attempts to override such agreements. For example, in *Roeder v. Islamic Republic of Iran*, individuals who had been taken hostage in Iran in 1979—the crisis that gave rise to the executive agreement upheld in *Dames & Moore*—brought a class action suit against Iran seeking damages on a variety of tort claims. 333 F.3d 228, 230 (D.C. Cir. 2003). When originally filed, their claims did not fall under one of the FSIA's exceptions to foreign sovereign immunity. While the case was pending, however, Congress and the President enacted an amendment to the

began as a challenge by insurance companies to California's Holocaust Victim Insurance Relief Act of 1999 ("HVIRA" or "Act").[185] The Act required any insurer doing business in California to disclose information about all policies sold in Europe between 1920 and 1945 by the company or any affiliated entity.[186] The aim of the statute was to enable Holocaust victims to discover documentation regarding insurance policies that were lost or confiscated during the Nazi era. Such documentation was necessary for victims to pursue claims against insurance companies doing business in Germany during the Nazi era. Claims of this kind became increasingly frequent in U.S. courts after German courts interpreted the agreement reunifying East and West Germany in 1990 as lifting a longstanding moratorium on Holocaust claims by foreign nationals.[187]

Such suits generated strong protests by European companies and their respective governments and led the Clinton Administration to enter into sole executive agreements with Germany, Austria, and France.[188] Although these agreements are similar, the German

FSIA to allow their claims. See id. at 231. In addition, Congress enacted a second statute correcting a technical error and suggesting, through legislative history, that Congress intended its amendments to abrogate the Algiers Accords with respect to these plaintiffs. See id. at 235–37. Notwithstanding these legislative efforts, the D.C. Circuit held that even though the FSIA (as amended) no longer barred the plaintiffs' claims, the Algiers Accords continued to do so because Congress did not include express language specifically abrogating the Accords. See id. at 237–38. Thus, despite the Court's narrow, limiting language in *Dames & Moore*, federal courts have relied on it to recognize broad presidential power to displace both state and federal law, subject only to express, unequivocal abrogation by Congress.

[185] Cal. Ins. Code §§ 13800–13807 (West 2005).

[186] See *Garamendi*, 539 U.S. 396, 409–10 (2003).

[187] See id. at 404–05; see also Burt Neuborne, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts, 80 Wash. U. L.Q. 795, 796 n.2, 813–14 (2002). As Professors Detlev Vagts and Peter Murray point out, resolution of Nazi-era claims through litigation "would have been protracted and success doubtful." Detlev Vagts & Peter Murray, Litigating the Nazi Labor Claims: The Path Not Taken, 43 Harv. Int'l L.J. 503, 504 (2002). Potential difficulties would have included the statute of limitations, foreign affairs preclusion, class action issues, and problems of proof. Id. at 514–28. In addition, even if some plaintiffs overcame these obstacles and received compensation, "large numbers of equally grievously injured individuals would have been excluded from sharing in the benefits." Id. at 504.

[188] Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298, 1303 [hereinafter German Foundation Agreement]; Agreement Concerning the Austrian Fund "Reconciliation, Peace and Cooperation" (Reconciliation Fund), U.S.-Austria, Oct. 24, 2000, 40 I.L.M.

Foundation Agreement is the most comprehensive[189] and gave rise to the *Garamendi* litigation. Under the agreement, Germany agreed to establish a foundation funded with ten billion Deutsch Marks to compensate victims from the Nazi era.[190] Although the United States shared Germany's desire that "all asserted claims should be pursued . . . through the Foundation instead of the courts,"[191] the agreement stated that the United States "does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal" of such claims.[192]

Rather, the United States agreed only to "reinforce the point that U.S. policy interests favor dismissal on any valid legal ground."[193] The United States agreed to make this point in two ways. First, whenever a German company is sued in an American court on a Holocaust-era claim, the United States will submit a statement to the court that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II."[194] Second, the United States agreed to "use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments."[195]

523; Agreement Concerning Payments for Certain Losses Suffered During World War II, U.S.-Fr., Jan. 18, 2001, KAV 5882, available at 2001 WL 416465.

[189] See Wuerth, supra note 27, at 8.

[190] See *Garamendi*, 539 U.S. at 405.

[191] German Foundation Agreement, supra note 188, at 1303.

[192] Id. at 1304. The absence of language purporting to settle or otherwise conclusively dispose of Nazi-era claims was no accident. Rather, it reflected a delicate compromise between the United States and German governments. See Stuart E. Eizenstat, Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II 269–71 (2003); see also The Supreme Court, 2002 Term—Leading Cases, 117 Harv. L. Rev. 226, 234–35 (2003) (explaining that the precise language of the German Foundation Agreement was the product of careful negotiation and compromise).

[193] German Foundation Agreement, supra note 188, at 1304.

[194] Id. at 1303.

[195] Id. at 1300. Even the wording of the statements of interest that the United States agreed to file was the product of intense negotiations. The Europeans strongly urged the United States to endorse a specific ground for dismissal in its statements of interest, but the United States refused to go that far. See Eizenstat, supra note 192, at 269–71; Graham O'Donaghue, Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation, 106 Colum. L. Rev. 1119,

Notwithstanding the President's disclaimer, the Supreme Court held that the foreign policy embodied by the Foundation Agreement preempted California's disclosure law. In an opinion by Justice Souter (joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer), the Court stated that if the Agreement "had expressly preempted laws like HVIRA, the issue would be straightforward."[196] According to the Court, its "cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress."[197] More specifically, the Court noted that "[m]aking executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice," going back more than 200 years.[198] Such agreements included the Litvinov Agreement upheld in *United States v. Belmont* and *United States v. Pink*, and the Algiers Accords upheld in *Dames & Moore*.[199] The Court acknowledged that the Foundation Agreement differs from past agreements in that it attempts to settle claims "against corporations, not . . . foreign governments," but concluded that "the distinction does not matter" because rejecting executive power to make such an agreement "would hamstring the President in settling international controversies."[200]

Because the Foundation Agreement and similar agreements with other countries contain no preemption clause, the insurance companies' claim of preemption rested "on asserted interference with the foreign policy those agreements embody."[201] Upon review, the Court found "evidence of a clear conflict between the policies adopted by" the President and the State of California.[202] In the Court's view, "California seeks to use an iron fist where the Presi-

1129–31 (2006). The final agreement provided that the United States would "recommend dismissal on any valid legal ground," German Foundation Agreement, supra note 188, at 1303, but would "take[] no position [in the Agreement] on the merits of the legal claims or arguments advanced by plaintiffs or defendants," id. at 1304.

[196] *Garamendi*, 539 U.S. at 417.

[197] Id. at 415.

[198] Id.

[199] See id.

[200] Id. at 416.

[201] Id. at 417.

[202] Id. at 421.

dent has consistently chosen kid gloves."[203] Ignoring several possible alternative grounds, the Court concluded that the federal policy embodied in the Foundation agreement is "enough to require [contrary] state law to yield."[204]

Justice Ginsburg (joined by Justices Stevens, Scalia, and Thomas) dissented on relatively narrow grounds. The dissent assumed, "*arguendo*, that an executive agreement or similarly formal foreign policy statement targeting disclosure could override the HVIRA,"[205] but found that the Foundation Agreement contained no express provision attempting to preempt state law. "Absent a clear statement aimed at disclosure requirements," the dissent would have left "intact California's enactment."[206] According to the

[203] Id. at 427. The Court refused to speculate whether the state or federal approach would provide a better remedy and suggested that "dissatisfaction [with the Foundation Agreement] should be addressed to the President or, perhaps, Congress." Id.

[204] Id. at 425. Arguably, there were several potential alternative grounds for invalidating California's disclosure law. Extraterritorial state laws regulating transactions in foreign countries between foreign nationals raise several constitutional concerns. As Professor Gillian Metzger has recently explained, "[t]he principle that states are territorially bound polities permeates the Constitution and finds explicit textual manifestation in the New State Clause's protection of an existing state's territory." Gillian E. Metzger, Congress, Article IV, and Interstate Relations, 120 Harv. L. Rev. 1468, 1520 (2007); see also Mark D. Rosen, Extraterritoriality and Political Heterogeneity in American Federalism, 150 U. Pa. L. Rev. 855 (2002) (noting that constitutional constraints on extraterritorial state regulation are particularly strong as applied to nonstate citizens). In addition, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (quotation marks and citation omitted). State regulation of foreign conduct also raises concerns under the foreign Commerce Clause. See Japan Line, Ltd. v. County of L.A., 441 U.S. 434, 448 (1979). Finally, extraterritorial state laws implicate the Due Process Clause. See, e.g., BMW of N. Am. v. Gore, 517 U.S. 559, 572 (1996) (stating that it follows from "principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States"); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985) (stating that due process prevents a State from applying its own law to "a transaction with little or no relationship to the [State]"); Home Ins. Co. v. Dick, 281 U.S. 397, 408 n.5 (1930) (noting that "a State is without power to impose either public or private obligations on contracts made outside of the State and not to be performed there"). The *Garamendi* Court could have explored one or more of these grounds instead of endorsing the dubious proposition that sole executive agreements are generally "fit to preempt state law, just as treaties are." 539 U.S. at 416.

[205] *Garamendi*, 539 U.S. at 443 (Ginsburg, J., dissenting).

[206] Id. at 430.

dissenting Justices, "courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds."[207]

The *Garamendi* Court could have limited *Dames & Moore* to its facts. Instead, the Court endorsed a sweeping view of presidential power to make sole executive agreements with the force of federal law. Although President Bush does not yet appear to have made use of this extraordinary power, Presidents will certainly be tempted to do so in the future—especially when Congress is controlled by the opposing political party. Thus, although unilateral presidential attempts to alter preexisting legal rights have been rare, they are likely to become more frequent now that the Court has unequivocally endorsed inherent executive power to make sole executive agreements with the force of federal law. Before such extraordinary power becomes entrenched, the Court should reassess its current assumptions regarding the domestic effect of sole executive agreements.

Significantly, the Supreme Court made no real attempt in either *Dames & Moore* or *Garamendi* to explain how sole executive agreements attain the status of "the supreme Law of the Land" under the Supremacy Clause. Rather, the Court relied primarily on two arguments tied to historical practice and precedent. First, the Court stressed the President's long-standing historical practice of settling claims against foreign nations on behalf of U.S. nationals. Second, the Court emphasized two decisions—*Belmont*[208] and *Pink*[209]—upholding a sole executive agreement made in the course of recognizing the Soviet Union in 1933. If valid, these arguments might support the conclusion that Article II authorizes the President to make sole executive agreements with the force of supreme federal law. Upon examination, however, neither of these arguments adequately supports the Court's modern assumption—contradicted by the negative implication of the Supremacy Clause—that the President has independent constitutional authority to make sole executive agreements with the force of federal law.

[207] Id. at 443.
[208] 301 U.S. 324 (1937).
[209] 315 U.S. 203 (1942).

II. CLAIMS SETTLEMENT

In *American Insurance Association v. Garamendi*,[210] the Supreme Court relied heavily on the President's historical practice of settling claims.[211] Stating that "the practice goes back over 200 years," the Court thought it "'indisputable'" that "'the President's control of foreign relations includes the settlement of claims.'"[212] If Article II itself authorizes the President to make sole executive agreements with the force of federal law, then such agreements would trigger preemption under the Supremacy Clause, which of course recognizes the "Constitution" as "the supreme Law of the Land." The actual historical record, however, does not support the Court's assumptions regarding the scope of presidential power. For one thing, the historical practice generally involved presidential settlement of claims against foreign nations, not private companies. More fundamentally, prior to the enactment of the Foreign Sovereign Immunities Act of 1976,[213] foreign states enjoyed absolute immunity from suit in U.S. courts. Thus, Americans with claims against foreign nations had no recourse other than presidential espousal and settlement of their claims. This modest presidential practice is fully consistent with Article II and the Supremacy Clause, but does not support a freestanding executive power to settle legal claims by citizens with a federal statutory right to sue foreign states in U.S. courts. To the extent that Congress has constitutional power to abrogate foreign sovereign immunity and has exercised such power, the federal government can countermand existing state and federal law claims only by adopting a contrary federal statute or treaty.

A. Foreign Sovereign Immunity

An understanding of foreign sovereign immunity is necessary to evaluate *Garamendi*'s reliance on the President's practice of set-

[210] 539 U.S. 396 (2003).

[211] Some commentators have made arguments that parallel those of the Court. See, e.g., Henkin, supra note 41, at 219–30 (defending sole executive agreements).

[212] *Garamendi*, 539 U.S. at 415 (quoting *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring)).

[213] Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C.A. §§ 1330, 1332(a), 1391(f), 1446, 1601–1611 (West 2006 & Supp. 2007)).

tling claims by U.S. citizens against foreign states. Historically, foreign states enjoyed absolute immunity from suit in American courts. Such immunity was originally part of the law of nations, which recognized "the equality and absolute independence of sovereign states."[214] As applied in American courts, foreign sovereign immunity is traditionally tied to Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*,[215] which raised the analogous question "whether an American citizen can assert, in an American court, a title to an armed national vessel [of another country], found within the waters of the United States."[216] The Court answered this question in the negative, finding the vessel to be immune from suit. The Court based such immunity in part on respect for the power and dignity of foreign sovereigns[217] and in part on the prevailing practice of nations.[218] Under the circumstances, the Court felt constrained to follow the "principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[219]

The Schooner Exchange also tied immunity to the Constitution's allocation of powers over foreign affairs. The Court's opinion suggests that the Constitution assigns exclusive power to abrogate foreign sovereign immunity to the political branches of the federal government and that courts lack power to abrogate such immunity on their own. Chief Justice Marshall acknowledged that, "[w]ithout doubt, the sovereign of the place is capable of destroying" the im-

[214] L'Invincible, 14 U.S. (1 Wheat.) 238, 254 (1816).

[215] 11 U.S. (7 Cranch) 116 (1812); see Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) ("Chief Justice Marshall's opinion in *Schooner Exchange v. McFaddon* is generally viewed as the source of our foreign sovereign immunity jurisprudence." (citation omitted)); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983) (recounting that *The Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns").

[216] *The Schooner Exchange*, 11 U.S. (7 Cranch) at 135.

[217] Id. at 144 (noting that interference with the military force of a foreign sovereign "cannot take place without affecting his power and his dignity").

[218] Id. (observing that "in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception").

[219] Id. at 145–46. The Court's characterization of the United States as a "friendly power" may have been a shorthand way to suggest a presumption that foreign powers recognized by the United States enjoy immunity in U.S. courts as an incident of such recognition.

munity recognized by the Court.[220] "He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals."[221] The first method entails military power exercised by the President, while the second involves legislative power exercised by Congress.[222] Absent the use of either power "in a manner not to be misunderstood," Marshall thought it would be "a breach of faith" for courts to exercise jurisdiction over foreign ships of war.[223] This conclusion was consistent with Marshall's suggestion "that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, [and] that they are for diplomatic, rather than legal discussion."[224]

Although technically deciding only the immunity of foreign warships, *The Schooner Exchange* came to stand for the broader proposition that foreign sovereigns enjoy virtually absolute immunity in American courts.[225] If the constitutional allocation of power over foreign affairs prevents courts from entertaining suits against foreign warships absent clear authorization from the political branches, then it presumably also prevents courts from entertaining claims asserted directly against foreign sovereigns. After *Erie Railroad Co. v. Tompkins*,[226] one might object that rules of foreign

[220] Id. at 146.

[221] Id. In this quote, "He" appears to refer to "the sovereign of the place." Id.

[222] Congress has power to "constitute Tribunals inferior to the supreme Court," U.S. Const. art. I, § 8, cl. 9, and to define and limit their jurisdiction "'in the exact degrees and character which to Congress may seem proper for the public good,'" Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)).

[223] *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146. Marshall also noted "the general inability of the judicial power to enforce its decisions in cases of this description." Id.

[224] Id.

[225] See, e.g., Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 571 (1926); Robert B. von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Colum. J. Transnat'l L. 33, 39–40 (1978). In the course of holding that foreign warships entering a friendly port enjoy immunity from judicial process, however, Chief Justice Marshall did identify two other related types of immunity enjoyed by foreign sovereigns: (1) "the exemption of the person of the sovereign from arrest or detention within a foreign territory," *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137, and (2) "the immunity which all civilized nations allow to foreign ministers," id. at 138.

[226] 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

sovereign immunity like those recognized in *The Schooner Exchange* represent a form of federal common lawmaking and are therefore themselves in tension with the Supremacy Clause.[227] Both before and after *Erie*, however, the Constitution itself arguably required courts to recognize various types of foreign sovereign immunity in order to uphold the respective roles of the judiciary and the political branches in conducting foreign relations.[228] As Chief Justice Marshall observed in *The Schooner Exchange*, other nations would justly consider the United States as violating its faith if it "should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world."[229]

Marshall's point was not that "the sovereign of the place" is incapable of exercising its territorial powers in violation of the law of nations.[230] Rather, it was that the political branches—rather than the courts—must make the fundamental policy decision to subject foreign warships to the jurisdiction of "the ordinary tribunals."[231] In order to uphold this allocation of power, the Court imposed a clear-statement rule of sorts: "But until such power [to override implied immunity] be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise."[232] As I have previously suggested, rules of immunity like the one recognized in *The Schooner Exchange* "are binding in both federal and state courts, not because they are 'federal

[227] See Clark, supra note 24, at 1430, 1452–54; see also Bradford R. Clark, *Erie*'s Constitutional Source, 95 Cal. L. Rev. (forthcoming 2007).

[228] This structural imperative applies to both federal and state courts. Cf. Anthony J. Bellia Jr., State Courts and the Making of Federal Common Law, 153 U. Pa. L. Rev. 825, 888 (2005) (arguing that state courts are justified in making a narrow form of federal common law when necessary to fulfill their duty to enforce federal law).

[229] 11 U.S. (7 Cranch) at 137; see also Ex parte Republic of Peru, 318 U.S. 578, 588 (1943) (stating that "the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune").

[230] *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146. For example, at the outset of his opinion, Chief Justice Marshall stressed that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." Id. at 136.

[231] Id. at 146.

[232] Id.

judge-made law' and thus constitute 'the supreme Law of the Land,' but because the judiciary's failure to apply them would interfere with powers assigned by the Constitution exclusively to the political branches of the federal government."[233]

However one conceptualizes foreign sovereign immunity in U.S. courts, neither the legislative nor the executive branch saw fit to disturb the general background rule of foreign sovereign immunity for most of our constitutional history. Congress took no action, and "the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns" until 1952.[234] Thus, "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country."[235]

In 1952, the State Department issued the Tate Letter, formally endorsing the "restrictive" theory of foreign sovereign immunity.[236] Under this theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising

[233] Clark, supra note 117, at 1311; see id. at 1311–21 (suggesting that judicial adherence to traditional rules of diplomatic immunity implemented the constitutional allocation of powers over foreign affairs); see also *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146 ("The arguments in favor of this opinion which have been drawn . . . from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention.").

[234] Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983). A prominent exception foreshadowed the State Department's eventual withdrawal of its support for absolute foreign sovereign immunity. See Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954), amending 173 F.2d 71 (2d Cir. 1949). In 1949, after the Second Circuit dismissed a claim for confiscation and destruction of property by the Nazis, the State Department published a letter from Jack Tate, then the Department's Acting Legal Adviser, to counsel for the plaintiff. The letter stated that it was

> [t]he policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, . . . to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Bernstein, 210 F.2d at 376 (quoting Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State, to the Attorneys for the Plaintiff (Apr. 13, 1949)).

[235] *Verlinden*, 461 U.S. at 486.

[236] Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984 (1952).

out of a foreign state's strictly commercial acts."[237] This development complicated the judiciary's immunity determinations because the State Department was not always consistent in its application of the restrictive theory. As the Court recently recounted, "'foreign nations often placed diplomatic pressure on the State Department,' and political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'"[238] "Not surprisingly, the governing standards were neither clear nor uniformly applied."[239]

In 1976, Congress sought to alleviate these problems by enacting the Foreign Sovereign Immunities Act ("FSIA" or "Act"),[240] effective January 19, 1977.[241] The Act essentially codifies the restrictive theory of foreign sovereign immunity but "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch."[242] The Act contains a general provision rendering foreign states "immune from the jurisdiction of the courts of the United States and of the States except as provided" by the Act.[243] The Act then sets forth several exceptions denying immunity to foreign states in suits relating to "commercial activity,"[244] "property taken in violation of international law,"[245] and "torture, extrajudi-

[237] *Verlinden*, 461 U.S. at 487.

[238] Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004) (quoting *Verlinden*, 461 U.S. at 487–88); see, e.g., Arthur W. Rovine, U.S. Dep't of State, Digest of United States Practice in International Law: 1973, at 225–27 (1973) (describing a case in which the State Department sought immunity on behalf of Cuba even though the suit involved commercial activities).

[239] *Verlinden*, 461 U.S. at 488. Sometimes the State Department took no position, leaving courts to decide immunity based on prior practice.

[240] Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1444, 1601–1611 (West 2006 & Supp. 2007)).

[241] Id. § 8, 90 Stat. at 2898 (providing that the effective date of FSIA is ninety days after its enactment on October 21, 1976); Gilson v. Republic of Ireland, 682 F.2d 1022, 1023 n.1 (D.C. Cir. 1982) ("The Act went into effect 19 January 1977.").

[242] *Altmann*, 541 U.S. at 691; see Letter from Monroe Leigh, Legal Adviser, Dep't of State, to Edward H. Levi, Attorney General (Nov. 2, 1976), *reprinted in* 75 Dep't St. Bull. 649 (1976) (observing that "it would be inconsistent with the legislative intent of [FSIA] for the Executive Branch to file any suggestion of immunity on or after" the effective date of the the Act).

[243] 28 U.S.C. § 1604 (2000). In addition, the Act limits the means of enforcing judgments obtained against foreign states. See id. § 1610.

[244] Id. § 1605(a)(2).

[245] Id. § 1605(a)(3).

cial killing, aircraft sabotage, [and] hostage taking."[246] Under the Act, federal courts lack subject-matter jurisdiction over suits against a foreign state unless they find that one of the statutory exceptions applies.[247]

Recently, in *Republic of Austria v. Altmann*, the Supreme Court held that the Foreign Sovereign Immunities Act applies retroactively to conduct that occurred prior to its enactment and even to conduct that occurred prior to the United States's adoption of the restrictive theory of foreign sovereign immunity.[248] *Altmann* involved a suit against Austria seeking to recover paintings taken by Nazis during World War II.[249] The Court allowed the suit to go forward even though a similar suit would have been barred if it had been brought prior to 1952 or perhaps even prior to 1976.[250] *Altmann* establishes that the FSIA now provides the exclusive basis for immunity in all suits against foreign states in U.S. courts. If the subject matter of the suit falls within one of the statutory exceptions, then the foreign state can be sued in American courts.[251] If the exceptions do not apply, then the foreign state is immune.

B. Executive Settlements and Foreign Sovereign Immunity

In *Garamendi*, the Supreme Court placed significant reliance on the historical fact that making "executive agreements to settle claims of American nationals against foreign governments is a par-

[246] Id. § 1605(a)(7).
[247] See *Altmann*, 541 U.S. at 691.
[248] 541 U.S. 677, 700 (2004).
[249] Id. at 680–81.
[250] See id. at 700.
[251] The Court noted somewhat cryptically that "nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity." Id. at 701. One might read this statement as support for reviving judicial deference to "the considered judgment of the Executive on a particular question of foreign policy." Id. at 702. See Mark J. Chorazak, Note, Clarity and Confusion: Did *Republic of Austria v. Altmann* Revive State Department Suggestions of Foreign Sovereign Immunity?, 55 Duke L.J. 373 (2005) (arguing that the Court erred in inviting the State Department to revive the practice of filing statements of interest). The Court, however, was careful to "express no opinion on the question whether such deference should be granted in cases covered by the FSIA." *Altmann*, 541 U.S. at 702; see also id. at 702 n.23 ("We do not hold . . . that executive intervention could or would trump considered application of the FSIA's more neutral principles . . . .").

ticularly longstanding practice."[252] The Court noted that the first example was "as early as 1799, when the Adams administration settled demands against the Dutch Government by American citizens who lost their cargo when Dutch privateers overtook the schooner *Wilmington Packet*."[253] The Court stated that "the practice goes back over 200 years, and has received congressional acquiescence throughout its history."[254] Under these circumstances, the Court thought that "the conclusion '[t]hat the President's control of foreign relations includes the settlement of claims is indisputable.'"[255] As support for this proposition, the Court cited *Belmont*, *Pink*, and *Dames & Moore*.[256]

In reaching this conclusion, however, the *Garamendi* Court failed to distinguish between executive settlements made before and after 1977. In that year, the Foreign Sovereign Immunities Act took effect and gave Americans a limited federal statutory right to sue foreign states in U.S. courts for the first time. For several reasons, the Court should distinguish between claims barred by foreign sovereign immunity and claims that fall within the exceptions adopted by Congress.[257] First, taken in context, the historical prac-

[252] 539 U.S. at 415.

[253] Id.

[254] Id. While the President's practice of settling citizens' claims against foreign sovereigns traces back to the early years of the republic, the prevalence of the practice is open to question. Indeed, one of the sources that the *Dames & Moore* Court cited for the proposition that "Presidents have exercised the power to settle claims of United States nationals by executive agreement" for two centuries, 453 U.S. 654, 679 n.8 (1981), offers a somewhat more measured assessment:

> [N]umerous settlement agreements during the nineteenth century also took the form of treaties, and, despite occasional statements to the effect that Senate approval never was necessary, that form of international agreement-making probably predominated. Indeed, in so far as major lump sum agreements are concerned, 15 of the 17 concluded prior to World War II actually were submitted to the Senate for its advice and consent.

R. B. Lillich, The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement, 69 Am. J. Int'l L. 837, 844 (1975) (footnotes omitted).

[255] *Garamendi*, 539 U.S. at 415 (quoting United States v. Pink, 315 U.S. 203, 240 (1942) (Frankfurter, J., concurring)).

[256] Id.

[257] Cf. Marks & Grabow, supra note 171, at 87–88 (explaining that claims settled by Presidents before 1952 are "irrelevant to the propriety of settling enforceable commercial claims of American citizens . . . against foreign governments" because until that time the doctrine of absolute sovereign immunity barred Americans from suing foreign states).

tice supports only a presidential power to settle claims barred by foreign sovereign immunity. Second, more recent presidential attempts to settle claims permitted by the FSIA arguably contradict the statute and thus should only be upheld if Congress lacks power to authorize such claims.

Prior to 1952, foreign sovereign immunity generally posed an absolute bar to suits by American citizens against foreign states regardless of the nature of the claims.[258] Even after 1952, until the enactment of the FSIA, Americans had no right to sue foreign states in U.S. courts.[259] Given this historical reality, many claimants sought alternative relief by having the President espouse their claims through diplomatic channels.[260] Espousal was an international law doctrine well known to the Founders.[261] As Professor Thomas Lee has explained, "[a] sovereign's espousal of its citizen's private grievance rendered it a public claim on the international

[258] See supra notes 214–35 and accompanying text.

[259] In 1952, the State Department issued the Tate Letter and adopted the "restrictive" theory of sovereign immunity. See Letter from Jack B. Tate to Philip B. Perlman, supra note 236. Although the Tate Letter made it possible for Americans to assert at least some claims against foreign sovereigns, it did not give them a legal right to do so. The executive branch remained free to urge dismissal of suits arguably allowed by this theory based on foreign policy considerations, and courts generally deferred to the executive's suggestions in such cases. See supra notes 236–39 and accompanying text. The State Department did not acknowledge that it could no longer seek dismissal on foreign sovereign immunity grounds until the passage of the FSIA. See Letter from Monroe Leigh to Edward H. Levi, supra note 242, at 649 (noting that "[t]he Department of State will not make any sovereign immunity determinations after the effective date of [FSIA]").

[260] See Lee, supra note 30, at 1856–59; Marks & Grabow, supra note 171, at 88–89; Ramsey, supra note 1, at 177. I am very grateful to Professor Henry Monaghan for his comments stressing the historical significance of espousal in connection with executive claims settlements. In an important article, Monaghan recently defended the constitutionality of statutes and treaties authorizing non-Article III tribunals to adjudicate claims by U.S. citizens against foreign sovereigns. See Henry Paul Monaghan, Article III and Supranational Judicial Review, 107 Colum. L. Rev. 833 (2007). In his view, since "the Jay Treaty of 1794, it has been clear that claims of American nationals espoused by the United States against foreign sovereigns could be adjudicated by" such tribunals, id. at 851, in part because such claims were barred by foreign sovereign immunity and thus fit within the "public rights" exception to Article III, see id. at 869–70 & n.216.

[261] See Lee, supra note 30, at 1858 ("The Framers understood and embraced espousal.").

plane,"[262] and the sovereign "could employ whatever means it elected, including the waging of war," to vindicate its claim.[263]

A sovereign, of course, had no obligation to espouse a claim, and "espousal was considered a domestic political decision by a sovereign state."[264] Justice Iredell summarized the practice in 1796 as follows:

> When any individual, therefore, of any nation, has cause of complaint against another nation, or any individual of it, not immediately amenable to the authority of his own, he may complain to that power in his own nation, which is entrusted with the sovereignty of it as to foreign negociations, and he will be en[t]itled to all the redress which the nature of his case requires, and the si[t]uation of his own country will enable him to obtain.[265]

In the United States, the President is the official "entrusted with the sovereignty of [the nation] as to foreign negociations." This follows from the President's power to "receive"—and therefore communicate with—"Ambassadors and other public Ministers."[266]

As the case of the *Wilmington Packet* suggests, early Presidents embraced the role of chief negotiator by espousing and settling the claims of U.S. citizens against foreign nations barred by foreign sovereign immunity.[267] Presidents would decide, in their discretion,

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[262] Id. at 1856.

[263] Id. at 1855.

[264] Id. at 1857.

[265] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 259–60 (1796) (statement of Iredell, J.).

[266] U.S. Const. art. II, § 3.

[267] See Wuerth, supra note 27, at 20 ("Historically, claims settlement by the executive branch has been closely tied to the doctrines of espousal and state responsibility."). As Professor Andrea Bjorklund has explained, the basic premise of the law of state responsibility "was that an alien entering a state must subject himself to that state's law during his sojourn, but that in return the state promised to defend his person and secure justice for him." Andrea Bjorklund, Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims, 45 Va. J. Int'l L. 809, 818 (2005). In practice, an injured party had little recourse against a foreign state because of sovereign immunity. Id. at 820. Thus, espousal, or diplomatic dispute resolution, was often the only means of redress. Espousal was based on the fiction that "an injury to an alien was also an injury to the alien's country of origin." Id. at 822. This fiction "facilitated the elevation of a dispute to the state-to-state level recognized under international law." Id.

whether and how to espouse such claims.[268] Even if the President agreed to espouse a claim, he retained wide-ranging discretion in disposing of it. He could "compromise it, seek to enforce it, or waive it entirely."[269] Moreover, the President's power to espouse a claim did not depend on the consent of the private claimholder.[270] Rather, the President was free to raise and settle any claims that, in his view, adversely affected ongoing relations between the two countries. In the end, whatever compensation the President secured for the claimant[271] was almost certainly greater than any

[268] See *Ware*, 3 U.S. (3 Dall.) at 260 (statement of Iredell, J.) (stating that when the government espouses citizens' private claims, "[t]he remedy depends on the discretion and sense of duty of their own government"); Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 244 (1983) ("The President . . . has no obligation to take up a national's claim and present it diplomatically to a foreign government."); Restatement (Second) of Foreign Relations Law of the United States § 212 (1965) ("The government of the United States has discretion as to whether to espouse the claim of a United States national . . . . This discretion is vested in the President and exercised on his behalf by the Secretary of State."); Lee, supra note 30, at 1856–58 (noting the sovereign's "uninhibited discretion" under international law to decide whether to espouse a claim); Wuerth, supra note 27, at 20 (stating that "the executive branch decides whether, and under what conditions, to press claims of injury to its nationals with other nations").

[269] Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1523 (D.C. Cir. 1984); see Bjorklund, supra note 267, at 822 ("For any number of reasons, including the possibility of jeopardizing negotiations with another state over some long-sought concession, a protecting state might not want to espouse a claim against that state for the alleged injury.").

[270] See Bjorklund, supra note 267, at 824 (stating that once the government espoused a claim, it "might waive or settle the claim without the agreement of the individual"); Wuerth, supra note 27, at 20 (stating that the executive branch "decides whether to compromise or abandon such claims, even over the objection of the injured national").

[271] As Professor Bjorklund points out, the "settlement, if any, would usually be paid to the government rather than to the injured individual because of the fiction that the wrong was actually perpetrated against the protecting government." Bjorklund, supra note 267, at 824. While the espousing state "could pass any recovery on to the aggrieved citizen, the citizen seeking espousal was dependent on the government's goodwill." Id. at 825. In the United States, Congress sought to regularize the process by enacting the International Claims Settlement Act of 1949 ("ICSA"), Pub. L. No. 81-455, 64 Stat. 12 (1950) (codified as amended at 22 U.S.C. §§ 1621–1627 (2000)). The Act established "a procedure whereby funds resulting from future settlements could be distributed." Dames & Moore v. Regan, 453 U.S. 654, 680 (1981). To this end, "Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds." Id.

amount the claimant could recover on his or her own, since foreign sovereign immunity foreclosed access to U.S. courts.[272]

Even after the FSIA abrogated foreign sovereign immunity in some circumstances, moreover, the consensus among lower federal courts was that claimants could not sue foreign states under one of the Act's exceptions for conduct that occurred prior to the effective date of the statute.[273] For example, in 1982 a district court initially held that a suit seeking payment of bearer railroad bonds issued by the Imperial Chinese Government in 1911 fell within the commercial activity exception of the FSIA and entered a default judgment against the defendant.[274] The court subsequently reopened the judgment, however, and ruled that the FSIA did not apply retroactively to the conduct in question.[275] The Eleventh Circuit agreed and affirmed the dismissal of the suit.[276] The D.C. and Second Circuits subsequently reached the same conclusion regarding the retroactivity of the FSIA.[277] It was not until 2002, when the Ninth Circuit decided *Altmann*, that a federal court of appeals in-

[272] Cf. Lillich, supra note 254, at 846 ("If one regards a settlement agreement, no matter how poor, as a 'windfall' to claimants, one obviously has little reason to concern oneself with how it has been achieved." (footnote omitted)). In 1964, in response to the Supreme Court's application of the act of state doctrine to deny recovery in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), Congress enacted the Second Hickenlooper Amendment, Foreign Assistance Act of 1964, Pub. L. No. 88-663, § 301(d), 78 Stat. 1009, 1113 (codified at 22 U.S.C. § 2370(e)(2)), which prohibits courts from declining to adjudicate certain expropriation claims "on the ground of the federal act of state doctrine." Congress, however, did not abrogate foreign sovereign immunity in such cases until a decade later when it enacted the FSIA. See supra notes 240–46 and accompanying text.

[273] If the conduct in question occurred after the State Department adopted the restrictive theory of foreign sovereign immunity in 1952 and fell within one of the recognized exceptions, then a claimant might have been able to sue without relying on the FSIA. In *Altmann*, however, the Supreme Court rendered any such temporal distinction moot by holding that the FSIA applies retroactively both to conduct that occurred before its enactment and to conduct that occurred before the issuance of the Tate Letter. See 541 U.S. at 700.

[274] Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982).

[275] Jackson v. People's Republic of China, 596 F. Supp. 386, 389 (N.D. Ala. 1984).

[276] Jackson v. People's Republic of China, 794 F.2d 1490, 1499 (11th Cir. 1986).

[277] See Joo v. Japan, 332 F.3d 679, 680 (D.C. Cir. 2003), vacated, 542 U.S. 901 (2004); Abrams v. Société Nationale Des Chemins De Fer Francais, 332 F.3d 173, 186 (2d Cir. 2003), vacated, 542 U.S. 901 (2004); Carl Marks & Co. v. Union of Soviet Socialist Republics, 841 F.2d 26, 27 (2d Cir. 1988).

terpreted the Act to apply retroactively.[278] As discussed, the Supreme Court agreed and affirmed in 2004.

Accordingly, executive settlement agreements made before 1977 did not deprive claimants of any tangible legal right to vindicate their claims the way such agreements may today.[279] Rather, such settlements were generally the only hope that claimants had of receiving any compensation from a foreign state.[280] Thus, well-known historical settlements—like President Adams's agreement with the Dutch Government to settle the claims of Americans in connection with the seizure of the *Wilmington Packet*—did not deprive the claimants of compensation, but actually provided it.[281] Had the claimants attempted to sue the foreign government in question, their claims would have been dismissed on the basis of foreign sovereign immunity.[282] Thus, had the President failed to espouse their claims, they would have recovered nothing. In addition, even executive settlements reached after the effective date of the FSIA (1977), but before *Altmann* found the Act to be retroactive (2004), did not deprive claimants of available legal remedies to the extent that such settlements concerned claims predating the FSIA.[283] For

[278] Altmann v. Republic of Austria, 317 F.3d 954, 958 (9th Cir. 2002), aff'd, 541 U.S. 677 (2004); see David P. Vandenberg, Comment, In the Wake of *Republic of Austria v. Altmann*: The Current Status of Foreign Sovereign Immunity in United States Courts, 77 U. Colo. L. Rev. 739, 749 (2006) ("Before *Altmann*, courts consistently ruled against retroactive application of FSIA.").

[279] See Wuerth, supra note 27, at 21 (stating that, historically, diplomatic settlement of claims against foreign governments "was unlikely to affect any private claims because international law required that the private claims be exhausted before the diplomatic claims were lodged, and because domestic claims against foreign sovereigns for injuries that occurred abroad in any event were likely barred for jurisdictional reasons, as well as by the doctrine of foreign sovereign immunity"); see also Ramsey, supra note 1, at 177 ("Nineteenth-century rules of jurisdiction and immunity made suit by a private party against a foreign sovereign essentially impossible . . . .").

[280] See Marks & Grabow, supra note 171, at 88 & n.122.

[281] See Wuerth, supra note 27, at 21 ("Settlement of claims concerning *The Wilmington Packet* illustrates the traditional doctrines of espousal and state responsibility.").

[282] See id.

[283] See, e.g., Agreement Concerning the Settlement of Claims, U.S.-P.R.C., May 11, 1979, 30 U.S.T. 1957 (settling the claims of U.S. nationals against the People's Republic of China arising from any nationalization or expropriation of the property of U.S. nationals on or after October 1, 1949, and prior to the date of the agreement). While the U.S.-China Agreement technically encompasses claims arising after the effective date of the FSIA, it appears that all claims actually subject to the agreement arose prior to that time. Indeed, the vast majority (87.6%) of claims settled by the Agreement arose before 1966. See Natalie G. Lichtenstein, Unfrozen Assets: The 1979

these reasons, the "longstanding practice" of executive claims settlement invoked by the *Garamendi* Court arguably has little relevance to the validity of the much more recent and infrequent practice of using executive agreements to settle claims that fall within the express statutory exceptions established by the FSIA.

Distinguishing between executive settlements made before and after the FSIA is necessary to evaluate their propriety. Justice Jackson's famous concurrence in *Youngstown* described three "somewhat over-simplified" scenarios involving the exercise of presidential power.[284] First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[285] Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[286] And third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[287]

Prior to 1977, sole executive agreements settling claims against foreign states arguably fell within Justice Jackson's second category and thus posed no clear constitutional difficulty. During this period, executive agreements settling claims by U.S. nationals against foreign nations were made in the "absence of either a con-

Claims Settlement Between the United States and China, *in* Staff of the Joint Economic Comm., 97th Cong., China Under the Four Modernizations, Part 2, at 316, 322–25 (Comm. Print 1982). An even larger proportion (99.2%) of the claims deemed meritorious by the Foreign Claims Settlement Commission arose prior to 1966. See id. at 322, 325. In any event, even if the China agreement purports to settle expropriation claims arising after 1977, the preclusive effect of that settlement might nonetheless stem from the act of state doctrine rather than the fact of the agreement. See Marks & Grabow, supra note 171, at 89 n.142; infra Part III.

[284] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[285] Id.

[286] Id. at 637.

[287] Id.

gressional grant or denial of authority" to settle such claims.[288] In these circumstances, the President relied on his own power to conduct foreign relations to make settlement agreements. As the Supreme Court has noted, "[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns."[289] Historically, the President exercised discretion in deciding whether and how to press such claims with foreign states.[290] He might choose to ignore the claims altogether, or he might bargain them away in exchange for better relations in other areas.[291] In any event, in the absence of a congressional waiver of foreign sovereign immunity, executive settlement agreements did not contradict "the expressed or implied will of Congress," and the claimants lost no legally enforceable rights as a result of such agreements.[292]

After 1977, executive agreements settling claims permitted by the FSIA appear to fall within Justice Jackson's third category and are thus more problematic.[293] Congress's enactment of the FSIA—establishing statutory exceptions to foreign sovereign immunity—arguably circumscribed the President's unilateral power to settle

[288] See *Dames & Moore*, 453 U.S. at 682 n.10 (noting that "Congress, though legislating in the area, has left 'untouched' the authority of the President to enter into settlement agreements"). Arguably, "[b]y creating a procedure to implement future settlement agreements [in the International Claims Settlement Act], Congress placed its stamp of approval on such agreements." Id. at 680. Such approval, however, does not appear to constitute "express or implied authorization" sufficient to trigger Justice Jackson's first category. See Marks & Grabow, supra note 171, at 90–91; supra note 171 (discussing the International Claims Settlement Act).

[289] *Dames & Moore*, 453 U.S. at 679 (quoting *Pink*, 315 U.S. at 225 (1942)).

[290] See supra note 268 and accompanying text.

[291] See supra note 269 and accompanying text.

[292] In the 1970s, Congress required the executive branch to inform it of any agreements made, but did not purport to authorize or restrict such agreements. See Case-Zablocki Act, 1 U.S.C. § 112b (1976) (amended 1978) ("The Secretary of State shall transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force . . . .").

[293] But cf. Mark D. Rosen, Revisiting *Youngstown*: Against the View That Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief, 54 UCLA L. Rev. (forthcoming 2007) (arguing that Justice Jackson's concurrence rests on the unproven assumption that when Congress's regulatory powers overlap with the President's Commander in Chief powers, the former categorically trump the latter).

claims that fall within those exceptions.[294] By enacting these exceptions, Congress appears to have made the judgment that the need to vindicate such claims outweighs any strain on foreign relations that might flow from subjecting foreign sovereigns to suit.[295] Sole executive agreements purporting to settle claims that fall within the statute's exceptions—over the objection of the claimants—arguably contradict Congress's explicit decision to relax foreign sovereign immunity in such cases.[296] In *Dames & Moore v. Regan*,

[294] Of course, some might argue that the President has residual constitutional power to conduct foreign relations (and therefore to settle claims against foreign sovereigns) and that this power is not subject to congressional interference. Cf. Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L.J. 231 (2001) (arguing that the President, rather than Congress, possesses broad residual foreign affairs power by virtue of Article II's vesting of "executive Power" in the President). But see Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545, 551 (2004) (challenging "the Vesting Clause Thesis on both textual and historical grounds").

[295] In fact, claims against foreign countries under the FSIA have prompted strenuous objections and have even strained our relations with certain countries. See Jackson v. People's Republic of China, 794 F.2d 1490, 1495 (11th Cir. 1986) (recounting that Chinese leader Deng Xiaoping brought up a U.S. default judgment against China pursuant to the FSIA and "indicated to Secretary of State Schultz that the PRC regarded it as a serious matter and a major irritant in bilateral relations with the United States"). In enacting the FSIA, Congress was willing to bear such costs. Even those who argue for strong deference to the executive in the conduct of foreign relations acknowledge the need to respect Congress's considered judgment when it speaks clearly on such matters. See Eric A. Posner & Cass R. Sunstein, *Chevron*izing Foreign Relations Law, 116 Yale L.J. 1170, 1177–78 (2007) ("Under our approach [of deference to executive interpretations of ambiguous laws affecting foreign relations], the expressed will of Congress would still control . . . .").

[296] For similar reasons, presidential power to extend foreign sovereign immunity beyond the terms of the FSIA would also appear to contradict the statute. There seems to be broad agreement that the effect of the FSIA was to transfer foreign sovereign immunity determinations from the executive to the judiciary. See *Altmann*, 541 U.S. at 691 (stating that the FSIA "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch"); Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226, 1234 (2d Cir. 1995) (quoting H.R. Rep. No. 94-1487, at 7 (1976) ("The FSIA was enacted not so much to change the rules as to 'transfer the determination of sovereign immunity from the executive branch to the judicial branch . . . .'"); Letter from Monroe Leigh to Edward H. Levi, supra note 242, at 649 (observing that "it would be inconsistent with the legislative intent of [the FSIA] for the Executive Branch to file any suggestion of immunity on or after January 19, 1977"). But cf. *Altmann*, 541 U.S. at 701 (stating that "nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity"); id. at 714 (Breyer, J., concurring) (suggesting that "the United States may enter a statement of interest counseling dismissal" in FSIA cases, referring "not only to sov-

however, the Court found no such contradiction.[297] Instead, the Court read the FSIA primarily as a jurisdictional statute and observed that presidential settlement agreements do not attempt "to divest the federal courts of jurisdiction."[298] Rather, when the President exercises his power to settle claims, he "has simply effected a change in the substantive law governing the lawsuit."[299]

The Court's analysis in *Dames & Moore* is problematic.[300] The exceptions set forth in the FSIA not only confer subject-matter jurisdiction on federal courts to hear claims against foreign nations, but also establish substantive principles of federal law binding in both state and federal courts. As the Court explained several years after *Dames & Moore* in *Verlinden B.V. v. Central Bank of Nigeria*,

> [t]he Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law . . . .[301]

The substantive nature of the FSIA is underscored by the *Verlinden* Court's holding that claims within the statutory exceptions "arise under" federal law for purposes of Article III[302] and its emphasis that the standards set forth in the Act "control in" both federal and state courts.[303] If the FSIA were merely jurisdictional, then

ereign immunity, but also to other grounds for dismissal, such as the presence of superior alternative and exclusive remedies" or "the nonjusticiable nature . . . of the matters at issue").

[297] 453 U.S. at 685.

[298] Id. at 684. But cf. Monaghan, supra note 260, at 858 (characterizing this aspect of *Dames & Moore* as "unconvincing").

[299] *Dames & Moore*, 453 U.S. at 685.

[300] Cf. *Youngstown*, 343 U.S. at 587 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). Although the *Dames & Moore* Court suggested that Congress acquiesced in the President's practice of settling claims against foreign nations (by enacting the ICSA), there is little evidence that Congress acquiesced in a presidential power to deprive claimants of their private legal rights. See supra note 171. Rather, Congress merely established a procedure for distributing the proceeds of any settlements resulting from the President's traditional power to espouse claims on behalf of U.S. nationals. See supra note 271.

[301] 461 U.S. 480, 496–97 (1983).

[302] Id. at 491–97.

[303] Id. at 489.

certain applications of the statute would apparently exceed the limits of Article III,[304] and the statute would not be binding in state court.[305]

Although Congress chose not to codify foreign sovereign immunity for most of our history, *Verlinden* made plain that Congress has clear constitutional authority to do so. "By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States."[306] Once Congress enacted legislation providing that foreign states are amenable to suit for specified claims, the President presumably lost his ability to determine immunity unilaterally[307] and to settle such claims without the claimants' consent.

As Justice Jackson pointed out in *Youngstown*, "[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."[308] To be sure, the President has certain exclusive constitutional powers in the field of foreign relations, most notably his power to recognize foreign governments.[309] According to the *Verlinden* Court, however, control over suits against foreign nations is not one of the President's exclusive powers, but rather falls within Congress's power over foreign commerce and foreign relations.[310]

During the long initial period of congressional silence regarding foreign sovereign immunity, the President arguably had residual

[304] Id. at 497 (stating that "every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly 'arises under' federal law, within the meaning of Art. III").

[305] See id. at 489 (explaining that the substantive standards of the FSIA govern immunity in both federal and state court).

[306] Id. at 493.

[307] See Chuidian v. Phillippine Nat'l Bank, 912 F.2d 1095, 1100 (9th Cir. 1990) ("The principal change envisioned by the statute was to remove the role of the State Department in determining immunity. Sovereign immunity could be obtained only by the provisions of the Act, and only by the courts interpreting its provisions; 'suggestions' from the State Department would no longer constitute binding determinations of immunity.").

[308] *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

[309] See U.S. Const. art. II, § 3; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."); see also Henkin, supra note 41, at 43.

[310] See supra note 306 and accompanying text.

power to influence how courts applied the doctrine because such immunity was arguably an incident of recognition. In fact, prior to the enactment of the FSIA, federal courts (including the Supreme Court) "consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns."[311] Once Congress enacted the FSIA, however, the President's power was necessarily circumscribed by the Act. Although the Court recently expressed "no opinion" on the question whether courts should grant deference to "the considered judgment of the Executive on a particular question of foreign policy" in cases covered by the Act,[312] it went out of its way to note that it did "not hold . . . that executive intervention could or would trump considered application of the FSIA's more neutral principles."[313] The Court's reservation is consistent with the traditional understanding that a statute falling within Congress's constitutional powers binds the executive no less than the courts.

In short, prior to Congress's enactment of the FSIA, the President espoused and settled Americans' claims against foreign nations as part of his power to receive ambassadors and conduct foreign relations. The claimants had no legal right to recover against foreign nations because Congress had not yet acted to abrogate foreign sovereign immunity and states lacked constitutional power to do so. Thus, presidential agreements settling such claims neither contradicted a federal statute nor materially affected recovery under state law. The enactment of the FSIA, however, arguably limited the President's power to settle the claims of U.S. nationals that fall within the Act's express statutory exceptions.[314] Holders of such claims appear to have a federal statutory right to sue. At a mini-

[311] *Verlinden*, 461 U.S. at 486 (citing Ex parte Peru, 318 U.S. 578, 586–90 (1943); Republic of Mexico v. Hoffman, 324 U.S. 30, 33–36 (1945)).

[312] *Altmann,* 541 U.S. at 702.

[313] Id. at 702 n.23.

[314] Of course, foreign sovereign immunity continues to bar claims against foreign sovereigns that fall outside the FSIA's enumerated exceptions. See, e.g., Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (holding that the FSIA barred tort claims by an American citizen employed by a government-owned hospital in Saudi Arabia because such claims did not fall within the Act's "commercial activity" exception). The FSIA does not circumscribe the President's ability to settle such claims, and presidential espousal may be the only way to obtain relief.

mum, therefore, presidential agreements settling such claims cannot be upheld—as *Garamendi* suggests—simply by analogy to pre-1977 executive settlement agreements.

III. THE ACT OF STATE DOCTRINE

In addition to invoking the President's historical practice of settling claims, the Supreme Court's modern, expansive view of sole executive agreements relies heavily on two prior decisions—*United States v. Belmont*[315] and *United States v. Pink*[316]—upholding a sole executive agreement made by President Roosevelt in the course of recognizing the Soviet Union in 1933. Both cases contain language suggesting that such agreements—at least in conjunction with recognition of a foreign government—are capable of preempting state law. For example, *Belmont* states that "no state policy can prevail against the international compact here involved."[317] Although the Court acknowledged that the supremacy of "treaties is established by the express language of cl. 2, Art. VI, of the Constitution," it reasoned without further explanation that "the same rule would result in the case of all international compacts and agreements."[318] Similarly, in *Pink*, the Court recounted the status of treaties under the Supremacy Clause and declared that "[s]uch international compacts and agreements as the Litvinov Assignment have a similar dignity."[319] In light of such language, it is understandable that the *Garamendi* Court relied on *Belmont* and *Pink* to support the proposition that "valid executive agreements are fit to preempt state law, just as treaties are."[320]

Careful examination of *Belmont* and *Pink*, however, reveals that it was the President's exercise of his independent constitutional power to recognize the Soviet Union—rather than his agreement to do so—that operated to displace state law in those cases. The

[315] 301 U.S. 324 (1937).
[316] 315 U.S. 203 (1942).
[317] *Belmont,* 301 U.S at 327.
[318] Id. at 331.
[319] *Pink,* 315 U.S. at 230; see also id. at 230–31 ("But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.").
[320] 539 U.S. 396, 416 (2003) (citing *Belmont*, 301 U.S. at 327, 331; *Pink*, 315 U.S. at 223, 230–31).

President's decision to recognize the Soviet Union triggered the act of state doctrine, which in turn preempted contrary state law. Using the act of state doctrine to preempt state law in such cases is consistent with the Supremacy Clause because the doctrine is "a consequence of domestic separation of powers."[321] As the Supreme Court recognized in *Banco Nacional de Cuba v. Sabbatino*, the Constitution gives the political branches of the federal government the exclusive constitutional power to challenge "the validity of the public acts a recognized foreign sovereign power committed within its own territory."[322] Thus, under the Constitution, federal and state courts may not inquire into the validity of such acts and must disregard state law to the contrary.[323] From this perspective, *Belmont* and *Pink* had no need to decide whether sole executive agreements qualify as "the supreme Law of the Land." Rather, properly understood, these cases merely illustrate the proposition (later confirmed in *Sabbatino*) that the act of state doctrine overrides contrary state law.

A. Belmont

On July 5, 1917, the United States recognized the Provisional Russian Government as the successor to the Imperial Russian Government, which disbanded after the Tsar abdicated in Febru-

[321] W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964) (stating that the act of state doctrine maintains "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs"). Because the Supreme Court has also stated that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers," Baker v. Carr, 369 U.S. 186, 210 (1962), the act of state doctrine and the political question doctrine appear to overlap, see Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 727 (1976) (Marshall, J., dissenting) (observing that "the act of state doctrine reflects the notion that the validity of an act of a foreign sovereign is, under some circumstances, a 'political question' not cognizable in our courts"); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 787–88 (1972) (Brennan, J., dissenting) (same). Federal courts, however, continue to treat the two doctrines as related but analytically distinct. See, e.g., Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1086 (9th Cir. 2006) (noting that "the act of state analysis, while related, is not identical to the political question analysis"); Gross v. German Found. Indus. Initiative, 456 F.3d 363, 377–92 (3d Cir. 2006) (treating the political question doctrine and the act of state doctrine as distinct inquiries).

[322] 376 U.S. at 401.

[323] Id. at 425–27; see Clark, supra note 117, at 1303–04 & n.273.

ary of that year. In October, the Bolsheviks overthrew the Provisional Government, but the United States continued for many years to recognize the latter as the de jure government of Russia. By certain laws, decrees, enactments, and orders in 1918 and 1919, the de facto Russian Government nationalized Russian corporations and all of their property, wherever situated.[324] Many of these companies did business and kept funds abroad, especially in New York and London. In the ensuing years, courts struggled with litigation among various classes of claimants due to "the hazards and embarrassments growing out of the confiscatory decrees of the Russian Soviet Republic."[325] These hazards and embarrassments were compounded prior to 1933 because the United States did not recognize the Soviet Union, and therefore its confiscatory acts were not entitled to respect in U.S. courts.[326]

On November 16, 1933, President Roosevelt officially recognized the government of the Union of Socialist Soviet Republics as part of an exchange of diplomatic letters with Maxim Litvinov.[327] Under the so-called Litvinov Agreement, the Soviet Union "released and assigned to the United States" all amounts due to the Soviet Union from American nationals, "with the understanding that the Soviet Government was to be duly notified of all amounts realized by the United States from such release and assignment."[328] Following this assignment, the United States sued August Belmont, a private banker doing business in New York as August Belmont & Co., in federal court to recover money deposited prior to 1918 with Belmont by Petrograd Metal Works, a Russian corporation.[329]

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[324] See *Belmont*, 301 U.S. at 326; cf. *Pink*, 315 U.S. at 210–11 (describing simultaneous confiscation of Russian insurance companies).

[325] People v. Russian Reinsurance Co., 175 N.E. 114, 115 (N.Y. 1931) (Cardozo, C.J.).

[326] See Lehigh Valley R.R. Co. v. State of Russia, 21 F.2d 396, 400 (2d Cir. 1927) (permitting a suit by the long-defunct provisional Russian Government to proceed because "courts may not independently make inquiry as to who should or should not be recognized").

[327] Exchange of Communications Between the President of the United States and Maxim B. Litvinov, People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, U.S.-U.S.S.R., Nov. 16, 1933, 28 Am. J. Int'l L. (Supp.) 2 (1934).

[328] *Belmont,* 301 U.S. at 326.

[329] Id. at 325–26.

The district court dismissed the complaint, and the Second Circuit affirmed. The court of appeals sought to distinguish between "property physically located within Russian territory" and "property outside [Russia's] own territory."[330] With respect to the former class of property, the court acknowledged the force of the act of state doctrine, noting "that after recognition of the Soviet government by the executive branch of our own government, the courts of this country must enforce titles and rights valid according to Russian law with respect to such property."[331] With respect to property outside Russia, however, the court considered itself bound to apply "the policy of New York,"[332] which declined to enforce "confiscatory decrees with respect to property located [in the state] at the date of the decree."[333] Because the court considered Belmont's debt to the Russian corporation to be property located within New York, it refused to recognize the title of the confiscating government and hence that of the United States as its assignee.[334]

The Supreme Court reversed. Although the Court's opinion contains broad language, a careful reading of the opinion suggests that the decision rests primarily on the act of state doctrine, which was triggered by the President's recognition of the Soviet Union. The Court began its analysis by broadly stating that "[w]e do not pause to inquire whether in fact there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved."[335] Proponents of broad executive power understandably read this statement to mean that sole executive agreements necessarily trump contrary state law. This reading, however, would render the rest of the Court's opinion largely superfluous. By contrast, reading the Court's statement in light of the rest of its opinion suggests that the preemptive power of "the international compact here involved" stemmed not from the mere fact of the agreement, but from the President's underlying recognition of the Soviet Union. According to the Court, "[t]he recognition, establishment of dip-

[330] United States v. Belmont, 85 F.2d 542, 543 (2d Cir. 1936).
[331] Id.
[332] Id. at 544.
[333] Id. at 543.
[334] Id. at 543–44.
[335] *Belmont*, 301 U.S. at 327.

lomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments."[336] Thus, "the international compact here involved" preempted state law because it included *recognition* of the Soviet Union, which in turn triggered the act of state doctrine. That doctrine—rather than the agreement itself—validated the Soviet Union's decrees "without regard to state laws or policies."[337]

The Court's opinion supports this reading. Immediately after stating that "no state policy can prevail against the international compact here involved," the Court undertook an extended discussion of the act of state doctrine. The Court began by reciting the general principal "that every sovereign state must recognize the independence of every other sovereign state; and that the courts of one will not sit in judgment upon the acts of the government of another, done within its own territory."[338] The Court then discussed its prior act of state doctrine precedents at some length and even described a decision of the English Court of Appeal.[339] Having recounted the doctrine in detail, the Court next proceeded to "take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet Government."[340] The Court explained that "the effect of this [recognition] was to validate, so far as this country is concerned, all acts of the Soviet Government here involved."[341] In other words, the Court made clear that recognition triggered the application of the act of state doctrine—the principle that "the courts of one [country] will not sit in judgment upon the acts of the government of another, done within its own territory."[342]

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[336] Id. at 330.

[337] Id. at 331.

[338] Id. at 327.

[339] See id. at 327–30 (citing Underhill v. Hernandez, 168 U.S. 250 (1897); Oetjen v. Cent. Leather Co., 246 U.S. 297 (1918); Ricaud v. Am. Metal Co., 246 U.S. 304 (1918); A.M. Luther v. James Sagor & Co., L.R., (1921) 3 K.B. 532 (U.K.)).

[340] Id. at 330.

[341] Id.

[342] Id. at 327 (citing *Underhill*, 168 U.S. 250; *Oetjen,* 246 U.S. 297). Professor Joseph Dellapenna characterizes *Belmont* and *Pink* as "the first divided opinions in the Supreme Court concerning the act of state doctrine." Joseph W. Dellapenna, Deciphering the Act of State Doctrine, 35 Vill. L. Rev. 1, 18 (1990). He describes *Belmont* as a brief opinion "holding that the act of state doctrine, as federal law, displaced any in-

Notwithstanding such language, Professor Michael Ramsey has suggested that the act of state doctrine was inapplicable to the Court's decision in *Belmont*. Ramsey acknowledges that "the initial portion of the [*Belmont*] opinion discusses the so-called 'act of state' doctrine," but concludes that the doctrine "does not appear relevant to any issue raised in the case."[343] Ramsey recognizes that, under the act of state doctrine, "a nationalization occurring wholly within the Soviet Union would have been recognized in New York."[344] In his view, however, the doctrine was not relevant in *Belmont* because "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" the protection of the act of state doctrine.[345]

Professor Ramsey's analysis is questionable. As he acknowledges, the Supreme Court itself seemed to think that the act of state doctrine was relevant to its disposition since it discussed the doctrine at some length and purported to apply it to the case.[346] More fundamentally, Ramsey erroneously assumes that the property to which the act of state doctrine applied in *Belmont* consisted of the *assets* of the Russian corporations (located in New York), rather than the Russian *corporations* themselves (located in Russia). The Second Circuit seemed to make the same mistake by stressing that "the situs of the bank deposit was within the state of New York; [and] that in no sense could it be regarded as an intangible property right within Soviet territory."[347]

consistent state policy." Id. at 19. Consistent with earlier act of state decisions, *Belmont* held that "recognition of the Soviet Government retroactively validated the acts of that government for American courts." Id.

[343] Ramsey, supra note 1, at 147 n.52; see also Michael D. Ramsey, The Constitution's Text in Foreign Affairs 295–99 (2007) (arguing that *Belmont* was wrongly decided).

[344] Ramsey, supra note 1, at 147 n.52.

[345] Id. Professor Ramsey is not alone in his assessment. Chief Justice Stone made similar observations in his dissent in *Pink*. See infra note 377; cf. Dellapenna, supra note 342, at 19 (suggesting that *Belmont* effectively extended the act of state doctrine to "a nationalization of property owned by nationals of the nationalizing state even when that property was within the United States").

[346] See *Belmont*, 301 U.S. at 327–30.

[347] Id. at 327 (summarizing the analysis of the Court of Appeals below). Justice Stone appears to have made a similar assumption. See id. at 333 (Stone, J., concurring) (stating that there is "no question of reexamining the validity of acts of a foreign state"); id. at 334 ("The chose in action is so far within the control of the state as to be

The Supreme Court, however, did not regard the situs of the debt (New York) as determinative of the application of the act of state doctrine. Rather, the Court seemed to apply the doctrine based on the situs of the Russian corporation (Russia). Sidestepping the situs of the debt question, the Court simply declared that "[w]hat another country has done in the way of taking over property of its nationals, *and especially of its corporations*, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."[348]

This statement suggests that the Court understood the act of state doctrine to apply not on the basis of the situs of the debt, but on the basis of the situs of the Russian corporation. In this regard, it is important to recall that the Soviet Union nationalized not just the property of the corporation, but the corporation itself. Prior to the Soviet decrees, the corporation had the right under New York law to demand its bank deposit from Belmont. In *Belmont*, the Court simply held that, following the decrees, the "substantive right to the moneys . . . became vested in the Soviet Government *as the successor to the corporation*."[349] Because the Soviet Union assigned all its claims to the United States, New York law could reject the United States's demand for the money only by denying the validity of the Soviet Union's act of nationalizing the Russian corporation. This, according to *Belmont*, would violate the act of state doctrine because the relevant act of the Russian government was "done within its own territory."[350]

Well-accepted conceptions of the corporation support the *Belmont* Court's assumption that the legal situs of the Russian corporation remained at all times in Russia. The Court has long recognized that a "corporation is an artificial being, invisible, intangible,

regarded as located there for many purposes."); see also Philip C. Jessup, The Litvinov Assignment and the Belmont Case, 31 Am. J. Int'l L. 481, 482 (1937) ("In the Belmont case, . . . the *res* was a debt which the Soviet Government had not even attempted to reduce to possession.").

[348] *Belmont*, 301 U.S. at 332 (majority opinion) (emphasis added); see Jessup, supra note 347, at 482 (stating that the Court apparently considered the situs of the debt to be immaterial).

[349] *Belmont*, 301 U.S. at 322 (emphasis added).

[350] Id. at 327.

and existing only in contemplation of law."[351] In order to apply the act of state doctrine, the Court did not need to conclude that a "corporation can have no legal existence out of the boundaries of the sovereignty by which it is created."[352] Rather, it was sufficient that the sovereign of the corporation's place of incorporation (the Soviet Union) retained jurisdiction to regulate and define the corporation's "very existence and attributes."[353] In this case, the Soviet Union's act of decreeing itself to be "the successor to the corporation" at issue[354] "necessarily occurred in its place of incorporation, the Soviet Union."[355] On this assumption, the act of state doctrine precluded courts (after the President's recognition of the Soviet Union) from questioning the validity of that decree as applied to ownership of the corporation.[356] In other words, under the act of state doctrine, U.S. courts were required to recognize the Soviet Union "as the successor to the corporation" and to permit it or its assignee (the United States) to recover the corporation's assets (wherever located) on the same terms as the original corporation.

From this perspective, the existence of a sole executive agreement with the Soviet Union had no independent legal significance to the disposition of the case. The key to understanding the Court's decision in *Belmont* was the President's underlying recognition of the Soviet Union, which had the effect of retroactively validating all acts of the Soviet Union taken within its own territory—including its nationalization of Petrograd Metal Works in 1918. As the legal successor to the corporation, the Soviet Union had the right to recover the funds that the company had deposited with Belmont in New York and thus was entitled to assign that right to the United States (whether as part of an international agreement

[351] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

[352] Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

[353] CTS Corp. v. Dynamics Corp., 481 U.S. 69, 89 (1987); see State Tax Comm. v. Aldrich, 316 U.S. 174, 180 (1942) (stating that a Utah "corporation owes its existence to Utah" and holding that "Utah has power over the transfer by the corporation of its shares of stock").

[354] *Belmont*, 301 U.S. at 332.

[355] Clark, supra note 24, at 1447; see *CTS Corp.*, 481 U.S. at 89 (stating that corporations are "entities whose very existence and attributes are a product of state law").

[356] The Court stressed that "only the rights of the Russian corporation have been affected by what has been done" and reserved consideration of "the rights of our nationals [until] when, if ever, by proper judicial proceeding, it shall be made to appear that they are so affected as to entitle them to judicial relief." *Belmont*, 301 U.S. at 332.

or otherwise). An American court could dismiss the complaint only by failing to recognize the validity of the Soviet Union's nationalization decree. As discussed, such a failure would violate the act of state doctrine. Thus, the *Belmont* Court had no need to decide whether sole executive agreements in and of themselves qualify as "the supreme Law of the Land." Rather, *Belmont* held only that the Litvinov Assignment—as part of a broader agreement that included recognition of the Soviet Union—triggered preemption under the act of state doctrine.[357]

B. Pink

Just five years after *Belmont*, in *Pink*, the Supreme Court again confronted state resistance to the same Soviet decrees. The First Russian Insurance Company was incorporated under the laws of the former Empire of Russia and opened a New York branch in 1907.[358] Pursuant to New York law, the company deposited assets with the Superintendent of Insurance to secure the payment of claims resulting from the operations of its New York branch.[359] Although the Soviet Union nationalized all Russian insurance companies (including First Russian) in 1918 and 1919, the New York branch continued to do business until 1925, when the Superintendent of Insurance took possession of its assets pursuant to a court order.[360] The Superintendent paid all claims of domestic creditors arising out of the business of the New York branch and had a surplus of more than one million dollars on hand.[361] In 1931, the New York Court of Appeals directed the Superintendent to dispose of the balance by first paying certain claims of foreign creditors and then paying any surplus to a quorum of the board of directors of the company.[362]

Before the assets were distributed, President Roosevelt recognized the Soviet Union and that government assigned its claims to

[357] See Clark, supra note 24, at 1445–48; Jessup, supra note 347, at 483 (stating that the Court's view on the effect of international agreements "does not appear to have been necessary to the decision").

[358] 315 U.S. 203, 210 (1942).

[359] Id.

[360] Id. at 210–11.

[361] Id. at 211.

[362] See People v. First Russian Ins. Co., 175 N.E. 114, 117 (N.Y. 1931).

the company's assets to the United States.[363] The United States brought suit in state court seeking an order awarding it all funds remaining in the Superintendent's possession.[364] The trial court dismissed the complaint as insufficient in law, and the New York Court of Appeals affirmed[365] largely on the basis of its earlier decision in an essentially similar case, *Moscow Fire Insurance Co. v. Bank of New York & Trust Co.*[366] There, the Court of Appeals held that property deposited with the state by the New York branch of a Russian insurance company "has always been in the custody of the State," and "[a]t no time could the insurance company or the Russian government have transferred it to Russia."[367] Accordingly, the property remained "subject exclusively to the laws of the State,"[368] and the United States as assignee had no greater right to the property than its assignor under state law. The Supreme Court affirmed the judgment in *Moscow Fire* by an equally divided vote.[369] In *Pink*, the Court reversed and stressed that it was not bound by the disposition in *Moscow Fire* because of "the lack of an agreement by a majority of the Court on the principles of law involved."[370]

Although *Pink* noted in passing that treaties and executive agreements "have a similar dignity,"[371] the Supreme Court's decision—as in *Belmont*—rested primarily on the legal effect of the President's recognition of the Soviet Union and the consequent application of the act of state doctrine. The Court began its analysis by stating that "the *Belmont* case is . . . determinative of the present controversy, unless the stake of the foreign creditors in this liquidation proceeding and the provision which New York has provided for their protection call for a different result."[372] The Court

[363] *Pink*, 315 U.S. at 212.
[364] Id. at 213.
[365] United States v. Pink, 32 N.E.2d 552, 552 (N.Y. 1940).
[366] 20 N.E.2d 758 (N.Y. 1939).
[367] Id.
[368] Id. at 768.
[369] United States v. Moscow Fire Ins. Co., 309 U.S. 624 (1940) (per curiam).
[370] *Pink*, 315 U.S. at 216.
[371] Id. at 230; see also id. at 230–31 (stating that "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement").
[372] Id. at 226; see also id. at 242 (Stone, C.J., dissenting) (stating that "my brethren are content to rest their decision on the authority of the dictum in *United States v. Belmont*"); Dellapenna, supra note 342, at 20 (stating that *Pink* "essentially retraced

held that New York could not elevate the claims of foreign creditors over those of the United States (as assignee of the Russian company's claim) without undermining the President's recognition of the Soviet Union and violating the act of state doctrine. Once the President recognized the Soviet Union, state courts were bound to accept the validity "of the nationalization program of the Soviet Government."[373] Under that program, "the right to the funds or property in question became vested in the Soviet Government as the successor to the First Russian Insurance Co.,"[374] and the Soviet Union was free to assign that right to the United States.

As in *Belmont*, the existence of an executive agreement had no independent legal significance. Rather, the agreement was simply the means by which the President recognized the Soviet Union and the Soviet Union assigned its claims to the United States. In essence, *Pink* held that the New York courts violated the act of state doctrine by refusing "to give effect or recognition in New York to acts of the Soviet Government which the United States by its policy of recognition agreed no longer to question."[375] *Pink* tied the requirement that states adhere to the act of state doctrine to the President's recognition power: "The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system."[376] Accordingly, the Court reversed, holding that the United States—as the Soviet Union's assignee—was entitled to the property at issue.[377]

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the reasoning of the *Belmont* decision"). The Court stressed that "all creditors whose claims arose out of dealings with the New York branch have been paid." *Pink*, 315 U.S. at 226 (majority opinion). Thus, the "contest here is between the United States and creditors of the Russian corporation who, we assume, are not citizens of this country and whose claims did not arise out of transactions with the New York branch." Id. at 227.

[373] Id. at 232.

[374] Id. at 234.

[375] Id. at 231.

[376] Id. at 233.

[377] Id. at 234. As in *Belmont*, the Court's application of the act of state doctrine rested on the assumption that the Soviet decrees transferred ownership of the Russian corporations in Russia. See supra notes 348–56 and accompanying text. Chief Justice Stone saw things differently. He acknowledged that "the Soviet decrees are the acts of the government of the Russian state, which is sovereign in its own territory, and that in consequence of our recognition of that government" U.S. courts may not inquire into the effect of such decrees on "property which was located in Russia at the time of

C. Preemption Under the Act of State Doctrine

At first glance, one might think that reliance on the act of state doctrine to limit *Belmont* and *Pink* is somewhat anachronistic because the Supreme Court did not make clear that the act of state doctrine applies as a matter of "federal judge-made law" until it decided *Sabbatino* in 1964.[378] In addition, one might object that, because adopted by judges, the act of state doctrine is itself in tension with the procedural safeguards built into the Supremacy Clause. Properly understood, however, the rule announced in *Sabbatino* is not the kind of federal common law that judges have discretion to adopt, revise, or reject as they see fit. Rather, the doctrine implements the allocation of powers over the conduct of foreign relations previously recognized in *Belmont* and *Pink* and inherent in the Constitution since the Founding. As the Court itself has acknowledged, the doctrine is "a consequence of domestic separation of powers"[379] because it ensures that "the political departments of our Government,"[380] rather than state or federal courts, exercise the sovereign prerogative to invalidate foreign acts of state. Because the act of state doctrine reflects "deep seated" "concept[s] of territorial sovereignty" shared by many nations, any decision to depart from the doctrine in order to invalidate confiscations by a foreign government taken within its own territory would "often be likely to give offense to the expropriating country."[381] Indeed, the Court has long stressed that departure from the act of state doctrine "'would very certainly imperil the amicable relations between governments and vex the peace of nations.'"[382] Under these circumstances, the Constitution requires that the political branches of the federal government—rather than federal or state courts—make the decision when, if ever, to abrogate the doctrine.[383]

their promulgation." *Pink*, 315 U.S. at 244 (Stone, C.J., dissenting). In his view, however, "the property to which the New York judgment relates has at all relevant times been in New York." Id. at 245.

[378] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

[379] W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990).

[380] Ricaud v. Am. Metal Co., 246 U.S. 304, 310 (1918).

[381] *Sabbatino*, 376 U.S. at 432.

[382] Id. at 417–18 (quoting Oetjen v. Cent. Leather Co., 246 U.S. 297, 303–04 (1918)).

[383] See Clark, supra note 117, at 1300–06.

Traditionally, courts adhered to principles like the act of state doctrine out of respect for notions of territorial sovereignty under the law of nations.[384] Courts often applied these principles in cases arising within the federal courts' exclusive admiralty jurisdiction. For example, in 1822, the Supreme Court explained that the courts of one country will not inquire into the means by which another acquired title to property because any such inquiry "would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy."[385] According to the Court, this doctrine reflects "the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns."[386]

Since the early days of the republic, the Supreme Court has adhered to such rules on the ground that the Constitution assigns responsibility for taking action that could endanger the "peace and repose" of nations to Congress and the President rather than to state and federal courts. For example, in 1812, the Court held that admiralty courts could not adjudicate a claim to recover a French warship found within U.S. territorial waters, which the plaintiff alleged to have been "violently and forcibly" taken from its rightful owner in violation of the law of nations by persons "acting under the decrees and orders" of the French Emperor Napoleon.[387] In reaching this conclusion, the Court relied both on principles derived from the law of nations and on the constitutional allocation of powers over foreign affairs. According to the Court, "the questions to which [wrongs committed by a foreign sovereign] give birth are rather questions of policy than of law," and accordingly "are for diplomatic, rather than legal discussion."[388]

Similarly, in 1815, the Court reiterated that determining whether and how to retaliate against a foreign sovereign for "its unjust pro-

[384] See id. at 1300–04.
[385] The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 336 (1822).
[386] Id.
[387] See The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 117 (1812).
[388] Id. at 146.

ceedings towards our citizens, is a political not a legal measure."[389] Chief Justice Marshall elaborated the point:

> It is for the consideration of the government not of its Courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its Courts to interfere with the proceedings of the nation and to thwart its views.[390]

Marshall's distinction between the government and its courts foreshadowed the Court's subsequent invocation of the constitutional separation of powers in act of state cases. For example, in supporting the doctrine in *Oetjen v. Central Leather Co.*, the Court noted that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government."[391] Similarly, in *Sabbatino*, the Court suggested that the judicial obligation to apply the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers."[392]

Prior to *Erie Railroad Co. v. Tompkins*,[393] federal and state courts appear to have applied the act of state doctrine as part of the general law of nations and had no real need to characterize the doctrine as either federal or state law.[394] After *Erie*, questions arose as to whether state courts were free to depart from the act of state doctrine and whether federal courts sitting in diversity were bound to follow their decisions.[395] In *Sabbatino*, the Supreme Court answered this question directly by stating that it "seems fair to assume that the Court did not have rules like the act of state doctrine

[389] The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815).
[390] Id.
[391] 246 U.S. 297, 302 (1918).
[392] 376 U.S. at 423.
[393] 304 U.S. 64 (1938).
[394] See *Sabbatino*, 376 U.S. at 426 (noting that the Court "in the pre-*Erie* act of state cases" was "not burdened with the problem of the source of applicable law"); Clark, supra note 117, at 1279–85.
[395] See, e.g., Philip C. Jessup, The Doctrine of *Erie Railroad v. Tompkins* Applied to International Law, 33 Am. J. Int'l L. 740 (1939).

in mind when it decided *Erie*."[396] According to *Sabbatino*, "the scope of the act of state doctrine must be determined according to federal law,"[397] and state courts are not free to narrow "the apparent scope of the rule."[398] The Court, however, offered little in the way of explanation for federalizing the doctrine. The Court was essentially content to assert "that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[399]

There is a more complete explanation—consistent with *Sabbatino* and the Supremacy Clause—for why the act of state doctrine overrides contrary state law. Under the Constitution, the President has the power to "receive Ambassadors and other public Ministers,"[400] and this power is generally thought to confer power to recognize foreign governments.[401] Recognition acknowledges on behalf of the United States that a foreign state is entitled to all the rights traditionally associated with sovereign states, including sovereignty within its own territory.[402] The act of state doctrine implements recognition by upholding this sovereignty. Notably, the act

[396] *Sabbatino*, 376 U.S. at 425.

[397] Id. at 427.

[398] Id. at 424.

[399] Id. at 425.

[400] U.S. Const. art. II, § 3.

[401] See Restatement (Third) of Foreign Relations Law of the United States § 204 cmt. a (1986) (stating that the President's power to recognize foreign governments "is implied in the President's express constitutional power to appoint Ambassadors (Article II, Section 2) and to receive Ambassadors (Article II, Section 3)"); Nzelibe, supra note 94, at 959 ("Although the constitutional text does not explicitly address the President's power to recognize foreign governments, courts have routinely held that such authority is implicit in the President's Article II power to appoint and receive Ambassadors."); see also *Sabbatino*, 376 U.S. at 410 ("Political recognition is exclusively a function of the executive."). But see Prakash & Ramsey, supra note 294, at 316 ("Just because one can greet messengers, it does not logically follow that one can decide which messengers to receive and whether one will receive messages or messengers only from particular countries or governments.").

[402] See The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (reciting the traditional principle, derived from the law of nations, that "[t]he jurisdiction of [every] nation within its own territory is necessarily exclusive and absolute"); Restatement (Third) of Foreign Relations Law of the United States § 206 (1987) (defining the rights of a state under international law to include "sovereignty over its territory and general authority over its nationals").

of state doctrine applies only to the acts of a *recognized* foreign government taken within its own territory.[403] Once it attaches, the doctrine prevents federal and state courts alike from second-guessing the validity of such acts. A judicial decision denying the validity of such acts would not only interfere with a foreign state's sovereignty, but also undermine the President's recognition of the foreign government as sovereign within its own territory. To the extent that the President's recognition power is conferred by the Constitution and the act of state doctrine implements that power, the Supremacy Clause requires state and federal courts alike to apply the doctrine.

This explanation is also consistent with *Belmont* and *Pink*. Both opinions emphasized recognition and the act of state doctrine, and *Pink* actually described the act of state doctrine as necessary to implement the President's recognition of the Soviet Union. According to the Court, New York's policy refused "to give effect or recognition in New York to acts of the Soviet Government which the United States by its policy of recognition agreed no longer to question."[404] In other words, the *Pink* Court thought that New York's actions amounted "in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia."[405] According to the Court, "[s]uch power is not accorded a State in our constitutional system."[406] From this perspective, *Belmont* and *Pink* properly applied the act of state doctrine under the Supremacy Clause and arguably supplied a more comprehensive explanation than *Sabbatino* as to why the doctrine effectively functions as part of "the supreme Law of the Land."

D. Garamendi

In *American Insurance Association v. Garamendi*, the Supreme Court repeatedly cited *Belmont* and *Pink* in support of its expansive view that "valid executive agreements are [generally] fit to

[403] See *Sabbatino*, 376 U.S. at 401 ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.").

[404] *Pink*, 315 U.S. at 231.

[405] Id. at 233.

[406] Id.

preempt state law."[407] Properly understood, however, *Belmont* and *Pink* provide no real support for *Garamendi*'s assumption that sole executive agreements—of their own force—override preexisting rights under state and federal law. *Garamendi* did not involve presidential recognition of a foreign government and did not purport to apply the act of state doctrine to preempt California's Holocaust Victim Protection Act. For several reasons, the act of state doctrine is inapplicable.

First, to the extent that the challenged acts were those of private German insurance companies, rather than those of the German government itself, the act of state doctrine would not apply. As the Court has made clear, the doctrine only "precludes the courts . . . from inquiring into the validity of the *public acts a recognized foreign sovereign power* committed within its own territory."[408] The acts of German citizens and corporations do not qualify for protection under the act of state doctrine.

Second, even assuming that the Nazi government's actions prevented Holocaust victims from collecting insurance proceeds,[409] the act of state doctrine still might not apply because "the government which perpetrated the challenged act of state is no longer in existence."[410] Indeed, the Court was careful in *Sabbatino* to hold only that the judiciary "will not examine the validity of a taking of property within its own territory by a foreign sovereign government, *extant and recognized by this country at the time of suit*."[411] Thus, unlike *Belmont* and *Pink*, *Garamendi* could not tie preemption to the act of state doctrine. Instead, the Court asserted that preemption follows from the independent legal force of the President's sole executive agreement. Thus, contrary to the Court's assertion in *Garamendi*, *Belmont* and *Pink* do not establish the proposition that sole executive agreements are generally fit to pre-

[407] 539 U.S. 396, 416 (2003).

[408] *Sabbatino*, 376 U.S. at 401 (emphasis added).

[409] See *Garamendi*, 539 U.S. at 402 (discussing the Nazi government's role in confiscating life insurance policies owned by Jews).

[410] *Sabbatino*, 376 U.S. at 428.

[411] Id. (emphasis added). Presumably, the act of state doctrine would shield the post-war acts of the Federal Republic of Germany from judicial scrutiny. That government—extant and continuously recognized by the United States—administered much of the post-war reparations process and passed legislation to that end beginning in the 1950s. See *Garamendi*, 539 U.S. at 404–05.

empt state law. Rather, understood in their full legal and historical context, *Belmont* and *Pink* stand for the quite different proposition that presidential recognition of a foreign government triggers the act of state doctrine, and that doctrine preempts state law.

IV. REASSESSING SOLE EXECUTIVE AGREEMENTS

In the end, the Supreme Court's modern view concerning the domestic legal effect of sole executive agreements has remarkably little support. As discussed, the checks and balances built into the constitutional structure cut against treating such agreements as "the supreme Law of the Land."[412] The Supremacy Clause recognizes only the "Constitution," "Laws," and "Treaties" of the United States as the supreme law of the land. Significantly, each of these sources of law must be adopted according to exclusive procedures that call for the Senate to act in conjunction with one or more additional actors. Recognizing unilateral presidential authority to make sole executive agreements with the force of federal law would circumvent the Constitution's carefully crafted safeguards and the exclusivity of federal lawmaking procedures. As the Court recognized in *Immigration and Naturalization Service v. Chadha*, "the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[413] In addition, allowing sole executive agreements to override rights under existing federal law is problematic because "[a]mendment and repeal of statutes, no less than enactment, must conform with Art. I."[414]

The Supreme Court's attempt to ground its expansive view of presidential power in various historical and judicial precedents is unavailing. The President's pre-1977 practice of settling claims of U.S. nationals against foreign nations dealt with claims barred by foreign sovereign immunity. Settling such claims in the course of conducting foreign relations did not interfere with recovery under

[412] See supra Section I.B.

[413] 462 U.S. 919, 951 (1983).

[414] Id. at 954; see also Clinton v. City of N.Y., 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.").

state or federal law.[415] Rather, consistent with the executive tradition of espousal, presidential settlement of claims against foreign sovereigns actually provided a means of partially satisfying claims otherwise barred by foreign sovereign immunity. Similarly, although *Belmont* and *Pink* upheld the Litvinov Assignment, these decisions turned more on the President's recognition of the Soviet Union and the application of the act of state doctrine than on the existence of an executive agreement.[416] In endorsing a broad, free-standing presidential power to settle claims against foreign nations (and corporations) over the objection of U.S. claimants, the *Garamendi* Court has essentially taken these historical and judicial precedents out of context.

In light of the foregoing, courts should uphold sole executive agreements purporting to alter preexisting legal rights only when the President has independent constitutional or statutory authority to do so. The mere fact of an agreement itself does not confer any power on the President; it is simply a means by which the President may exercise his independent constitutional and statutory authority. For example, the President's historical practice of settling claims on behalf of U.S. nationals was not contingent on the existence of a formal agreement. In conducting foreign relations, the President could encourage foreign states to settle outstanding claims in order to remove a source of friction between nations. A foreign state could settle such claims by executing a formal agreement with the President, or it could simply pay such claims on terms generally acceptable to the United States. In either case, the President's efforts to encourage such settlements were supported by his constitutional power to receive ambassadors and communicate with foreign nations on behalf of the United States.[417] The presence or absence of an agreement neither added to nor subtracted from the President's power to seek such settlements.

Similarly, an executive agreement was not necessary to enforce the underlying components of the Litvinov Agreement with the Soviet Union. The President has independent constitutional power

[415] See supra notes 252–83 and accompanying text.

[416] See supra notes 315–77 and accompanying text.

[417] The President, of course, has the power to send and receive ambassadors, U.S. Const. art. II, § 3, and that power necessarily includes the power to communicate with a foreign state regarding its relations with the United States.

to recognize foreign governments and thus could have recognized the Soviet Union unilaterally. Likewise, the Soviet Union was free to assign its claims against U.S. nationals to the United States following recognition. The Supreme Court's decisions upholding these assignments did not depend on the existence of a sole executive agreement. Rather, these decisions were compelled by the President's recognition of the Soviet Union, which, in turn, triggered the act of state doctrine. That doctrine—not the existence of an executive agreement—prevented courts from questioning the validity of the Soviet Union's confiscation of Russian corporations and its right to recover their property. Thus, properly understood, *Belmont* and *Pink* rest on the President's constitutional power to recognize foreign governments, rather than on any independent power to make sole executive agreements with the force of federal law.

Dames & Moore v. Regan came closest to recognizing at least some presidential power to use sole executive agreements to alter preexisting legal rights.[418] Even there, however, the Court's decision seems to rest more on congressional acquiescence and executive power to resolve "a major foreign policy dispute" than on any free-standing presidential power to make executive agreements with the force of federal law. That is why the Court went out of its way to stress the narrowness of its decision and to declare that it did "not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities."[419] The Algiers Accords were simply the means by which the President exercised whatever constitutional and statutory power he possessed to resolve the Iranian hostage crisis.

Garamendi, by contrast, seems to endorse an open-ended presidential power to make sole executive agreements with the force and effect of treaties.[420] Such a power, however, sweeps far too broadly and runs counter to the constitutional structure. The Con-

[418] See supra notes 156–83 and accompanying text.

[419] Dames & Moore v. Regan, 453 U.S. 654, 688 (1981).

[420] The Court did note, however, that sole executive agreements are subject "to the Constitution's guarantees of individual rights." *Garamendi*, 539 U.S. at 416 n.9. The Court did not explain why such agreements are not also subject to other constitutional constraints, such as the negative implication of the Supremacy Clause that state law continues to govern unless it conflicts with the "Constitution," "Laws," or "Treaties" of the United States. See U.S. Const. art. VI, cl. 2.

stitution does not expressly grant the President power to make sole executive agreements. If such power exists, it is implicit in—and thus bounded by—other presidential powers. This makes *Garamendi* a difficult case. The Court attempted to support the Foundation Agreement on the basis of the President's historical practice of settling claims by U.S. nationals against foreign sovereigns. As discussed, however, this practice does not support recognizing unilateral presidential power to settle claims now expressly permitted by the Foreign Sovereign Immunities Act. Moreover, the historical practice provides no support whatsoever for the Court's novel recognition of presidential power to settle claims against foreign *corporations* as opposed to foreign *states*.[421] The Court attempted to bridge this gap by falling back on the President's "'vast share of responsibility for the conduct of our foreign relations.'"[422] According to the Court, such power supports sole executive agreements in general as well as a more specific presidential power to settle the claims of U.S. nationals against foreign corporations as part of the President's power to settle "international controversies."[423]

Such general reliance on the President's foreign affairs powers proves too much. If the *Garamendi* Court actually meant to recognize an independent presidential power to resolve "international controversies," then it gave the President ready means to circumvent traditional limits on the scope of his constitutional authority. Consider, for example, how *Garamendi*'s approach might have altered the outcome in *Youngstown Sheet & Tube Co. v. Sawyer*, which of course held that the President lacked inherent Article II authority to seize the nation's steel mills in order to ensure the successful prosecution of the Korean conflict.[424] There, the Court in-

[421] See Wuerth, supra note 27, at 1 (noting that the sole executive agreement upheld in *Garamendi* marks "an important departure from prior practice by resolving pending U.S. litigation against private companies rather than claims against foreign sovereigns"); id. at 19–20 (concluding that "there is neither a long-standing history of executive branch settlement of claims against private parties, nor any other indicia of Congressional approval of such practice").

[422] See *Garamendi*, 539 U.S. at 414 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

[423] Id. at 416 ("While a sharp line between public and private acts works for many purposes in the domestic law, insisting on the same line in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies.").

[424] *Youngstown*, 343 U.S. at 579.

validated the President's unilateral attempt to prevent a wartime strike by seizing and operating private steel mills. Although the Justices offered several rationales, all recognized the need to check unilateral presidential power over preexisting legal rights even when exercised in the name of military necessity. As Justice Black explained on behalf of the Court, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[425] Similarly, Justice Jackson found "indications that the Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants."[426] And in the same vein, Justice Douglas wrote that the Court "could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some. Such a step would most assuredly alter the pattern of the Constitution."[427]

Under *Garamendi*'s expansive view of sole executive agreements, *Youngstown* might have come out differently if President Truman had simply entered into an agreement with South Korea to seize the steel mills and keep them operating for the duration of the conflict. If the President has inherent Article II power to make executive agreements with the force of federal law, then a presidential agreement would have sufficed to authorize the President's seizure of domestic steel mills. In addition, assuming that South Korea objected to the shutdown of U.S. steel mills, *Garamendi* further suggests that the *Youngstown* Court could have upheld the executive seizures simply in order to avoid "hamstring[ing] the President in settling international controversies."[428] The *Youngstown* majority would have been surprised, to say the least, by this result. Their view was that the Constitution does not grant the President unilateral power to seize and dispose of private property

[425] Id. at 587.

[426] Id. at 643–44 (Jackson, J., concurring); see also id. at 655 ("With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.").

[427] Id. at 633 (Douglas, J., concurring).

[428] *Garamendi*, 539 U.S. at 416.

and to command would-be strikers to work, even when he believes that such actions are necessary to conduct foreign relations or to support ongoing military operations.[429] Overturning this view would grant the President vast new unchecked power at odds with the Constitution's design.

Restricting sole executive agreements to matters that fall within the President's independent powers would avoid these difficulties. This approach would also help to distinguish sole executive agreements from treaties, at least for purposes of domestic law. After surveying the Supreme Court's pre-*Garamendi* decisions, for example, Professor Louis Henkin concluded that "[a]t least some sole executive agreements . . . can be self-executing and have some status as law of the land."[430] Like treaties, he reasoned, "a self-executing executive agreement would surely lose its effect as domestic law in the face of an inconsistent subsequent act of Congress."[431] On the other hand, Henkin acknowledged that the "issue remains unresolved" whether a sole executive agreement—like a treaty—can prevail against an *earlier* act of Congress. He suggested that it might if "one accepts Presidential primacy in foreign affairs in relation to Congress" and if "one grants the President some legislative authority in foreign affairs."[432] Permitting sole executive agreements to supersede federal statutes, however, not only contradicts the Supremacy Clause and the exclusivity of federal lawmaking procedures, but also transfers vast lawmaking authority to

[429] See Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–79 (1804) (holding that the President lacked authority to expand the reach of a federal statute authorizing certain seizures on the high seas); Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 24 (1993) (explaining that the Supreme Court "has steadfastly held that the President lacks authority to act *contra legem*, even in an emergency").

[430] Henkin, supra note 41, at 228.

[431] Id.; see Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam) (noting that the Supreme Court has held for more than a century that "an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null" (quotation marks and citations omitted)). See generally Julian G. Ku, Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes, 80 Ind. L.J. 319 (2005) (observing that courts have applied the "last-in-time" rule for nearly 150 years to resolve conflicts between treaties and federal statutes).

[432] Henkin, supra note 41, at 228.

the President at a time when domestic matters increasingly implicate foreign relations.[433]

Denying sole executive agreements independent legal force does not, of course, mean that the President cannot use such agreements to facilitate the exercise of his constitutional or statutory authority. Examples might include agreements to recognize a foreign government, to pardon a foreign national, or to conduct military exercises with a foreign power. In this regard, President Carter's executive agreement promising to transfer frozen Iranian assets to Iran was constitutionally permissible. President Carter's power to bring about the transfer came not from his agreement with Iran, but from a federal statute.[434] At first blush, sole executive agreements of this kind may appear—by virtue of the President's exercise of his underlying powers—to have the force of federal law. In fact, their force comes from constitutional and statutory authority external to such agreements. Of course, as a practical matter, the President may make sole executive agreements that exceed his constitutional and statutory authority. The Constitution, however, does not require courts to recognize such agreements as "the supreme Law of the Land."

[433] International conventions now cover a number of matters traditionally governed exclusively by domestic law. See Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195.

[434] See *Dames & Moore*, 453 U.S. at 675 (concluding that "the IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets"). Thus, the President unquestionably had authority to order the transfer of frozen Iranian assets. Where the Court strained was in concluding that the President's power extended to suspending American citizens' otherwise valid tort or commercial law claims against Iran—claims that did not involve any particular piece of Iranian property and were therefore beyond the scope of the IEEPA. See id.

CONCLUSION

At a time when many question the wisdom and constitutionality of unchecked executive power in foreign affairs, the Supreme Court has recently endorsed broad presidential power to make "sole executive agreements" capable of altering the legal rights and duties of American citizens without the approval of either House of Congress. Although Presidents have long used sole executive agreements to facilitate the exercise of their independent powers, the Court has now broadly asserted that such agreements are generally "fit to preempt state law, just as treaties are."[435] Viewing sole executive agreements as interchangeable with treaties raises concerns under both the Treaty Clause and the Supremacy Clause. Although the line between permissible executive agreements and matters exclusively within the Treaty Clause has long proved elusive, the Supremacy Clause provides judicially manageable standards for distinguishing agreements from treaties for purposes of domestic law. The Supremacy Clause recognizes only three sources of law—the "Constitution," "Laws," and "Treaties"—as "the supreme Law of the Land" and incorporates precise procedures governing their adoption. Unless a sole executive agreement is adopted as a "Treaty" or as a "Law" using these procedures, the Supremacy Clause does not recognize it as a basis for overriding existing law. Accepting the Court's contrary suggestion would not only contradict the constitutional structure, but would also recognize new, unchecked executive power at a time when many think the modern President is already too powerful.

[435] *Garamendi*, 539 U.S. at 416.