

INTERNATIONAL LAW AND THE DOMESTIC SEPARATION OF POWERS

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INTRODUCTION

CONSIDER three notable recent assertions of the President’s foreign affairs powers. First, in 2011, President Obama ordered U.S. armed forces to attack Libya without any authorization from Congress.¹ Second, in a case before the Supreme Court in the spring of 2012, the Obama Administration refused to enforce a congressional statute involving the contents of U.S. passports on the ground that this statute intruded on the President’s “exclusive” power to recognize foreign nations.² Third, at various points in 2011 and 2012, the Obama Administration has claimed that it can ratify an important international agreement on intellectual property without any clear authorization from Congress or the Senate.³

These examples involve three very different areas of foreign relations law—war powers, recognition, and treaty-making. Yet they have much in common. All raise constitutional questions of the separation of powers between Congress and the President. All showcase aggressive assertions of presidential power to act either in the absence of congressional legislation or in defiance of it. And all are defended by their supporters

¹ See Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to Eric Holder, Attorney Gen., Authority to Use Military Force in Libya (Apr. 1, 2011) [hereinafter *Libya Memorandum*], available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

² Brief for Respondent at 13, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699).

³ Fact Sheet, Office of the U.S. Trade Representative, ACTA: Meeting U.S. Objectives (Oct. 2011), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/september/acta-meeting-us-objectives> [hereinafter USTR Fact Sheet]; Letter from Ambassador Ron Kirk, U.S. Trade Representative, to Senator Ron Wyden (Dec. 7, 2011), available at <http://infojustice.org/wp-content/uploads/2012/01/Kirk-12072011.pdf>; Letter from Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, to Senator Ron Wyden (Mar. 6, 2012), available at <http://infojustice.org/wp-content/uploads/2012/03/84365507-State-Department-Response-to-Wyden-on-ACTA.pdf>.

not so much based on the Constitution's text, but rather based on past practice.

One other similarity is that these examples all relate to questions of international law. The Libya intervention raised international legal questions regarding the use of force; the power at issue in the passport case is the power to accord recognition as a matter of international law to foreign nations; and the intellectual property agreement would create international legal obligations for the United States. But those focused on the separation of powers would be forgiven for letting this similarity pass unnoticed. In the briefs, legal opinions, and academic commentary relating to these three examples of expansive presidential power, international law is mentioned at most only in passing.⁴ The relevant law—the interpretation of the Constitution—is taken to be a purely domestic matter.

These examples thus reveal the absence of international law from the interpretive principles used today to determine the constitutional separation of powers.⁵ While international law can be an input for *other* principles of interpretation—for example, textualists might look to international law in determining the meaning of the phrase “declare war” in Article I, Section 8—constitutional actors and commentators today do not treat international law as a direct principle of constitutional interpretation in the separation of powers context. This absence should not be surprising if constitutional interpretation is a purely domestic matter, and there are many who think it should be. Justices Scalia and Thomas, for example, treat international law as “irrelevant to the meaning of our Constitution,” and their belief is shared by numerous members of Congress and distinguished legal scholars.⁶ What is surprising, however, is

⁴ See *infra* Part IV.

⁵ A few notes on terminology. First, my focus on this Article is on the separation of powers between the President and Congress in the foreign affairs context. Nonetheless, for shorthand I often use the broader term “separation of powers” rather than the more precise “separation of foreign affairs powers.” Second, I use the term “international law” in its usual sense of encompassing both customary international law and treaties. From my examination, of the two forms of international law, however, customary international law has mattered more as a principle of constitutional interpretation. Third, I use the term “constitutional actors” throughout to refer to members of the three branches of the federal government who play a role in deciding what acts are constitutional.

⁶ *Graham v. Florida*, 130 S. Ct. 2011, 2053 n.12 (2010) (Thomas, J., dissenting); see also, e.g., H.R. 973, 112th Cong. (2011) (bill introduced in the House with about fifty co-sponsors that would limit federal courts' use of foreign law); S. Res. 92, 109th Cong. (2005) (proposed resolution introduced in the Senate expressing the sense that the use of foreign law in constitutional interpretation is appropriate only if it informs the “original meaning” of the

that even those who consider international law to be a guiding principle in other areas of constitutional interpretation do not seem to see it as similarly important to the separation of powers. While they defend international law as an interpretive principle for most aspects of constitutional law—the territorial reach of the Constitution, the scope of the federal government’s powers, principles of federalism, and individual rights—they do not describe it as similarly relevant to the separation of powers.⁷ In other words, regardless of the role that international law plays in other areas of constitutional interpretation, its bearing on the separation of powers is limited.

It was not always this way. As this Article will show, international law historically played a direct and important role in shaping the constitutional separation of powers between Congress and the President. This role has been largely overlooked by contemporary scholarship because this scholarship tends to focus on constitutional interpretation by the *courts*, particularly the Supreme Court. The separation of foreign affairs powers between Congress and the President, however, has mostly been determined *outside the courts*, by the actions and inactions of the political branches. As it turns out, historically both political branches have relied on international law as an interpretive principle for determining the boundaries of their constitutional powers.

Importantly, the role that international law has played in the separation of powers has not been a neutral one. *Instead, constitutional actors have typically relied on international law in ways that have strengthened the powers of the President vis-à-vis Congress.* Along with using international law as an input for other interpretive principles, constitutional actors have relied on international law in two main ways. First, they have sometimes used international law as a principle that directly guides constitutional interpretation. Nineteenth-century proponents of the President’s sole power to recognize foreign nations, for example, asserted that international law only recognized the pronouncements of executive

Constitution); see also academic sources cited *infra* note 19. These objections are typically applied to both comparative and international law, are often combined under the label of “foreign law,” and generally except the use of these sources as inputs for originalism.

⁷ See, e.g., Sarah H. Cleveland, *Our International Constitution*, 31 *Yale J. Int’l L.* 1, 12–27, 33–87 (2006); see also sources cited *infra* note 50. As discussed *infra* note 47, there is a limited exception for the separation of powers regarding the conduct of hostilities (as opposed to the entry into hostilities). Here, some constitutional actors and scholars have recognized a role for international law as a principle of constitutional interpretation, albeit one that is often closely tied to concerns about individual rights.

actors, and therefore that the Constitution necessarily entrusted the power of recognition to the President. While international law could in theory be used to favor the powers of either Congress or the President, in practice most uses of international law favored the President because of the close connection perceived between executive action and international law. Second, constitutional actors have relied on international law as an alternative source of legitimacy for presidential actions where the constitutional basis for these actions was otherwise lacking or unclear. While these precedents were initially understood and explained primarily in terms of international law, they ultimately became precedents for expansive presidential powers as a matter of constitutional law.

The effects of international law's role in the separation of powers remain with us today. They are shielded from present recognition but are kept relevant by the most important tool in the interpretation of the separation of foreign affairs powers today: reliance on past practice. Past practice offers a historical "gloss" on the separation of powers that is understood to help resolve questions about it. This gloss has an opaque quality: It makes past practices relevant without requiring a searching inquiry into *why* these practices themselves took place. The historical gloss thus shields the role that international law played in establishing key precedents while at the same time causing these precedents to matter greatly to our present-day constitutional interpretation. Indeed, as this Article will show, the precedents in war powers, recognition, and treaty-making that the Obama Administration relied on to support its recent aggressive stances in these areas all owe a debt to international law's past role in constitutional interpretation.

The role that international law has played in strengthening executive power in turn holds implications both for how we understand the separation of powers today and for the relationship between presidential power and international law. International law helped grow presidential power, and members of Congress accepted this growth, in part because international law was also understood to impose certain constraints on presidential action. As this connection has eroded, however, it has created a situation where *neither* the original congressional checks envisioned at the Framing *nor* the international legal checks recognized in the hundred-and-fifty years that followed are understood to serve as strong constraints on presidential foreign affairs powers. This problematic situation has been recently termed the "Executive Unbound" by Professors Eric

Posner and Adrian Vermeule.⁸ This Article thus ends with some tentative thoughts on how to recapture the interplay between international law and the separation of powers in a way that restores some constraints on presidential power.

The rest of this Article develops and supports the themes outlined above. Part I identifies three ways in which international law can influence constitutional interpretation: first, as an input for other principles of constitutional interpretation; second, as a direct principle of constitutional interpretation; and third, as an alternative source of legitimacy for actions that ultimately become constitutional precedents. Part II highlights what I call the “separation-of-powers anomaly”: the fact that while many constitutional actors and commentators today accept international law as a direct principle of constitutional interpretation in certain areas of constitutional law, they do not treat it as similarly relevant to the separation of powers. Part III shows how international law has in fact been used in the past by constitutional actors—particularly actors situated in the political branches—in all three of the ways described in Part I to help enhance the President’s foreign affairs powers. More specifically, I focus on the roles played by international law in the separation of powers in three key areas: recognition, war powers regarding entry into hostilities, and treaty-making. Part IV uses the three current examples mentioned at the beginning of this Article to show how these enhanced presidential powers continue today under the guise of reliance on past practice, even though their international legal roots are now obscured and any limits set by international law are thus lost. Finally, Part V considers the lessons this forgotten history holds for constitutional interpretation today, including the extent to which international law should constrain the President.

I. INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION: CONVENTIONAL AND UNCONVENTIONAL ACCOUNTS

In recent years, the role of international law in constitutional interpretation has proved astonishingly contentious. Not only has it been the subject of heated debate within Supreme Court decisions and among legal scholars, but it has become a cause célèbre in the public sphere more generally. Backlash against the Supreme Court’s use of international law

⁸ See generally Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010).

in constitutional decision-making has even led to the introduction of congressional legislation to curtail the use of foreign law by federal courts. Justifying the need for such legislation, the chief sponsor of one recent bill explained that by “interject[ing] international law into their rulings,” Supreme Court justices have shown “transparent disregard for the Constitution.”⁹

A closer look at the controversy shows that it focuses not on *all* uses of international law in constitutional interpretation, but rather largely on *one* particular role that international law can play in constitutional interpretation. This is the role that international law can play as a *direct* principle of constitutional interpretation—as something that guides the process by which constitutional actors approach the Constitution. But this is not the only role that international law can play in constitutional interpretation. It has at least two other possible roles as well. One is to serve as a source of information—an input—that assists constitutional actors applying other principles of constitutional interpretation. The other, less conventional role that international law can play is to help justify constitutionally dubious actions by serving as an extra-constitutional source of legitimacy.

This Part describes all three roles that international law can play in constitutional interpretation. I begin with international law’s role as an input for other theories of constitutional interpretation, then turn to its more contentious role as a direct principle of constitutional interpretation. Lastly, I discuss how international law might influence constitutional interpretation by serving as an extra-constitutional source of legitimacy.

A. International Law as an Input for Other Principles of Constitutional Interpretation

The least controversial role that international law plays in constitutional interpretation is to serve as an input for other principles of constitutional interpretation. If one believes, for example, that the Constitution should be interpreted according to its text’s ordinary meaning at the time of the Framing, then the law of nations at the time of the Framing will obviously be relevant for interpreting the clauses in the Constitution that

⁹ Sandy Adams, Op-Ed., Ban Foreign Law from Courts; We Make Our Own Laws, Wash. Times, Mar. 10, 2011, at B3; see also H.R. 973, 112th Cong. (2011) (bill introduced by Rep. Adams and numerous co-sponsors to limit federal courts’ use of foreign law).

implicitly or explicitly reference international legal standards. Scholars applying this approach have accordingly looked to the law of nations at the time of the Framing in understanding the meaning of terms like “declare war” that appear in the Constitution’s text.¹⁰

Here international law serves as an input for a form of textualism, but it can also be an input for other interpretive approaches. Those who apply a textualism that considers the evolving meaning of words, for example, could look to the evolving meaning of “treaty” in international law to interpret the clauses of the Constitution that refer to treaties.¹¹ Similarly, those who emphasize the original intentions of the Framers could find international law at the time of the Framing relevant to understanding these intentions.¹² As yet another example, structural constitutionalists guided by the tripartite scheme set forth by Justice Jackson in *Youngstown* could view international law, or at least certain forms of international law, as inputs comparable to congressional legislation—for instance, as having the power structurally to put the President at his maximum authority (category 1) or alternatively at his “lowest ebb” (category 3).¹³

¹⁰ See e.g., Anthony J. Bellia Jr. & Bradford R. Clark, The Law of Nations as Constitutional Law, 98 Va. L. Rev. 729, 735 (2012) (exploring “the original public meaning of several specific constitutional powers—such as the power to recognize foreign nations, the war power, and the powers to authorize reprisals and captures—which can only be understood against background assumptions provided by the law of nations” (emphasis omitted)); Michael D. Ramsey, Textualism and War Powers, 69 U. Chi. L. Rev. 1543, 1545 (2002) (looking to international law around the time of the framing to understand the textual meaning of the “declare war” clause); see also Ingrid Brunk Wuerth, International Law and Constitutional Interpretation: The Commander-in-Chief Clause Reconsidered, 106 Mich. L. Rev. 61, 82–95 (2007) (looking to international law to interpret the scope of the commander-in-chief power at the time of the Framing).

¹¹ E.g., Restatement (Third) of Foreign Relations Law § 302 cmt. c & reporters’ note 2 (1987) (asserting that the “references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law” and then looking to twentieth-century international law to define the reach of this concept).

¹² This approach seems to be underlying Justice Scalia’s use of international law in his recent dissent in *Arizona v. United States*, 132 S. Ct. 2492, 2513 (2012) (relying on international law at the time of the Framing in interpreting the boundaries of state and federal sovereignty).

¹³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); cf. *Medellin v. Texas*, 552 U.S. 491, 524–27 (2008) (holding that the President acts in *Youngstown* category 3 when he tries to transform non-self-executing treaty obligations into domestic law obligations). There is room for debate as to which international law obligations—namely, self-executing treaties, non-self-executing treaties, and customary international law—should be treated as comparable to congressional statutes for this purpose.

In all these instances, international law does not operate as a principle of constitutional interpretation. Rather, it serves as an input for other interpretive principles, in the same way that dictionary definitions might be inputs for textualists, or that historical influences on the Framers might be inputs for originalists. This reality makes the role played by international law relatively uncontroversial, but also makes the role dependent in two ways on the interpretive principle that controls its use. First, international law's role is dependent on the extent to which its users rely on the interpretive principle in the first place. For example, constitutional actors will rely on international law as an input to the Framers' intent only to the extent to which they find the Framers' intent to be a guiding principle of constitutional interpretation. Second, where international law is an input for another interpretive principle, it is bound by whatever constraints are imposed by that interpretive principle. A textualist seeking to recover the original public meaning of the Constitution, for example, might care only about international law at the time of the Framing, not about its dramatic evolution over the subsequent two centuries.

B. International Law as a Principle of Constitutional Interpretation

A more controversial role that international law can play in constitutional interpretation is to directly influence the process of constitutional interpretation. International law will never be the sole principle used for interpreting the Constitution, but it can serve as an influential supplement to other interpretive approaches. Constitutional actors and commentators who look to international law as a principle of interpretation typically do so by presuming that the Constitution should be interpreted to maximize conformity with international law. The strength of this presumption can vary from the lightest of touches to a substantial weight.

The Supreme Court's decision in *Roper v. Simmons*¹⁴ illustrates how international law can serve as a principle of constitutional interpretation. In holding that the death penalty is an unconstitutional punishment for crimes committed by minors, the Supreme Court applied a faint—very faint—presumption in favor of reading the Constitution to be in accordance with international legal norms, which bar the use of the death penalty against minors.¹⁵ These international legal norms did not apply di-

¹⁴ 543 U.S. 551 (2005).

¹⁵ *Id.* at 575–78.

rectly to the United States (which had never consented to the treaty provisions setting forth these norms), but the Court nonetheless viewed them as “instructive” and providing “respected and significant confirmation” for its conclusion.¹⁶

Roper and similar cases triggered a backlash against the use of international law as a principle of constitutional interpretation. Writing in dissent, Justice Scalia urged that “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”¹⁷ While Justice Scalia based his objections on a sense of American exceptionalism, others have also emphasized that reliance on international law as a principle of constitutional interpretation is undemocratic, as it draws on the views of those outside the United States.¹⁸ Still others view its use as simply unnecessary and unhelpful given the other array of tools of constitutional interpretation. In alarmist tones, Professor Roger Alford has suggested that reliance on international law “fundamentally destabilizes the equilibrium of constitutional decisionmaking” by adding a “new source” to the traditional interpretive tools of “text, structure, history, and national experience.”¹⁹

Roper and the other Supreme Court cases at the center of the recent controversy deal mostly with the interpretation of individual rights provisions in the Constitution.²⁰ But scholars sympathetic to the use of in-

¹⁶ *Id.* at 575, 578.

¹⁷ *Id.* at 624 (Scalia, J., dissenting).

¹⁸ Chief Justice Roberts made this point at his confirmation hearing. See Transcript: Day Two of the Roberts Confirmation Hearings, Wash. Post, Sept. 13, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html> (noting a “concern” based on “democratic theory” with regard to citing foreign law in constitutional interpretation); see also, e.g., Nicholas Quinn Rosenkranz, An American Amendment, 32 Harv. J.L. & Pub. Pol’y 475, 476 (2009) (“[T]he notion that [developments in constitutional law] may be brought about by changes in foreign law violates basic premises of democratic self-governance.”).

¹⁹ Roger P. Alford, Misusing International Sources to Interpret the Constitution, 98 Am. J. Int’l L. 57, 57–58 (2004). For an example of other scholarship objecting to the Supreme Court’s use of international law, see, e.g., Joan L. Larsen, Importing Constitutional Norms from a ‘Wider Civilization’: *Lawrence* and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 Ohio St. L.J. 1283 (2004); cf. Austen L. Parrish, Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law, 2007 U. Ill. L. Rev. 637, 639 n.9 (giving numerous citations to scholarship condemning the use of foreign law); Rosenkranz, *supra* note 18.

²⁰ Other cases include *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (life sentences without the possibility of parole for juveniles who committed crimes other than murder); *Lawrence v. Texas*, 539 U.S. 558, 573–77 (2003) (substantive due process in context of the

international law as a principle of constitutional interpretation have demonstrated that in the past the Supreme Court has taken a similar approach in other areas of constitutional law. Professor Sarah Cleveland shows that the Supreme Court has used international law as a “background principle”²¹ of constitutional interpretation not only in individual rights cases, but also in past cases dealing with the territorial reach of constitutional rights, the extent of the federal government’s powers, and federalism.²² Cleveland’s far-reaching survey brings what is probably the widest scholarly lens applied to the issue of international law’s role in constitutional interpretation. Yet, as I discuss in Part II.B, even Cleveland finds little role for international law as a background principle of constitutional interpretation in the context of separation-of-powers disputes.

Before turning to the third role that international law can play in constitutional interpretation, it is worth noting that it is not always easy to distinguish between the first two roles. For one thing, constitutional actors do not always clearly explain how or why they are using international law in constitutional interpretation. For another, the roles can blend together conceptually and practically. Conceptually, for example, the roles would blend together for a believer in original intent who concludes that the Framers intended the Constitution’s interpreters to use evolving international law as an interpretive principle. Practically, for example, one could treat *Roper* as using international law as a direct principle of constitutional interpretation (as I do) or could instead claim that the Court was instead applying some unspoken morality-based or functionalist principle of interpretation to which international law was effectively serving as an input. Yet the distinction is nonetheless helpful, for two reasons. First, it captures a genuine difference in how constitutional actors can make use of international law, even if this difference is not discernible in every instance. Second, it helps explain why, in the debate over the use of international law in constitutional interpretation, some uses of international law are relatively uncontroversial while others are fiercely contested.

right to privacy); *Atkins v. Virginia*, 536 U.S. 304, 316–17 (2002) (death penalty); and *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988) (plurality opinion) (death penalty).

²¹ Cleveland, *supra* note 7, at 33.

²² *Id.* at 33–62.

C. International Law as a Source of Extra-Constitutional Legitimacy

The two roles described above are conventional ones, whatever one thinks of their merits. There is a question of constitutional interpretation and an answer is needed; through these roles, international law can help constitutional actors reach the answer. But constitutional law does not always develop through tidy processes. Sometimes constitutional actors act in response to perceived problems without even considering or justifying the constitutionality of their actions. At other times, they can choose deliberately to act in ways that they believe violate the Constitution—think Thomas Jefferson and the Louisiana Purchase—or in ways that they can justify only through dubious constitutional interpretation. Such precedents in turn can influence the shape of constitutional law going forward.

When do constitutional actors violate the Constitution or aggressively push its boundaries? In a recent essay, Professor Richard Pildes suggests that the answer may lie in a “kind of consequentialist framework” in which the actors “take law into account as an exceptionally important factor, but still only as a factor.”²³ Constitutional actors are reluctant to violate the Constitution, whether out of their own fidelity to it or because of the political importance attached to compliance with it. Yet they may do so if the perceived benefits are high enough and they believe their actions will be deemed legitimate in the eyes of the public. Pildes gives the example of President Obama’s decision to continue using military force in Libya despite the absence of supportive legislation from Congress and suggests that while this decision may have been unconstitutional, it was sufficiently wise policy that the U.S. political community let it pass largely unchallenged.²⁴

Pildes treats policy considerations as the main source of extra-constitutional legitimacy. But international law itself could also be a source of such legitimacy. Decision-makers could justify actions that vi-

²³ Richard H. Pildes, *Law and the President*, 125 Harv. L. Rev. 1381, 1419 (2012) (book review) (specifically discussing the President). For a few other recent perspectives on the relationship between law and power, see generally Posner & Vermeule, *supra* note 8; Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411 (2012) (a piece whose title influenced my own choice of title); Frederick Schauer, *Is Legality Political?*, 53 Wm. & Mary L. Rev. 481 (2011); see also Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004) (arguing that the Constitution contains an embedded principle of necessity that authorizes violations of specific constitutional provisions under appropriate circumstances).

²⁴ Pildes, *supra* note 23, at 1421.

olate or aggressively push the boundaries of the Constitution partly on the grounds that these actions are appropriate under international law. The Libya conflict itself provides a possible example of this. In using force in Libya, President Obama had the sanction of international law—the Security Council of the United Nations had authorized the intervention—and indeed it is unlikely that he would have ordered the use of force without this authorization.²⁵ This international authorization in turn may have played a role in reducing domestic resistance to President Obama’s decision to keep using force despite the absence of congressional authorization.²⁶ Accordingly, even if this international authorization did not affect the constitutional question as a matter of *doctrine*, it may nonetheless have affected the constitutional resolution as a matter of *politics*.

One need not approve of international law serving as an extra-constitutional source of legitimacy in order to accept that, as a descriptive matter, it may in fact do so. Two further factors help explain why it may have been especially influential at various times in the past. The first is that respect for international law within the U.S. political community has not been constant over time. While in recent times politicians have scored points by describing international law as a dangerous threat to American values, at other times in our history—such as the time of the Framing or right around the end of World War II—international law was treated, in the political discourse, with intense and at times over-

²⁵ See, e.g., U.N. Security Council Authorizes No-Fly Zone in Libya, FoxNews.com (Mar. 17, 2011), <http://www.foxnews.com/politics/2011/03/17/seeks-resolution-authorizing-wide-range-strikes-libya/> (reporting that “[t]he Obama Administration has said it would not act without Security Council authorization”).

²⁶ Supporters of the Libya intervention made a point of mentioning the Security Council Resolution very often. E.g., Letter from President Barack Obama to the Speaker of the House of Representatives (Mar. 21, 2011), available at <http://media.washtimes.com/media/misc/2011/03/22/2011libyamilitaryrel.pdf> (mentioning the Security Council and its resolution eight times in a one-and-a-half page letter); Testimony of Harold Hongju Koh before the Senate Foreign Relations Committee, June 28, 2011, available at <http://www.state.gov/s/l/releases/remarks/167250.htm> (mentioning the Security Council resolution seven times in his prepared remarks on the domestic law questions); see also Dustin Tingley & Michael Tomz, How Does the U.N. Security Council Influence Public Opinion 1–2 (Nov. 2012) (unpublished manuscript), available at <http://politics.virginia.edu/sites/politics.virginia.edu/files/Tomz-LLB.pdf> (conducting experiments through public opinion surveys and finding that U.N. Security Council Resolutions substantially increase U.S. public opinion in support of military actions because citizens feel a sense of commitment to follow through on these resolutions).

whelming respect.²⁷ The greater the public respect for international law, the more international law justifications might be accepted as sources of extra-constitutional legitimacy.

The second reason international law's influence may have been greater in the past has to do with a particular constitutional argument. The Take Care Clause in Article II provides that the President is to "take Care that the Laws be faithfully executed,"²⁸ but its text does not specify whether these "Laws" include international law. Recently, the Supreme Court has suggested that this reference to "Laws" excludes many treaties, and similar reasoning might justify a conclusion that "Laws" also excludes customary international law.²⁹ In the past, however, up to at least as recently as the 1980s, the Take Care Clause was commonly understood to apply to international law.³⁰ The Take Care Clause thus served as a bridge between the Constitution and international law, at least where actions by the President were concerned. Where the Presi-

²⁷ See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799, 883–85 (1995) (describing the powerful internationalist climate in the United States around the end of World War II); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 937–39 (2010) (describing respect of the Framers for international law).

²⁸ U.S. Const. art. II, § 3.

²⁹ *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (effectively concluding that the Take Care Clause does not apply to non-self-executing treaties); see also Edward T. Swaine, *Taking Care of Treaties*, 108 Colum. L. Rev. 331, 335 (2008) (noting that the Take Care Clause has "fallen out of favor"). The reasoning in *Medellin* is brief, unsupported, and seemingly ignorant of the history of the Take Care Clause's interpretation—and therefore may well not prove to be the Court's final word on this issue. Such as it is, however, the Court's discussion in *Medellin* implies that "Laws," for purposes of the Take Care Clause, must create domestic legal obligations, not merely international legal obligations. Applying this approach, customary international law would constitute "Laws" only to the extent that it amounts to domestic law—an issue which has been hotly disputed since Curtis A. Bradley and Jack L. Goldsmith published their famous article, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997).

³⁰ E.g., Restatement (Third) of Foreign Relations Law § 111 cmt. c (1987); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 186 (1980). This understanding was articulated as far back as the Washington Administration. *Pacificus* Number I (June 29, 1793), in Alexander Hamilton & James Madison, *The Pacificus-Helvidius Debate of 1793–1794*, at 16 (Morton J. Frisch ed., 2007) [hereinafter *Pacificus-Helvidius Debate*] (stating that "Our Treaties and the laws of Nations form a part of the law of the land" with regard to the Take Care Clause); *Helvidius* Number II (Aug. 31, 1793), in *id.* at 72 (considering it a "truth" that the "executive is charged with the execution of all laws, the laws of nations as well as the municipal law which recognizes and adopts those laws") (emphasis omitted); see also *Restoration of a Danish Slave*, 1 Op. Att'y Gen. 566, 570–71 (1852).

dent acted to execute international law, he could justify his actions as a matter of constitutional law on the ground that he was taking care of international law even where he was acting without any other plausible bases of constitutional power.

II. THE SEPARATION-OF-POWERS ANOMALY

One of the striking developments of constitutional law since the Framing has been the rise of presidential power. This is especially true where foreign affairs powers are concerned. If the Constitution poses an “invitation” for the President and Congress to “struggle for the privilege of directing American foreign policy,” as Edwin Corwin famously observed,³¹ then the President is the accepted winner. While struggles continue over the allocation of foreign affairs powers between the two political branches, the “lion’s share” of power lies clearly with the President.³²

Doctrinally, constitutional actors both within and outside the courts now justify the President’s enormous foreign affairs powers through a variety of interpretive principles, most prominently the embrace of past practice as a “gloss” on lawful presidential power. But interestingly, today these principles do not include international law. International law is certainly understood to inform the constitutional separation of powers via the first of the three roles described in the prior Part, typically as an input for textualism and originalism.³³ But even constitutional actors and commentators who are sympathetic to the use of international law as a direct principle of interpretation in other areas of constitutional law do not seem to see it as playing that role for the separation of foreign affairs powers. This is a curious anomaly, especially since foreign relations law

³¹ See Edward S. Corwin, *The President: Office and Powers, 1787–1948*, at 208 (1948). For a flavor of the massive literature, see generally Louis Henkin, *Foreign Affairs and the U.S. Constitution* 31–62 (1996); Posner & Vermeule, *supra* note 8; Arthur M. Schlesinger, Jr., *The Imperial Presidency* (1973); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *Mich. L. Rev.* 545 (2004); Bradley & Morrison, *supra* note 23; Henry P. Monaghan, *The Protective Power of the Presidency*, 93 *Colum. L. Rev.* 1 (1993); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L.J.* 231 (2001).

³² Corwin, *supra* note 31, at 208.

³³ See *supra* note 10; see also, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *Colum. L. Rev.* 1, 5–6 (2009) (arguing that a distinction in the law of nations at the time of the Framing between perfect and imperfect rights informs how the judicial branch should understand the separation of powers between it and the political branches on matters that relate to customary international law).

is the area of constitutional law with the most direct connections to international law.

This Part first outlines the conventional justifications for the President's expansive foreign affairs powers, with a particular focus on the role of past practice. It then discusses how notably absent international law is from these justifications and suggests that this absence may be due to the fact that scholarship examining the role of international law in constitutional interpretation has focused almost exclusively on the Supreme Court and overlooked constitutional decision-making by the two political branches.

A. Executive Power and Its Doctrinal Defenses

The checks and balances developed by the Framers have not held up well against the "maxim attributed to Napoleon that '[t]he tools belong to the man who can use them.'"³⁴ The text of the Constitution grants the President only a few clear foreign affairs powers: the role of the commander in chief, the authority to receive ambassadors, and the powers, by and with the advice and consent of the Senate, to make treaties and appoint ambassadors.³⁵ But Presidents began taking expansive views of their foreign affairs powers as early as the Washington Administration and aggressively resisted congressional encroachment on their perceived prerogatives. Today, the additional foreign affairs powers recognized as belonging to the President, either solely or concurrently with Congress, include the following: to formulate foreign policy for the United States; to be the "sole organ" of communication with other nations on behalf of the United States; to represent the United States at international organizations; to recognize foreign nations; to waive obligations owed to the United States by other nations; to enter into executive agreements with other nations that are binding as a matter of international law and in at least some instances can preempt state law; to interpret treaties in the first instance; to withdraw the United States from treaties; and to authorize the use of force abroad by U.S. troops in pursuit of U.S. interests, at least up to a certain threshold of engagement. The divergence between the President's real and paper powers is so great that Louis Henkin ob-

³⁴ *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring).

³⁵ U.S. Const. art. II.

served that “[w]hat the Constitution says and does not say, then, can not have determined what the President can and can not do.”³⁶

What has determined what the President can and cannot do? There are vast literatures in history and political science on this subject,³⁷ but those interested in law tend to focus on two sets of legal principles which have explicitly or implicitly authorized the expansion of presidential power. First, there are justiciability rules such as the political question doctrine which courts have developed to avoid making difficult decisions about the constitutional scope of presidential power. The effect of these rules is to shift decision-making about the limits of presidential power from the courts to executive branch lawyers, who have stronger institutional reasons for siding with the President.³⁸ Second, and more importantly for the purposes of this Article, there are interpretive principles governing constitutional interpretation. Not all of these principles tend to favor expansive executive power, and none do so all the time. Constitutional scholars who emphasize the original intent of the Framers, for example, tend to disapprove of today’s expansive presidential power, as do scholars who emphasize the structural importance of robust checks and balances.³⁹ Scholars who emphasize a textual approach can disagree among each other dramatically over the degree to which the Constitution’s text

³⁶ Henkin, *supra* note 31, at 31.

³⁷ Political science approaches emphasize institutional features that have given the President a practical edge over Congress, such as his advantages as a unitary rather than collective actor, and the influence of the party system on the relationship between the political branches. See, e.g., Bradley & Morrison, *supra* note 23, at 453; Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 *Harv. L. Rev.* 2311, 2314–15 (2006). Historical approaches tend to focus on the times and circumstances of particular Presidents. E.g., G. Edward White, The Transformation of the Constitutional Regime of Foreign Relations, 85 *Va. L. Rev.* 1 (1999).

³⁸ See Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 35 (2007) (“Legal advice to the President from the Department of Justice is neither like advice from a private attorney nor like a politically neutral ruling from a court. It is something inevitably, and uncomfortably, in between.”); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 *Colum. L. Rev.* 1448, 1502 (2010) (noting that although the Office of Legal Counsel seeks to provide its best view of the law, this role “need not carry the pretense of ‘true’ neutrality”).

³⁹ E.g., Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 *Seton Hall L. Rev.* 527, 623–36 (1974) (advocating an original understanding of the Treaty Clause that would give more power to the Senate); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 *UCLA L. Rev.* 309, 314–15 (2006) (drawing on structural arguments, among others, in urging limits on the President’s foreign affairs powers).

supports expansive presidential powers.⁴⁰ Yet expansive presidential power has one particular ally among the principles of interpretation—an ally so important that it arguably dwarfs the other principles in importance in the separation of powers context. This is reliance on past practice, which “is a mainstay of decisionmaking and debates concerning the scope of presidential power.”⁴¹

Reliance on past practice has widespread acceptance as an interpretive principle among constitutional actors. As early as 1796, President Washington defended his view of the limited role held by the House of Representatives in treaty-making in part on the ground that this reflected the practice to date.⁴² Since then, constitutional actors have considered the presence (or absence) of past practice in resolving virtually all separation-of-powers disputes. In theory, of course, past practice can cut in favor of either the President or Congress. In actuality, however, past practice has furthered gradual accretions of presidential power because the President, as a unitary actor unhindered by the collective action challenges that constrain Congress, has both the incentives and the abilities to push the boundaries repeatedly.⁴³

As Professors Curtis Bradley and Trevor Morrison argue, however, the concept of past practice needs to be unpacked. Constitutional actors and scholars will sometimes further define past practice in terms of two factors: first, the amount of past practice on point, and, second, the extent to which Congress has acquiesced in this past practice.⁴⁴ But this

⁴⁰ Consider, for example, the debate over whether and to what extent the Vesting Clause of Article II is a source of unenumerated presidential powers. Compare Prakash & Ramsey, *supra* note 31, at 252–55, with Bradley & Flaherty, *supra* note 31, at 546–52.

⁴¹ Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 *Colum. L. Rev.* (forthcoming 2013). Another important ally is functionalist reasoning. See, e.g., Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 *Ariz. St. L.J.* 87, 89–93 (2009). For example, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), Justice Sutherland emphasized that the President needed broad foreign affairs powers “if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved.”

⁴² George Washington, *Message to the House of Representatives, Declining to Submit Diplomatic Instructions and Correspondence* (Mar. 30, 1796), available at <http://millercen.org/president/speeches/detail/3461> (“In this construction of the Constitution every House of Representatives has heretofore acquiesced; and until the present time, not a doubt or suspicion has appeared to my knowledge that this construction was not the true one.”).

⁴³ Bradley & Morrison, *supra* note 23, at 412–15.

⁴⁴ In his concurrence in *Youngstown*, Justice Frankfurter offers the most famous articulation of these factors:

breakdown only begs further questions in terms of what counts as past practice on point or as congressional acquiescence. Professors Bradley and Morrison focus on acquiescence and show that how acquiescence is defined can dramatically affect the extent to which it is satisfied.⁴⁵ Acquiescence could be understood to mean the absence of any congressional legislation regarding a presidential practice, or it could mean the lack of objection from any members of Congress regarding this practice, or it could mean congressional legislation explicitly or implicitly approving a presidential practice. The meaning chosen will significantly affect the extent of acquiescence because some of these forms of acquiescence (for example, the absence of congressional legislation) are easier to come by than others (for example, the presence of affirming legislation). While Professors Bradley and Morrison focus on acquiescence, this Article will consider in Part IV how broad or narrow treatments of past practice can similarly affect what is understood to be constitutional.

B. The Absence of International Law

International law does not currently feature among the interpretive principles used to resolve separation of powers questions. While international law certainly plays a role in current separation-of-powers disputes, it does so almost exclusively as an input for other means of constitutional interpretation—most notably originalism and textualism. While international law has been found to be a direct principle of interpretation in

It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. . . . [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, mak[es] as it were such exercise of power part of the structure of our government.

343 U.S. at 610–11 (Frankfurter, J., concurring) (linking this argument to the Vesting Clause in Article II). In calling for a “systematic, unbroken” practice that is “never before questioned” by Congress, Justice Frankfurter sets a high bar and appears to require both factors for past practice to count at all. Quite commonly, however, constitutional actors relying on past practice take a looser approach and require less robust levels of past practice and/or acquiescence. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting the Frankfurter language but also quoting looser language from *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915), about the need for a “long-continued practice, known to and acquiesced in by Congress”) and in practice applying a fairly shallow inquiry into both factors); Libya Memorandum, *supra* note 1, at 4–9 (quoting Justice Frankfurter’s reference to the historical “gloss” but not further quoting his stringent requirements for this gloss to be satisfied).

⁴⁵ Bradley & Morrison, *supra* note 23, at 432–47.

many areas of constitutional law,⁴⁶ it is rarely seen as such in the context of the separation of foreign affairs powers—even though these powers are the ones most directly connected to international law.

This fact is evident from a look at the extensive scholarship in the last decade on the role of international law in constitutional interpretation. Except for some work on the conduct of hostilities,⁴⁷ this scholarship does not discuss international law's role in the separation of powers, other than to the extent that it is an input for other principles of constitutional interpretation. Professor Cleveland, for example, shows at length how international law serves as an input for interpreting clauses in the Constitution that relate to the separation of powers,⁴⁸ but when considering the role that international law can play as a “background principle for constitutional analysis,” she does not include the separation of powers in the many areas of constitutional law that she covers.⁴⁹ Another lengthy historical treatment of international law in constitutional interpretation by Professors Steven Calabresi and Stephanie Zimdahl finds that the Supreme Court “rarely cites foreign sources of law in structural constitutional cases,” with the exception of some federalism decisions.⁵⁰

⁴⁶ See Cleveland, *supra* note 7, at 33–62.

⁴⁷ Professor Ingrid Wuerth, for example, argues that international law can be a valuable “second-order tool of constitutional interpretation” in assessing the scope of the President’s Commander-in-Chief powers. Wuerth, *supra* note 10, at 74–82. Nonetheless, even with regard to the conduct of hostilities, much of the literature considering the relationship between international law and presidential power does not consider the role that international law might play as a direct principle of constitutional interpretation in the separation of powers. Rather, it looks at (1) how international law influences the interpretation of congressional statutes that in turn enable or constrain the President, for example, *Hamdi v. Rumsfeld*, 542 U.S. 507, 517–22 (2004) (plurality opinion) (relying on the law of war in interpreting a congressional statute); or (2) how international law serves as a direct principle of constitutional interpretation with regard to individual rights, for example, *id.* at 531 (“[T]he law of war and the realities of combat may render [certain] detentions both necessary and appropriate, and our due process analysis need not blink at those realities.”).

⁴⁸ See Cleveland, *supra* note 7, at 12–27 (covering separation-of-powers related issues where the Constitution makes “express reference to international law or to a concept of international law”).

⁴⁹ *Id.* at 33–63; see also *id.* at 63–87 (treating individual rights related issues in a separate section, but with an analysis that similarly shows international law’s use as a background principle of constitutional interpretation).

⁵⁰ Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 *Wm. & Mary L. Rev.* 743, 906 (2005). For examples of other scholarship that look broadly at the role of international law in constitutional interpretation but either do not address the separation of powers or treat international law mainly as an input for other principles of interpretation in that context, see generally Harold Hongju Koh, *International Law as Part of*

There are several possible reasons why international law might not be seen as a relevant principle for resolving separation-of-powers disputes by those who treat it as such in other areas of constitutional law. Perhaps international law is not and has not been particularly relevant to separation-of-powers issues for structural reasons. International law is sometimes said to speak to the *substance* of what states can and cannot do rather than to the *process* by which they do it. Since the separation of powers is a question of internal process, international law might not shed any light upon it. Professor Vicki Jackson, for example, claims that “international law simply does not address many important constitutional issues having to do with the structure of government.”⁵¹ But this claim suggests too strong a divide between substance and process. While international law may not dictate the constitutional structures of government, it may influence these structures. For one thing, not all international law is about substance. Some of it does have to do with process, such as default rules governing treaty-making and other communications between nations. For another thing, even where international law is substantive, nations might benefit from using it in designing their internal structural rules. Actions that violate international law, for example, are likely to generate more international friction than actions that comply with international law, and so nations might wish to set a higher internal threshold for engaging in such actions.

Another possible explanation for why international law is not thought of as a principle for resolving separation-of-powers disputes is that the Supreme Court has done little, if anything, to use it as such. Scholars interested in the role of international law in constitutional interpretation have focused almost exclusively on the Supreme Court and its approach to constitutional interpretation. Professors Cleveland, Calabresi, and Zimdahl, for example, define their projects on the role of international law in constitutional interpretation in terms of the Supreme Court’s jurisprudence on the subject.⁵² The scholarly focus on the Supreme Court

Our Law, 98 Am. J. Int’l L. 43 (2004); Larsen, *supra* note 19, at 1283–87; Parrish, *supra* note 19, at 638–42; see also Gerald L. Neuman, The Uses of International Law in Constitutional Interpretation, 98 Am. J. Int’l L. 82, 82 (2004) (“Sound constitutional interpretation combines other constitutional principles and structures with conceptions derived from contemporary international practice.”).

⁵¹ Vicki C. Jackson, Constitutional Law and Transnational Comparisons: The *Youngstown* Decision and American Exceptionalism, 30 Harv. J.L. & Pub. Pol’y 191, 212 (2006).

⁵² Calabresi & Zimdahl, *supra* note 50, at 748–56; Cleveland, *supra* note 7, at 2–12. The other sources cited in *supra* note 50 also focus overwhelmingly on the Supreme Court. (For

is understandable, since it is the governmental body that plays the greatest overall role in U.S. constitutional law today. But this focus may also underemphasize the role of international law in areas of constitutional law that the Supreme Court is more hesitant about addressing. Chief among these areas is the distribution of foreign affairs powers between Congress and the President. While the Supreme Court does sometimes address this distribution, it does so rarely, cautiously, and often only after longstanding practices have been established by the political branches. To see this practice, however—and to see if international law plays a role in its creation—we must look to the constitutional interpretations by members of Congress and the Executive branch.

III. INTERNATIONAL LAW AND EXECUTIVE POWER

This Part looks at the role that international law has played in shaping the separation of powers in three key areas of foreign relations law: recognition, war powers, and treaty-making. For reasons mentioned above, it focuses largely on constitutional decision-making by Congress and the executive branch. In all of these areas, I find that international law has influenced the constitutional separation of powers in ways that go beyond simply serving as an input for other principles of interpretation. Importantly, rather than being neutral, the influence of international law has typically served to strengthen the President's powers vis-à-vis Congress. Thus, though it may seem counterintuitive, the imperial Presidency of today owes something to international law.

The history of recognition, war powers, and treaty-making in the United States could each fill many volumes. My review here is necessarily selective, and two caveats in particular apply. First, although I cover all three of the roles discussed in Part I that international law has played in shaping the constitutional division of foreign affairs powers, I pay particular attention to international law's role as a direct principle of constitutional interpretation and as an extra-constitutional source of legitimacy. I do this because these roles are the least accepted, and thus the most interesting, as a matter of legal doctrine today. Second, I most-

an interesting recent exception focusing on the role of comparative law in the process of congressional legislation-making, see a piece by Katerina Linos, *Legislative Borrowing*, 106 *Am. Soc'y Int'l L. Proc.* 149 (2012).) Constitutional scholarship more generally, however, is increasingly taking into account the role of the political branches in shaping constitutional law. E.g., Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999).

ly discuss moments of constitutional decision-making where the decision-makers took international law into account. This over-emphasizes the direct influence of international law in the constitutional separation of powers, since I do not give equal attention to moments that lack evidence of decision-makers taking international law into account. My aim here is to show that international law has mattered in shaping the domestic separation of powers, not to try to quantify the precise degree across history that it has done so.

A. Recognition

Over the late eighteenth and the nineteenth century, some of the most vexing foreign affairs questions confronting the United States were issues of recognition. Should it recognize the revolutionary government of France? Venezuela and its neighbors as they broke away from Spain? Texas? Cuba? These questions implicated U.S. security since, as President Jackson observed in relation to Texas, “the power of originally recognizing a new state [is a] power the exercise of which is equivalent, under some circumstances, to a declaration of war.”⁵³ Yet the text of the Constitution does not provide clear guidance as to which branch of government can exercise this power and under what circumstances. The President is vested with the executive power of the United States and is specifically given the power to receive ambassadors; the President and the Senate between them have the power to make treaties and appoint ambassadors; and Congress has the power to regulate foreign commerce and the powers conferred by the necessary and proper clause. The power of recognition must lie somewhere, but it is not obvious which branch or branches possess it.

Starting immediately after the Framing, international law played a role in leading U.S. constitutional interpreters to conclude that the President *could* exercise the power of recognition. President Washington relied partly on international law as a source of extra-constitutional legitimacy in recognizing the revolutionary government of France without congressional approval. Later, over the course of the nineteenth century, the executive branch moved increasingly towards the position that it was *solely* entrusted with the power of recognition. Here, again, international law played a role, primarily as a direct principle of constitutional inter-

⁵³ Andrew Jackson, Message to Congress Regarding Texas (Dec. 21, 1836), in 1 John Bassett Moore, *A Digest of International Law* 99 (1906).

pretation supporting the executive's position. By a few decades into the twentieth century, the view that the executive branch had the sole power of recognition was widely accepted.

1. President Washington's Recognition of France

The French Revolution first presented the question of which part or parts of the federal government held the constitutional power to recognize foreign powers. Following the overthrow of King Louis XVI, the Washington Administration had to decide whether to recall its ambassador as European countries were doing, whether to continue the payments to France's revolutionary government for war debts it owed to France, and whether to receive the ambassador sent by that government—practical questions that effectively also raised the question of whether or not to recognize the new government of France.⁵⁴

The decisions made by the Washington Administration would ultimately become a key precedent for claims of a concurrent or even exclusive presidential recognition power. Importantly, however, the focus within the Washington Administration in resolving these questions was not on the constitutional power of the President to make these decisions but rather on the international legal obligations of the United States. In a recent pair of articles, Professor Robert Reinstein has shown how decision-making within the Washington Administration on this issue was driven by the aim of strict compliance with international law.⁵⁵ As set forth by the theorist Emer de Vattel—a favorite source on international law for the Founding generation—nations were to “take for their rule the circumstance of actual possession” in deciding whether to engage in diplomatic relations with new governments.⁵⁶ This principle of international

⁵⁴ See Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 422–26 (2012) [hereinafter Reinstein, *Executive Power*]; Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 839–40 (2011) [hereinafter Reinstein, *Recognition*].

⁵⁵ Reinstein, *Executive Power*, supra note 54, at 380, 422–28; Reinstein, *Recognition*, supra note 54, at 839–42.

⁵⁶ Emer de Vattel, *The Law of Nations* bk. IV, § 68 (Béla Kaposy & Richard Whatmore, eds., Tomas Nugent, trans., 2008); see also Reinstein, *Recognition*, supra note 54, at 839. Although the Washington Administration viewed international law as requiring recognition where there was de facto possession, this view may not have accurately reflected the European custom of the time. See Julius Goebel, Jr., *The Recognition Policy of the United States 95–96, 98, 114–15* (1915) (arguing that the U.S. approach did not in fact represent existing international law, though it shaped international law going forward).

law, as Washington Administration officials understood it, played a key role in their deliberations. When Secretary of the Treasury Alexander Hamilton, who was no fan of the revolutionary government, asked John Jay for advice on whether there was some basis for limiting the reception of the ambassador sent by the revolutionary government, Jay offered him no support. Instead, Jay emphasized that “they who actually administer the government of any nation, are by foreign nations to be regarded as its lawful Rulers” and insisted that it is the “[d]uty . . . of the United States, strictly to observe that conduct towards all nations, which the laws of nations prescribe.”⁵⁷

As these recognition-related questions unfolded over 1792 and 1793, it is striking how little Washington Administration officials appeared to reflect on whether the President could constitutionally make recognition decisions on his own. The first written constitutional justification that I am aware of occurs in the essays of Pacificus, written anonymously by Alexander Hamilton some months after the recognition questions were resolved. Hamilton remarked that “the right of the Executive to receive ambassadors and other public Ministers . . . includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will, and ought to [be] recognized, or not.”⁵⁸ One might infer from this argument, along with the absence of other debate on the issue, that there really was no constitutional question—that the constitutional right of the President to make these recognition decisions on his own was so settled in light of the Receive Ambassadors Clause that there was simply no need to discuss the issue. But this conclusion seems unlikely given the treatment of the Receive Ambassadors Clause during the debates over the ratification of the Constitution. At that time, none other than Hamilton described the clause as “more of a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government.”⁵⁹ In light of this, Hamilton’s later treatment of the Receive

⁵⁷ Draft Proclamation prepared by John Jay, *enclosed in* Letter from John Jay to Alexander Hamilton (Apr. 11, 1793), *in* 14 *The Papers of Alexander Hamilton* 309 (Harold C. Syrett & Jacob E. Cooke eds., 1969) (alteration in original) (emphasis omitted); see also Reinstein, *Executive Power*, *supra* note 54, at 426 (discussing this exchange). For a discussion of other Washington Administration correspondence emphasizing that diplomatic relations should turn on actual possession, see Reinstein, *Executive Power*, *supra* note 54, at 422–23.

⁵⁸ Pacificus Number I (June 29, 1793), *in* Pacificus-Helvidius Debate, *supra* note 30, at 8, 14 (alteration in original).

⁵⁹ The Federalist No. 69, at 341 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

Ambassadors Clause as a positive source of recognition power seems suspiciously like a post hoc justification.

The absence of focus on the constitutional question suggests that international law served here as an extra-constitutional source of legitimacy. It seems that the Washington Administration officials simply focused on making sure the United States was obeying international law, as a responsible nation would do, without even initially digesting whether or not they were the proper actors within the nation to make these decisions. In doing so, however, the Washington Administration established the important constitutional precedent that the President could make at least some recognition determinations by himself.

2. The “Sole Organ” Principle and the Birth of the Idea of Exclusive Presidential Recognition

The recognition of France by the Washington Administration established that Presidents could make recognition decisions on their own, at least where new governments were concerned, but left open whether the President’s recognition power was sole or shared with Congress. Over the next half-century, Presidents made the most important recognition decisions in conjunction with Congress, but the idea of an exclusive presidential power of recognition began to arise, due partly to the use of international law as a direct principle of constitutional interpretation. This idea tied into the developing principle that the President speaks as the “sole organ” for the United States as a matter of international law.

In a speech before the House of Representatives in 1800, John Marshall described the President as “the sole organ of the nation in its external relations, and its sole representative with foreign nations.”⁶⁰ Although Marshall did not specify the basis for this claim, it lies at the intersection of international law and Lockean theories of executive power. International law at the time required that states maintain a single “representative authority” with which other states could raise interna-

⁶⁰ 10 Annals of Cong. 613 (1800) (statement of Rep. Marshall). Precursors include Pacificus Number I (June 29, 1793), *in* Pacificus-Helvidius Debate, *supra* note 30, at 11 (describing the executive branch as “the organ of intercourse between the [United States] and foreign Nations” (emphasis omitted)); Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), *in* 16 The Papers of Thomas Jefferson 378, 379 (Julian P. Boyd et al. eds, 1961) (asserting that the “transaction of business with foreign nations is Executive altogether”); cf. Act of July 27, 1789, § 1, 1 Stat. 28 (1789) (establishing the Department of Foreign Affairs to conduct communications with foreign nations according to the President’s orders).

tional legal concerns.⁶¹ Interpreting the Constitution to be in compliance with this principle of international law, as Marshall and others appear to have done, the question arose whether Congress or the President served as this authority. Under the Articles of Confederation, this role necessarily fell to the Continental Congress, but there were strong arguments in favor of the President having this authority under the Constitution. Not only did John Locke's theory of executive power suggest that this role fell naturally to the executive,⁶² but in addition, the President was favored by strong functional arguments—what if an urgent issue came up and Congress was not in session?—and by the fact that at least some direct communication between the President and foreign governments was clearly contemplated by the Receive Ambassadors Clause. These factors suggested that the President should have *some* role as the representative of the United States to foreign government, and the international law requirement of a *single* representative authority elevated the President to holding this power solely. The President's role as the "sole organ" (which numerous constitutional actors since Marshall have ech-

⁶¹ Quincy Wright, *The Control of American Foreign Relations* 15 (1922). This representative authority could perhaps have been thought of as the federal government generally, see 1 Op. Att'y Gen. 522 (1852) ("The people of the United States seem to have contemplated the national government as the sole and exclusive organ of intercourse with foreign nations."), but the further requirement under the law of nations that communication between nations happen between ministers, see Vattel, *supra* note 56, at bk. 4, § 55, furthered a more specific understanding of the representative authority as the entity within the government that supervised ministers. See Wright, *supra*, at 23.

⁶² See Prakash & Ramsey, *supra* note 31, at 266–68. Professors Prakash and Ramsey treat Lockean theories of executive power as the basis of the sole organ doctrine. But international law has also played an important role, in two respects. First, international law and theories of executive power, particularly those powers related to foreign affairs, were closely intertwined, with some theorists justifying one by way of the other. E.g., 1 William Blackstone, *Commentaries* *257 (explaining that the king has the treaty-making prerogative because "it is by the law of nations essential to the goodness of a [treaty] that it be made by the sovereign power"); see Vattel, *supra* note 56, at bk. 4, § 55 (identifying international law norms governing communications between nations). At the very least, international law identified the need for a single representative, even if theories of executive power signaled the actor that would fill that need. Second, in practice, important actors in American foreign relations law have rooted the sole organ doctrine primarily in international law. Quincy Wright's treatise on *The Control of American Foreign Relations Power*, for example, makes "the requirement of international law that states maintain a definite authority to which foreign states may complain of violations of international law and from which they may expect satisfaction on the basis of that law alone" a centerpiece of his entire argument. Wright, *supra* note 61, at 15.

oed⁶³) in turn ultimately bolstered arguments for a sole presidential recognition power and for other presidential foreign affairs powers. It has been perhaps the most important principle derived from international law to influence the constitutional separation of powers.

During the decades that followed the Washington Administration, however, both political branches took a mostly cooperative approach to the recognition power. James Monroe sought the backing of Congress in recognizing Latin American countries breaking away from Spain, and Andrew Jackson accepted a congressional role in the recognition of Texas as a matter of political desirability (although noting that he reserved comment on the constitutional question).⁶⁴ From the congressional side, Henry Clay produced a report claiming that recognition could be accomplished in multiple ways, including exclusively by the President, by the President and the Senate together, or by Congress.⁶⁵ This period of cooperation was perhaps helped by the fact that, at least prior to the Civil War, the constitutional actors largely deemed themselves as constrained by what the Washington Administration had viewed as the international legal principles governing recognition.⁶⁶

Yet hints of an exclusive presidential power of recognition were emerging. Secretaries of State John Quincy Adams and William Seward asserted that the recognition power lay exclusively with the President,⁶⁷

⁶³ The Senate acknowledged this proposition early on, see S. Foreign Relations Comm., 56th Cong., Rep. of Feb. 15, 1816, *reprinted in* 6 Compilation of Reports of Committee on Foreign Relations, United States Senate, 1789–1901, at 21 (1901) (“The President is the constitutional representative of the United States with regard to foreign nations.”), and the Supreme Court famously embraced it in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

⁶⁴ President Monroe, Message to Congress of Mar. 8, 1822, *in* 1 Moore, *supra* note 53, at 245; President Jackson, Message to Congress of Dec. 21, 1836, *in id.* at 99.

⁶⁵ See Julius Goebel, Jr., *The Recognition Policy of the United States* 149–51 (1915) (quoting Clay’s report and discussing the context at length).

⁶⁶ See *supra* notes 55–57 (describing the Washington Administration view); Goebel, *supra* note 56, at 113–15, 171–72 (claiming that there was faithful adherence of the United States to this approach until the Civil War, in which the United States was understandably resistant to de facto possession giving rise to recognition). But see Robert Reinstein, *Slavery, Executive Power and International Law: The Haitian Revolution and American Constitutionalism*, 53 *Am. J. Legal Hist.* (forthcoming 2013) (manuscript at 65–71, 87–92) (on file with author) (arguing that the failure of U.S. presidents to recognize Haiti as the nineteenth century unfolded is a counterexample to Goebel’s claim).

⁶⁷ John Quincy Adams, *Memoirs* 205–06 (Charles Francis Adams ed., 1875); Letter from William H. Seward, Sec’y of State, to William L. Dayton, U.S. Minister to France (Apr. 7, 1864), *in* *The American Annual Cyclopaedia and Register of Important Events of the Year 1864*, at 528 (New York, D. Appleton & Co. 1865). But see H.R. Rep. No. 38-129, at 11

and Presidents increasingly emphasized their “sole organ” power. In one notable instance, Ulysses S. Grant vetoed two trivial joint resolutions by Congress—resolutions that simply responded to congratulations sent by foreign nations—on the ground that “[t]he Constitution of the United States, *following the established usage of nations*, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers.”⁶⁸ This language suggests that international law, or at least international custom, was serving as a direct principle of constitutional interpretation with regard to the power to deal with other states.

3. The Recognition of Cuba as a Separation-of-Powers Debate

International law played a role in perhaps the sharpest exchange between Congress and the executive branch over recognition during the nineteenth century—the debate over whether and when to recognize Cuba during its war of independence. In December 1896, the Senate Foreign Relations Committee voted to send a resolution to the floor of the Senate recognizing Cuba as independent. This decision came well before the President was ready to recognize Cuba and prompted an immediate, angry rebuttal by Secretary of State Richard Olney. “The power to recognize the so-called Republic of Cuba as an independent State,” Olney claimed, “rest[s] exclusively with the Executive.”⁶⁹ His remarks in turn provoked outrage among Senators, and helped fuel a lengthy floor debate over the constitutional allocation of the recognition power. Senators on both sides of the issue drew on international law in their constitutional interpretation.

(1864) (disagreeing with Seward’s assertions of an exclusive presidential recognition power).

⁶⁸ Ulysses S. Grant, Veto Message of Jan. 26, 1877, *in* Veto Messages of the President of the United States with the Action of Congress Thereon 407 (Washington, D.C., Government Printing Office 1886) (emphasis added).

⁶⁹ Olney Opposes Recognition of Cuba by America, *Norfolk Virginian*, Dec. 20, 1896, at 1. Two years later, the Solicitor of the State Department published a law review article that took a somewhat more nuanced view of the issue. He emphasized that “while the faculty of recognition depends on the internal public law of a State, yet in the forum of international law its exercise is considered as usually an executive function.” W. L. Penfield, *Recognition of a New State—Is It an Executive Function?*, 32 *Am. L. Rev.* 390, 390 (1898); see also *id.* at 396. His ultimate conclusion, however, was that since, in his view, international law did not require any particular style of recognition, a statute passed by Congress and signed by the President would constitute recognition. See *id.* at 408.

In asserting a congressional power of recognition, Senator Augustus Bacon of Florida relied on international law's status as domestic law in the United States. Bacon emphasized that "[i]nternational law is a part of the law of this land and will be administered by the courts of this country, both Federal and State, without any distinct legal enactment either by Congress or by any State government."⁷⁰ Because international law is domestic law, he reasoned, Congress, as the body in charge of making domestic law, should have the responsibility for the international legal decisions such as recognition.⁷¹ Bacon's structural argument was met with skepticism, however, as other Senators pointed out that his reasoning suggested that *only* Congress should make recognition decisions, while past practice (including the Washington Administration's recognition of France) suggested that the President had at least a concurrent power to do so.⁷²

More powerfully, Senator Eugene Hale of Maine used international law as a principle of constitutional interpretation in arguing for a sole presidential recognition power. In essence, he argued on the floor and in a written memorandum that the sole organ doctrine meant that the constitutional power of recognition lay with the President:

Resolutions of . . . legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a congressional recognition of belligerency or independence would be a nullity. . . . Congress can help the Cuban insurgents by legislation in many ways, but it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct.⁷³

⁷⁰ 29 Cong. Rec. 747 (1897) (statement of Sen. Bacon). This language bears a striking resemblance to the Supreme Court's contemporary assertion that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Hilton v. Guyot*, 159 U.S. 113, 143 (1895).

⁷¹ 29 Cong. Rec. 747 (1897) (statement of Sen. Bacon); see also *id.* at 746.

⁷² *Id.* at 747–49 (exchanges between Sens. Bacon, Gray, and Platt).

⁷³ 29 Cong. Rec. 670 (1987), also available as S. Doc. No. 54–56 (1987). There is a touch of originalism in Senator Hale's argument, as he asserts that "[a]ll of these considerations were familiar to the statesmen who framed the Federal Constitution," but the argument is not framed as a solely originalist one. *Id.* In addition to Senator Hale, Senator John Morgan of Alabama also relied on international law in interpreting the Constitution to give the President

Ultimately, the showdown over the recognition of Cuba turned into a compromise. The Senate did not pass this resolution, and just over a year later, President McKinley and Congress agreed on a resolution acknowledging the “people of the island of Cuba” as “free and independent”—language which did not explicitly recognize Cuba but came carefully close to doing so.⁷⁴ The arguments made by Senator Hale, however, found twentieth-century supporters and helped move the practice towards an exclusive presidential power of recognition.

4. Exclusive Presidential Recognition in the Twentieth Century

The theory of exclusive presidential recognition power crystallized as the twentieth century unfolded. During this period, scholars and constitutional actors followed Senator Hale in relying on international law as a principle of constitutional interpretation supporting an exclusive presidential recognition power.

The importance of international law as a background principle for interpreting the constitutional allocation of recognition powers is apparent in the writings of two particularly influential scholars of foreign affairs powers: Edwin Corwin and Philip Quincy Wright. In concluding in 1917 that the recognition power lay only with the President—acting alone or in conjunction with the Senate—Corwin relied on Senator Hale’s argument that “[r]esolutions of . . . legislative departments upon diplomatic matters have no status in international law.”⁷⁵ Quincy Wright similarly defended an exclusive presidential recognition power based on the President’s role as the representative organ for the United States under inter-

the recognition power as a “mere piece of diplomatic authority which he derives under the law of nations, which are recognized in the Constitution.” 29 Cong. Rec. 684 (1897) (statement of Sen. Morgan).

⁷⁴ 15 James D. Richardson, *A Compilation of the Messages and Papers of Presidents, 1789–1897*, at 6448 (New York, Bureau of National Literature, Inc. 1897); see also *Senate Discusses Cuba*, N.Y. Times, Apr. 21, 1898, at 3 (noting that a version of the resolution that would explicitly have recognized Cuba did not pass). The joint resolution also authorized the President to use force against Spain to further Cuban independence, see *id.*, and later defenders of an exclusive presidential power of recognition would argue that this resolution was an authorization of intervention only, not an act of recognition. E.g., Wright, *supra* note 61, at 271.

⁷⁵ Edwin S. Corwin, *The President’s Control of Foreign Relations* 80 (1917) (quoting Senator Hale’s memorandum); see also *id.* at 82 (alluding again to the fact that Congress lacked the power to communicate as a matter of international law on behalf of the United States).

national law.⁷⁶ Significantly, Wright saw international law not only as the basis for a presidential power of recognition, but also as a potential constraint on this power. More specifically, he suggested that the President's recognition powers might be constitutionally limited to situations where recognition was in fact warranted by international law—for example, to situations where the government to be recognized did in fact have territorial control.⁷⁷

Like Corwin and Quincy Wright, the Supreme Court came to rely on the sole organ doctrine in justifying the President's recognition powers. In *United States v. Belmont*, the Supreme Court considered whether President Franklin Roosevelt had the power to make an executive agreement ancillary to his sole decision to recognize the Soviet Union and its communist government. In upholding the President's actions as within his constitutional powers, the Court emphasized his "authority to speak as the sole organ of that government."⁷⁸

Belmont did not mention any role for Congress in recognition, though it did not expressly reject such a role either. Eventually, however, the Supreme Court would go further in dicta in *Banco Nacional de Cuba v. Sabbatino* to suggest that the recognition power is "exclusively a function of the Executive."⁷⁹ The Court did not further explain this dicta, simply making this statement in passing without any citation. With the development of this dicta, however, those seeking to justify the President's sole recognition power no longer needed to rely directly on international law as a background principle of constitutional interpretation. Instead, they could simply cite this dicta as demonstrating that constitutional provisions such as the Receive Ambassador Clause entrusted the recognition power to the President.⁸⁰ The role that international law had

⁷⁶ See Wright, *supra* note 61, at 268; see also *id.* at 273 (quoting Senator Hale for the proposition that legislative pronouncements lack status under international law).

⁷⁷ *Id.* at 269–70.

⁷⁸ 301 U.S. 324, 330 (1937).

⁷⁹ 376 U.S. 398, 410 (1964). This same shift can be seen from the *Restatement (Second) of Foreign Relations Law*, which described the President as having the recognition power without expressly discussing whether Congress had a concurrent recognition power, to the *Restatement (Third) of Foreign Relations Law*, which treats the President's recognition power as exclusive. See *Restatement (Second) of Foreign Relations Law of the United States* § 106(2) (1965); *Restatement (Third) of the Foreign Relations Law of the United States* § 204 (1987).

⁸⁰ E.g., *Restatement (Third) of the Foreign Relations Law of the United States* § 204 cmt. a & reporters' note 1 (1987).

played in shaping the constitutional allocation of the recognition powers thus faded into obscurity.

B. War Powers

The text of the Constitution gives Congress the power to “declare War,”⁸¹ and both its drafting history and the practice of the first Presidents indicates an original understanding that congressional authorization was needed for the United States to initiate hostilities. The reality today is far different. Presidents now consider themselves constitutionally entitled to launch significant attacks on other countries without congressional authorization, provided that doing so furthers what they consider to be the interests of the United States.

As a legal matter, Office of Legal Counsel memoranda now justify this shift by reference to the historical gloss. A close look at the past practices that underlie this gloss, however, reveals that international law has helped shape the constitutional distribution of war powers in all three of the ways discussed in Part I—as an input for other principles of constitutional interpretation, as a direct principle of constitutional interpretation, and as an extra-constitutional source of legitimacy.⁸² As Edwin Corwin once observed, “from the first it has devolved upon [the President] to protect American rights and to discharge American duties under the law of nations; and, as commonly happens, the path of duty became in time a road to power.”⁸³ Among other practices, international

⁸¹ U.S. Const. art. I, § 8, cl. 11.

⁸² I focus here only on international law’s role in shaping decisions to use force in the first place. International law has also played an important role in shaping the constitutional allocation of war powers with regard to the conduct of existing hostilities. As early as *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), the Supreme Court used international law in interpreting the constitutional scope of the President’s powers to conduct hostilities. *Id.* at 123–29 (concluding that, in the absence of specific congressional authorization, the President did not have the constitutional power to seize enemy property within the United States in violation of a “modern” rule of international law). Perhaps because the Supreme Court has weighed in more frequently on the separation of powers with regard to the conduct of hostilities than with regard to the other areas of foreign relations law explored in this Article, existing scholarship has already explored how international law has helped shape the constitutional allocation of powers with regard to the conduct of hostilities. See *supra* note 47.

⁸³ Corwin, *supra* note 31, at 236 (suggesting that the Take Care Clause helped bolster this growth in presidential power); see also *id.* at 240–41 (“Thanks to the same capacity to base action directly on his own reading of international law . . . the President has been able to gather to himself powers with respect to warmaking which ill accord with the specific delegation in the Constitution of the war-declaring power to Congress.”).

law helped justify the many minor engagements undertaken solely under presidential authority, as well as more major commitments undertaken by Presidents acting without Congress in asserted responses to treaty commitments of the United States.

1. *Minor Engagements*

Starting early in the nineteenth century, U.S. armed forces periodically carried out small-scale attacks without congressional authorization. For purposes of constitutional law, the most important of these attacks was probably the bombardment of Greytown, Nicaragua by the U.S. naval ship *Cyane*, nominally in retaliation for an unpunished assault on an American diplomat.⁸⁴ The bombardment of Greytown is significant both because it was a comparatively substantial use of force—the *Cyane* destroyed the town—and because it gave rise to a rare court decision on presidential authority to use force. Written by Supreme Court Justice Samuel Nelson riding circuit, *Durand v. Hollins* is a case that still appears in leading textbooks covering the constitutional division of war powers.⁸⁵

In deciding that the President had the constitutional power to authorize the bombardment of Greytown, Justice Nelson observed that:

As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection.⁸⁶

This passage hints at two principles of international law. One—the one directly relevant to the case—is the principle that nations are responsible for protecting their citizens from abuse and seeking reparations or revenge for injuries to them.⁸⁷ But international law does not di-

⁸⁴ For a detailed account, see David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861*, at 117–21 (2005).

⁸⁵ 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186); see also, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* 232–33 (2011) (including this case).

⁸⁶ *Durand*, 8 F. Cas at 112.

⁸⁷ Emer de Vattel, *The Law of Nations* bk. II, § 71 (“Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should

rectly speak to what branch of government bears responsibility for fulfilling this responsibility. To attribute this responsibility to the President, Justice Nelson draws an analogy to another principle of international law—the sole organ doctrine—reasoning that because the President acts as the sole organ under international law, he must also be responsible for fulfilling the international legal role of protecting U.S. citizens.⁸⁸

In *Durand*, Justice Nelson also noted that Greytown was “an irresponsible and marauding community.”⁸⁹ Although he did not elaborate on this point, there is an implication that it is appropriate for the President to independently authorize the use of force against such communities, as opposed to more responsible states. International law authorized the punishment of “mischievous” nations,⁹⁰ and in any event such communities might be less akin to nations than to pirates, who were understood to be the enemy of all. These international legal principles in turn might influence the constitutional allocation of powers, either by suggesting that attacks on such communities did not amount to “war” or because the President would be independently authorized to conduct these attacks under his increasingly recognized role as the constitutional enforcer of international law.

Although *Durand* gives only a hint of these arguments, they were made more expressly by constitutional actors in the political branches in relation to the bombardment of Greytown. President Franklin Pierce likened Greytown to a “piratical resort of outlaws” and emphasized that it “did not profess to belong to any regular government, and had, in fact, no recognized dependence on or connection with anyone to which the United States or their injured citizens might apply for redress or which could be held responsible in any way for the outrages committed.”⁹¹ In a debate in the Senate a few years later, Senator Jacob Collamer asserted that while the President might have the constitutional power to use force

avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation.”).

⁸⁸ For a discussion of some other instances where the international legal principle of protecting or avenging one’s citizens is used to bolster the President’s power to authorize the use of aggressive force in the nineteenth century, see Currie, *supra* note 84, at 122–23.

⁸⁹ 8 F. Cas. at 112.

⁹⁰ Vattel, *supra* note 87, at bk II, § 70.

⁹¹ Franklin Pierce, Message to Congress of Dec. 4, 1854, *in* 5 Richardson, *supra* note 74, at 282; see also Currie, *supra* note 84, at 119–21 (noting the constitutional implications). President Buchanan would later back away from his predecessor’s justification of the attack. See Louis Fisher, *The War Power: Original and Contemporary* 20 (2009).

against “barbarous and uncivilized people” like the inhabitants of Greytown, he could not do so “in relation to a civilized people, a people with whom we have reciprocated diplomatic relations.”⁹²

International law thus provided a constitutionally significant distinction regarding what communities the President could use force against without the need for congressional authorization. This distinction mattered beyond Greytown and can be found in the thinking of constitutional actors as late as President William Howard Taft. After observing that congressional authorization is only needed in “the case of a war of aggression” against a foreign country, he went on to remark that:

[W]hat constitutes an act of war [as a constitutional matter] . . . is sometimes a nice question of law and fact. It really seems to differ with the character of the nation whose relations with the United States are affected. The unstable condition as to law and order of some of the Central American republics creates different rules of international law from those that obtain in governments that can be depended upon to maintain their own peace and order.”⁹³

In essence, Taft used an evolving understanding of international law as an input for understanding the textual meaning of “war” in the Constitution. His approach justified the independent use of force by the President in many contexts, but still required congressional authorization to initiate hostilities against stable countries.

Important as these international-law-based distinctions may have been, however, they would ultimately get swallowed up by a more expansive understanding of presidential war powers—one which used the precedents created in line with these distinctions without recognizing their importance. One common approach taken by twentieth-century supporters of broad presidential war powers was to simply list all prior independent presidential uses of force without discussing the justifications given for them. In 1941, for example, Senator Connally of Texas offered up a list of “85 incidents” of presidential authorizations of mili-

⁹² Cong. Globe, 35th Cong., 1st Sess. 1727 (1858). For another example, see Currie, *supra* note 84, at 115, 120 n.34 (noting that President Tyler viewed congressional authorization as needed for military intervention to protect American civilians, provided that the intervention would be “agst [sic] a civilized Nation”).

⁹³ William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities, and Its Limitations* 86 (1916).

tary missions abroad without congressional authorization⁹⁴ in the course of arguing that, prior to the U.S. entry into World War II, the President had the constitutional authority to send thousands of U.S. troops to Iceland to repel any German threat there. Senator Connally's list included mostly minor uses of force, typically against non-state communities or the Central American countries considered distinctive for international law purposes by Taft. One entry reads, "Cuba 1823: [t]o pursue and break up an establishment of pirates," and another, "Fiji Islands 1840: [t]o punish natives for an attack upon Americans."⁹⁵ But rather than considering the nuances of these practices, Senator Connally offered them up as wholesale endorsements of presidential power to use force abroad on behalf of U.S. interests. Such simplified aggregations would later be embraced by executive branch officials seeking to justify unilateral presidential uses of force.

2. Treaties as a Basis for Presidential Uses of Force

Treaties have helped enhance the President's war powers vis-à-vis Congress in three main ways. First, there is a longstanding constitutional debate about whether the President can use force without congressional approval that he would otherwise need where treaty commitments obligate or, more commonly, authorize this use of force. The more widely accepted view today is that he cannot, but past precedents going the other way have informed the current scope of the President's war powers. Second, where treaties authorize U.S. action, Presidents can use this fact as an extra-constitutional source of legitimacy that bolsters their arguments in favor of the use of force. Third, in its early days, the U.N. Charter was deemed by some constitutional actors to influence the constitutional allocation of power between the President and Congress not only in the two ways just suggested, but also by reshaping the international law of war.

The relationship between the congressional power to declare war and the treaty power shared by the President and the Senate hinges on whether congressional authorization for the use of force is needed where a treaty commits or authorizes the United States to go to war under cer-

⁹⁴ 87 Cong. Rec. 5930–31 (1941); see also *id.* at 5929 (making clear that the list focuses on presidential actions not specifically authorized by Congress).

⁹⁵ *Id.* at 5930.

tain conditions and these conditions have been satisfied.⁹⁶ These questions first arose very early in U.S. constitutional history,⁹⁷ but to date they have appeared most dramatically in relation to the Korean and Vietnam Wars.

In committing U.S. troops to the Korean War without congressional authorization, President Truman relied heavily on the fact that, in response to North Korea's attack, the U.N. Security Council had voted to recommend that Member States "furnish such assistance to [South Korea] as may be necessary to repel the armed attack and to restore international peace and security in the area."⁹⁸ The executive branch's doctrinal use of the Security Council Resolution was two-fold. First, executive branch officials and supporters argued that, as a matter of constitutional doctrine, the Security Council Resolution removed any need for congressional authorization. The State Department memorandum justifying the intervention argued that the President was authorized to carry out the Security Council's recommendation under his Take Care Clause power and that doing so was a "paramount" interest of the United States.⁹⁹ Second, congressional supporters claimed that the Security Council Resolution had the effect of making the intervention a "police operation" rather than a "war" within the meaning of the Constitution¹⁰⁰—in effect arguing, as President Taft had done decades earlier, that evolving international law shapes the meaning of "war" for constitutional purposes. But

⁹⁶ A precedential question is whether the United States can enter into such treaties in the first place. While this issue has been debated, see, e.g., 1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 290 (1929), in practice U.S. treaties have done so. One Senate Foreign Relations Committee report has suggested that mutual defense and other such treaties should at least "implicitly" reserve a right for the United States to decide whether to act militarily, in order to preserve a role for the House of Representatives in warmaking. See S. Exec. Rep. No. 95-12, at 74 (1978).

⁹⁷ See Wright, *supra* note 61, at 227; Corwin, *supra* note 75, at 158–63. For a discussion of how this argument was used to justify President Roosevelt's intervention in Cuba in 1906 under the Platt Amendment, see Taft, *supra* note 93, at 74–76.

⁹⁸ S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).

⁹⁹ Dep't of State, Memorandum of July 3, 1950, *reprinted in* H. Rep. No. 81-2495, at 61, 65–67 (1950). The memorandum also argued that the intervention lay within the President's sole authority based on the numerous nineteenth-century presidential uses of force, using the reasoning discussed *supra* note 94 and accompanying text. *Id.* at 64–65, 67–68.

¹⁰⁰ 96 Cong. Rec. 9541 (1950) (statement of Sen. Flanders); see also Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 Harv. J.L. & Pub. Pol'y 533, 576 (1996) (discussing the characterization of the Korean War as a "police action" by congressional supporters immediately following the Security Council Resolution and describing how President Truman ultimately appropriated this language).

these arguments all had weak points. Importantly, the Security Council had not undertaken action directly nor had it required anything of Member States. Instead, it had simply *recommended* that Member States take action—facts which weakened the Take Care Clause argument because it meant the United States had no international legal obligation to carry out the Security Council mandate and which weakened the “police action” argument because it meant that for all practical purposes the response would come from individual states rather than directly from a centralized international authority. Moreover, the legislative history behind the approval of the U.N. Charter in the Senate and of its implementing legislation in Congress more generally indicated a congressional assumption that further congressional action would occur before the United States used force on behalf of the Security Council.¹⁰¹

But while the doctrinal arguments were weak, the extra-constitutional legitimacy conveyed by the Security Council Resolution was strong. At least initially, members of Congress were nearly unanimous in applauding the intervention in Korea¹⁰²—and while some of this approval rested on anti-communist fervor, much of it also rested on a desire to bolster the recently created United Nations.¹⁰³ Senator Ralph Flanders, for example, emphasized that he did not think the President had the power to initiate such a use of force under “ordinary circumstances,” but that the use of force here “gets its justification from the preservation of the usefulness and very existence of the United Nations.”¹⁰⁴ Majority Leader

¹⁰¹ In particular, Congress assumed that there would be a further agreement with the United Nations, approved by the Senate or Congress, whereby the United States placed a certain number of troops at the Security Council’s disposal. The President would then be able to authorize use of these troops, but any additional troop use would need further congressional approval. This agreement, however, was never made. See Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 *Am. J. Int’l L.* 74, 77–81 (1991). But see Turner, *supra* note 100, at 559–63 (arguing that even in the absence of the additional agreement, the President has the constitutional authority to commit troops on behalf of the United States).

¹⁰² Turner, *supra* note 100, at 568–70.

¹⁰³ E.g., 96 *Cong. Rec.* 9539 (1950) (statement of Sen. Knowland) (expressing anti-communist views); *id.* at 9540 (statement of Sen. Stennis) (voicing pride that “we are operating at this time through the United Nations”); *id.* at 9543 (statement of Sen. Saltonstall) (“We are in Korea because under the United Nations Charter . . . we are attempting to keep peace.”); *id.* at 9544 (statement of Sen. Connally) (noting “serious obligations resting upon us as a nation, because of our plighted faith to support the United Nations”).

¹⁰⁴ 96 *Cong. Rec.* 9541 (1950).

Scott Lucas viewed the Security Council Resolution as “a fact that cannot be stressed too much.”¹⁰⁵

Although the constitutionality of Truman’s intervention in Korea remains doubtful today, in practice the executive branch has since used similar reasoning in justifying other interventions, including the war in Vietnam. The State Department memorandum defending the legality of the President’s intervention there relied on three independent arguments in concluding that there was “no question” as to the constitutionality of his actions.¹⁰⁶ One of these arguments relied on the Southeast Asia Collective Defense Treaty (“SEATO”).¹⁰⁷ Under this treaty, members agreed to “act to meet the common danger in accordance with [their] constitutional processes,” and the State Department rather dubiously read this language as implying that the President could undertake whatever actions he deemed necessary to fulfill this obligation for the United States.¹⁰⁸ This reasoning closely resembles that used with regard to the Korean War, since in both cases the State Department considered a U.S. treaty obligation to increase the President’s independent war powers.

As importantly, however, the State Department’s justification for the Vietnam War reveals how opportunistically prior precedents like the Korean War can be used. As discussed above, the defenses of President Truman’s intervention in Korea relied heavily on the U.N. Security Council Resolution not simply because the U.N. Charter was a treaty commitment of the United States, but also because the U.N. Charter was seen as a *transformative* treaty commitment that conveyed powerful extra-constitutional legitimacy and altered the meaning of war in international law in ways that had constitutional ramifications. In Vietnam, however, there was no supportive Security Council Resolution. One might think that the State Department memorandum would have noted these comparative points of weakness, but its constitutional discussion

¹⁰⁵ Id. at 9542.

¹⁰⁶ See Dep’t of State Memorandum of Mar. 4, 1966, *reprinted in* 112 Cong. Rec. 5504–09 (1966).

¹⁰⁷ See generally *id.* at 5508. In addition to relying on the SEATO Treaty, the memorandum argued (1) that the President had the independent power to commit U.S. troops to Vietnam as commander-in-chief (citing the Korean War, among others, as a precedent and also relying on the dubious numeric reasoning discussed *supra* note 94 and accompanying text) and (2) that the Gulf of Tonkin Resolution constituted congressional authorization. See *id.* at 5507–09.

¹⁰⁸ Id. at 5508 (acknowledging but essentially ignoring evidence from the ratification history that a land army would not be used by the President for this purpose).

made scant mention of them.¹⁰⁹ Instead, the comparisons drawn by the State Department only emphasized the constitutional strengths of the Vietnam intervention compared to Korea:

In the Korean conflict, where large-scale hostilities were conducted with an American troop participation of a quarter of a million men, no declaration of war was made by the Congress. The President acted on the basis of his constitutional responsibilities. While the Security Council, under a treaty of this country—the United Nations Charter—recommended assistance to the Republic of Korea against the Communist armed attack, the United States had no treaty commitment at that time obligating us to join in the defense of South Korea. In the case of South Vietnam we have the obligation of the SEATO Treaty and clear expressions of congressional support. If the President could act in Korea without a declaration of war, a fortiori he is empowered to do so now in Vietnam.¹¹⁰

This discussion demonstrates just how easily past practices can be used to justify still more expansive practices down the road. The State Department memorandum ignores or downplays factors that were important to President Truman's constitutional war powers at the time of the Korean intervention—the Security Council Resolution, the paramount interest in having the United Nations be a success, the support of most members of Congress—in favor of a narrative of unbounded, unilateral presidential action. This fluid use of the Korean War precedent, like the use of minor nineteenth-century engagements, helped develop the current, extraordinarily broad understanding of the President's war powers.

C. Sole Executive Agreements

The text of the Constitution provides only one clear way for the United States to make international agreements. This is the Treaty Clause, which gives the President the power to make treaties with the advice and consent of two-thirds of the Senate.¹¹¹ Today, however, the President enters into many international agreements under his own authority. Known

¹⁰⁹ Id. at 5507–09. The memorandum did discuss the absence of a Security Council Resolution in the section addressing the intervention's legality under international law. Id. at 5505–06.

¹¹⁰ Id. at 5509.

¹¹¹ U.S. Const. art II, § 2, cl. 2.

as sole executive agreements, these tend to be more modest international legal commitments than treaties approved through the Treaty Clause, but they still serve as a substantial source of presidential foreign affairs powers.¹¹²

As with recognition powers and war powers, international law has bolstered the President's power to make sole executive agreements.¹¹³ Historically, constitutional actors used international law in all three of the ways described in Part I in determining and defending these increased powers. More specifically, international law helped justify the President's power to enter into the two types of sole executive agreements that form the roots of this power: first, agreements settling claims between U.S. nationals and foreign nations; and second, temporary agreements, known as *modi vivendi*, with other nations pending more permanent arrangements. As with recognition (though in a less pronounced way), the sole organ doctrine played a part in these developments, and so did several other principles of international law.

1. Claims Settlement Agreements

Claims settlement agreements are a well-established type of sole executive agreements and have done the most to establish the President's power to enter into sole executive agreements. These agreements initially settled the claims of U.S. citizens against foreign nations, though they have now come to have broader scopes.¹¹⁴ The first involved the *Wilmington Packet*, a privately owned American ship that was seized by a Dutch privateer in a way that the United States believed violated a treaty between the Netherlands and the United States. In 1799, the U.S. diplomat posted to the Netherlands entered into an agreement with his Dutch

¹¹² For discussions of the reach of sole executive agreements, see, e.g., Michael D. Ramsey, Executive Agreements and the (Non)Treaty Power, 77 N.C. L. Rev. 133 (1998); Bradford R. Clark, Domesticating Sole Executive Agreements, 93 Va. L. Rev. 1573 (2007).

¹¹³ I focus here only on sole executive agreements, but international law has also strengthened the President's hand in other forms of international agreements. For example, the sole organ doctrine helped persuade the Senate to abdicate a formal pre-negotiation role with regard to treaties made through the Treaty Clause, see S. Foreign Relations Comm., 14th Cong., Rep. of Feb. 15, 1816 (1st Sess. 1816), though the best evidence suggests that the Framers intended the Senate to play both pre-negotiation and post-negotiation roles, see Jean Galbraith, Prospective Advice and Consent, 37 Yale J. Int'l L. 247, 256–58 (2012).

¹¹⁴ Ingrid Brunk Wuerth, The Dangers of Deference: International Claim Settlement by the President, 44 Harv. Int'l L.J. 1, 1 (2003). Historically, sovereign immunity principles made it difficult or impossible for private citizens to pursue these claims on their own. *Id.* at 21.

counterpart whereby the Dutch government paid a sum of money to the United States on behalf of the American owners of the cargo and in return was released of all claims.¹¹⁵ From the perspective of foreign relations law, the most interesting thing about the settlement process is the lack of evidence suggesting that the U.S. executive branch officials involved ever considered whether they had the constitutional power to make the agreement.¹¹⁶ They seem to have simply assumed that they had this power—an assumption which presumably was influenced as a matter of extra-constitutional legitimacy by the fact that, as a matter of international law, this was the kind of thing that foreign offices did for their citizens.

As the State Department undertook more claims settlement agreements, however, the constitutional justifications began to be formally developed. These justifications relied on international law as a principle of constitutional interpretation. Most prominently, constitutional actors cited the sole organ doctrine, which, as discussed earlier, is grounded in a mix of international law and perceptions of executive power. In 1835, Andrew Jackson vetoed an act that would have authorized the Secretary of State to settle claims of American citizens with Sicily and Naples for less than the full amount, on the ground that the “Executive [already] has competent authority to negotiate about it for them with a foreign government—an authority Congress can not constitutionally abridge or increase.”¹¹⁷ When the question of the President’s power to enter into claims settlement agreements ultimately reached the courts, they would similarly emphasize the sole organ doctrine and the appropriateness, as a matter of international law, that claims settlement be handled by the State Department.¹¹⁸

¹¹⁵ See Letter from William Vans Murray to U.S. Secretary of State Timothy Pickering (Dec. 23, 1799), in 5 *Treaties and Other International Acts of the United States of America* 1099 (Hunter Miller ed., 1937) [hereinafter Miller].

¹¹⁶ There is no mention of the constitutional question, for example, in the lengthy compilation of documents in Miller, *supra* note 115, at 1075–1103, related to the *Wilmington Packet*.

¹¹⁷ Andrew Jackson, Veto Message to the Senate (Mar. 3, 1835), in 3 Richardson, *supra* note 74, at 146.

¹¹⁸ E.g., *Dames & Moore v. Regan*, 453 U.S. 654, 683 (1981) (quoting language from *Ozanic*); *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951) (“The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.”); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (relying on the “sole organ” doctrine); see also Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presi-*

In addition to the sole organ doctrine, constitutional actors also derived the President's power to enter into claims settlement agreements from the international legal responsibility of nations to look after the interests of their citizens—a responsibility that, as discussed earlier, was understood to lie primarily with the executive. “In making [claims settlement agreements],” explained a Department of State Memorandum in 1922, “the Executive has taken appropriate steps to obtain redress for infringement of rights of American citizens under treaties and under international law.”¹¹⁹

These two international legal doctrines helped develop the President's constitutional power to enter into claims settlement agreements. In addition, textualists have come to use international law as an input for understanding the meaning of the word “treaties” in the Treaty Clause in a way that also supports this presidential power. Professor Michael Ramsey, for example, has argued that the word “treaties” is meant to invoke a distinction made by Vattel and other eighteenth-century international legal theorists between different types of international agreements.¹²⁰ Vattel used “treaties” to refer to particularly important international agreements, whereas “agreements” referred to less significant undertakings.¹²¹ International law thus provides a textualist basis for finding *some* international agreements made outside the Treaty Clause by the President to be constitutional, but also for requiring that more significant international commitments go through the Treaty Clause.¹²² This use of in-

dential Agreements: Interchangeable Instruments of National Policy: Part I, 54 Yale L.J. 181, 249–50 (1945) (attributing claims settlement power to the sole organ doctrine); *id.* at 268 (“International law and practice provide that claims by citizens of one government against another government may be prosecuted only through the foreign office of the claimant's government.”).

¹¹⁹ Memorandum of the Solicitor for the Department of State (Nielsen), sent to Senator Lodge by the Under Secretary of State (Phillips) (Aug. 23, 1922), *quoted in* 5 Green Haywood Hackworth, *Digest of International Law* 390 (1943); see also James F. Barnett, *International Agreements Without the Advice and Consent of the Senate*, 15 Yale L.J. 63, 76 (1905) (explaining, in a section on claims settlement agreements, how “[o]ne of the principal duties of the department of state relates to the protection of American citizens abroad”).

¹²⁰ Ramsey, *supra* note 112, at 165–71. The Supreme Court drew a similar textualist distinction between “Treaties” for purposes of the Treaty Clause and “Agreements or Compacts” for purposes of the State Compacts Clause as far back as *Holmes v. Jennison*, 39 U.S. 540, 571–72 (1840), though this decision related to vertical separation of powers rather than to their horizontal separation.

¹²¹ Ramsey, *supra* note 112, at 165–71 (discussing the issue with much more nuance).

¹²² See *id.* at 204 (making this argument in the claims settlement context). To the contrary, however, scholars who think the meaning of “treaties” in the Constitution should be under-

ternational law, however, may be historically less important than the uses of the sole organ doctrine and the responsibility for the protection of American citizens in the development of the President's claim settlement powers, however, as there is little evidence that the executive actually relied on it during the formative periods.

2. *Modi Vivendi*

A *modus vivendi* is "an arrangement of a temporary and provisional nature concluded between . . . subjects of international law which gives rise to binding obligations on the parties."¹²³ As with claim settlement agreements, it came to be accepted that Presidents could enter into *modi vivendi* under their sole constitutional powers. Some *modi vivendi* were procedural in nature, setting forth the ground rules that would govern a treaty negotiation. The President's authority to enter into these was accepted as flowing from his sole organ power, but constitutional actors have also used this power to justify other more substantive *modi vivendi*, such as provisional agreements on boundary disputes or fishing rights pending their final resolutions.¹²⁴

One particularly bold use of a *modus vivendi* was made by Theodore Roosevelt with the Dominican Republic. He had negotiated a treaty with the Dominican Republic that would, among other things, place the United States in charge of collecting the Dominican Republic's customs revenue.¹²⁵ When the Senate did not immediately have the votes needed for its advice and consent, President Roosevelt simply arranged a *modus vi-*

stood in light of current rather than eighteenth-century international law have argued that, in light of developments in international law, important international commitments can be "agreements" rather than "treaties" and that this is relevant for constitutional purposes. E.g., McDougal & Lans, *supra* note 118, at 195–97, 318–28.

¹²³ Walter Rudolf, *Modus Vivendi*, in 3 *Encyclopedia of Public International Law* 442–44 (Rudolf Bernhardt ed., 1997).

¹²⁴ Memorandum from Alvey A. Adee, Acting Secretary of State to W.A.F. Ekengren, Swedish Charge d'Affaires ad interim (Mar. 22, 1907), *quoted in* 5 Hackworth, *supra* note 119, at 392 ("The executive department of the government is confided the general authority over foreign intercourse, and, as a necessary incident to such authority, the executive possesses a large and undefined power to enter into compacts and agreements relating to almost every topic properly subject to international negotiation. A typical illustration of an agreement within the competence of the Executive . . . is the ordinary case of a *modus vivendi*."); cf. *Watts v. United States*, 1 Wash. Terr. 288, 294 (1870) (deeming the power to make a *modus vivendi* over a boundary to be "a necessary incident to every national government" and further stating that it "inheres where the executive power is vested").

¹²⁵ For a detailed discussion, see W. Stull Holt, *Treaties Defeated by the Senate* 212–29 (1933).

vendi that effectively implemented the customs-collections provisions of the treaty.¹²⁶ This sharply reduced the relevance of the Senate's review of the treaty and, as Roosevelt well knew, was a move of dubious constitutionality.¹²⁷ During the angry debate that followed in the Senate, President Roosevelt's chief defender, Senator John Spooner of Wisconsin, had very little to offer in the way of constitutional justifications.¹²⁸ One of his few arguments, however, drew upon international legal principles. He claimed that the *modus vivendi* was appropriate because the pending treaty created an "obligation of honor" upon both parties to act in a way that would respect the terms of the future treaty.¹²⁹ Although Spooner did not elaborate on this "obligation of honor," it invokes an international legal principle that nations owe some duties to each other regarding a treaty from the time a treaty is signed, not just after it is ratified.¹³⁰ Spooner then argued that this obligation meant that the "President not only had a constitutional right to [enter into the *modus vivendi*], but it was his duty . . . to this body where the treaty is pending to do it."¹³¹ Spooner's argument is yet another example of the use of international law as a background principle of constitutional interpretation, albeit a particularly unconvincing and opportunistic one.

Although less significant than claims settlement agreements, *modi vivendi* have proved important to constitutional justifications of the President's power to enter into sole executive agreements more generally. Almost all defenses of this presidential power have relied heavily on the past practice of one or both of claims settlement agreements and *modi vivendi*.¹³² The role that international legal principles like the sole organ

¹²⁶ Id. at 222–23.

¹²⁷ Roosevelt later observed that "[t]he Constitution did not explicitly give me the power to bring about [the *modus vivendi*]. But the Constitution did not forbid my doing what I did. I put the agreement into effect, and I continued its execution for two years before the Senate acted . . ." Theodore Roosevelt, *An Autobiography* 524 (1916).

¹²⁸ See 40. Cong. Rec. 1423–31 (1906).

¹²⁹ Id. at 1425–26.

¹³⁰ In the eighteenth century, this doctrine was so strong that nations were understood to be obligated to ratify treaties that they signed, see Galbraith, *supra* note 113, at 265–68. Today, vestiges of this doctrine remain in the principle that signatories to a treaty are obliged not to take acts that would defeat its "object and purpose" prior to its entry into force. Vienna Convention on the Law of Treaties art. 18, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

¹³¹ 40. Cong. Rec. 1426 (1906).

¹³² See, e.g., George Sutherland, *Constitutional Power and World Affairs* 120–21 (1919); Corwin, *supra* note 75, at 119–23; Wright, *supra* note 61, at 237–46. Where sole executive agreements relate to military affairs, however, they are often justified by reference to the

doctrine have played in helping build the President's sole executive agreement powers therefore reaches beyond these two particular types of agreements.

IV. PAST PRACTICE TODAY

The prior Part described the debt that the President's expansive foreign affairs powers owe to international law. It showed how constitutional actors who favored presidential power relied on international legal principles in justifying accruals of presidential power vis-à-vis Congress. The practices discussed in the prior Part, however, all took place in the past, mostly in the nineteenth and early to mid-twentieth centuries. In this Part, I turn to the practice of foreign relations law today, and to the roles played or not played by international law. I do so by looking at three assertive exercises of presidential foreign affairs powers by the Obama Administration in the last few years: its stance on the recognition power taken in *Zivotofsky v. Clinton*; its military intervention in Libya without Congressional authorization; and its apparent assertion that the President can ratify the Anti-Counterfeiting Trade Agreement ("ACTA") on behalf of the United States as a sole executive agreement.

On the face of the Administration's defense of these actions, international law matters little, if at all, to the constitutional separation of foreign affairs powers today. Consistent with the separation-of-powers anomaly discussed in Part II, the legal justifications given for the President's actions do not treat international law as a background principle of constitutional interpretation or indeed even rely on it as an input for other principles of constitutional interpretation. Yet this does not mean that international law has played no role in defining the current practices. For what these justifications do rely on—and rely on primarily—are either the past practices that were described in Part III or later practices that were in turn derivative of those practices. Since these past practices are now used without any consideration of their international legal roots,

commander-in-chief clause. E.g., Corwin, *supra* note 75, at 117–18. Interestingly, the Supreme Court's dicta in *United States v. Curtiss-Wright Export Corp.* supporting international agreements made other than through the Treaty Clause does not specifically rely on the claims settlement agreements or *modi vivendi*, although it does rely on international law more generally. 299 U.S. 304, 319 (1936) (“[T]he power to make such international agreements as do not constitute treaties in the constitutional sense . . . [while not] expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. . . . [based on] the law of nations.”).

however, the role that international law played in creating them is forgotten and the nuances that international law might bring to their interpretation are lost.

A. Zivotofsky

During the 2011 term, the Supreme Court considered a showdown between Congress and the President over whether U.S. citizens born in Jerusalem could list “Israel” as their nation of birth on their U.S. passports.¹³³ Congress had passed a statute requiring that the State Department allow U.S. citizens born in Jerusalem to do so,¹³⁴ but the Obama Administration refused to enforce this statute. Noting a consistent executive policy since the Eisenhower Administration of not recognizing Jerusalem as part of any state, the executive branch claimed that this statute violated an exclusive presidential power to recognize foreign states.¹³⁵

In *Zivotofsky v. Clinton*, an American citizen born in Jerusalem challenged the executive branch’s refusal to enforce the Congressional statute. The district court and the D.C. Circuit dismissed the case as barred by the political question doctrine, but the Supreme Court reversed, with eight justices agreeing that the case was justiciable. Although the merits were fully briefed and argued, the Court chose not to address them, but rather remanded for the D.C. Circuit to address the merits in the first instance.¹³⁶ The D.C. Circuit had not decided this case at the time this piece was finalized for publication, but the original D.C. Circuit opinion suggests that the court will agree with the Obama Administration that the President has an exclusive recognition power upon which the statute impermissibly intrudes.¹³⁷

¹³³ *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1424 (2012).

¹³⁴ Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, 1366 (2002). In a signing statement, President George W. Bush had stated that this statutory provision (and other associated ones) unconstitutionally interfered with his recognition powers. See *Zivotofsky*, 132 S. Ct. at 1425.

¹³⁵ Brief for the Respondent at 13, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699).

¹³⁶ *Zivotofsky*, 132 S. Ct. at 1430–31.

¹³⁷ *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009) (asserting that it has been “clear from the earliest days of the Republic” that the recognition power “belongs solely to the President”); see also *id.* at 1245 (Edwards, J., concurring) (concluding that the statute “impermissibly intrudes on the President’s exclusive power to recognize foreign sovereigns”).

Throughout the briefing and oral argument, past practice formed the backbone of the executive branch's assertion of an exclusive recognition power. The brief for the Secretary of State emphasized that "[l]ongstanding Executive Branch practice, congressional acquiescence, and judicial precedent establish that the President[] . . . [has] the exclusive power to recognize foreign states and their governments."¹³⁸ It devoted seven pages to the past practices of recognition, including President Washington's decision to recognize the revolutionary government of France and the back-and-forth between Congress and the President over the recognition of Cuba.¹³⁹ At oral argument, the Solicitor General also spent substantial time on historical practice and argued that it was "critical as a matter of history . . . that there is not a single piece of legislation that has passed both houses of Congress and come to the President purporting to recognize a foreign nation."¹⁴⁰

Although the executive branch lawyers emphasized past practice, they did not mention international law's role in shaping past practice or otherwise treat international law as relevant to the constitutional question. The brief for the Secretary of State treated the past practices as growing out of domestic considerations. When it relied on the Washington Administration's decision to recognize the revolutionary government of France, it did not mention the role that international law played in this constitutional precedent; and although its discussion of the dispute over the recognition of Cuba referenced Senator Hale's memorandum, it did not note the international-law-based reasoning underpinning this memorandum.¹⁴¹ The treatment of the sole organ doctrine is particularly striking. It is mentioned, to be sure, but its international legal underpinnings are not. Instead, the brief treats the sole organ doctrine as reflecting a

¹³⁸ Brief for the Respondent, *supra* note 135, at 14. As a textual matter, the brief also emphasized the Receive Ambassadors Clause, see, e.g., *id.*, but at oral argument, the Solicitor General acknowledged that this clause was not essential to his argument. See Transcript of Oral Argument at 42, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699).

¹³⁹ Brief for the Respondent, *supra* note 135 at 18–24.

¹⁴⁰ Transcript of Oral Argument, *supra* note 138, at 25; see also *id.* at 25, 28–30 (discussing past practice).

¹⁴¹ Brief for the Respondent, *supra* note 135, at 18–24. The reply brief for Zivotofsky, however, does claim that international law shaped the Washington Administration's decision. Petitioner's Reply Brief at 5–7, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699) (citing Professor Reinstein's work). Justice Kennedy asked Zivotofsky's counsel one question in relation to this argument, Transcript of Oral Argument, *supra* note 138, at 55–56, but the discussion of the recognition power in the Court's eventual opinion made no reference to international law. See generally *Zivotofsky*, 132 S. Ct. 1421.

principle of *domestic* expediency—one aimed at “avoiding conflicting foreign-policy pronouncements among the three Branches.”¹⁴² By ignoring how international law has helped shape past practice, constitutional actors in the executive branch thus presented a different—and much stronger case—for the President’s recognition power than the historical record reflects.

B. Libya

President Obama’s decision to use force in Libya demonstrates just how much the executive’s independent war powers have developed since the Founding. On March 19, 2011, following a U.N. Security Council Resolution authorizing the use of force, President Obama and European allies initiated “a military intervention on a scale not seen in the Arab world since the Iraq war.”¹⁴³ “Operation Odyssey Dawn” enforced a no-fly-zone over Libya and carried out extensive bombing of strategic targets in order to “prevent[] Qaddafi from overrunning those who oppose him.”¹⁴⁴ In advising the President that he could constitutionally undertake this intervention without congressional authorization, the Office of Legal Counsel (“OLC”) relied mainly on past practice, explaining that “[e]arlier opinions of this Office and other historical precedents establish the framework for our analysis.”¹⁴⁵

In its memorandum, OLC’s use of international law was notably limited. Unlike the State Department’s memorandum on the President’s use of force in Korea, the OLC memorandum did not directly rely on international law in its constitutional interpretation. Instead, for OLC, the only legal relevance of the Security Council’s resolution was that it triggered an “important” U.S. interest—namely, “preserving the credibility and effectiveness of the United Nations Security Council.”¹⁴⁶ Gone was the argument that the President had the independent authority under the Take Care Clause to implement a Security Council Resolution, and gone was the claim that the Security Council Resolution changed the nature of

¹⁴² Brief for the Respondent, *supra* note 135, at 27.

¹⁴³ David D. Kirkpatrick et al., *Allies Open Air Assault on Qaddafi’s Forces*, N.Y. Times, Mar. 20, 2011, at A1.

¹⁴⁴ Libya Memorandum, *supra* note 1, at 5.

¹⁴⁵ *Id.* at 6.

¹⁴⁶ *Id.* As noted *supra* note 26 and accompanying text, the Security Council Resolution may have also been tacitly used as a source of extra-constitutional legitimacy.

the action from “war” to “police action.”¹⁴⁷ Instead, OLC simply relied on past practice, mostly of recent vintage, including a 1980 OLC Memorandum on *Presidential Power to Use the Armed Forces Abroad without Statutory Authorization* and the OLC memoranda supporting the 1992 intervention in Somalia, the 1995 deployment to Bosnia, and the 2004 intervention in Haiti.¹⁴⁸

These prior OLC memoranda in turn relied heavily on past practices in which international law played a role, but ignored or watered down how international law helped justify these practices. In terms of minor engagements, the memoranda simply emphasized the large number of times the President has used force abroad with little discussion of the contemporaneous justifications given for these uses.¹⁴⁹ *Durand v. Hollins* and the bombardment of Greytown became straightforward precedents for the President’s power to respond to attacks against American citizens without any consideration of either the international legal roots

¹⁴⁷ See supra notes 99–100 and accompanying text. Intriguingly, several foreign relations law scholars felt it necessary to articulate why, in their view, the Security Council Resolution did not change the legal analysis presented—even though the Obama Administration was not formally arguing otherwise. See Michael J. Glennon, Forum: The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion, *Harv. Nat’l Security J.* 7–14, (2011), http://harvardnsj.org/wp-content/uploads/2011/04/Forum_Glennon.pdf; Statement by Louis Fisher before the Senate Committee on Foreign Relations, *Libya and War Powers I*, 3 (June 28, 2011), http://www.foreign.senate.gov/imo/media/doc/Fisher_Testimony.pdf. These responses may reflect frustration with the role the Security Council Resolution was playing as an extra-constitutional source of legitimacy.

¹⁴⁸ Libya Memorandum, supra note 1, at 6–9 (drawing primarily on these memoranda and the interventions they authorized). The President’s initial decision to use force in Libya without congressional authorization was basically consistent with these practices. His decision to *continue* using force in Libya, however, was a more dramatic break from precedent, as this decision was difficult to reconcile with the requirements of the War Powers Resolution. See Trevor W. Morrison, Forum: Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation, 124 *Harv. L. Rev.* 62, 62–63, 66 (2011).

¹⁴⁹ Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to the Counsel for the President, Proposed Deployment of United States Armed Forces into Bosnia 4 n.4 and accompanying text (Nov. 30, 1995), available at www.justice.gov/olc/bosnia2.htm [hereinafter Bosnia Memorandum]; Memorandum from Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel, to William P. Barr, Attorney General, Authority to Use United States Military Forces in Somalia 3 n.2 and accompanying text (Dec. 4, 1992), available at <http://www.justice.gov/olc/presiden.8.htm> [hereinafter Somalia Memorandum]; Memorandum from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, to the Counsel for the President, Deployment of United States Armed Forces to Haiti 2 (Mar. 17, 2004), available at <http://www.justice.gov/olc/2004/legalityofdeployment.pdf> [hereinafter Haiti Memorandum].

of this power or the relevance of Greytown's piratical character.¹⁵⁰ Even more interesting was the way the memoranda relied on treaty-based precedents and yet downplayed the importance of the treaty obligations in describing these precedents. All four memoranda explicitly used the Korean War as a precedent but described it in ways that minimized the role that international law played in its constitutional justification.¹⁵¹ (This occurred even though the interventions at issue in the Haiti and Somalia memoranda were, like the Korean War, authorized by the U.N. Security Council, and one might therefore think the international legal reasoning used in the Korean War would have been applicable.) None of the four memoranda suggested that the Security Council's role might affect whether the intervention constitutes a "war." Only the oldest of these memoranda—the 1980 one—reiterated the claim that the President has authority under the Take Care Clause to use force to advance U.S. international legal commitments and the memorandum was hesitant to treat the Korean War as an example of this authority.¹⁵² The later three memoranda simply dropped the Take Care Clause justification altogether.¹⁵³ These three memoranda did rely on the one remaining use of international law for constitutional purposes made during the Korean War:

¹⁵⁰ See Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980) [hereinafter Presidential Power Memorandum]; Somalia Memorandum, *supra* note 149, at 3; Haiti Memorandum, *supra* note 149, at 2–3.

¹⁵¹ Two memoranda used the Korean and Vietnam Wars as precedential support for unilateral presidential power to initiate hostilities. Presidential Power Memorandum, *supra* note 150, at 187–89 (treating the Korean and Vietnam Wars as appropriate precedents for presidential initiation of hostilities, although noting the need of congressional approval for sustaining the operations); Bosnia Memorandum, *supra* note 149, at 3 (citing approvingly to the Vietnam and Korean Memoranda as support for unilateral presidential action without reference to their treaty-based arguments, although noting in a footnote that it was "unnecessary" to consider whether presidential power reached as far as to cover the Korean War); *id.* at 4 n.5. The other two used it only in claiming that supporting the United Nations is an interest of the United States as described *infra* note 154.

¹⁵² Presidential Power Memorandum, *supra* note 150, at 186 (observing that "[t]he President also derives authority from his duty to 'take Care that the Laws be faithfully executed,' for both treaties and customary international law are part of our law and Presidents have repeatedly asserted authority to enforce our international obligations even when Congress has not enacted implementing legislation," but qualifying this claim in a footnote); *id.* at 188 n.7 (stating, in relation to Korea, that "[a]lthough support for this introduction of our armed forces into a 'hot' war could be found in the U.N. Charter and a Security Council resolution, the fact remains that this commitment of substantial forces occurred without congressional approval").

¹⁵³ This abandonment of the Take Care Clause argument by the executive branch thus pre-dates the Supreme Court's decision in *Medellin v. Texas* discussed *supra* note 29.

the claim that support for the United Nations constitutes a key U.S. interest. Even here, however, the argument was watered down: Where this was a “paramount” U.S. interest in the Korea Memorandum, it slipped to being a “vital” U.S. interest in the Somalia and Bosnia, and Haiti interventions¹⁵⁴—and, as noted above, dwindled still further in the Libya Memorandum to being simply an “important” U.S. interest.¹⁵⁵

Constitutional decision-making on the use of force has thus become almost entirely divorced doctrinally from international law, even though international law helped justify past practices on which the current doctrine relies. This divorce has important implications for the President’s power to initiate military interventions without congressional support. On the one hand, international law no longer provides a direct boost to presidential power as a matter of doctrine (though it may still serve as a source of extra-constitutional legitimacy). This is not very significant, however, because international law is no longer directly needed for these boosts—instead, constitutional actors can support sole presidential uses of force simply by pointing to past practices without further considering the international legal roots of these practices. On the other hand—and more significantly—the divorce between constitutional decision-making and international law means that international law no longer supplies any recognized *limits* on the President’s power to initiate military interventions. International law has ceased to be used as a boundary between constitutionally acceptable and constitutionally dubious independent presidential uses of force; instead, recent OLC memoranda treat the President as having the constitutional authority to initiate the use of force in violation of international law.¹⁵⁶

C. *The ACTA*

As with the Libya intervention, the constitutional question of whether the United States can ratify the Anti-Counterfeiting Trade Agreement as

¹⁵⁴ Somalia Memorandum, supra note 149, at 4 (quoting “paramount” language from the Korea Memorandum as well); Bosnia Memorandum, supra note 153, at 5; Haiti Memorandum, supra note 153, at 4 (quoting “paramount” language from the Korea Memorandum as well).

¹⁵⁵ Libya Memorandum, supra note 1, at 6, 10, 12; see also *id.* at 12 (quoting the Bosnia Memorandum for the word “vital,” though not directly applying it to the Libya intervention).

¹⁵⁶ See Somalia Memorandum, supra note 149, at 1 (noting in cover memo that a Security Council Resolution is not a “precondition” for presidential action); Haiti Memorandum, supra note 149, at 4 (same).

a sole executive agreement has so far remained outside the courts. The ACTA is an international agreement negotiated among an important group of developed countries that mandates strong enforcement efforts and tough penalties for intellectual property violations.¹⁵⁷ U.S. law already satisfies most or all of the ACTA's requirements,¹⁵⁸ but, if the United States were to ratify the ACTA, it would be committed to these requirements as a matter of international law, rather than simply domestic law. Because the ACTA is controversial—its ratification is opposed by some influential organizations who deem it too harsh an enforcement regime¹⁵⁹—it would be very difficult for the President to obtain the advice and consent of two-thirds of the Senate in support of it (or alternatively to get Congress to approve it as a congressional-executive agreement). As a result, the constitutional question is critically important to whether the United States will ratify the ACTA. If the President has the power to ratify this agreement as a sole executive agreement, then he can do so whenever he chooses; but if he needs Congress or the Senate, then ratification will be impossible or, at best, a difficult fight that requires the expenditure of significant political capital.

Unlike with *Zivotofsky* and the Libya intervention, the executive branch has not produced any extensive, publicly available explanation of why it considers that the President can constitutionally ratify the ACTA as a sole executive agreement. To date, we only have brief assertions by executive-branch officials—mostly contained in letters responding to the inquiries of a member of Congress¹⁶⁰—plus some academic scholarship

¹⁵⁷ See Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, 50 I.L.M. 243, available at http://www.ustr.gov/webfm_send/2417.

¹⁵⁸ Oona A. Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, ASIL INSIGHTS (Aug. 24, 2011), <http://www.asil.org/pdfs/insights/insight110824.pdf> (noting dispute over whether the ACTA is fully compatible with existing U.S. domestic law).

¹⁵⁹ *Id.* at 3 (noting concerns raised by a coalition that includes Google, Facebook, Microsoft, and eBay). Advocacy groups favoring Internet freedom such as EFF are also opponents. See, e.g., Maira Sutton & Parker Higgins, *We Have Every Right to be Furious about ACTA*, Electronic Frontier Foundation, (Jan. 27, 2012), <https://www.eff.org/deeplinks/2012/01/we-have-every-right-be-furious-about-acta>. Resistance to ACTA has already led the European Parliament to reject it. See Charles Arthur, *ACTA down, but not out, as Europe vote against controversial treaty*, *The Guardian* at 1 (July 4, 2012, 9:24 AM), <http://www.guardian.co.uk/technology/2012/jul/04/acta-european-parliament-votes-against>.

¹⁶⁰ See sources cited *supra* note 3. Some commentators have read the Obama Administration as claiming it can ratify the ACTA as an *ex ante* congressional-executive agreement, since a letter by State Department Legal Advisor Harold Koh notes that the "ACTA was negotiated in response to express congressional calls for international cooperation to enhance

exploring the constitutional question in more depth.¹⁶¹ As support for its argument that the ACTA can be ratified as a sole executive agreement, the executive branch has relied primarily on past practice. The oldest practice it cites is the 1947 General Agreement on Tariffs and Trade (GATT),¹⁶² and it also cites a “long line” of later, more minor trade agreements which were ratified as sole executive agreements.¹⁶³

The executive branch’s limited public defense of its position makes analysis of its legal reasoning and of the historical pedigree it relies upon more difficult than with *Zivotofsky* and the Libya intervention. Nonetheless, it seems that international law is not playing any direct role in the constitutional question of whether the President can ratify the ACTA as a sole executive agreement. The executive branch pronouncements on this question, such as they are, do not suggest that international law is playing any direct part; and nor does the scholarship produced to date on the issue.¹⁶⁴ Like the other examples, however, this does not mean that international law has not influenced the constitutional analysis, but rather any such influence must lie in how international law helped develop the past practices that built the President’s sole executive agreement power. As discussed earlier, international legal concepts indeed help develop these practices, including ones in the claims settlement and *modus*

enforcement of intellectual property rights.” Letter from Harold Koh, *supra* note 3, at 1; Jack Goldsmith, *The Doubtful Constitutionality of ACTA as an Ex Ante Congressional-Executive Agreement*, Lawfare Blog (May 21, 2012, 1:03 PM), <http://www.lawfareblog.com/2012/05/the-doubtful-constitutionality-of-acta-as-an-ex-ante-congressional-executive-agreement/>. I view this argument as a secondary one, however, since (1) Koh’s letter does not disavow the sole executive agreement justification, see generally Letter from Harold Koh, *supra* note 3; and (2) as a matter of statutory construction, it is difficult to read the statute cited in Koh’s letter as congressional authorization of ACTA’s ratification. See Goldsmith, *supra*. An even more recent speech by Koh suggests that he would view an executive branch ratification of ACTA as falling on a spectrum between ex ante congressional-executive agreement and a sole executive agreement. Harold Koh, Legal Advisor, U.S. Dep’t of State, Thomas F. Ryan Lecture at Georgetown University Law School, *Twenty-First Century International Lawmaking* (Oct. 17, 2012), available at <http://www.state.gov/s/l/releases/remarks/199319.htm>.

¹⁶¹ See Sean Flynn, *ACTA’s Constitutional Problem: The Treaty Is Not a Treaty*, 26 *Am. U. Int’l L. Rev.* 903, 904 (2011); Hathaway & Kapczynski, *supra* note 158.

¹⁶² USTR Fact Sheet, *supra* note 3.

¹⁶³ Letter from Ron Kirk, *supra* note 3, at 1; Letter from Harold Koh, *supra* note 3, at 2. The Supreme Court has not ruled on the constitutionality of these sole executive agreements but has held that they should not affect its interpretation of previously enacted congressional statutes. See *Quality King Distrib. v. L’Anza Research Int’l*, 523 U.S. 135, 153–54 (1998) (finding three of the executive agreements later cited in the Kirk Letter to be “irrelevant” to a statutory interpretation question before it).

¹⁶⁴ See generally sources cited *supra* notes 3 and 160.

vivendi context that helped cement the President's sole executive agreement power.¹⁶⁵

V. RETHINKING PRESIDENTIAL POWER

So far, this Article has been mostly descriptive. I have shown that while today international law is rarely if at all used as a direct principle of constitutional interpretation in resolving separation of powers disputes, historically constitutional actors drew on it in resolving these disputes in favor of the President. This Part considers implications that this account holds for our present understanding of presidential power. I first argue that this account offers grounds for skepticism, or at least for careful scrutiny, regarding arguments based on past practice. I then briefly turn to consider the role that international law could play in separation of powers interpretation today.

A. Skepticism About Past Practice

There are several reasons why past practice is important to constitutional interpretation. It can serve as an input for originalist thinking (as when it signals the views of constitutional actors who themselves had been Framers), but it can also stand alone as a principle of constitutional interpretation. Professors Bradley and Morrison suggest that it can have the Burkean quality of “reflect[ing] collective wisdom generated by the judgments of numerous actors over time.”¹⁶⁶ It also can serve the same

¹⁶⁵ Additionally, in the specific context of the GATT, early executive branch justifications relied on the President's sole organ powers. Extension of Reciprocal Trade Agreement Act: Hearing on H.R. 1211 Before the S. Comm. On Finance, 81st Cong. 1051 (1947) (statement of Winthrop G. Brown, Director, Office of Int'l Trade Policy, Dep't of State) (“Under the Constitution the President, as the organ of the United States Government for the conduct of foreign affairs, has broad authority to discuss any matter of foreign relations with other governments and come to tentative agreement with them as to how such matters should be handled.”) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). The relevance of the GATT as a precedent for sole executive trade agreements is far more complicated than USTR's reference to it in its Fact Sheet on ACTA suggests. President Truman embraced a “provisional” agreement applying the GATT pending the GATT's formal ratification in a way similar to Theodore Roosevelt's *modus vivendi* with the Dominican Republic (though the provisional agreement lasted far longer, as the GATT itself was never ratified). See Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 Calif. L. Rev. 671, 751–52 (1998). The executive branch defended this provisional agreement as a mixture of a sole executive agreement and an ex ante congressional-executive agreement. See *id.*

¹⁶⁶ Bradley & Morrison, *supra* note 23, at 426.

values of consistency, predictability, efficiency, and protection of reliance interests that respect for precedent serves in the context of judicial decision-making.¹⁶⁷ But, as with judicial precedents, the power of past practice to actually advance these values is not absolute. Oliver Wendell Holmes, Jr. warned against overreliance on past practice when he complained about following a rule simply because it was “laid down in the time of Henry IV”—and noted that it was “still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”¹⁶⁸ Prior practices may not fit a present situation, even if these prior practices were wise ones for their times. Moreover, these prior practices may reflect poor initial decision-making or be narrower than their subsequent invocations suggest.

This Article’s exploration of past foreign relations practice offers at least two reasons in favor of subjecting arguments rooted in past practice to more rigorous scrutiny than they presently receive. First, in line with Justice Holmes’s observation, I have shown that past practices establishing the constitutional separation of powers rest in part on the use of international law as a principle of constitutional interpretation—a use which is not comparably found today. Its absence today stems from a matter of principle on the part of constitutional actors who do not favor the use of international law as a principle of constitutional interpretation and from a matter of practice from constitutional actors who do favor such a role but use it primarily in the individual rights context.

Both groups have reason to be wary of past practices that rest in part on the use of international law as principle of constitutional interpretation. Those constitutional actors and scholars who do not favor the use of international law in constitutional interpretation might not wish to rely on past practices which are grounded on such uses. And those constitutional actors who do favor the use of international law in constitutional interpretation should be concerned about relying on past practices where these practices rest in part on international legal principles that have since faded or vanished entirely. The structure of international law has changed substantially since the nineteenth century, both in terms of what it covers and how it is understood to operate. The sole organ doctrine that spurred the President’s recognition power, for example, is no longer

¹⁶⁷ Id. at 427–28.

¹⁶⁸ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

as important to international law as it was in the nineteenth century.¹⁶⁹ To give another example, international law regarding the use of force has changed dramatically since it was used in establishing past practices in the nineteenth and early twentieth centuries, and it now sets rigorous doctrinal limits on when the use of force is permissible. Such developments raise serious questions about whether the premises undergirding past practices still remain valid.

Second, the uses of past practice explored in this Article suggest that the strength and applicability of past practices are often overstated by supporters of increased presidential power. By ignoring international law, these supporters miss alternative explanations for why past practices occurred and thus miss the nuances and limitations that these past practices contain.

The debate over the recognition power illustrates this point. In the Solicitor General's retelling in *Zivotofsky*, the Washington Administration's decision to recognize France becomes a decision "that this is an *exclusive* power" of the President,¹⁷⁰ rather than a decision in which the constitutional issue was barely considered, if at all (let alone considered in terms of whether the power was concurrent or exclusive), and the *g* was instead driven by the aim of complying with the law of nations. The Solicitor General's emphasis on the absence of congressional statutes proclaiming recognition similarly overlooks a likely explanation related to international law in favor of a claim of broad Presidential power under the Constitution. Rather than signaling congressional acceptance of an exclusive presidential recognition power, this absence instead might instead show respect for the international legal principle that states conduct their official business through a single representative authority.¹⁷¹

¹⁶⁹ See, e.g., Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, ¶ 3, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) (omitting any discussion of need for states to maintain a single representative authority); Anne-Marie Slaughter, *A New World Order* (2004) (describing increasing disaggregation of states at the international level); Peter J. Spiro, Globalization and the (Foreign Affairs) Constitution, 63 *Ohio St. L.J.* 649, 667–71 (2002) (discussing how the norms governing communication have changed).

¹⁷⁰ Transcript of Oral Argument, *supra* note 138, at 28 (emphasis added); see also *id.* at 25; Brief for Respondent, *supra* note 135, at 18 (characterizing the Washington Administration's decision as an "assert[ion of] the *sole* authority to recognize which government represents a foreign state") (emphasis added).

¹⁷¹ See Penfield, *supra* note 69, at 408. Congress might accordingly consider itself entitled to participate in the internal decision-making process about recognition (as shown by nineteenth-century legislation closely tied to recognition), while leaving it to the President to undertake the official act of recognition out of respect for international law. This in turn might

By overlooking the role that international law played in shaping past constitutional practice, the Solicitor General air-brushed out these nuances and enabled a broader claim of presidential power. In turn, the original D.C. Circuit opinion accepted the executive branch's characterizations of past practice at face value without looking closely to see whether these are in fact warranted. It simply repeated the executive branch's claim that past practice established the President's exclusive recognition power not long after the Framing,¹⁷² stating in its opinion that it has been "clear from the earliest days of the Republic" that the recognition power "belongs solely to the President."¹⁷³ Had the court looked closely at the actual past practice, however, it would have discovered that nineteenth-century precedents did not resolve whether the President's recognition power was exclusive or concurrent with Congress (and indeed arguably favored the latter position).

Although these two points favor increased scrutiny of separation-of-powers arguments based on past practice, they do not necessarily negate these arguments. The reasons on which past practices are based may remain entirely or mostly applicable today: The importance of efficiency and respect for reliance interests may be sufficient to justify the continuance of the practice, or there may be other reasons why its continuance is desirable. Indeed, I myself believe that past practice is a valuable and appropriate tool of constitutional interpretation. My claim is simply that arguments based on past practice should be treated more warily than is presently the case. It is important to look beneath the surface and see if past practice really supports what it is said to support and, if so, whether the reasons underlying this practice remain true today. The need for scrutiny is especially strong because the executive branch may have incentives to inflate the significance of past practices supporting presidential exercises of power. The other branches should therefore be cautious in accepting such claims. Greater scrutiny of the sources and scope of past practices relied on the executive branch might lead courts to substantially different outcomes in separation-of-powers cases.

suggest that Congress can constitutionally legislate on matters that have a close nexus with recognition, such as birthplace designations on U.S. passports, but that do not constitute official communications between nations.

¹⁷² See Brief for Appellee at 23, *Zivotofsky v. Sec'y of State*, 571 F.3d 1227 (D.C. Cir. 2009) (No. 07-5347) (claiming that "[f]or at least 150 years, it has been settled law that recognition of foreign sovereigns is a constitutional power vested exclusively in the President").

¹⁷³ *Zivotofsky*, 571 F.3d at 1231.

B. Using International Law Going Forward

The influence that international law has had on the separation of foreign affairs powers in the past has implications for how international law could be used in separation of powers jurisprudence today. These implications are far from absolute, as approaches to constitutional interpretation rest as much on normative presumptions as on the lessons of experience. Nonetheless, for those who can normatively accept the prospect of international law's use as a direct principle of constitutional interpretation, the past uses described in this Article offer both support and guidance for how it could potentially be used today with regard to the separation of powers.

The past practice described here offers support for the use of international law in the separation of powers because it shows that international law is not a "new source" of constitutional interpretation in this context,¹⁷⁴ but rather an old one. Accordingly, as Sarah Cleveland has observed, "historical practice answers the legitimacy objection that international law is 'foreign' to the American constitutional tradition."¹⁷⁵ Indeed, the role that international law has played in helping to bolster executive power in the past might make it particularly fitting for international law to be considered in assessing the limits of the Presidential power going forward. As this Article has shown, Presidents accrued power in the past in part by using international legal arguments, which in turn have helped deter Congress and the courts from resisting these exercises of power. Later Presidents then expanded on these practices by relying on them without recognizing their international legal roots. In essence, the President's current powers make use of all the gains gotten from international law without also being responsive to the limits set by international law. Returning international law to the interpretive set would thus assist in recovering the boundary that international law used to help set between permissible and impermissible sole presidential action.¹⁷⁶

¹⁷⁴ Contra Alford, *supra* note 19, at 57–58.

¹⁷⁵ Cleveland, *supra* note 7, at 7. One can question how much international law today really follows continuously from international law in the nineteenth century, particularly given developments like human rights law. The examples used in this paper, however, are all ones that international law regulated in some manner back in the nineteenth century, though its specific contours have since changed.

¹⁷⁶ Cf. Wuerth, *supra* note 10, at 75–82 (arguing that, historically, the permissible boundaries of the President's commander-in-chief power were shaped by international law).

The past practices discussed in this Article also suggest that international law might have functional value as a principle of constitutional interpretation in the separation of powers context. As one example, the nineteenth century reliance on international law principles in interpreting the boundary between when the President could use force on his own versus when he needed congressional authorization had practical advantages: it allowed the President to act swiftly in response to piratical communities, but encouraged congressional authorization where the force was aimed at other countries and was therefore more likely to create international frictions. As this suggests, international law can serve as a useful proxy for assessing what actions might most risk international tensions. In the modern era, U.S. military operations abroad that are in compliance with international law, such as the Libya intervention authorized by the Security Council, are less likely to cause international strife than operations in violation of international law. There might therefore be benefits to a constitutional approach that permitted the President alone to undertake military interventions of up to a certain scale that are in compliance with international law but that required congressional authorization for military interventions that are in violation of international law. The fit is not perfect—some actions in violation of international law will doubtless cause little international tension, and some actions in furtherance of it will cause much tension—but it offers an improvement over the current doctrinal divorce between the scope of presidential power and the international consequences of its exercise.¹⁷⁷

Past practice alone does not necessarily justify the use of international law in understanding the domestic separation of power. Nor does it answer every question about how exactly international law might be used, what kinds of international law might be used, or what might incentivize constitutional actors to reincorporate international law into their constitutional analysis. All these important questions lie well beyond the scope of this piece to address. But past practice does provide some clues for how international law might be used and, for those who view historical

¹⁷⁷ The functional value of this appeal is suggested by the fact that the Supreme Court has interpreted certain congressional statutes to incorporate international law in ways that constrain the President to act in accordance with international law. This is particularly true regarding the interpretation of statutes relevant to the detention and trial by military commission of alleged Al Qaeda combatants. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593–94 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion).

practice as enhancing legitimacy, some basis for thinking it might be appropriate to use it.

CONCLUSION

In 1859, Czar Alexander II came across a soldier standing guard in an obscure part of his palace garden. Intrigued, he sought to learn why the soldier was posted there. The answer, which took some trouble to find, was that long ago Catherine the Great had seen a snowdrop in bloom on that spot, and ordered that it not be plucked. “This command had been carried out by placing a sentry on the spot, and ever since then”—decades after the passing of the snowdrop—“one had stood there all the year round.”¹⁷⁸

Like the sentries of the Czar, the historical gloss remains long after the original reasons for exercises of presidential power have withered away. Today, the President is understood to have expansive foreign affairs powers mostly because he has exercised them in the past. What is largely forgotten is *why* he initially exercised these powers, even though the answers might tell us something about the extent to which he should be doing so today.

This Article has sought to uncover the forgotten role that international law played in furthering the rise of the President’s foreign affairs powers. It has shown that the President’s expansive foreign affairs powers developed in part through reasoning based on international law, even though today they are understood to rest on domestic grounds. In the process, it has shown that the doctrinal line between domestic and international law was once much more fluid than it is today. Ironically, even as international law has come to play a greater and greater role in world affairs, the boundary between international law and U.S. constitutional law has become steeper and higher.

But the recovery of memory is only a first step. The revelation that the sentry had been posted to protect long-vanished snowdrops led the Czar to reassign him—or so one hopes. Similarly, once we begin to understand how the President’s powers vis-à-vis Congress were shaped by international law, then we can begin to rethink the roles that international law should play in expanding or constraining presidential power.

¹⁷⁸ 1 Otto von Bismarck, *Bismarck, the Man and Statesman* 247 (New York and London, A.J. Butler trans., Harper & Bros. 1899).