International Agreements and the Political Safeguards of Federalism

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In an article written almost fifty years ago, Professor Herbert Wechsler claimed that "the national political process in the United States... is intrinsically well adapted to retarding or restraining new intrusions by the
center on the domain of the states." In light of the political safeguards of federalism, he argued, the Supreme Court "is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states . . . ." In short, given the safeguards for states' interests that are inherent in the political process, there is little need for the Supreme Court to fashion judicially created constitutional rules to protect the states against unwanted intrusions by the federal government.

Although the Supreme Court once adopted Wechsler's view,\(^3\) the Rehnquist Court has firmly rejected Wechsler's thesis with respect to ordinary legislation.\(^4\) The Rehnquist Court has not yet considered, though, how Wechsler's thesis and its own federalism doctrines apply to international agreements. This Article considers the application of the Rehnquist Court's federalism jurisprudence to international agreements. In doing so, the Article assumes the validity of that jurisprudence, without attempting to defend or critique it.

The United States employs three different types of mechanisms for entering into international agreements: treaties, congressional-executive agreements, and sole executive agreements. A "treaty" is an international agreement approved by a two-thirds vote in the Senate. A "congressional-executive agreement" is an international agreement approved by majority vote in both Houses of Congress. A "sole executive agreement" is an agreement concluded by the President on the basis of his Article II powers, without explicit authorization or approval by any legislative body.\(^5\) This Article's central thesis is that the need for judicially created constitutional rules to protect the states is inversely related to the degree of political safeguards inherent in the different mechanisms for entering into international agreements.

Part I contends that there is a strong case for judicially enforced federalism limitations on sole executive agreements because the process for concluding sole executive agreements provides very weak political safeguards for the states. Part II contends that there is little need for judicially enforced federalism limitations on the treaty power because the two-thirds majority requirement and the disproportionate power of small states in the Senate provide substantial political safeguards for the states. Part III contends that congressional-executive agreements are an intermediate case. Compared to

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2. Id. at 559.
3. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) ("State sovereign interests... are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").
4. See infra notes 77-79 and accompanying text.

treaties, the need for judicial enforcement of federalism limitations is greater because the political safeguards are weaker. Compared to sole executive agreements, however, there is less need for judicially enforced federalism constraints because the political safeguards are stronger.6

I. STATE LAW AND SOLE EXECUTIVE AGREEMENTS

Scholarly views about the relationship between state law and sole executive agreements tend to divide between nationalist and federalist positions. Professor Michael Ramsey, representing the federalist position, contends that "the President has independent authority to enter minor [sole executive] agreements in order to conduct routine affairs,"7 but such agreements can never supersede state law. In contrast, the Restatement (Third), representing the nationalist position, says that the Tenth Amendment does not limit the President's power to make sole executive agreements,8 and that "[a] sole executive agreement made by the President on his own constitutional authority is the law of the land and supreme to State law."9

Part I is divided into four sections. The first section suggests that the federalist position finds substantial support in the constitutional text and the original intent of the Framers. The second section demonstrates that Supreme Court precedent and Executive Branch practice tend to support the nationalist position. The third section contends that there are sound practical reasons for finding a middle ground between the federalist and nationalist positions. The final section invokes the principle of democratic legitimacy as a way to mediate between nationalist and federalist camps.

Part I proposes the following two-part rule. First, the President does not have the constitutional authority to utilize a sole executive agreement to supersede valid state statutory or constitutional law. Second, the President does have the constitutional authority to utilize a sole executive agreement to supersede state common law. The federalist arguments summarized in the first

6. In comparing the degree of political safeguards associated with different mechanisms for concluding international agreements, my focus is primarily on structural safeguards. Professor Larry Kramer has argued that the "real" political safeguards of federalism are not derived from structural safeguards, but rather from "a complex system of informal political institutions (of which political parties have historically been the most important)." Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215, 219 (2000). Kramer's analysis, though, focuses on domestic legislation. Thus, even assuming that he is right, his argument is consistent with the view that structural safeguards are important with respect to international agreements.


8. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302, cmt. d [hereinafter RESTATEMENT (THIRD)].

9. Id. § 115 n.5. The Restatement does suggest that there may be Eleventh Amendment limits on the President’s power to conclude sole executive agreements. See id. § 302 n.3.
section support the first part of the rule. The nationalist arguments summarized in the second section support the second part of the rule. The concept of democratic legitimacy provides a principled rationale for giving less weight to sole executive agreements than other types of international agreements, and for according greater weight to state statutory and constitutional law than state common law.

A. The Federalist View

Sole executive agreements involve “two distinct powers: (1) the power to create international obligations binding upon the United States as a matter of international law, and (2) the power to implement such international obligations as a matter of U.S. law, such that they supersede existing inconsistent U.S. law . . .”

Professor Ramsey claims that the President has a limited power to create binding international obligations by means of sole executive agreements, but the President cannot create binding domestic law by means of sole executive agreements.

Ramsey presents both textual and historical arguments in support of his view that sole executive agreements lack the force of law within the domestic legal system. In his view, the Framers recognized a distinction between treaties and nontreaty agreements. The Framers intended the President to have a power to undertake minor or temporary commitments by means of nontreaty agreements. In contrast, the treaty power was intended to be the exclusive means for the United States to enter into significant, long-term commitments. Whereas the Framers intended for treaties to have domestic legal force, they did not intend for nontreaty agreements to have domestic legal effect in the absence of implementing legislation.

The constitutional text is generally consistent with Ramsey’s view of original intent. The text of the Constitution distinguishes between a treaty and an “Agreement or Compact with . . . a foreign Power.” Article II states explicitly that treaties require Senate approval, and the Supremacy Clause provides that treaties are “the supreme Law of the Land.” In contrast, the Constitution does not require Senate approval for an “Agreement or Compact.”

10. Ramsey, supra note 7, at 145.
11. See id. at 139.
12. See id. at 160-73 (analyzing the original understanding of the President’s power to enter into sole executive agreements).
14. See Ramsey, supra note 7, at 194-206.
15. See id. at 225-31.
16. U.S. Const. art. I, § 10, cl. 3 (providing that no State shall enter into an agreement or compact with a foreign power “without the Consent of Congress”).
17. U.S. Const. art. II, § 2, cl. 2.
18. U.S. Const. art. VI, cl. 2.
nor does it grant such nontreaty agreements the status of supreme federal law. If nontreaty agreements had the same domestic legal force as treaties, then there would be no apparent reason to require Senate approval for treaties because the President could bypass the Senate at will and achieve the same results by using sole executive agreements. Therefore, textual analysis supports the inference that nontreaty agreements should not have the same domestic legal force as treaties.

Nationalists may argue that the different approval processes for treaties and executive agreements relate to differences in the international scope of such agreements, not their domestic effects. Under this view, treaties require Senate approval because the treaty mechanism is used for agreements of major international significance; sole executive agreements do not require Senate approval because they "deal with minor, technical or routine matters of diplomacy." 19 There are two responses to this argument. First, as an empirical matter, the President has often utilized sole executive agreements to conclude international agreements of major political importance. 20 Second, as a textual matter, differences between the international scope of treaties and sole executive agreements may help explain why sole executive agreements do not require Senate approval, but those differences cannot explain why sole executive agreements are excluded from the text of the Supremacy Clause. Indeed, the fact that the Supremacy Clause refers to treaties, but not sole executive agreements, provides strong textual support for the federalist position.

B. The Nationalist View

In The Federalist, John Jay stated: "All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature..." 21 The Supreme Court cited this language approvingly in one of its key decisions on the domestic effects of sole executive agreements. 22 The implication is clear: Insofar as the President has the constitutional power to enter into sole executive

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20. See, e.g., Cong. Research Serv., Treaties and Other International Agreements: The Role of the United States Senate 61 (1993) [hereinafter CRS Study] (Sole executive agreements "were responsible for the Open Door policy toward China at the beginning of the twentieth century, the effective acknowledgment of Japan's political hegemony in the Far East pursuant to the Taft-Katsura Agreement of 1905 and the Lansing-Ishii Agreement of 1917, American recognition of the Soviet Union in the Litvinov Agreement of 1933, the Destroyers-for-Bases exchange with Great Britain prior to American entry into World War II, the Yalta Agreement of 1945 ... the 1973 Vietnam Peace Agreement, and, more recently, the Iranian Hostage Agreement of 1981.").
agreements, such agreements have the same domestic legal force as a federal statute. This is the nationalist view.23

Longstanding Presidential practice supports the nationalist view. Between 1789 and 1989, the United States concluded more than 12,000 nontreaty international agreements.24 Although the vast majority of such agreements were concluded after 1939, the United States had entered into 1,182 such agreements before 1939.25 Beginning in the early nineteenth century, Presidents utilized sole executive agreements not only to deal with politically important matters involving relations with foreign governments,26 but also to deal with matters affecting the private rights of U.S. citizens.27

_Watts v. United States_28 is the earliest reported judicial decision addressing the domestic effects of sole executive agreements. The key issue in the case was whether “the Island of San Juan is within the sole and exclusive jurisdiction of the federal government,”29 or whether the government of the Territory of Washington exercised concurrent jurisdiction. The area near San Juan Island had been the subject of a boundary dispute between the United States and Great Britain. As an interim measure, to avoid military conflict, the two sides concluded a sole executive agreement in 1859, thereby establishing a joint military occupation of San Juan Island.30 The dissent in _Watts_ argued that the 1859 executive agreement completely displaced the law of Washington Territory, placing San Juan Island under the “sole and exclusive jurisdiction” of the federal government.31 The majority concluded that the 1859 agreement was not intended to establish exclusive federal jurisdiction over San Juan Island. However, the majority agreed that the 1859 agreement “should be allowed to modify for the time being the operation of the organic act of this Territory . . . .”32 Thus, it was common ground among all the Justices that a sole executive agreement could displace the legislative jurisdiction of a territorial government.

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23. See, e.g., _RESTATEMENT_ (THIRD), supra note 8, § 115 n.5 (“A sole executive agreement made by the President on his own constitutional authority is the law of the land and supreme to State law.”); _HENKIN_, supra note 5, at 226-28 (rejecting the view that sole executive agreements lack domestic legal force).

24. _CRS STUDY_, supra note 20, at 14. Due in part to definitional problems in distinguishing between sole executive agreements and congressional-executive agreements, it is unclear how many of these 12,000 nontreaty agreements should be considered “sole executive agreements.”

25. _Id._


27. See _id._ at 108-11.


29. _Id._ at 292.

30. _Id._ at 292-93.

31. _Id._ at 301-04 (Jacobs, C.J., dissenting).

32. _Id._ at 294.
The Supreme Court has decided three cases involving the relationship between sole executive agreements and state law: *United States v. Belmont*, *United States v. Pink*, and *Dames & Moore v. Regan*. Both *Belmont* and *Pink* involved funds deposited in New York banks by private Russian corporations before 1918. In 1918, the new Soviet government liquidated private Russian corporations and appropriated their property. Then, in 1933, as part of an agreement in which the United States granted diplomatic recognition and established normal diplomatic relations with the Soviet Union (the so-called "Litvinov Agreement"), the Soviet government assigned to the United States its interest in the deposited funds. In both *Belmont* and *Pink*, the United States brought suit to recover the funds.

There was one significant difference between the two cases. There were no private interests at stake in *Belmont* because the United States sued to recover funds from the executors of an estate, who were merely "custodians" of the funds. In *Pink*, though, there were adverse private claimants—creditors of the Russian corporation—who asserted entitlement to the funds. If the Court had applied New York law, the creditors in *Pink* would have had priority over the federal government, because the government's claim derived from the Soviet expropriation, and the State of New York, as a matter of judicial policy, refused to recognize the validity of the Soviet expropriation. However, President Roosevelt decided in the 1933 Litvinov Agreement, as an incident to the grant of diplomatic recognition, to accept the validity of the Soviet expropriation. The Supreme Court ruled in favor of the United States on the grounds that the Litvinov Agreement (which was a sole executive agreement, not a treaty) took precedence over New York common law.

The Supreme Court's decision in *Dames & Moore v. Regan* arose directly out of the Iranian hostage crisis. "On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage." The United States finally secured the release of the hostages in January 1981 by means of a sole executive agreement between the United States and the Government of Iran. Among other things, the agreement

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33. 301 U.S. 324 (1937).
34. 315 U.S. 203 (1942).
36. See *Belmont*, 301 U.S. at 326; *Pink*, 315 U.S. at 210-11.
37. *Belmont*, 301 U.S. at 326.
38. *Pink*, 315 U.S. at 211.
41. See *Belmont*, 301 U.S. at 330 (stating that the effect of the Litvinov Agreement "was to validate, so far as this country is concerned, all acts of the Soviet government here involved").
43. Id. at 662.
44. Id. at 664.
obligated the United States “to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises . . . and to bring about the termination of such claims through binding arbitration.”

One such claim was a breach of contract action filed by Dames & Moore against the Government of Iran and the Atomic Energy Organization of Iran. The agreement with Iran, and the executive orders adopted to implement that agreement, did not extinguish Dames & Moore’s claim against Iran. Rather, the agreement and subsequent executive orders mandated the transfer of petitioner’s claim from a federal district court to a specially created Iran-U.S. Claims Tribunal. Objecting to the presidentially mandated change of venue, Dames & Moore filed suit in federal court “for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran.” The Supreme Court upheld the President’s authority, acting by means of a sole executive agreement, to suspend private state law claims pending in U.S. courts, at least in cases where “the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute . . . and where, as here, we can conclude that Congress acquiesced in the President’s action.”

In sum, both Presidential practice and judicial precedent support the nationalist view that sole executive agreements supersede conflicting state law, at least in some cases.

C. Pragmatic Considerations

From a pragmatic standpoint, there are powerful arguments in favor of a limited Presidential power to alter domestic law by means of sole executive agreements. Consider the facts of Dames & Moore. Islamic radicals seized the U.S. Embassy in Tehran on November 4, 1979, taking U.S. diplomats hostage. The event created both a foreign policy crisis for the United States, and a domestic political crisis for President Carter. President Carter’s failure to gain reelection in the November 1980 election was due, in no small measure, to the fact that he had not yet obtained the release of the hostages. On January

45. Id. at 665 (quoting the Agreement).
46. Id. at 663-64.
47. See id. at 664-66.
48. Id. at 666-67.
49. Id. at 688.
51. Id. at 662.
52. Some even alleged that Republican campaign officials concluded a secret agreement with Ayatollah Khomeini to delay the release of the American hostages until after the November election, thereby assuring the defeat of President Carter. See STAFF OF
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19, 1981, just one day before President Reagan took office, the United States and Iran entered into an agreement to secure the release of the hostages.\textsuperscript{53} The United States’s promise to suspend all claims against Iran in U.S. courts, and to create the Iran-U.S. Claims Tribunal as an alternative forum for resolution of disputes, was a vital element of the agreement that secured the hostages’ release.\textsuperscript{54}

If the Supreme Court had adopted the federalist position prior to the Iran hostage crisis, the release of the hostages would almost certainly have been delayed. One of Iran’s key objectives in the negotiations was to terminate litigation against Iran in U.S. courts.\textsuperscript{55} If Iran knew that the President lacked the power to achieve that result without congressional action, Iran would have had no incentive to release the hostages during the last days of the Carter administration because a key quid pro quo—enactment of legislation to suspend claims in U.S. courts—would have had to await the convening of a new session of Congress and the inauguration of a new President. In short, the federalist position, if adopted by the Supreme Court, would severely impair the President’s ability to achieve a negotiated resolution of a major foreign policy crisis.

The nationalist position, on the other hand, poses a different set of problems. The core of the nationalist view is that the President’s constitutional power to create domestic law by means of sole executive agreements is coextensive with his constitutional authority to make legally binding international agreements on behalf of the United States, without legislative involvement.\textsuperscript{56} Thus, the nationalist position assumes that the only limits on the President’s domestic lawmaking powers are the constitutional limitations on his independent power to make international agreements. However, “[t]he reaches of the President’s power to make executive agreements remain highly uncertain as a matter of constitutional law . . . .”\textsuperscript{57} Moreover, the Executive Branch has a strong tendency to adopt an expansive view of Presidential authority,\textsuperscript{58} and the judiciary has a strong tendency to defer to the executive
branch in matters of foreign affairs.\textsuperscript{59} Thus, as a practical matter, uncertainty about the limits of Presidential authority, judicial deference and Presidential overreaching combine to create a situation where "the President might be able to make international agreements completely free of Senate control."\textsuperscript{60}

The lack of effective judicial control over the international aspect of Presidential executive agreements, in and of itself, is not especially problematic. However, the nationalist position holds that the President’s domestic lawmaking power is coextensive with his power to make international agreements. That position is problematic because it means, as a practical matter, that the judiciary has very little control over the domestic effects of sole executive agreements. Thus, under the nationalist position, the President’s power to create domestic law by means of sole executive agreements is theoretically limited, but practically unbounded.\textsuperscript{61} A doctrine that, as a practical matter, gives the President a virtually unlimited power to create domestic law by means of sole executive agreements is antithetical to the principle that the federal government is a government of "limited and enumerated powers."\textsuperscript{62}

In sum, the competing demands of international relations, on the one hand, and domestic constitutionalism, on the other, require a reevaluation of the nationalist premise that the President’s domestic lawmaking power is coextensive with his independent power to make international agreements. The need for broad Presidential flexibility to manage foreign policy crises counsels against judicially enforced constitutional limitations on the President’s independent power to enter into international agreements.\textsuperscript{63} However, domestic constitutional principles weigh in favor of some judicially enforced constitutional limits on the scope of the President’s power to create domestic law by means of sole executive agreements.


\textsuperscript{60} Michael J. Glennon, Constitutional Diplomacy 184 (1990).

\textsuperscript{61} Professor Henkin acknowledges that the absence of clear constitutional limits on presidential authority "might tempt activist Presidents into far-reaching undertakings." Henkin, supra note 5, at 224. He contends, though, that Congress’s defense of its constitutional prerogatives provides an effective political safeguard against Presidential overreaching. Id. This political safeguards argument is unconvincing. The temptation for Presidents to exceed the limits of their constitutional power is greatest during crisis situations. Moreover, political safeguards against presidential overreaching are least effective during a crisis, as evidenced by Congress’s compliant response to President Bush’s antiterrorism policies in the wake of the World Trade Center bombings. Thus, political safeguards against presidential overreaching are least effective when they are most needed.


\textsuperscript{63} I am not suggesting that the President has an unlimited power to make binding international commitments on behalf of the United States by means of sole executive agreements. Rather, I am suggesting that constitutional limits on the international aspect of sole executive agreements are best enforced by political means, whereas limits on the domestic aspect of sole executive agreements require some judicial enforcement.
D. Proposed Middle Ground

The principle of democratic legitimacy suggests that the status of a legal rule depends, in part, on the nature of the process by which the legal rule was adopted. State and federal constitutional law have the highest status, within their respective spheres, because supermajoritarian requirements ensure that any constitutional change gains the approval of a substantial majority of the people. State statutes rank lower than state constitutions, and federal statutes rank lower than the United States Constitution, because statutes typically require only a simple majority vote among elected representatives. Sole executive agreements rank lower than federal statutes, and state common law ranks lower than state statutes, because common law and sole executive agreements are made without the participation of any democratically elected legislature.

In view of the principle of democratic legitimacy, I suggest the following two-part rule. First, the President does not have the constitutional authority to utilize a sole executive agreement to supersede valid state statutory or constitutional law. Second, the President does have the constitutional authority to utilize a sole executive agreement to supersede state common law.

Under this rule, an executive agreement that could be implemented without any changes in domestic law would pose no problems. Similarly, if implementation of the agreement would require modification of state common law, the President does not have the constitutional authority to do so.

64. See, e.g., U.S. CONST. art. V (specifying that Constitutional amendments cannot take effect unless “ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof”).

65. See infra note 68.

66. The word “valid” is an important qualifier. Suppose, hypothetically, that the Massachusetts legislature enacted a statute granting diplomatic recognition to Kosovo. It is well settled that the President has exclusive authority to grant recognition to a foreign government. See Henkin, supra note 5, at 88 (“Congress cannot itself... recognize foreign states or governments.”). Even assuming that the hypothetical law did not conflict with any international agreement, the law would probably be invalidated on the grounds that it interferes with the exercise of an exclusive presidential power. See Zschernig v. Miller, 389 U.S. 429 (1968) (invalidating state statute that interfered with the power of the President and Congress to conduct foreign affairs). Therefore, if Massachusetts enacted the hypothetical law, and the President later concluded an executive agreement with Yugoslavia recognizing Yugoslavia’s sovereignty over Kosovo, then the executive agreement would trump the state law, not because the President has the power to override a state statute, but because Massachusetts lacks the power to recognize foreign governments.

67. I assume that the President cannot utilize sole executive agreements to create domestic law beyond the scope of Congress’s Article I powers. To hold otherwise would be inconsistent with the principle of enumerated powers. However, the President might have the power to enter into an international agreement whose domestic implementation would require legislation that, in the absence of such an agreement, would be outside the scope of Congress’s Article I powers. It is an open question whether the Necessary and Proper Clause empowers Congress to enact such legislation. See infra note 137.
law, implementing legislation would not be necessary because the agreement itself would automatically supersede state common law. However, if implementation would require modification of state statutory or constitutional law (or of a federal statute),\textsuperscript{68} then Congress would have to enact implementing legislation to empower the President to execute the agreement.\textsuperscript{69}

Textual and originalist considerations support the proposition that the President lacks the constitutional authority to utilize a sole executive agreement to preempt valid state statutory or constitutional law. The fact that the Framers included treaties, but not executive agreements, in the text of the Supremacy Clause suggests that they did not intend to grant the President a unilateral power to supersede state law. The historical record generally supports this conclusion.\textsuperscript{70} Although presidential practice and judicial precedent tend to support the nationalist view, practice and precedent are not inconsistent with the first part of the proposed rule. It is difficult to prove a negative, but this author has been unable to identify any case in which the President relied on a sole executive agreement to supersede state statutory or constitutional law. Moreover, the three Supreme Court decisions that provide the strongest support for the nationalist view—\textit{Belmont}, \textit{Pink}, and \textit{Dames & Moore}—all involved state common law, not state statutory or constitutional law.\textsuperscript{71}

Presidential practice and judicial precedent support the proposition that the President does have the constitutional authority to utilize a sole executive agreement to preempt state common law. Indeed, the Court could not hold

\textsuperscript{68} The weight of judicial authority suggests that a federal statute has higher status than a sole executive agreement. \textit{See}, \textit{e.g.}, United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953) (holding that an “executive agreement was void because it was not authorized by Congress and contravened provisions of a statute”); Swearingen v. United States, 565 F. Supp. 1019, 1021 (D. Colo. 1983) (stating that “executive agreements do not supersede prior inconsistent acts of Congress because, unlike treaties, they are not the ‘supreme Law of the Land’”); Seery v. United States, 127 F. Supp. 601, 606-07 (Ct. Cl. 1955) (rejecting Government’s contention that an executive agreement is equivalent to a treaty under the Supremacy Clause). \textit{But see} Etlimar S.A. of Casablanca v. United States, 106 F. Supp. 191 (Ct. Cl. 1952) (suggesting that an executive agreement might supersede an earlier act of Congress).

\textsuperscript{69} The proposed rule raises the following question: What if a state legislature enacts a later-in-time statute that conflicts with a previous sole executive agreement? Assuming that the President lacks the power unilaterally to preempt a state statute, the principle of federal supremacy nevertheless suggests that a state legislature also lacks the power to nullify a valid executive agreement. Therefore, just as the President would have to enlist the aid of Congress to implement a sole executive agreement that conflicted with a state statute, a state government would have to ask Congress to authorize state legislation that conflicted with a prior executive agreement. To hold otherwise would give state legislatures too much power to frustrate foreign policy objectives.

\textsuperscript{70} \textit{See generally} Ramsey, \textit{supra} note 7.

\textsuperscript{71} \textit{See} \textit{supra} notes 33-49 and accompanying text. Granted, none of the three cases relied explicitly on the distinction between common law and statutory law as a justification for the result. Even so, the holding of each of the cases is consistent with the proposition that the President lacks the constitutional authority to utilize sole executive agreements to preempt valid state constitutional or statutory law.
otherwise without overruling both *Pink* and *Dames & Moore*.\(^{72}\) Although the constitutional text does not explicitly grant the President a unilateral power to preempt state common law, it is not unreasonable to conclude that the President’s general foreign affairs power is broad enough to include the power to preempt state common law. Moreover, originalist arguments against such a power are not sufficiently weighty to overcome two centuries of entrenched practice.\(^{73}\)

II. STATE LAW AND THE TREATY POWER

The scope of federalism limitations on the treaty power has been a subject of vigorous scholarly debate in recent years. One aspect of that debate concerns the question whether the treatymakers can use their Article II powers to create supreme federal law outside the scope of Congress’s enumerated powers.\(^{74}\) Professor Bradley has proposed a constitutional rule “that would allow the treatymakers the ability to conclude treaties on any subject but would limit their ability to create supreme federal law to the scope of Congress’s power to do so.”\(^{75}\)

Part II contends that Professor Bradley’s proposal is flawed because it fails to account for the political safeguards of federalism inherent in the treaty process. The first section describes the context of the debate. The second section directly addresses Bradley’s proposal.\(^{76}\)

A. The Context of the Debate

There are three distinct aspects of the Supreme Court’s recent federalism jurisprudence. First, the anticommandeering principle associated with the Tenth Amendment precludes Congress from compelling state legislatures to enact a federal regulatory program, or from compelling state executive officers to administer a federal regulatory program.\(^{77}\) Second, the state sovereign immunity principle associated with the Eleventh Amendment restricts civil

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72. As noted above, there were no private interests at stake in *Belmont*. *See supra* note 39 and accompanying text. Therefore, the claim that sole executive agreements preempt state common law is not strictly necessary to the holding in *Belmont*.

73. *See supra* notes 20 and 24-27 and accompanying text.


75. Bradley II, *supra* note 74, at 100.


suits by private plaintiffs against the States. Third, the Court has imposed strict federalism limitations on the scope of Congress’s enumerated powers under the Commerce Clause and the Fourteenth Amendment.

To analyze the implications of the Court’s federalism jurisprudence for the scope of the treaty power, it is helpful to consider a concrete example. There are several treaties that prohibit the imposition of capital punishment for crimes committed by persons under eighteen years of age (the “juvenile death penalty”). In recent years, the United States has come under increasing international pressure to abolish the juvenile death penalty. The death penalty generally, and the juvenile death penalty in particular, has become a major source of contention between the United States and its European allies. In a recent case, a distinguished group of retired U.S. diplomats informed the Supreme Court that the continued practice of executing mentally retarded individuals would “strain diplomatic relations with close American allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase U.S. diplomatic isolation, and impair other U.S foreign

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policy interests.” The same could be said with respect to the execution of juvenile offenders. Thus, a U.S. president might reasonably conclude that it is in the foreign policy interests of the United States to accept a treaty obligation to abolish the juvenile death penalty.

Hence, the question arises whether the federal political branches have the constitutional power to abolish the juvenile death penalty by means of a treaty. Recent Supreme Court decisions suggest that neither the Commerce Clause nor the Fourteenth Amendment grants Congress the power to abolish the juvenile death penalty. However, in Missouri v. Holland, the Supreme Court held that constitutional limitations on the scope of Congress’s powers under the Commerce Clause do not apply to the treaty power. Therefore, unless the Supreme Court overrules Missouri, the constitutional limitations on the scope of Congress’s powers under the Commerce Clause and the Fourteenth Amendment do not apply to the treaty power.

Commentators disagree about whether the anticommandeering principle associated with the Tenth Amendment applies to the treaty power. Even assuming, though, that the anticommandeering principle limits the treaty power in the same way that it limits Congress’s legislative powers, that principle would not preclude the use of the treaty power to abolish the juvenile death penalty. If the United States ratified a treaty prohibiting the juvenile death penalty, state judges could enforce the federal prohibition; the Constitution “permit[s] imposition of an obligation on state judges to enforce federal prescriptions.” The federal government could achieve its objectives without compelling state legislatures to legislate, and without commanding state executive officers to administer a federal program. Therefore, a treaty provision banning the juvenile death penalty would not run afoul of the anticommandeering principle.

Nor would a treaty ban on the juvenile death penalty be inconsistent with the Supreme Court’s sovereign immunity jurisprudence. Even assuming that


84. See Morrison, 529 U.S. 598; City of Boerne, 521 U.S. 507; Lopez, 514 U.S. 549.

85. 252 U.S. 416 (1920).


the treatymakers lack the power to abrogate state sovereign immunity, the sovereign immunity principle would not prevent the treatymakers from undertaking a treaty obligation to restrict capital punishment. Sovereign immunity does not prevent the federal government from imposing binding obligations on states; it merely precludes private plaintiffs from obtaining money damages against states that violate those obligations. Therefore, if the United States ratified a treaty banning the juvenile death penalty, the Eleventh Amendment would bar a suit for damages by surviving family members against a state that executed someone in violation of the treaty, but the Eleventh Amendment would not preclude a capital defendant from invoking the treaty as a defense in a state criminal proceeding.

In sum, assuming that the treaty power is subject to anticommandeering and sovereign immunity limitations, those limitations do not preclude use of the treaty power to abolish the juvenile death penalty. Moreover, unless the Supreme Court overrules Missouri, the constitutional limitations on the scope of Congress's powers under the Commerce Clause and the Fourteenth Amendment do not apply to the treaty power. Therefore, unless the Supreme Court extends its recent federalism jurisprudence by overruling Missouri, the treaty power gives the federal government the power to abolish the juvenile death penalty.

B. A Critique of Professor Bradley's Proposal

Professor Bradley has argued that the Supreme Court should overrule Missouri. In place of the Missouri rule, he proposes a constitutional rule "that would allow the treatymakers the ability to conclude treaties on any subject but would limit their ability to create supreme federal law to the scope of Congress's power to do so." In short, Bradley's proposal would divide the treaty power into international and domestic components. The international aspect of the treaty power would be practically unlimited. But Bradley would limit the treatymakers' domestic lawmaking powers to preclude creation of domestic law beyond the scope of Congress's enumerated powers.

Depending upon how narrowly the Supreme Court construes the scope of enumerated powers other than the Commerce Clause and the Fourteenth


90. Bradley II, supra note 74, at 100.
Amendment, Professor Bradley’s proposal may not impose any practical limitation on the scope of the treaty power. However, Part II assumes, for the sake of argument, that the Supreme Court will adopt a narrow construction of Congress’s other enumerated powers so that, absent a treaty, Congress lacks the power to enact legislation to abolish the juvenile death penalty. In that case, Bradley’s proposal would have real bite. As a practical matter, his proposal, if accepted, would deprive the federal political branches of the power to implement an international treaty obligation to abolish the juvenile death penalty.

This section highlights three main problems with Bradley’s proposal. First, his proposal would result in a dramatic shift of power over U.S. foreign relations from the federal government to the states. Second, it would also result in a significant shift of power over U.S. foreign policy from the federal political branches to the federal judiciary. Finally, these constitutional power transfers are not necessary to protect states’ rights because the political safeguards inherent in the treaty approval process adequately protect the states against unwarranted extensions of the treaty power.

1. Transferring foreign affairs power to the states.

To appreciate the significance of Bradley’s proposal, it is useful to review some basic principles of treaty law. Treaties, in a sense, lead a dual life. As instruments of international law, treaties are mechanisms for creating binding legal obligations within the international legal system. Article II of the Constitution empowers the President and Senate to create binding international obligations by means of treaties. But apart from their function within the international legal system, treaties also have a separate function within the domestic legal system. By virtue of the Supremacy Clause, treaties have the status of supreme federal law within the United States.

Bradley, at times, appears to be proposing a limitation on the scope of the treaty-makers’ Article II power to undertake binding international obligations on behalf of the United States. However, upon closer examination, it is clear that

91. Article I grants Congress the power “[t]o define and punish ... Offences against the Law of Nations.” U.S. Const. art. I, § 8, cl. 10. The Offences Clause arguably grants Congress the power to enact legislation abolishing the juvenile death penalty. See Beth Stephens, Federalism and Foreign Affairs: Congress’s Power to “Define and Punish ... Offenses Against the Law of Nations,” 42 WM. & MARY L. REV. 447, 549-52 (2000). Moreover, Congress might be able to utilize its spending power to enact legislation that would effectively abolish the juvenile death penalty. See South Dakota v. Dole, 483 U.S. 203, 207 (1987) (“[O]bjectives not thought to be within Article I’s “enumerated legislative fields” may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.” (quoting United States v. Butler, 297 U.S. 1, 65 (1936))).

92. U.S. Const. art. II, § 2, cl. 2.

93. Id. art. VI, cl. 2.
Bradley is actually proposing a limitation on the domestic effects of treaties under the Supremacy Clause.

Thus, under Bradley's proposal, Article II gives the treatymakers a virtually unlimited power within the international sphere. However, in his view, the Supremacy Clause should be construed to limit the domestic effects of treaties. Specifically, he proposes a constitutional interpretation that "would limit [the treatymakers'] ability to create supreme federal law to the scope of Congress's power to do so."

From a textual standpoint, one could defend Bradley's proposed limitation on the domestic effects of treaties as follows. The Supremacy Clause does not say that all treaties are supreme federal law. Rather, it states: "[A]ll Treaties made . . . under the Authority of the United States, [are] the supreme Law of the Land." The italicized phrase effectively means that some treaties that are binding on the United States as a matter of international law lack the status of supreme federal law within the United States's domestic legal system because they are not "made . . . under the authority of the United States" within the meaning of the Supremacy Clause. Thus, for example, a treaty provision obligating the United States to contribute funds to an international organization is binding on the United States for purposes of international law because the treatymakers have the power under Article II to undertake such a binding obligation within the international sphere. However, for purposes of domestic law, a treaty provision obligating the United States to contribute funds to an international organization is not equivalent to a federal statute appropriating money for that organization because the treatymakers lack the domestic legal authority to appropriate money. Therefore, such a treaty provision is not "made under the authority of the United States" within the meaning of the Supremacy Clause.

94. See, e.g., Bradley I, supra note 74, at 451-56 (rejecting any subject matter limitation on the treatymakers' Article II power to undertake binding international obligations on behalf of the United States); Bradley II, supra note 74, at 100 (proposing an interpretation "that would allow the treatymakers to conclude treaties on any subject").

95. Bradley resists characterizing his proposal as an interpretation of the Supremacy Clause; he describes it as an interpretation of the treaty power. At the same time, though, it is clear that he is not proposing any constitutional limitation either on the international effect of treaties, or on the scope of the treatymakers' domestic constitutional authority to undertake binding international obligations on behalf of the United States. The only constitutional limit he is proposing relates to the effect of treaties within the domestic legal system. Since Article II says nothing about the effect of treaties within the domestic legal system, but the Supremacy Clause addresses that issue directly, his proposal is best understood as a proposed interpretation of the Supremacy Clause, not a proposed interpretation of Article II.

96. Bradley II, supra note 74, at 100.
97. U.S. CONST. art. VI, cl. 2 (emphasis added).
99. See RESTATEMENT (THIRD), supra note 8, § 111 cmt. i.
By analogy, Bradley might argue, a treaty provision obligating the United States to abolish the juvenile death penalty would be binding on the United States for purposes of international law because the treatymakers have the power under Article II to undertake such a binding obligation within the international sphere. However, for purposes of domestic law, a treaty provision obligating the United States to abolish the juvenile death penalty is not equivalent to a state statute prohibiting the juvenile death penalty, because the treatymakers lack the domestic legal authority to impose a binding obligation on the states to prohibit the juvenile death penalty. In short, even though such a treaty provision is within the scope of the treatymakers’ Article II power to create obligations that are binding on the United States as a matter of international law, a treaty provision outlawing the juvenile death penalty would not be the “Law of the Land” because it is not “made under the authority of the United States” within the meaning of the Supremacy Clause.

Although this argument by analogy is superficially attractive, it is fundamentally flawed because it adopts an interpretation of the Supremacy Clause that is directly at odds with the Framers’ primary purpose for including treaties in the Supremacy Clause. Under the Articles of Confederation, the fledgling United States repeatedly breached its international treaty commitments because the federal government lacked the power to compel states to comply with treaties. The Framers included treaties in the Supremacy Clause, making treaties supreme federal law, to avert this problem, and to ensure that the federal government did not have to rely on state legislatures to enact laws to secure U.S. compliance with its international treaty obligations. As a practical matter, Bradley’s proposal would reinstate the regime that existed under the Articles of Confederation, giving state legislatures the power to block U.S. implementation of some treaty obligations. In effect, he is proposing an interpretation of the Supremacy Clause that achieves the exact opposite of the result that the Framers sought to achieve by including treaties in the Supremacy Clause.

There is a critical distinction, in this regard, between the juvenile death penalty example, and the example of a treaty provision committing funds to an international organization. In the funding example, the treatymakers are dependent upon Congress to enact legislation to appropriate funds to implement U.S. treaty commitments. Thus, the domestic constitutional authority to decide whether to implement U.S. treaty commitments remains vested in the federal political branches. This is entirely consistent with the Framers’ intentions. In contrast, under Bradley’s proposal, the treatymakers would be dependent upon


state legislatures to enact legislation to abolish the juvenile death penalty. Thus, the domestic constitutional authority to decide whether to implement certain U.S. treaty commitments would be vested in state governments. This is directly contrary to the Framers' intentions.102

In sum, Bradley's proposal would result in a dramatic transfer of power over treaty implementation from the federal government to the state governments, which is directly at odds with the central purpose for including treaties in the Supremacy Clause.

2. Transferring foreign affairs power to the Supreme Court.

The transfer of foreign affairs power from the federal government to the states is presumably an intended consequence of Bradley's proposal. A different consequence of his proposal, though, which appears to be unintended, would be the transfer of foreign affairs power from the federal political branches to the federal judiciary.

For the reasons noted above, President Bush or a future U.S. President might reasonably conclude that it is in the foreign policy interests of the United States to abolish the juvenile death penalty.103 If the Supreme Court adopted Professor Bradley's proposed constitutional limitation on the domestic effects of treaties, though, the federal political branches would be powerless to compel the states to abolish the juvenile death penalty.104 However, the Supreme Court would retain the power to create a rule of federal law, binding on all fifty states, abolishing the juvenile death penalty. To clarify this point, it is necessary to review briefly the Supreme Court's Eighth Amendment jurisprudence.

The Eighth Amendment prohibits "cruel and unusual punishments."105 The Supreme Court construes the ban on cruel and unusual punishment in light of "the evolving standards of decency that mark the progress of a maturing

102. Note that there is a critical distinction, in this regard, between Professor Bradley's proposal to limit the domestic effects of treaties, and my proposal to limit the domestic effects of sole executive agreements. My proposal would limit the President's unilateral power to implement sole executive agreements domestically. See supra Part I. However, Congress would retain the power to implement agreements within the scope of its Article I powers, and the treaty option would remain available for agreements exceeding the scope of Congress's Article I powers. Therefore, state governments would not have the power to obstruct implementation of the United States's international commitments. In contrast, under Bradley's proposal, state governments would have the power to obstruct implementation of the United States's international commitments. That outcome is directly contrary to the Framers' intentions.

103. See supra notes 80-83 and accompanying text.

104. This assumes that the Supreme Court adopts a narrow interpretation of Congress's power under the Offences Clause and the Spending Clause. See supra note 91.

105. U.S. CONST. amend. VIII.
society.” In 1988, the Supreme Court decided in *Thompson v. Oklahoma* that evolving standards of decency precluded the imposition of capital punishment on persons who were under sixteen years of age at the time they committed a crime. Thus, despite the fact that in 1988 nineteen states still permitted capital punishment for crimes committed by fifteen-year-olds, the Supreme Court used its power of constitutional interpretation to create a new rule of federal law preempting those state laws.

Similarly, in *Atkins v. Virginia*, the Supreme Court decided that “evolving standards of decency” precluded the imposition of capital punishment on mentally retarded persons. At the time *Atkins* was decided, twenty states still permitted execution of mentally retarded criminals. As in *Thompson*, the Supreme Court used its Article III power of constitutional interpretation to create a new rule of federal law that preempted the laws enacted by state legislatures. Thus, despite the Court’s frequent invocation of federalist rhetoric, a majority of the Court believes that it is legitimate for the Supreme Court to order Virginia not to execute the mentally retarded on the grounds that thirty other states have decided that the practice is abhorrent. If that position is consistent with the principles of federalism, then it is hard to see why it would be inconsistent with principles of federalism for the federal political branches to order Virginia (by means of a treaty approved by two thirds of the Senate) not to execute juveniles on the grounds that 191 other countries have decided that the practice is abhorrent.

In *Stanford v. Kentucky*, decided in 1989, the Court decided that capital punishment for sixteen- and seventeen-year-old juvenile offenders did not violate the Eighth Amendment. However, in light of both *Atkins* and *Thompson*, there is no question that the Supreme Court has the constitutional power to overrule *Stanford* and create a rule of federal law that would conform U.S. practice to international norms by prohibiting the juvenile death penalty. Indeed, four of the nine Supreme Court Justices recently called for a reconsideration of *Stanford*.

Thus, even if the Supreme Court adopted Bradley’s proposed constitutional rule limiting the domestic effects of treaties, it would not preclude the federal government from creating a rule of federal law, binding on all fifty states, prohibiting the juvenile death penalty. In fact, if the Supreme Court adopted

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108. See id. at 826 & n.26 (noting that death penalty statutes in nineteen states have no minimum age).
110. See id. at 342 (Scalia, J., dissenting).
111. See id. at 313-17.
Bradley's proposed constitutional rule, the Court would effectively be telling the federal political branches: "If you want to resolve the foreign policy problems associated with the juvenile death penalty, then you have to petition the Supreme Court to reinterpret the Eighth Amendment." Therefore, Bradley's proposed constitutional rule is seriously flawed because it would not preclude the federal government from abolishing the juvenile death penalty, but it would force the federal political branches to enlist the aid of the Supreme Court to resolve a major foreign policy problem.

3. Political safeguards.

With respect to Congress's legislative powers, the Supreme Court's recent federalism jurisprudence has firmly rejected the view that the political process provides adequate safeguards against unwarranted congressional interference with states' rights. Even so, the disproportionate representation of small states in the Senate, combined with the constitutional supermajority requirement for treaties,\(^1\) suggests that the political safeguards inherent in the treaty process render judicial enforcement of federalism limitations on the treaty power unnecessary.\(^1\)

If one looks only at aggregate numbers, one might conclude that the Senate is merely a rubber stamp for approval of treaties negotiated by the President. For example, in the 103d through 106th Congresses (between January 1993 and December 2000), the President transmitted 184 treaties to the Senate. As of November 30, 2002, the Senate had approved 170 of those treaties.\(^1\) That is roughly a 92% success rate for the President.

However, if one distinguishes between bilateral and multilateral treaties, a more complex picture begins to emerge. The 184 treaties transmitted to the Senate between January 1993 and December 2000 included 130 bilateral treaties and 54 multilateral treaties. As of November 30, 2002, the Senate had approved 126 of 130 bilateral treaties (97%). In contrast, the Senate approved only 81% (44 out of 54) of the multilateral treaties.\(^1\) Moreover, the 54 multilateral treaties can be further subdivided into 14 regional treaties and 40 global treaties. As of November 30, 2002, the Senate had approved 13 of the

\(^1\) See U.S. Const. art. II, § 2, cl. 2 (requiring the concurrence of "two thirds of the Senators present" before the President can ratify a treaty).

\(^1\) The original Constitutional design provided an additional safeguard for the states: Senators were not elected by popular vote, but were chosen by state legislatures. See U.S. Const. art. I, § 3, cl. 1. Since adoption of the Seventeenth Amendment in 1913, Senators have been elected by popular vote. See U.S. Const. amend XVII, cl. 1.

\(^1\) The figures in this paragraph are derived from information available on the Thomas database, at http://thomas.loc.gov.

\(^1\) These figures are also derived from the Thomas database, at http://thomas.loc.gov.
14 regional treaties (93%). In contrast, the Senate had approved only 31 of the 40 global treaties (77%). Concerns that the treaty power infringes on states' rights tend to focus on the rise of global, multilateral treaties. The fact that the Senate has withheld its consent for almost one fourth of the global, multilateral treaties submitted by the President over an eight-year period suggests that the political safeguards inherent in the treaty process provide substantial protection for states' rights.

Two other factors reinforce this conclusion. First, the Senate attached conditions to 24 of the 31 global, multilateral treaties that it approved during this period; it approved 7 others without conditions. Thus, out of 40 global treaties transmitted to the Senate between January 1993 and December 2000, the Senate approved only 17.5% unconditionally. It approved 60% subject to conditions and withheld consent for the remaining 22.5%. Moreover, for the 31 treaties that the Senate did approve, the average time interval between international adoption of the treaty and Senate consent was six years and four months. Thus, not only has the Senate withheld its consent for a significant

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119. See Appendix (listing treaties).

120. See Appendix.

121. See Appendix. Much of the delay is attributable to delay by the executive branch before it submits the treaties to the Senate. But, of course, executive branch delays can be
number of global treaties, but also when the Senate does consent, it typically
does so after prolonged delays, and subject to various conditions.

The Secretary General of the United Nations has identified a group of 27
“core treaties” that are “most central to the spirit and goals of the Charter of the
United Nations.” The United States’s record with respect to those 27 treaties
provides further evidence that the Senate approval process for treaties offers
robust political safeguards. The United States is party to only 12 of the 27
“core treaties” identified by the Secretary General (44%). Six of the 27
treaties have been transmitted to the Senate, and await Senate approval. The

explained, in part, by the fact that the President knows he needs to win a two-thirds majority
in the Senate, and he generally does not want to submit a treaty that is “dead on arrival.”

122. Letter from The Secretary-General, to Heads of State and Government (May 15
2000), reprinted in UNITED NATIONS, MILLENNIUM SUMMIT MULTILATERAL TREATY
FRAMEWORK: AN INVITATION TO UNIVERSAL PARTICIPATION vii (2000).

123. Optional Protocol to the Convention on the Rights of the Child on the Sale of
U.N. Doc. A/RES/54/263 (approved by Senate on June 18, 2002); Optional Protocol to the
Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,
June 18, 2002); International Convention for the Suppression of Terrorist Bombings, Dec.
2001); Amended Protocol II to the Convention on Conventional Weapons on Prohibitions or
Restrictions on the Uses of Mines, Booby-Traps and Other Devices as amended on 3 May
(approved by Senate on May 20, 1999); Convention to Combat Desertification in Those
Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa,
2000); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948,

Sess., U.N. Doc. A/50/1027 (transmitted to Senate on Sept. 23, 1997); Protocol IV to
Senate on Jan. 7, 1997); Convention on the Safety of United Nations and Associated
Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363 (transmitted to Senate on Jan. 3, 2001); Convention
on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (transmitted to Senate
on Nov. 20, 1993); Convention on the Elimination of All Forms of Discrimination Against
Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (transmitted to Senate on Nov. 12, 1980);
other 9 treaties have never been transmitted to the Senate (33%). For the 12 "core treaties" to which the United States is a party, the average time interval between international adoption and Senate consent was eleven years and two months. Perhaps most significantly, none of the 12 "core treaties" ratified by the United States has been approved unconditionally; the United States has included conditions in its instruments of ratification for all 12 "core treaties" to which it is a party.

In sum, the evidence suggests that the political process is working because the most politically sensitive treaties face the greatest obstacles to ratification. The Senate is less likely to approve multilateral treaties than bilateral treaties, less likely to approve global treaties than regional treaties, and less likely to approve "core treaties" than other global treaties. Moreover, Senate approval of global treaties typically requires a protracted process that results in conditional approval. For "core treaties," the process is even more protracted, and approval is always conditional.

* * *

The Supreme Court should not create constitutional rules to invalidate statutes or treaties that result from a democratic lawmaking process unless there is a defect in the political process that justifies constitutional lawmaking by the Court. One common justification for the Supreme Court to invalidate a federal statute approved by both Houses of Congress is that the legislative process provides inadequate protection for states' rights. That rationale does not apply to treaties. The disproportionate representation of small states in the...
Senate, combined with the constitutional requirement for a two-thirds Senate majority, gives the States substantial power to block ratification of disfavored treaties. The Senate has utilized its power effectively to impede U.S. ratification of global, multilateral treaties. The Supreme Court should reject Professor Bradley's proposed constitutional rule because the democratic process is not broken, so there is no need to fix it.

III. STATE LAW AND CONGRESSIONAL-EXECUTIVE AGREEMENTS

A congressional-executive agreement is an international agreement concluded by the President and authorized by a majority vote in both Houses of Congress. Congressional-executive agreements typically have two components: a domestic statute enacted by Congress, and an international agreement concluded by the President. Although the domestic statute and the international agreement are distinct legal instruments, the term "congressional-executive" agreement is often used to refer jointly to the domestic statute and the international agreement.

The Restatement states "that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance." This proposition, which is known as the interchangeability doctrine, has been the subject of extensive academic commentary. The commentary raises at least two distinct sets of issues: (1) whether Congress has the power to approve an agreement previously negotiated by the President; and (2) assuming that the answer to the first question is "yes," whether Congress can use that power to create domestic law outside the scope of its enumerated powers.

129. Restatement (Third), supra note 8, § 303 cmt. e.
131. Professor Tribe contends that Congress can authorize an international agreement before the President negotiates it ("ex ante"), but that the Article II treaty process is the only constitutionally permissible mechanism for ex post approval, after the agreement has been negotiated. See Tribe, supra note 130. Professors Ackerman and Golove contend that both ex ante and ex post congressional-executive agreements are constitutionally permissible. See Ackerman & Golove, supra note 130.
132. Professor Yoo claims that Congress cannot utilize congressional-executive agreements to create domestic law beyond the scope of its enumerated powers. See Yoo, supra note 130. Professors Ackerman and Golove seem to suggest that constitutional limits on the scope of Congress's enumerated powers do not apply to congressional-executive agreements. See Ackerman & Golove, supra note 130. However, Professors Ackerman and Golove published their seminal article in Harvard Law Review two months before the Supreme Court decided United States v. Lopez, 514 U.S. 549 (1995). Lopez significantly
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does not address either question in detail. Rather, Part III proposes a
framework for analyzing these problems that helps illuminate the nature of the
underlying issues.

At the outset, it is helpful to draw two distinctions. First, there is an
important distinction between international agreements that the President can
consummate on the basis of his independent constitutional authority, and
international agreements that require some sort of legislative approval before
the President can make a binding international commitment on behalf of the
United States.133 Second, it is important to distinguish between international
agreements that can be implemented domestically by means of legislation
within the scope of Congress’s enumerated powers, and international
agreements that require domestic implementation measures that are outside the
scope of Congress’s enumerated powers.

A. Agreements Within the Scope of the President’s Independent Authority
and Within the Scope of Congress’s Enumerated Powers

Suppose that Congress enacts a statute within the scope of its enumerated
powers that authorizes the President to conclude an international agreement
within the scope of his independent constitutional authority. In this case, it
makes no difference whether Congress enacts the statute before the President
negotiates the agreement (ex ante) or after the President negotiates the
agreement (ex post). Even if there were no international agreement, the statute
would be valid because it is within the scope of Congress’s enumerated powers.
Similarly, even if there were no statute, the international agreement would be
valid because it is within the scope of the President’s independent
constitutional authority. In short, this type of “congressional-executive
agreement” poses no real constitutional difficulty.134

altered constitutional doctrine pertaining to the limits on Congress’s enumerated powers. In
an article published after Lopez, Professor Golove distinguished between weaker and
stronger versions of interchangeability. The weak version claims that “Congress has the
power . . . to approve international agreements that are within the reach of its enumerated
and implied powers.” David M. Golove, Against Free-Form Formalism, 73 N.Y.U. L. REV.
1791, 1800 n.28 (1998). The strong version claims “that Congress has the power to approve
any international agreement.” Id. Professor Golove says that the article he coauthored with
Professor Ackerman “explicitly defended the weaker version, but the stronger is probably
also consistent with our argument.” Id.

133. There is general agreement that Article II empowers the President to conclude
some international agreements on the basis of his independent constitutional authority,
without any legislative involvement. See RESTATEMENT (THIRD), supra note 8, § 303(4).
However, the limits on that power are very uncertain. See HENKIN, supra note 5, at 224.

134. I put the term “congressional-executive agreement” in quotes because there is
some disagreement on terminology. One might say that an executive agreement concluded
on the basis of the President’s independent authority, followed by a statute intended to
implement the agreement, is not really a “congressional-executive agreement,” but rather a
“sole executive agreement” followed by implementing legislation.
B. Agreements Within the Scope of the President’s Independent Authority but Outside the Scope of Congress’s Enumerated Powers

Consider a hypothetical case where the President concludes an international agreement within the scope of his independent authority, and Congress subsequently enacts a statute that, in the absence of that international agreement, would exceed the scope of its enumerated powers. In this hypothetical case, the international agreement is valid because it is within the scope of the President’s independent authority. However, it is less certain whether the statute is valid. A court might uphold the statute on the grounds that it is “necessary and proper for carrying into Execution . . . [another power] vested by th[e] Constitution in the Government of the United States.”\textsuperscript{135} In \textit{Missouri v. Holland}, the Supreme Court held that the Necessary and Proper Clause empowered Congress to enact a statute to implement a treaty, even though Congress arguably lacked the power to enact the same statute in the absence of a treaty.\textsuperscript{136} The only difference between \textit{Missouri} and this hypothetical case is that \textit{Missouri} involved a treaty followed by a statute, whereas this hypothetical case involves a sole executive agreement followed by a statute. The constitutional significance of that distinction is debatable.\textsuperscript{137}

A somewhat different situation is presented if Congress enacts the statute before the President negotiates the agreement. The Necessary and Proper Clause empowers Congress to enact laws that are “necessary and proper for carrying into Execution” other federal powers.\textsuperscript{138} Even assuming that the Necessary and Proper Clause empowers Congress to enact a statute \textit{ex post} to implement a previously negotiated sole executive agreement, it does not necessarily follow that Congress has the power to enact a similar statute \textit{ex ante}. For example, Congress enacted legislation \textit{ex post} to appropriate funds for the United Nations Relief and Rehabilitation Administration after the President concluded a sole executive agreement to create the organization.\textsuperscript{139}

\textsuperscript{135} U.S. CONST. art. I, § 8, cl. 18. Professors Ackerman and Golove rely heavily on the Necessary and Proper Clause to provide a constitutional justification for Congressional-Executive agreements. \textit{See} Ackerman & Golove, supra note 130, at 913-14.

\textsuperscript{136} 252 U.S. 416, 432-33 (1920).

\textsuperscript{137} The \textit{Restatement} adopts the view that the holding of \textit{Missouri} applies equally to a sole executive agreement followed by an implementing statute. \textit{See} RESTATEMENT (THIRD), supra note 8, § 111 cmt. j. On the other hand, insofar as the \textit{Missouri} rule relies on the political safeguards of the treaty process to justify use of the treaty power to create domestic law beyond the scope of Congress’s Article I powers, that rationale would not support the use of a sole executive agreement followed by implementing legislation to create domestic law beyond the scope of Congress’s Article I powers. In any event, the issue may be entirely theoretical, because it is difficult to imagine a concrete example of an executive agreement within the scope of the President’s independent authority that would require implementing legislation beyond the scope of Congress’s enumerated powers.

\textsuperscript{138} U.S. CONST. art. I, § 8, cl. 18.

\textsuperscript{139} \textit{See} Joint Resolution of Mar. 28, 1944, Pub. L. No. 78-267, 58 Stat. 122 (1944). The Governments of China, the Soviet Union, the United Kingdom and the United States
The statute appropriating funds for the organization was clearly a necessary and proper means of implementing the prior agreement to create the new international organization. However, it is doubtful whether Congress would have had the power ex ante to enact a statute requiring the President to establish an international organization that he did not wish to create.

C. Agreements Within the Scope of Congress’s Enumerated Powers but Outside the Scope of the President’s Independent Authority

Consider, next, an international agreement that can be implemented domestically by means of legislation within the scope of Congress’s enumerated powers, but that the President could not consummate on the basis of his own constitutional authority. For example, suppose that Congress enacts a statute that authorizes the President to lower tariffs on imports of goods from a designated country, but only if the other country agrees to offer certain reciprocal trade concessions. On the basis of this statutory authorization, the President negotiates a bilateral trade agreement, but does not submit it to the Senate. The statute is clearly valid, regardless of whether the President negotiates any agreement, because it is within the scope of Congress’s enumerated powers. However, a question arises as to whether the President has the constitutional authority to make a legally binding international commitment on behalf of the United States without first obtaining Senate consent under the Article II treaty process.

In the absence of any legislative action, a court would probably hold that the President lacks the independent constitutional authority to conclude an internationally binding agreement that commits the United States to charge import duties below the statutory rate. Even so, there is widespread agreement that the President has the constitutional authority to conclude bilateral trade agreements of this type, at least when they are authorized ex ante.

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140. See, e.g., Tariff Act of 1897, ch. 11, 30 Stat. 203.
141. There are many such agreements. See, e.g., SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 123 (2d ed. 1916) (listing several bilateral trade agreements concluded by the President on the basis of the Tariff Act of 1897).
142. In Field v. Clark, 143 U.S. 649 (1892), the Court considered a constitutional challenge to a statute that eliminated import duties on certain products, but authorized the President to impose specified duties on imports from countries that imposed “unequal and unreasonable” duties on U.S. exports. See id. at 680-81. Appellant contended that the statute was unconstitutional because it delegated “both legislative and treaty-making powers” to the President. Id. at 681. The Court upheld the statute. See id. at 682-94.
by Congress. Justice Jackson provides a compelling rationale as to why these types of congressional-executive agreements are valid:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it. 144

Although Justice Jackson speaks of a “seizure,” his argument applies with equal force to international agreements. There is some range of international agreements where the President lacks the independent authority to make a binding international commitment on behalf of the United States, but where the President can make an internationally binding commitment on the basis of an express congressional authorization, combined with his own constitutional authority. 145 However, it remains unclear whether this rationale applies to all international agreements that can be implemented domestically by means of legislation within the scope of Congress’s enumerated powers, or only some subset of those agreements.

Professor Tribe contends that the preceding rationale supports the constitutional validity of ex ante congressional-executive agreements, but not ex post agreements. 146 With due respect for Professor Tribe, I suggest that he is mistaken because so-called “ex post” agreements are actually “ex ante” in the only sense that matters constitutionally: that is, the congressional vote takes place before the President makes a binding international commitment on behalf of the United States. 147

Ex post congressional-executive agreements differ from ex ante agreements in that Congress enacts legislation for ex post agreements after the President has negotiated the agreement, whereas Congress enacts legislation for ex ante agreements before the President has negotiated the agreement. However, this distinction is constitutionally insignificant because the President has exclusive authority to negotiate international agreements on behalf of the United States. As Justice Sutherland stated: “Into the field of negotiation the

144. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 637 (1952) (Jackson, J., concurring).
145. See, e.g., RESTATEMENT (THIRD), supra note 8, § 303.
146. See Tribe, supra note 130, at 1269.
147. There are cases where the President first makes a binding international commitment on behalf of the United States, and Congress subsequently enacts implementing legislation. See supra note 139 and accompanying text. But this occurs only where the agreement is within the scope of the President’s independent constitutional authority. (If the agreement was not within the scope of the President’s independent authority, and he lacked prior congressional authorization, the attempt to create binding international obligations would be constitutionally invalid.) To avoid confusion, it is preferable to refer to this type of agreement as a sole executive agreement, followed by implementing legislation.
Senate cannot intrude; and Congress itself is powerless to invade it. Since, as a constitutional matter, the President never requires ex ante congressional authorization to negotiate an agreement, the fact that Congress authorizes ex ante agreements before they are negotiated is constitutionally immaterial.

One could also distinguish ex ante and ex post agreements on the basis of signature, rather than negotiation. Congress enacts legislation for ex post agreements after the President has signed the agreement, whereas Congress enacts legislation for ex ante agreements before the President has signed the agreement. The constitutional significance of the President’s signature depends upon the type of entry-into-force provision embodied in the international agreement. Some international agreements are legally binding, under international law, from the moment of signature. The President has the constitutional authority to sign such an agreement only if he obtains ex ante congressional authorization, or if the agreement is within the scope of his independent constitutional authority. Other international agreements require some further action, after signature, in order to acquire binding force under international law. The President never requires ex ante authorization to sign such an agreement, even if it is beyond the scope of his independent constitutional authority, because the Constitution does not constrain the President’s authority to sign an international agreement unless the act of signature creates legally binding international obligations for the United States.

Ex post congressional-executive agreements that are outside the scope of the President’s independent constitutional authority typically include entry-into-force provisions that require further action, after signature, in order to acquire binding force under international law. Moreover, the President does

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148. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936). Although Curtiss-Wright has been widely criticized on other grounds, this statement appears to be uncontroversial.

149. Of course, there are circumstances where the President may perceive a political requirement for ex ante congressional approval before negotiating an agreement, but that is a different matter.


151. See id. arts. 13-16.

152. If an international agreement contains an entry-into-force provision that requires further action, after the agreement is signed, then a State that signs the agreement is obligated “to refrain from acts which would defeat the object and purpose” of the agreement. Id. art. 18. Regardless, the President’s constitutional authority to sign international agreements that require subsequent ratification has never been seriously challenged, even in cases where the Constitution arguably requires use of the Article II treaty mechanism to create binding international legal obligations for the United States.

153. See, e.g., Marrakesh Agreement Establishing the World Trade Organization, art. XIV (“This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.”); North American Free Trade Agreement, Dec. 8, 1993, art. 2203, 32 I.L.M. 289 (signed by
not consummate such agreements without first obtaining congressional authorization.\textsuperscript{154} Hence, so-called “ex post” agreements are actually “ex ante” in the sense that the President obtains congressional authorization before making a binding international commitment on behalf of the United States. The fact that the President negotiates and signs such agreements before Congress enacts legislation is constitutionally immaterial, because there are no constitutional constraints on the President’s authority to negotiate and sign an international agreement that is not internationally binding from the moment of signature.

In sum, if an international agreement is outside the scope of the President’s independent constitutional authority, but the agreement can be implemented domestically by means of legislation within the scope of Congress’s enumerated powers, then it is constitutionally permissible, at least in some cases, for the President to make an internationally binding commitment on the basis of an express congressional authorization, combined with his own constitutional authority. For agreements of this type, the President must obtain congressional authorization before making an internationally binding commitment, but he is not required to obtain congressional authorization before negotiating and signing the agreement.

D. Agreements Outside the Scope of the President’s Independent Authority and Outside the Scope of Congress’s Enumerated Powers

Suppose that Congress enacted a statute outside the scope of its enumerated powers that ostensibly authorized the President to conclude an international agreement outside the scope of his independent constitutional authority. If Congress enacted the statute before the President entered into a binding international agreement, the statute would be invalid because Congress cannot enact statutes beyond the scope of its enumerated powers. If the statute were invalid, then the subsequent agreement would also be invalid, because the President cannot invoke an invalid statute as a basis for his authority to

the United States December 17, 1992) (“This Agreement shall enter into force on January 1, 1994, on an exchange of written notifications certifying the completion of necessary legal procedures.”).

conclude a legally binding agreement that he lacks the independent authority to consummate.

What if the President concluded the international agreement before Congress enacted the statute? In that case, the agreement would be invalid because the President cannot, without prior congressional authorization, undertake a binding international legal obligation beyond the scope of his independent constitutional authority. If the agreement were invalid, then the subsequent statute would also be invalid, because Congress cannot invoke the Necessary and Proper Clause to justify legislation to implement an invalid agreement. In short, congressional-executive agreements in this category are unconstitutional, regardless of whether the agreement is ex post or ex ante.

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If one accepts as a given the Rehnquist Court's federalism jurisprudence, it is difficult to conceive of a coherent argument in support of the claim that Congress can utilize congressional-executive agreements to create domestic law outside the scope of its Article I powers. The structural political safeguards that limit the exercise of the treaty power do not apply to congressional-executive agreements. Indeed, congressional-executive agreements are subject to the same political safeguards as ordinary legislation. Therefore, congressional-executive agreements should be subject to the same judicially enforced federalism limitations as ordinary legislation.

CONCLUSION

Recent foreign affairs scholarship has tended to address treaties, congressional-executive agreements, and sole executive agreements in isolation from each other. Although there are advantages to analyzing each type of international agreement separately, this scholarly balkanization tends to perpetuate the view that there is only one appropriate rule of constitutional law governing the relationship between international agreements and state law. In contrast, this Article contends that different constitutional rules are appropriate

155. Of course, the power to enact laws that are "necessary and proper" for implementing other federal powers is one of Congress' Article I powers. U.S. Const. art. I, sec. 8, cl. 18. It is unclear whether Congress has the power under the Necessary and Proper Clause to enact legislation that would otherwise exceed the scope of its enumerated powers if such legislation is necessary to implement a sole executive agreement. See supra note 137 and accompanying text.

for different types of international agreements because the political safeguards of federalism vary among the different types of international agreements.

In sum, I have argued that the President lacks the constitutional authority to utilize sole executive agreements to supersede valid state statutory or constitutional law. In contrast, a treaty approved by two thirds of the Senate always supersedes inconsistent state law, and the treaty power can be used to create domestic law outside the scope of Congress's enumerated powers. Finally, the federal political branches can utilize congressional-executive agreements to nullify state law, but only if Congress is acting within the scope of its enumerated powers. A detailed defense of these three propositions is beyond the scope of this brief Article. Hence, the preceding analysis is intended to be suggestive, not exhaustive.

APPENDIX: GLOBAL, MULTILATERAL TREATIES TRANSMITTED TO THE SENATE BETWEEN JANUARY 1993 AND DECEMBER 2000

<table>
<thead>
<tr>
<th>Name of Treaty</th>
<th>Treaty Dec. No.</th>
<th>Date of International Adoption</th>
<th>Date of Transmittal to Senate</th>
<th>Date of Approval by Senate</th>
<th>Conditions</th>
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<tbody>
<tr>
<td>International Convention for Suppression of Financing Terrorism</td>
<td>106-49</td>
<td>12/9/99</td>
<td>10/12/00</td>
<td>12/5/01</td>
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<td>Protocol to the Madrid Agreement</td>
<td>106-41</td>
<td>6/27/89</td>
<td>9/5/00</td>
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<td>Option Protocol to Convention on Rights of Child on Sale of Children and Child Pornography</td>
<td>106-37B</td>
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<td>7/25/00</td>
<td>6/18/02</td>
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<td>Option Protocol to Convention on Rights of Child on Children in Armed Conflict</td>
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<td>Amendment to Montreal Protocol (&quot;Beijing Amendment&quot;)</td>
<td>106-32</td>
<td>12/3/99</td>
<td>6/22/00</td>
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<td>International Plant Protection Convention</td>
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<td>11/17/97</td>
<td>3/23/00</td>
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<td>Rotterdam Convention Concerning Hazardous Chemicals and Pesticides</td>
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<td>2/9/00</td>
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<td>Food Aid Convention 1999</td>
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<td>4/13/99</td>
<td>10/13/99</td>
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<td>1997 Amendment to Montreal Protocol</td>
<td>106-10</td>
<td>9/17/97</td>
<td>9/16/99</td>
<td>10/9/02</td>
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<td>Convention (No. 176) Concerning Safety and Health in Mines</td>
<td>106-8</td>
<td>6/22/95</td>
<td>9/9/99</td>
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<td>International Convention for the Suppression of Terrorist Bombings</td>
<td>106-6</td>
<td>12/15/97</td>
<td>9/8/99</td>
<td>12/5/01</td>
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<td>Convention (No. 182) for Elimination of the Worst Forms of Child Labor</td>
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<td>6/17/99</td>
<td>8/5/99</td>
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<td>Convention on Protection of Children and Cooperation w/r/t Intercountry Adoption</td>
<td>105-51</td>
<td>5/29/93</td>
<td>6/11/98</td>
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<td>Trademark Law Treaty and Regulations</td>
<td>105-35</td>
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<td>1/29/98</td>
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<td>WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty</td>
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<td>7/28/97</td>
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<td>International Grains Agreement, 1995</td>
<td>105-4</td>
<td>6/26/95</td>
<td>4/7/97</td>
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<td>Incendiary Weapons Protocol and Protocol on Blinding Laser Weapons</td>
<td>105-1B</td>
<td>10/13/95</td>
<td>1/7/97</td>
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<td>Amended Mines Protocol</td>
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<td>Constitution and Convention of the International Telecommunication Union</td>
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<td>12/22/92</td>
<td>9/13/96</td>
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<td>United Nations Convention to Combat Desertification</td>
<td>104-29</td>
<td>10/14/94</td>
<td>8/2/96</td>
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<td>International Natural Rubber Agreement</td>
<td>104-27</td>
<td>2/17/95</td>
<td>6/18/96</td>
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<td>Convention for the Protection of Plants</td>
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<td>ILO Convention (No. 150) Concerning Labor Administration</td>
<td>103-26</td>
<td>6/7/78</td>
<td>7/26/94</td>
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<td>Agreement to Promote Compliance with International Conservation Measures by Fishing Vessels on the High Seas</td>
<td>103-24</td>
<td>11/24/93</td>
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<td>Chemical Weapons Convention</td>
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<td>Convention on Biological Diversity</td>
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<td>Convention on the Limitation Period in the International Sale of Goods</td>
<td>103-10</td>
<td>6/14/74</td>
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<td>Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer</td>
<td>103-9</td>
<td>11/25/92</td>
<td>7/20/93</td>
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<td>Protocol to the 1966 Conservation of Atlantic Tuna Convention</td>
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