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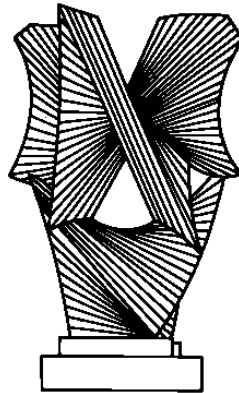
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FOREIGN AFFAIRS LEGALISM: A CRITIQUE

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Foreign Affairs Legalism: A Critique

Daniel Abebe and Eric A. Posner¹

February 9, 2010

Abstract. Foreign affairs legalism, the dominant approach in academic scholarship on foreign relations law, holds that courts should abandon their traditional deference to the executive in foreign relations, and that courts and Congress should take a more activist role in foreign relations than in the past. Foreign affairs legalists argue that greater judicial involvement in foreign relations would curb executive abuses and promote international law. We argue that foreign affairs legalism rests on implausible assumptions about the incentives and capacities of courts. In U.S. history the executive has given more support to international law than the judiciary or Congress has; this suggests that foreign affairs legalism would retard rather than spur the advance of international law.

Scholarship on foreign affairs law—the body of law, mainly constitutional, that governs the foreign affairs of the United States—reflects a striking divide between the courts and the academy. In the courts, the dominant judicial approach to foreign affairs law is “executive primacy”—the view that the judges should defer to the executive’s judgments about foreign affairs.² In the academy, the dominant approach is what we will call “foreign affairs legalism.” Foreign affairs legalism holds that courts should impose more restrictions on the executive than they have in the past, or that Congress should play a greater role in foreign affairs. This normative argument rests on two usually implicit descriptive premises: that courts and Congress have the capacity and motivation to restrain the executive, and that the courts and Congress will do so for the sake of promoting international law.

This disjunction between academic and judicial thought matters today more than it ever did in the past. The conflict with Al Qaeda has generated an enormous jurisprudence, including some cases that reflect a new legalist sensibility in tension with the old commitment to executive primacy.³ Globalization has produced more cross-border conflicts involving trade, migration, human rights, and investment—and the debate between executive primacy and foreign affairs legalism will help determine how courts handle these conflicts.

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² For a historical discussion of the executive’s dominance in foreign affairs, *see generally*, HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

³ *See infra*, notes 88-92.

Despite its prominence in the academy, there is no official school of foreign affairs legalism; no single scholar explicitly defends it. However, much of the foreign affairs scholarship of the last twenty years advances this account. The problem is that the argument is mostly implicit. In this Essay, our minimal goal is to lay out the distinctive empirical and normative assumptions of foreign affairs legalism. We also argue, more ambitiously, that foreign affairs legalism rests on unproven and inaccurate assumptions about the capacities and motivations of courts and the executive, and reflects confusion about the nature of international law. Of particular importance, foreign affairs legalists assume—falsely—that the judiciary seeks to advance international law, while the executive seeks to limit it.

In part I, we describe foreign affairs legalism as it manifests itself in the work of a few representative scholars. In part II, we describe the weaknesses in this account, propose an alternative approach to foreign affairs law, and suggest that our approach promotes the continued development of international law.

I. Foreign Affairs Legalism

A. Executive Primacy

Foreign affairs legalists promote judicial involvement in foreign affairs, arguing that the judiciary is the branch of government that most reliably advances international law. They regard the executive branch as intrinsically hostile to international law, reject executive primacy in foreign affairs, and aim to constrain executive decisionmaking authority. The executive and the judiciary in this story are antagonists. The executive is obsessed with power and national self-interest; the judiciary cares about the rule of law and the good of the broader international community. Foreign affairs legalists are in this way “pro-judiciary” and “pro-international law.”

Because foreign affairs legalism is a reaction to executive primacy, it is best to start with this idea. Executive primacy means that when the executive interprets international law and domestic law that regulates foreign relations, courts give greater deference to those interpretations than they do to other interpretations of the executive. This stance goes back to the founding generation, where proponents of executive primacy, such as Alexander Hamilton, argued that the executive needs freedom of action in foreign affairs because of the fluidity of relations among states and the ever-present danger of war.⁴ Secrecy, speed, and decisiveness are at a premium, and these are

⁴ THE FEDERALIST No. 70, at 392 (Alexander Hamilton) (Clinton Rossiter ed., 1961); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 547-48 (1999).

characteristics of the executive,⁵ not of the courts, which are slow and decentralized. Courts have largely, though not always, accepted this argument. Courts have provided a substantial level of deference to executive determinations on a number of foreign affairs law issues related to international law, including treaty interpretation⁶ and treaty termination.⁷ Courts consider the executive's views on the meaning of customary international law (CIL),⁸ and generally defer to the executive on the application of head of state immunity.⁹ They have permitted executives to evade the onerous supermajority requirements in the Article II treaty process by entering congressional-executive and executive agreements.¹⁰ And they have developed avoidance doctrines to limit their own capacity to adjudicate foreign affairs cases, including the political question doctrine, the act of state doctrine, international comity rules, and state secrecy rules.¹¹

Foreign affair legalists believe that judicial deference opens the way to abuse by the executive. In their criticism of a proposal by one of us and Cass Sunstein that the *Chevron* deference doctrine should be extended to executive actions touching on foreign affairs,¹² Derek Jinks and Neil Katyal display the characteristic legalist suspicion of the executive.¹³ They argue that increased judicial deference to executive decisionmaking will have negative consequences for international law.

⁵ Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 201-02 (2006).

⁶ See *Sumitomo Shoji America, Inc., v. Avalgalino*, 457 U.S. 176, 184-185 (1982) (“[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”). See also, David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. Rev. 953 (1994) (arguing that the executive's position on treaty meaning is the key variable to explain outcomes in treaty interpretation cases).

⁷ See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979) (dismissing claim regarding the President's unilateral termination of a defense treaty with Taiwan on justiciability grounds); *Charlton v. Kelly*, U.S. 447, 473-76 (1913) (executive determines whether treaty has been terminated or lapsed due to changed circumstances).

⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432-33 (1964) (“When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as interpreter of generally accepted and traditional rules, as would the courts, but also an advocate of the standards it believes desirable for the community of nations and protective of national concerns.”).

⁹ See, e.g., *Tachiona v. Mugabe*, 169 F. Supp 2d 259 (S.D.N.Y. 2001) (president and foreign minister); *Lafontant v. Aristide*, 844 F. Supp 128 (E.D.N.Y. 1994) (exiled president of Haiti); *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (violations of *jus cogens* norms).

¹⁰ See *United States v. Belmont*, 301 U.S. 324 (1937); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) *American Insurance Association v. Garamendi*, 123 S. Ct. 2374 (2003).

¹¹ See *infra*.

¹² See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L. J. 1170 (2007) (arguing that the executive is best-placed to resolve difficult foreign affairs questions requiring judgments of policy and principle, and that the judiciary should defer to the executive based on its foreign policy expertise).

¹³ See Derek Jinks & Neal K. Katyal, *Disregarding Foreign Relations Law*, 116 YALE L. J. 1230, 1230 (2007) (“We maintain that increased judicial deference to the executive in the foreign relations domain is inappropriate.”).

The United Nations, whatever its limitations, now provides a highly legitimated institutional vehicle for global cooperation in an astonishingly wide array of substantive domains—including national security and human rights. International human rights and humanitarian law provide a widely accepted normative framework that defines with increasing precision the constitutional principles of the international order. These developments, and many others like them, provide an institutional structure by which and normative framework within which effective and principled international cooperation is possible. Posner and Sunstein would set that project back when the United States, and the world, need it most.¹⁴

Jinks and Katyal believe that deference to the executive in foreign affairs harms international cooperation because the executive is hostile to international law and cooperation. The judiciary, by contrast, promotes international law.

Why would the executive be hostile to international law and the judiciary favorable to it? Jinks and Katyal's main argument is that the executive cares about the short-term—only until the next election. The judiciary, because it enjoys lifetime tenure, takes the longer view.¹⁵ And the longer view is one that recognizes the importance of international law for American security and prosperity.

The normative implication of the argument is straightforward. Because the judiciary supports international law and the executive rejects it, and because international law is good and necessary, power should be transferred from the executive to the courts. Courts should derive their power either from an interpretation of the Constitution that emphasizes limited executive power and robust judicial review, or from statutes that regulate foreign relations, which Congress should enact.¹⁶ This is the essence of foreign affairs legalism.

¹⁴ *Id.* at 1267.

¹⁵ *Id.* at 1262. (“Presidents are *nearsighted* in a way that other government actors are not, particularly the judiciary, which tends to be *farsighted*. The difference in outlook is a direct result of the Constitution’s text and structure, which gives the former four-year terms and the latter life tenure.”) (emphasis in original).

¹⁶ See THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992) (urging courts to be less deferential to the executive in foreign relations); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR, 185-206 (1990) (proposing that Congress pass framework legislation in the form of “National Security Reform Act” to restrain the executive); Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L. REV. 140, 241-259 (2009) (proposing that Congress more carefully delegate international lawmaking authority to President and develop a new system of delegations patterned after the Administrative Procedure Act).

B. Three Versions of Foreign Affairs Legalism

Foreign affairs legalism appears in a number of guises. We cannot survey all of them. Here, we present three examples.

1. Executive and Judicial Competition over International Law

Eyal Benvenisti argues that national courts should attempt to constrain their national executives by cooperating with other national courts in foreign countries, in enforcing international law. Benvenisti's argument has descriptive and normative components. The descriptive claim is that national courts and national executives are antagonists who disagree about the role of international law, with the courts having a more benign attitude toward it. The normative argument is that courts should therefore be encouraged to assert themselves in defiance of the executive.

Let us begin with the descriptive argument. Globalization, external economic pressure, and powerful international institutions force developing countries¹⁷ to harmonize practices around global standards. In doing so, their governments often ignore the will of the people and the opposition of local institutions. "Governments are more than ever the captives of narrow domestic interests, hence unable to represent broad constituencies; and the contemporary world of diplomacy exposes governments to increasing pressure, so that quite a few would actually benefit from domestic legal constraints that would tie their hands in the international bargaining process."¹⁸ However, national courts are not as constrained as national governments are. There are two reasons for this. First, national courts are self-interested and believe that they can preserve their independence by interpreting international law to restrict the authority of national governments and international institutions. Second, "national courts have come to realize that, under conditions of increased external pressures, allowing the government carte blanche to act freely in world politics actually impoverishes the domestic democratic and judicial processes and reduces the opportunity of most citizens to use these processes to shape outcomes."¹⁹ So courts have an institutional self-interest in maintaining their independence and a more public-spirited desire to preserve democracy.

¹⁷ Benvenisti suggests that since powerful countries with stronger domestic political processes are better placed to withstand the pressures of globalization, their national courts might not be "as assertive in safeguarding the domestic political processes." Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 248 (2008).

¹⁸ *Id.* at 245.

¹⁹ *Id.* at 247.

National courts engage in trans-judicial cooperation and use international law to develop a “united front” against the erosion of their autonomy and the pressures of globalization:²⁰

National courts join forces to offer meaningful judicial review of governmental action, even *intergovernmental* action. In this quest to restrict executive latitude, international law looms large as a key tool alongside comparative constitutional law. Thus, references to foreign law and to international law are being transformed from the shield that protected the government from judicial review to the sword by which the government’s (or governments’) case is struck down.²¹

National courts in this way draw on international law in order to constrain their governments.²²

According to Benvenisti and co-author George Downs, national governments fight back by stripping international institutions of power and splintering them.²³ These “fragmentation” strategies include (1) drafting narrowly focused agreements; (2) negotiating detailed agreements in infrequent, one-time multilateral settings; (3) limiting the influence of international courts or bureaucracies within international institutions; and (4) switching the institutional venue of negotiations if the negotiations do not proceed well for the powerful states.²⁴ “[A]s [coercive, openly power-driven] strategies have become increasingly contested and delegitimized . . . fragmentation strategies [serve] as an alternative means of achieving the same end in a less visible and politically costly way.”²⁵ Both the national governments and the national courts strategically use international law and tribunals; the former to exercise power, the latter to constrain the national governments’ exercise of it.

So far the argument seems like a purely descriptive account of competition between the executive and the judiciary over control of foreign affairs. However, Benvenisti and Downs draw a normative conclusion. Traditional judicial deference to the executive “was a mistake which had serious unintended consequences . . . limit[ing] the influence of national courts on the design and subsequent operation of the rapidly

²⁰ *Id.* at 250.

²¹ Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241, 243 (2008).

²² For discussion of this phenomenon, judicial cooperation and global governance, *see generally*, Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT’L L. 59 (2009); Eyal Benvenisti & George W. Downs, *Court Cooperation, Executive Accountability and Global Governance*, N.Y.U. J. INT’L L. & POL. (2009).

²³ Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596 (2007).

²⁴ *Id.* at 610-18.

²⁵ *Id.* at 598.

expanding international regulatory apparatus when more active engagement on their part might have led to a more coherent and less fragmented international legal system.”²⁶ Courts have been assertive, but not assertive enough.

National judiciaries, coordinating with their counterparts in other democracies, should act as a bulwark against national executives and their efforts to fragment international law and dilute the efficacy of international legal rules. Applied to the United States, this approach would require a shift of foreign affairs decisionmaking authority away from the executive, and to the judiciary.

2. *Balanced Institutional Participation*

Our second example of foreign affairs legalism comes from the work of Harold Koh. Koh focuses on the role of norms in encouraging state compliance with international law and the role of the judiciary in ensuring that shared norms and practices are internalized in domestic law and politics. His account focuses on interaction among agents “in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately internalize rules of transnational law.”²⁷ It emphasizes “internalization”—a process that results in states complying with international law not because they fear retaliation from other states if they do not, but because of domestic processes.²⁸ “Through a complex process of rational self-interest and norm internalization—at times spurred by transnational litigation—international legal norms seep into, are internalized, and become entrenched in domestic legal and political processes.”²⁹

Koh refers to his account as balanced institutional participation. Although Koh focuses less on national courts than Benvenisti’s does, national courts remain a central agent. Koh advocates an “approach to national security reform, predicated upon principles of restraining the executive, revitalizing Congress, and *reinvolving the courts*.”³⁰ He also is a longtime advocate of Alien Tort Statute litigation, in which courts adjudicate public international law disputes between private actors.³¹ Since the modern executive has been the dominant actor in foreign affairs, Koh’s theory ends up highly

²⁶ *Id.* at 60.

²⁷ Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84 (1996).

²⁸ *Id.* at 184.

²⁹ *Id.*

³⁰ HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR*, 185 (1990).

³¹ See, e.g., Harold Hongju Koh, *Restoring America’s Human Rights Reputation*, 40 CORNELL J. INT’L L. 635 (2007); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1480 (2003).

critical of the executive in American law; and indeed, Koh is a prominent critic of executive power in foreign affairs.

Again, the question arises as to the connection between the descriptive analysis—which focuses on how international norms are “internalized” into domestic law—and the normative criticism of executive power and the celebration of the judiciary. The connections are different in the two areas of Koh’s work—foreign affairs law and international law. In his work on foreign affairs law, Koh makes a constitutional argument. According to Koh, the Constitution requires judicial participation in foreign affairs in the form of concurrent decisionmaking authority with the executive. As the United States developed from a weak state (surrounded by Spanish, French and English possessions) in the late eighteenth century to a world power dominant in the Western Hemisphere by the late nineteenth century, American national interests and responsibilities outgrew the initial allocation of foreign affairs authority, resulting in a greater role for the executive. Enhanced judicial involvement is necessary to recover the foreign affairs authority improperly assumed by the executive and return to the Constitution’s original shared decisionmaking structure.³² For Koh, an executive with a relatively free hand in foreign affairs might have been tolerable in the eighteenth century when the United States was too weak to abuse that power; today, the judiciary is needed to prevent abuse in entirely different circumstances where the United States is the dominant power.

In his work on international law, Koh celebrates judicial intervention—both by national and international courts—on normative rather than constitutional grounds. In Alien Tort Statute litigation, American courts have heard cases brought by aliens on account of human rights violations. This litigation has produced some successes, including both symbolic victories against judgment-proof individuals and monetary settlements with corporations allegedly complicit in human rights abuses committed by governments. Human rights treaties have famously weak enforcement mechanisms—some of them create toothless committees or commissions, some of them nothing at all. So litigation in the United States provides a potential avenue for enforcement. For this reason, Koh supports this litigation.³³

³² See generally, HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990). For a similar argument, see Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT’L L. 805, 806 (1989) (arguing that the foreign affairs decisionmaking authority is distributed to all three branches of government, not exclusively with the executive).

³³ See, e.g., Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

3. Transnational Government Networks

A third account focuses on “networks” involving the sub-units of national governments rather than the national governments themselves. These sub-units include regulatory agencies and courts, which jointly develop policy, harmonize regulatory standards³⁴ and enforce international law. According to its leading proponent, Anne-Marie Slaughter, democratic constitutional structures encourage dialogue among the executive, legislative and judicial agencies of different countries.³⁵ In particular, judges discuss issues common to their legal systems, cite decisions from other constitutional legal systems, and share social and professional networks, possibly leading to convergence around shared legal norms to resolve general legal questions.³⁶

Slaughter never clearly explains the mechanism of influence. “Transnational judicial dialogue,” as she puts it, is a lofty way of referring to conversations that judges have with each other when they meet at international conferences. It is possible that these conversations cause judges to adopt the legal views of their counterparts, but it is just as possible that the conversations have no effect on their judicial activities, or even lead to greater disagreement rather than convergence. Even if judges are influenced in a positive way by foreign counterparts, judges in most countries have very limited authority to make policy—much less than in the United States. It seems doubtful that they could have more than a marginal effect on the foreign affairs of their countries. And in many countries, judges have little or no independence; any attempt to constrain their national governments and executives would fail.

Like Benvenisti, Downs, and Koh, Slaughter advances a descriptive thesis, but constructs atop of it dramatic normative implications. Judicial networks “could create a genuine global rule of law without centralized global institutions and could engage, socialize, support and constrain government officials of every type in every nation.”³⁷ As a global community of courts develops, judges view “themselves as capable of

³⁴ See Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracies*, 24 MICH. J. INT’L L. 1041 (2003).

³⁵ See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 64-103 (2004); Ann-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 506 (1993); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283 (2004). For related discussions, see, e.g., Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002); Peter Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002); Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401 (2000); Peter Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT’L L. & POL. 567 (2000).

³⁶ SLAUGHTER, *supra* at 64-103.

³⁷ *Id.* at 261.

independent action in both international and domestic realms [and] are increasingly coming to recognize each other as participants in a common judicial enterprise.”³⁸

Again, the mechanism is obscure. Why would judges enforce global norms rather than national norms? Because Slaughter does not provide a theory of judicial motivation, it is hard to understand why she thinks that they would compel national officials to comply with global norms. But the implications of her argument are clear. The courts, not the executives, have the primary role to play in advancing international law. They should constrain, not defer to, national executives.

C. Common Themes of Foreign Affairs Legalism

The three accounts differ in many respects but share three common themes. First, the authors believe that the judiciary has already displayed an interest in, and capacity for, restraining the executive’s foreign affairs powers. This empirical claim helps counter sometimes extreme statements from the other side—that judges simply have no ability to intervene in foreign affairs, or no interest in doing so.

Second, the authors believe that when judges do intervene in foreign affairs, they promote international law and international cooperation by constraining the executive. As a result of electoral incentives and other political constraints, executives seek to advance the short-term national interest. Judges care about the long term, and this disposes them to a more cosmopolitan outlook.

Third, the authors endorse the development of a “constitutional legal order” or “global rule of law” and suggest that executive dominance in foreign affairs interferes with the achievement of those goals, while greater judicial participation facilitates them. Foreign affairs legalists view the promotion and development of international law as normatively desirable.

D. Implications of Foreign Affairs Legalism for Foreign Affairs Law

Foreign affairs legalism has implications for many contentious foreign affairs law questions and in this section we describe them. In doing so, we will cite to scholarship that reflects the doctrinal implications of foreign affairs legalism. However, we do not claim that every scholar that subscribes to a doctrinal position consistent with the implications of foreign affairs legalism must necessarily accept the entirety of the accounts and common themes outlined above. Our purpose is to describe arguments, not categorize scholars.

³⁸ Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 193 (2003).

We are aware that the U.S. Constitution's text, foreign affairs law precedent, and historical practice may lead to doctrinal conclusions that, while consistent with foreign affairs legalism, do not necessarily reflect it. At the same time, however, it is also clear that many contemporary foreign affairs law questions cannot be resolved in a determinative manner solely by reference to text, doctrine, and practice. Resolving these foreign affairs law questions rest on policy judgments regarding the value of international law, the benefits of a globalized legal system, and the institutional competencies of the executive and the judiciary. Foreign affairs legalism reflects such policy judgments; its implications for foreign affairs law are discussed below.

Narrow Interpretation of Executive's Constitutional Powers. The Constitution vests the president with executive powers and the office of commander-in-chief.³⁹ Foreign affairs legalists argue that the executive power is the power to execute laws enacted by Congress, and the commander-in-chief power refers to control over tactical operations once Congress has declared or authorized war.⁴⁰ By contrast, the executive primacy view holds that the Constitution gives the president general authority to conduct foreign affairs, including the power to initiate hostilities. The two positions also divide over judicial review. The legalist camp argues that courts should ensure that the executive acts lawfully; the executive primacy camp urges courts to treat disputes over executive power as political questions to be resolved by Congress and the president.

Treaty Interpretation. Foreign affairs legalists argue that courts should have the primary role in treaty interpretation. They criticize the courts' tendency to defer to the executive's interpretation of treaties.⁴¹

Treaties Are Automatically Self-Executing and Trump Domestic Law. Article II of the Constitution confers on the President the authority "by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur."⁴² Article VI of the Constitution states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land."⁴³ To ensure that treaties are domestically enforceable, foreign affairs legalists view treaties as automatically self-executing once ratified.⁴⁴ Foreign affairs legalism is skeptical of the

³⁹ U.S. CONST., ART. II, §§ 1-2.

⁴⁰ See, e.g., MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 84-87 (1990); LOUIS FISHER, PRESIDENTIAL WAR POWER 185-207 (1995).

⁴¹ See, e.g., THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS (1992); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

⁴² U.S. CONST., ART. II, § 2, cl. 2

⁴³ *Id.*, ART. VI, cl. 2

⁴⁴ See generally, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION, 201 (1996). For a critical discussion of the non-self execution doctrine, see Carlos M. Vazquez, *Treaties as Law of the*

concept of ratified, non-self-executing treaties that would require additional domestic implementing legislation to serve as a rule of decision enforceable against the states.⁴⁵ Foreign affairs legalists also believe that treaties should have priority over earlier enacted legislation (which is current law) and even subsequently enacted legislation (contrary to current law),⁴⁶ and that the existing presumption against implying private rights of action from treaty obligations should be dropped.⁴⁷

Customary International Law Is Federal Common Law. Customary international law (CIL) consists of norms “result[ing] from a general and consistent practice of states followed from a sense of legal obligation.”⁴⁸ CIL has been treated historically as both general common law and federal common law within the American legal system, with different implications for CIL’s domestic legal status and enforceability against the states. Foreign affairs legalists view CIL as federal common law to be incorporated by judges and enforced domestically;⁴⁹ and hold that CIL preempts inconsistent state law.⁵⁰ It rejects an alternative understanding of CIL as general common law that requires congressional incorporation or political branch approval⁵¹ to gain domestic legal status as federal common law.

Land: The Supremacy Clause and the Judicial Enforcement of Treaties, 122 HARV. L. REV. 599 (2008); Carlos M. Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

⁴⁵ See, e.g., David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority*, 55 STAN. L. REV. 1697 (2003); David Sloss, *Self-Executing Treaties and Domestic Judicial Remedies*, 98 AM. SOC’Y INT’L L. PROC. 346 (2004); David Sloss, *Schizophrenic Treaty Law*, 43 TEX. INT’L L.J. 15 (2007). *But see*, Curtis Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540 (2008); Curtis Bradley, *International Delegations, The Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Curtis Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131 (2008).

⁴⁶ For an argument to this effect, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION*, 210-11 (1996).

⁴⁷ See generally, Peter Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003); Edward Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331 (2008). For a contrary view on treaty self-execution and arguments that all treaties do not supercede domestic law, see, e.g., Curtis Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131 (2008); Michael Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103 (2008).

⁴⁸ Restatement (Third) of the Foreign Relations Law of the United States §102 (2) (1987).

⁴⁹ See generally, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1 (1999); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, (1997).

⁵⁰ See generally, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 302-04; Louis Henkin, *International Law as the Law of the United States*, 82 MICH. L. REV. 1555, 1560-62 (1984).

⁵¹ See Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998).

Interpretation of Statutes Touching on Foreign Relations. Many statutes control the way that the executive conducts foreign affairs; others address more general concerns that sometimes have implications for foreign relations. Some scholars have argued that when these statutes are ambiguous, a reasonable interpretation advanced by the executive should be entitled to judicial deference.⁵² Foreign affairs legalists believe that the courts should not give deference to the executive's interpretation.⁵³

Statutory Interpretation and the Charming Betsy Canon. The *Charming Betsy* canon⁵⁴ holds that vague or ambiguous statutes should be not interpreted by courts in a manner inconsistent with international law if at all possible. Foreign affairs legalists generally support the expansive application of the *Charming Betsy* canon, even when it might conflict with traditional foreign affairs deference to executive interpretations of international law⁵⁵ or require the use of international norms to interpret individual rights⁵⁶ and constitutional protections.⁵⁷ U.S. Courts have been less consistent. In the recent case of *Al-Bihani v. Obama*, the U.S. Court of Appeals refused to interpret the Authorization for Use of Military Force in light of international law.⁵⁸ This decision greatly disappointed foreign affairs legalists.

Alien Tort Statute Litigation. The Alien Tort Statute (ATS) provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁵⁹ To encourage the enforcement of international human rights law⁶⁰ and promote human rights

⁵² Posner & Sunstein, *supra*; see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 685-91 (2000).

⁵³ Jinks & Katyal, *supra*.

⁵⁴ See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 1818 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . .”).

⁵⁵ See Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005). But see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

⁵⁶ See generally, Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002).

⁵⁷ See generally, Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT’L & COMP. L. 421 (2004).

⁵⁸ *Al-Bihani v. Obama*, U.S. Court of Appeals, D.C. Circuit, Jan. 5, 2010, available at <http://pacer.cadc.uscourts.gov/common/opinions/201001/09-5051-1223587.pdf>.

⁵⁹ 28 U.S.C. § 1850.

⁶⁰ See Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 528 (1997). For a discussion of human rights litigation, see Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT’L L. 485 (2001); Sarah Cleveland, *The Alien Tort Statute, Civil Society and Corporate Responsibility*, 56 RUTGERS L. REV. 971 (2004); Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998).

norms,⁶¹ foreign affairs legalists interpret the ATS to allow alien nationals to bring suit against other alien nationals in U.S. courts for torts in violation of CIL that occurred in third countries. Foreign affairs legalists also interpret the Supreme Court's decision in *Sosa v. Alvarez-Machain*⁶² as a clear endorsement for continued international human rights litigation under the ATS despite its skeptical language and suggestion of case-by-case deference to the executive.⁶³

The Primacy of International Institutions and Judicial Tribunals. Article III of the Constitution states that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁶⁴ Foreign affairs legalists view the growth of international institutions and supranational courts as favorable developments in the creation of a global legal system. To facilitate such a system, they support the domestic enforceability of judicial decisions from international courts—the International Court of Justice, for example—within the American legal system and the delegation of authority to international institutions.⁶⁵

The Use of International and Foreign Law to Interpret the U.S. Constitution. Foreign affairs legalists look favorably upon the citation of international and foreign law in the interpretation of the U.S. Constitution.⁶⁶ Recent cases where the Supreme Court

⁶¹ For a norm-driven account of the efficacy and possibilities of human rights law, *see generally*, Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621 (2004).

⁶² 542 U.S. 692, 724 (2004) (“Although the ATS is a jurisdictional statute creating no new causes of action . . . [it] is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”).

⁶³ *See, e.g.*, Harold Hongju Koh, *The 2004 Term: The Supreme Court Meets International Law*, John W. Hager Lecture at the University of Tulsa College of Law (Oct. 28, 2004), in 12 TULSA J. COMP. & INT’L L. 1 (2004); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241 (2004); Beth Stephens, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533 (2004).

⁶⁴ U.S. CONST. ART. III, § 1

⁶⁵ For the Supreme Court's recent jurisprudence on delegations, *see generally* *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Medellin v. Texas*, 128 S.Ct. 1346 (2008). For discussion of the treatment of International Court of Justice decisions in U.S. courts *see Symposium, Domestic Enforcement of Public International Law After Sanchez-Llamas v. Oregon*, 11 LEWIS & CLARK L. REV. 1-98 (2007). For a discussion of the benefits of international delegations for federalism, *see* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1501 (2004) (“While delegating national power to international institutions redistributes national legislative authority . . . it provides a bulwark against the concentration of political power in the national government that is consistent with the ambitions of federalism.”). For a defense of international tribunals and their influence on domestic legal systems, *see generally* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193 (2005).

⁶⁶ *See generally*, Daniel J. Frank, *Constitutional Interpretation Revisited: The Effects of a Delicate Supreme Court Balance on the Inclusion of Foreign Law in American Jurisprudence*, 92 IOWA L. REV. 1037 (2007); Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL’Y 177 (2006).

has done this, including *Roper v. Simmons*⁶⁷ and *Atkins v. Virginia*,⁶⁸ which restricted capital punishment for juvenile offenses and mentally retarded people, have received their enthusiastic support.⁶⁹

Global Constitutionalism. Global constitutionalism is an umbrella term for group of real or hoped-for developments, including the creation of a global community of courts,⁷⁰ the rise of constitutional norms of international law that states cannot opt out of,⁷¹ and the harmonization of domestic constitutional norms.⁷² The common theme is that rules of international law will no longer rest solely on the consent of states—consistent with the standard positivist conception of international law—but will now reflect universal norms to which states must submit. This view appeals to many foreign affairs legalists.

E. The Source of Foreign Affairs Legalism

What is the source of foreign affairs legalism? It is hard to identify the origin of broad movements in legal thought, and we do not attempt to. Instead, we identify several factors that are likely to have played a role in the emergence of foreign affairs legalism.

International Politics. The United States has always been a legalistic country with powerful judges.⁷³ But foreign affairs legalism is a relatively new phenomenon. Academic support for this view goes back only a few decades.

Foreign affairs legalism had to await the emergence of the United States as a great power. Woodrow Wilson's attempt to forge a League of Nations and a Permanent Court of International Justice was the first great legalist project, but it did not have the support of the American public. The creation of the United Nations and the International Court of Justice was the second great effort, but these institutions were frozen by the cold war impasse between the United States and the Soviet Union. Legalist thinking in both international law and foreign affairs law could not flourish during the cold war when one

⁶⁷ 543 U.S. 551 (2005).

⁶⁸ 536 U.S. 304 (2002).

⁶⁹ For two examples of support for the general practice, see, e.g., Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 31 GA. J. INT'L L. & COMP. L. 421 (2004); Sarah H. Cleveland, *Our International Constitution*, 31 YALE INT'L L. 1 (2006). For a debate on the use of foreign and international materials in interpreting the U.S. Constitution, see, *Agora, The United States Constitution and International Law*, 98 AM. J. INT'L L. 42 (2004).

⁷⁰ See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

⁷¹ See, for example, the essays collected in JEFFREY L. DUNOFF & JOEL P. TRACHTMAN, *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* (2009).

⁷² See generally, Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985 (2009).

⁷³ As diagnosed classically by ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (2003).

of the antagonists—the Soviet Union—explicitly rejected legalism as a bourgeois construct. This was the era of supreme executive autonomy in foreign affairs: an executive at war with a nuclear-armed opponent could not realistically be constrained by courts.

The collapse of the Soviet Union in 1991 marked the end of the cold war and the bipolar international system. The U.S. became the sole superpower and its capitalist economic system and democratic political system became the models for post-Soviet and other post-authoritarian states. In Latin America, Eastern Europe and East Asia, states began to embrace democratic and capitalist governance systems modeled after the U.S. system, including the adoption of constitutional systems based on the rule of law and the separation of powers.

The supremacy of the United States during the post-cold war period gave rise to two opposite reactions. Some people argued that the United States should use its dominant position to remake international politics by promoting international law and democracy,⁷⁴ and the protection of human rights.⁷⁵ The United States would take the lead in extending the rule of law to international relations.

Other people argued that the United States now posed a major threat, as U.S. officials would find it impossible to resist using their power to remake the world in the American image.⁷⁶ The United States would insist that other countries adopt American political and economic norms against the wishes of their populations.

We suspect that both of these views fueled the rise of foreign affairs legalism. For those optimistic about American power, quasi-wartime conditions no longer justified executive autonomy. The executive could bow to the will of courts without risking American security and in the process serve as a model for executives in other countries. For those pessimistic about American power, domestic courts were the only possible source of constraint on the executive given the international power vacuum,⁷⁷ and hence should be given full support.

⁷⁴ See David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1 (2006).

⁷⁵ “To this day, the United States remains the only superpower capable, and at times willing, to commit real resources and make real sacrifices to build, sustain, and drive an international system committed to international law, democracy, and the promotion of human rights.” Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1480, 1487 (2003).

⁷⁶ For example, the “hyperpower” comments of French foreign minister, Hubert Védrine. *See To Paris, U.S. Looks Like a “Hyperpower,”* N. Y. TIMES, Feb. 5, 1999, <http://www.nytimes.com/1999/02/05/news/05iht-france.t.0.html>.

⁷⁷ For a discussion of the interaction between international politics and domestic judicial constraints, *see, e.g.*, Daniel Abebe, *Great Power Politics and the Structure of Foreign Relations Law*, CHI. J. OF INT'L L. 125 (2009); Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L. J. 87 (2009).

Domestic Governmental Structure and American Legalism. The growth of executive authority in foreign affairs since the founding is unquestioned.⁷⁸ The growth has been both justified on institutional competency grounds⁷⁹ as a response to the U.S.'s evolution from a weak state to an international power and its attendant responsibilities, and criticized as a deviation⁸⁰ from the Constitution's initial—but sparse—allocation of foreign affairs authority. The growth of executive authority in foreign affairs, in turn, was a subset of the broader growth of federal power and the rise of the post-New Deal administrative state.

Yet this development has always been accompanied by uneasiness. For formalists, the growth of executive power seems to “unbalance” the balance of powers among the different branches of government and hence to violate the intent of the Framers.⁸¹ In light of Congress's acquiescence in the growth of executive power—its general refusal to counter executive aggrandizement—these scholars argue that the courts should pick up the slack.⁸² This argument may well have drawn strength from the emergence of the view in the 1950s and 1960s that the Supreme Court can and should serve as an agent for social change. There is also a pragmatic argument that the judiciary has certain advantages for foreign affairs. This argument is that the judiciary takes a longer-term view than the executive does, and acts dispassionately whereas the executive either acts emotionally or is excessively influenced by politics.⁸³ If the rise of the executive reflects one type of pragmatism that emphasizes the need for flexibility in foreign affairs, the rise

⁷⁸ See generally, HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR*, 67-101 (1990); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (1996); ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (2004).

⁷⁹ See Eric A. Posner and Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L. J. 1170, 1204–1207, 1211 (2007) (“[C]ourts should generally defer to the executive on the ground that resolving ambiguities requires judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments.”).

⁸⁰ See, e.g., HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR*, 185-208 (1990); Neal Katyal & Derek Jinks, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007); Gerald Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111 (2004).

⁸¹ David Sloss examines late eighteenth century foreign policy crises and national government decisionmaking to challenge the “executive political control thesis” and argues that the judiciary, at the founding, was much more involved role in foreign affairs decisionmaking than extant scholarship suggests. See David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, ST. LOUIS U. L.J. 145 (2008). For a critique of Professor Sloss's thesis and evidence, see, e.g., A. Mark Weisburd, *Affecting Foreign Affairs is Not the Same as Making Foreign Policy: A Comment on Judicial Foreign Policy*, 53 ST. LOUIS L.J. 197 (2008) (challenging the implications for contemporary foreign affairs law debates drawn from U.S. practice in the 1790s); Daniel J. Hulsebosch, *The Founders' Foreign Affairs Constitution: Improvising Among Empires*, 53 ST. LOUIS L.J. 209, 209 (2008) (“Sloss could consider viewing the controversy as, foremost, a diplomatic crisis for a newly postcolonial nation rather than a domestic problem of constitutional interpretation.”).

⁸² See, e.g., HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); Neal Katyal & Derek Jinks, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007).

⁸³ See Jinks & Katyal, *supra* at 1262.

of foreign affairs legalism expresses a different type of pragmatic argument that reflects the age-old fear that an unconstrained executive will engage in abuse.⁸⁴

II. The Flaws of Foreign Affairs Legalism

A. The Empirical Record: Do Judges Favor International Law More Than Executives?

1. The American Judiciary's Contribution to International Law

Foreign affairs legalists celebrate the American judiciary's contributions to international law but they can only point to a few concrete accomplishments. A few judge-made doctrines put limited pressure on the political branches to comply with international law. The *Charming Betsy* canon makes it more difficult for Congress to pass a statute that violates international law by requiring Congress to be clearer than it would otherwise be. International comity rules, in limited circumstances, avoid violations of international jurisdictional law that suggest that certain types of disputes are best resolved in the state with the most contacts to the litigation. The federal court's admiralty jurisprudence has developed in tandem with admiralty cases in other states, and in this way could be considered a contribution to international law. One could also point to the willingness of the federal courts in cases like *Missouri v. Holland*⁸⁵ to suspend federalism constraints in order to enforce treaties, but these cases are weak and inconsistent.⁸⁶

Moreover, the empirical literature regarding the judiciary's support of international law is thin. Benvenisti cites a handful of cases that suggest that national courts—mainly in developing countries—have used international law in an effort to constrain their executives. Koh also cites a very small number of cases—his best examples are American Alien Tort Statute (ATS) cases, which we discuss below. Slaughter rests much of her argument on the rise of international judicial conferences, where judges from different countries meet and exchange ideas. She does not provide evidence that these conferences have affected judicial outcomes; another possibility is that judges enjoy meeting each other and learning about foreign judicial decisions but do not, as a matter of pragmatics or principle, allow what they learn to affect the way that they decide cases.⁸⁷

⁸⁴ Eric A. Posner & Adrian Vermuele, *Tyrannophobia*, unpub. m.s. (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473858.

⁸⁵ 252 U.S. 416 (1920).

⁸⁶ See *infra*, notes 88-92.

⁸⁷ For a more detailed analysis of the three authors' evidence, see ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 28-40 (2009).

In contrast, many court decisions and judge-made doctrines cut against the claims of the foreign affairs legalism. The early decision in *Foster v. Neilson*⁸⁸ to distinguish between self-executing and non-self-executing treaties, recently reaffirmed in *Medellin v. Texas*,⁸⁹ ensures that many treaties cannot be judicially enforced. These rules have been reinforced by the reluctance to find judicially enforceable rights even in treaties that are self-executing. The tradition of executive deference also limits the judiciary's ability to contribute to international law. The judiciary generally prefers following the executive's lead to pushing the executive toward greater international engagement. In statutory interpretation cases, courts frequently defer to the executive.

On questions of international law—the area most important to foreign affairs legalists—the judiciary's record is poor. In the notable federal common law case, *Paquete Habana*,⁹⁰ the Supreme Court made clear that the executive could unilaterally decide that the United States would not comply with customary international law (CIL), in which case the victims of the legal violation would have had no remedy. Courts have held that both the executive and Congress have the authority to violate international law,⁹¹ and that violations of international law cannot be a basis for federal question jurisdiction.⁹² For example, the Supreme Court found that an illegal, extrajudicial abduction that circumvented the terms of an international extradition treaty did not preclude a US trial court's jurisdiction over the abductee.⁹³

The Supreme Court's treatment of international law in *Medellin v. Texas*⁹⁴ is also instructive. Here, the Court held that the Vienna Convention on Consular Relations was not self-executing or judicially enforceable in U.S. courts. That case involved a Mexican national who had been deprived of his rights to consular notification under that Convention after he had been arrested. He was later sentenced to death. The International Court of Justice had held that the United States violated international law by failing to

⁸⁸ 27 U.S. (2 Pet.) 253 (1829).

⁸⁹ 128 S.Ct. 1346 (2008).

⁹⁰ 175 U.S. 677 (1900).

⁹¹ For decisions regarding the executive's authority to violate international law in the immigration detention context, see, e.g., *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995); *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1558 (5th Cir. 1993); *Garcia-Mir v. Meese*, 1446, 1154-55 (11th Cir. 1986). For decisions regarding Congress's authority to violate international law in the extraterritorial application of criminal law, see, e.g., *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2d Cir. 2005).

⁹² See, e.g., *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1976 (D.C. Cir. 1994); *Xuncax v. Gramajo*, 886 F.Supp. 162, 193-94 (D. Mass. 1995); *Handel v. Artukovic*, 601 F. Supp. 1421, 1426 (C.D. Cal. 1985).

⁹³ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (holding that extraterritorial abduction of Mexican national by the US was not illegal under international or an existing US/Mexico extradition treaty).

⁹⁴ 128 S.Ct. 1346 (2008).

provide the Mexican national with access to his consulate.⁹⁵ What is striking in the present context is that not only did the Supreme Court refuse to intervene in order to vindicate rights under international law (earlier it had held that the ICJ judgment was not binding on U.S. courts), but also prevented President Bush from vindicating those rights. Bush had tried to order state courts to take account of the ICJ ruling, but the Supreme Court held that he did not have the power to do so.

The modern-day view that courts promote or should promote international law draws its inspiration from two recent jurisprudential developments. The first is ATS jurisprudence. The ATS gives federal courts jurisdiction to hear tort claims brought by aliens that are based on international law violations.⁹⁶ Although enacted in 1789, modern ATS litigation began in 1980 in *Filartiga v. Pena-Irala*.⁹⁷ That case involved the torture-murder of a member of plaintiffs' family, at the hands of a Paraguayan police officer, who was named as the defendant. The court held that the defendant was liable for damages because his actions violated international human rights norms.

Filartiga launched a wave of litigation⁹⁸ against government security officials,⁹⁹ former heads of state,¹⁰⁰ and multinational corporations¹⁰¹ (states and current heads of state are generally protected from litigation). In all of these cases, plaintiffs have pled—often with success—that treaties or norms of CIL prohibited a range of activities, including summary executions, disappearances, and war crimes, and complicity in these activities. Though many individual defendants are judgment-proof because they do not have assets in the United States, the complicity claims have been brought against multinational corporations, which usually have assets in the United States and thus can be made to pay damages.

⁹⁵ See *Case Concerning Avena and Other Mexican Nationals* (Mex. V. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31) (Avena) (holding that, due to the U.S.'s failure to adhere to its obligations under the Vienna Convention, petitioners were entitled to review and reconsideration of their convictions and sentences in United States courts).

⁹⁶ 28 U.S.C. § 1850.

⁹⁷ 630 F.2d 876 (2d Cir. 1980).

⁹⁸ For a historical examination of ATS litigation with a specific emphasis on the Bush Administration, see Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).

⁹⁹ See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (defendant was former Ethiopian security officer).

¹⁰⁰ See generally, *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (finding that ATS provides a cause of action for claim against the former President of the Philippines, Ferdinand Marcos).

¹⁰¹ Though the claims were dismissed, two examples of ATS litigation against multinational oil companies are *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002), and *Delgado v. Shell Oil Co.*, 231 F.3d 165 (2d Cir. 2000).

ATS litigation arguably promotes international law by making international lawbreakers potentially liable for large damage judgments in the United States. American courts have also, arguably, developed and strengthened international law by applying international norms in case after case, in the process fleshing them out and giving them credibility. Under basic principles of international law, a norm of CIL can exist if states consent to it, and domestic court judgments can be evidence of state consent. It is difficult to know how important these phenomena have been—few defendants have paid damages and the effect of American courts’ judgments on other nations is unknown.

Moreover, the legalist claim that ATS litigation supports international law has been challenged. No other country permits tort actions for violation of international law, as noted by a plurality of the ICJ, which concluded that the ATS’s broad form of extraterritorial jurisdiction does not have general approval of the international community.¹⁰² The British House of Lords has also questioned the unilateral extension of jurisdiction that the ATS embodies.¹⁰³ Even the U.S. Supreme Court in *Sosa v. Alvarez Machain* limited the sources of CIL and required that a CIL norm must be sufficiently obligatory, specific and universal for an ATS claim.¹⁰⁴

The second body of law involves constitutional interpretation. In a series of cases, the U.S. Supreme Court has interpreted ambiguous constitutional norms in light of foreign materials—including international law, foreign law, and the judgments of international and foreign courts. In *Atkins v. Virginia*,¹⁰⁵ the Court held that execution of the mentally retarded is cruel and unusual punishment under the Eighth amendment. In *Roper v. Simmons*,¹⁰⁶ the court held that execution of people for crimes committed when they were juveniles violates the Eighth Amendment. In *Lawrence v. Texas*,¹⁰⁷ the Court struck down a state law criminalizing sexual sodomy. In all of these cases, the Court cited international treaties, foreign constitutions, foreign law, or foreign institutional practices as support for its holding.

¹⁰² See *Democratic Republic of the Congo v Belgium (Case concerning arrest warrant of 11 April 2000)* [2002] ICJ Rep 3 at 77 (para 48) (concurring opinion of Judges Higgins, Kooijmans, and Buergenthal) (“In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the [ATS], the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas . . . While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.”).

¹⁰³ See *Jones v. Ministry of the Interior of the Kingdom of Arabia*, [2006] UKHL 26 (H.L. June 14, 2006) (para 99) (indicating that the TVPA “represents a unilateral extension of jurisdiction by the United States which is not required and perhaps not permitted by customary international law. It is not part of the law of Canada or any other state.”).

¹⁰⁴ 542 U.S. 692, 732-34 (2004).

¹⁰⁵ 536 U.S. 304 (2002).

¹⁰⁶ 543 U.S. 551 (2005).

¹⁰⁷ 539 U.S. 558 (2003).

The United States government has never agreed by treaty that executing mentally retarded people violates international law. In *Atkins*, the Court appears to be trying to bring the United States into line with the norms and practices of other states.¹⁰⁸ Whatever the Court's reasons for doing this, the effect is to bind the United States to treaties and norms of CIL that it would otherwise either refuse to agree to, or violate. However, these cases have proven to be extremely controversial and provoked a political backlash. In recent years, the Supreme Court has backed away from this practice.¹⁰⁹

We should also mention recent developments that postdate the rise of foreign affairs legalism—the war-on-terror cases, in particular *Hamdan v. Rumsfeld*¹¹⁰ and *Boumediene v. Bush*.¹¹¹ In *Hamdan*, the Supreme Court held that military commissions established by the Bush Administration violated a provision of the Uniform Code of Military Justice that incorporated international law.¹¹² In *Boumediene*, the Court held that federal habeas jurisdiction extended to Guantanamo Bay;¹¹³ although this case did not rest on international law, it eliminated the Bush administration's main reason for using this location, and thus helped doom an institution that many people regarded as an affront to international norms of legality.

Although these cases were qualified victories for foreign affairs legalism, their immediate impact was limited. Very few detainees have been released as a direct result of legal process,¹¹⁴ and, in fact, the Supreme Court followed its historical practice of temporizing until the emergency had passed. Courts were largely deferential to the executive branch from 2001 to today.¹¹⁵

In sum, U.S. courts sometimes promote international law, but their methods are highly limited and their effects are unknown. In run-of-the-mill adjudication, including statutory interpretation, the judiciary's contribution has been limited, and possibly negative. In ATS litigation, the judiciary's contribution has been more substantial, but these cases are limited to human rights and laws of war—two important fields of

¹⁰⁸ *Atkins v. Virginia*, 536 U.S. 304, 317, n. 21 (2002) (stating that “[internationally], the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”).

¹⁰⁹ See generally, *Olympic Airways v. Husain*, 541 U.S. 644 (2004) (debating the level of deference owed to foreign court decisions and rejecting reliance on decisions from the United Kingdom and Australia).

¹¹⁰ 548 U.S. 557 (2006).

¹¹¹ 128 S.Ct. 2229 (2008).

¹¹² 548 U.S. 557, 612 (“[T]he commission lacks power to proceed. The UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also . . . with the rules and precepts of [international law]”) (internal quotations and citations omitted).

¹¹³ 128 S.Ct. 2229, 2262 (“We hold that Art. I, §9, cl. 2, of the Constitution [the writ of habeas corpus] has full effect at Guantanamo Bay.”)

¹¹⁴ See Aziz Huq, *What Good is Habeas?*, unpub. m.s. (2010).

¹¹⁵ Very recently, the D.C. Circuit defined the president’s detention authority very expansively, holding among other things that it is unconstrained by international law. See *Al-Bihani v. Obama*, *supra*.

international law but only a narrow slice of a vast subject—and their effects have been ambiguous. In constitutional interpretation, use of international and foreign law materials has occurred in only a handful of cases, with ambiguous results, and has provoked a backlash.

2. The American Executive's Contribution to International Law

Let us compare the judiciary's record with that of the executive. To keep the discussion short, we will focus on post-World War II activity.

The executive has been the leading promoter of international law. It has negotiated and ratified (sometimes with the Senate's consent, sometimes with Congress's consent, and sometimes without legislative consent) thousands of treaties over the last sixty years,¹¹⁶ including the fundamental building blocks of the modern international legal system—such as the UN charter, GATT/WTO, the International Covenant for Civil and Political Rights, and the Genocide Convention. The executive, through the State Department, issues annual reports criticizing foreign countries for human rights violations and the U.S. government has frequently, although not with complete consistency, issued objections when foreign countries violate human rights. The executive has also negotiated and signed other important treaties to which the Senate has withheld consent—including the Vienna Convention on the Law of Treaties, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Law of the Sea, the Covenant on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, among others.¹¹⁷ The executive has also been instrumental in creating modern international institutions, including the UN Security Council, the GATT/WTO system, the World Bank, and the IMF.

Much of what we said might seem too obvious to mention. One can hardly imagine the judiciary deciding on its own that the United States must create or join some new treaty regime. But these obvious points have been overlooked in the debate about the role of the judiciary in foreign affairs. Virtually everything the judiciary does in this area depends on prior executive practice. Only the constitutional interpretation cases seem truly judge-initiated—for in these cases, the Court sometimes cites treaties the U.S. has not ratified, and sometimes cites the law of foreign nations.

¹¹⁶ See Thomas Miles & Eric A. Posner, *Which States Enter Treaties and Why?*, unpub. m.s. (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1211177.

¹¹⁷ See, CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS*, 543 (2009).

The claim that the judiciary can and even does play a primary role in the adoption of international law is puzzling. In almost all cases, the judiciary must follow the executive's lead. This also means that if the judiciary interprets treaties and other sources of international law in an aggressive way—in a way that the executive rejects—the executive may respond by being more cautious about negotiating treaties and adopting international law in the first place. This possible backlash effect has not been documented, but is plausible. As we discuss in the next section, fears of judicial enforcement of certain treaty obligations led to an effort by the Senate to ensure that those treaties would not have domestic legal effect.

3. A Note on Congress

Where does Congress fit into this debate? Congress is an awkward problem for the foreign affairs legalist because, aside from certain constitutional grants of jurisdiction such as admiralty, the judiciary's authority comes from Congress. Yet Congress has never been as enthusiastic in its support of international law as the executive has.

Congress has passed numerous statutes with some relationship to foreign affairs. Though the vast majority do not implicate sensitive foreign affairs concerns, these statutes reflect some coordination with the executive. Between 1990 and 2000, the US concluded 2857 executive agreements and only 249 treaties.¹¹⁸ On the more substantial questions—for example, international trade¹¹⁹ or national security sensitive export controls¹²⁰—Congress delegates foreign affairs decisionmaking authority to the executive. Despite these practices, Congress has generally been less internationalist than the executive.

The Senate has refused to ratify several international conventions signed by the executive, including the International Covenant on Economic, Social and Cultural Rights (signed in 1977); the American Convention on Human Rights (signed in 1977); the Convention on the Elimination on All Forms of Discrimination Against Women (signed in 1980); and the Convention on the Rights of the Child (signed in 1995).¹²¹ It took the Senate forty years to ratify the seemingly uncontroversial Genocide Convention. Despite the Clinton Administration's decision to sign the Rome Statute creating the International

¹¹⁸ See Oona A. Hathaway, *Treaties' End: The Past, Present and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1287 (2008).

¹¹⁹ Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. 2901, et. seq. (Trade Act of 1988).

¹²⁰ 15 C.F.R. §§ 734.3(a), 736.2(b)(2)-(3) (2008); U.S. DEP'T OF COM., GUIDANCE ON THE COMMERCE DEPARTMENT'S REEXPORT CONTROLS 2-5 (2008), available at http://www.bis.doc.gov/licensing/bis_reexport-controls.pdf.

¹²¹ See BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, INTERNATIONAL LAW, 783, 790-91 (5TH ED., 2007).

Criminal Court (ICC), Congress passed the “Hague Invasion Act”¹²² to prevent any cooperation with the ICC.

Another prominent example of Congress’s willingness to flaunt international law is the Helms-Burton Act of 1996,¹²³ which creates a right of action in US courts for a national against anyone who buys, sells, leases or even engages in commercial activity with respect to property confiscated by Fidel Castro’s government after 1959. The European Union, Canada, Mexico and Argentina, among other countries, immediately protested that the act constituted a violation of international law and passed “blocking or antidote legislation” to prohibit cooperation with the US regarding Helms-Burton.¹²⁴ To maintain fidelity with international law, the President, each year, has had to exercise a provision in the statute that allows him to delay temporarily the implementation of Helms-Burton.¹²⁵

In fact, it is nearly impossible to think of a single major international institution or initiative that has originated with Congress. The executive generally moves first, and Congress either acquiesces or obstructs.¹²⁶ In the case of treaties, which require 2/3 consent of the Senate, there are, of course, many treaties that the executive has signed but from which the Senate has withheld consent.¹²⁷ A prominent example is the United Nations Convention on the Law of the Sea, a treaty that was carefully negotiated over a decade, renegotiated to address President Reagan’s concerns, and endorsed since then by executives of both parties. The Senate made clear that it would not consent to the Kyoto Protocol, which at the time had the backing of the executive. The Senate also rejected the League of Nations treaty, of course. After World War II, Congress refused to implement the International Trade Organization Charter, and the executive had to negotiate a more limited agreement in its place, GATT.

¹²² See American Service-members’ Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 820 (2002) (barring US cooperation with the ICC and authorizing the President to use all means necessary to release any Americans held by the ICC).

¹²³ See The Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996).

¹²⁴ BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, *INTERNATIONAL LAW*, 702 N.8 (5TH ED., 2007). For additional discussion, see, e.g., Jorge F. Perez-Lopez & Matias F. Travieso-Diaz, *The Helms-Burton Law and Its Antidotes: A Classic Standoff?*, 7 SW. J.L. & TRADE AM. 95 (2000); Kim Campbell, *Helms-Burton: The Canadian View*, 20 HASTINGS INT’L & COMP. L. REV. 799 (1997); Jurgen Huber, *The Helms-Burton Blocking Statute of the European Union*, 20 FORDHAM INT’L L.J. 699, (1997); Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT’L L. 419 (1996).

¹²⁵ Cuban Liberty and Democratic Solidarity Act § 306(b), 110 Stat. at 821.

¹²⁶ See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999). See also WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER* (2007) (providing evidence that oversight is greater when there are partisan differences between president and Congress).

¹²⁷ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION*, 179 (1996) (“And if the Senate has become more sensitive to the onus of explicitly rejecting what the United States and other nations have labored to conclude, it has not hesitated to let treaties gather dust on Senate shelves.”).

Congress' skeptical attitude toward international law has appeared in various guises over the years. In one notorious example during 1950s, because of fears that human rights treaties would interfere with American legal norms and (in the south) Jim Crow laws, Senator Bricker of Ohio led a movement to amend the U.S. Constitution. The so-called "Bricker Amendment" would have rendered all human rights treaties non-self executing. Through the efforts of the executive—at that time, President Eisenhower—the proposed amendment was defeated in exchange for a commitment by the executive that the United States would not enter into human rights treaties.¹²⁸ Twenty years later, in an attempt to overcome continued opposition in the Senate and commit the United States to international law, President Carter proposed the attachment of conditions to human rights treaties, including non-self-execution provisions. This "made it possible for the Senate to ratify not only the ICCPR, but also the Genocide Convention, the Torture Convention, and the Convention on the Elimination of All Forms of Racial Discrimination."¹²⁹

In recent years, Congress has passed two statutes intended to limit the applicability of international law to American practices. One example is the Anti-Terrorism and Effective Death Penalty Act of 1996,¹³⁰ which barred the use of certain international law-based defenses in habeas petitions, and another is the more recent Military Commissions Act of 2006, which had a similar effect by providing that "no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting"¹³¹ the provisions of the then-amended War Crimes Act.¹³² Both of these statutes had the support of the executive, to be sure. A few members of Congress even went so far as to propose a resolution barring the Supreme Court from relying on foreign and international law to interpret the Constitution.¹³³

We will have more to say about the significance of Congress's record. For now, the important point to understand is that Congress either acquiesces in the executive's desire to commit the United States to treaties and international agreements or, in some instances, it obstructs that commitment. Proposals designed to enhance congressional

¹²⁸ For a full discussion of the defeated Bricker Amendment, see Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

¹²⁹ CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS, 518 N. 7 (2009).

¹³⁰ 28 U.S.C. §2254 (d)(1) (limiting federal court habeas review to state court decisions that are "contrary to or involve[] an unreasonable application, of clearly established federal law, as established by the Supreme Court of the United States.").

¹³¹ 28 U.S.C. §2241 (2)

¹³² 28 U.S.C. §2241

¹³³ For a discussion of the various congressional resolutions see Chimene I. Keitner, *International and Foreign Law Sources: Siren Song for U.S. Judges?*, 3 ADVANCE: THE JOURNAL OF ACS ISSUE GROUPS 215 (2009).

involvement in foreign affairs have accordingly never made much headway.¹³⁴ The real proponent of international law in American government is the executive.

4. The Case of Europe

Foreign affairs legalism in the academy has received a significant boost from Europe. A familiar story describes how the national courts in EU member states advanced European integration by submitting to the authority of the European Court of Justice on matters of European law. In this telling, the member states have, from time to time, regretted their commitment to European integration and sought to violate specific obligations. The European Commission or other institutions brought claims against these lawbreakers in the ECJ or the ECJ obtained jurisdiction through the preliminary reference process. The nation states were prepared to defy adverse ECJ judgments but then a surprising thing happened. The member states' own national courts incorporated the ECJ judgments into domestic law. This meant that member state governments could not defy the ECJ without disobeying their own national courts—a step with explosive constitutional implications and one that they were not prepared to take. A further important element in this story is that the national courts were never explicitly authorized by European treaty instruments or by their own governments to enforce European law. Yet they did, and in this way played a crucial role in the promotion of international—actually, regional—law, vindicating foreign affairs legalism.¹³⁵

The conventional story leaves out some important facts. The impetus for the entire European project came from national governments, not national courts. The governments set up the European institutions in the Rome Statute and subsequent treaties. Even more important, the national courts in many (but not all) of the European countries initially served as a brake on the project. These courts found that the various treaties violated national constitutional law, and so the project could be put into place only after the national governments had modified their constitutions. National courts have, from time to time, continued to express reservations about European integration, most famously in the German case of *Solange*, which found that European law could be valid only to the extent that it is consistent with German basic (constitutional) law.¹³⁶

These judicial rulings time and again put a break on the EU project, and forced national governments to scramble to change domestic laws and modify treaty law so as to overcome judicial objections. The national governments have always met this challenge. These governments, not the courts, have played the primary role in European integration.

¹³⁴ See *supra*, note 17.

¹³⁵ See, e.g., ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004); KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* (2001).

¹³⁶ *Solange I*, BVerfGE 37, 271 (1974), [1974] 2 CMLR 540.

B. Incentives and Institutional Capacities of Judges and Executives

Consider the standard separation-of-powers conception of government, which we present in caricatured form. The legislature deliberates and determines policy. It best reflects the values and interests of the population because (1) members are directly elected; (2) they are elected by relatively small groups of citizens and thus have fine-grained information about the preferences of citizens; (3) they deliberate as a group, facilitating information aggregation.

The executive implements the legislature's policies by applying force as necessary. A single individual must lead the executive so that the legislature (and the public) can hold someone accountable for bad actions, and so that quick and decisive action is possible. This is why a legislature cannot be given executive powers (unless it simply delegates them as it does in parliamentary systems). At the same time, the executive, even though elected, has poorer information about public values and interests than the legislature does; and individuals given enormous power can be easily corrupted. This is why the legislature, not the executive, has the policy-making function.

The judiciary hears disputes arising from ambiguities in the law as well as of the constitution. Because it has the responsibility to implement the policies of the legislature (including previous legislatures) and the constitution, the judiciary must be impartial. It must also have legal expertise. That is why neither the executive nor the legislature can be given judicial power. The judiciary becomes involved (usually) long after a law has been passed because a dispute must arise before it has jurisdiction. The case or controversy rules help maintain judicial impartiality by providing distance from events, and it ensures a factual record, helping courts to interpret ambiguous law. But by the same token, the judiciary is in no position to make policy or take executive action—spheres therefore reserved for the executive and the legislature.

We could imagine giving substantial foreign affairs power to the legislature and even the judiciary—more so than is done today. The legislature could have the power to set foreign policy. All treaties and international agreements would have to be initiated and ratified by the legislature. Perhaps, the executive could have a veto; perhaps, not. The judiciary would interpret treaties and other sources of international law in the same way that it interprets statutes and the common law. It need not give deference to the executive. The executive's obligation would be to carry out American treaty obligations and other foreign policies prescribed by Congress.

Such an approach is hardly impossible; indeed, it is easy to imagine. This was, in fact, the system that existed during the period of the Articles of Confederation, when the

executive power was held by Congress. But it is not the approach that we have now. Congress has acquiesced in the rise of executive primacy in foreign affairs, even going so far as to enact vague statutes that delegate enormous foreign affairs powers to the executive. Courts have been deferential to executive interpretations of international law and frequently unwilling to hear disputes about executive foreign policy actions.

Let us consider some possible reasons for this state of affairs.¹³⁷ Some of these reasons have been suggested by judges and other political actors; others are more speculative.

Why shouldn't legislatures determine policy and legislate with respect to foreign affairs more than they have? The best answer is that foreign policy addresses a more varied and complex set of agents and events than domestic policy does. Consider trade policy. A state may want to establish a set of tariffs on foreign imports for various reasons—to raise revenue, to protect industries, to reward friendly countries and to punish unfriendly countries. To do so, it must take into account the friendliness and unfriendliness of foreign countries. A country's friendliness, however, is difficult to quantify; it requires nuanced judgments about capacities as well as behavior. For example, a government with a population hostile to Americans might secretly provide basing privileges that enable the United States to perform an important military mission. The U.S. government might want to reward this government with favorable tariffs, or it might not, or it might want to lower tariffs with the understanding that they will be raised again unless the foreign government acts in a certain way. Now consider that there are nearly 200 countries, and there are many other aspects of their relationship with the United States—encompassing not only trade, but also military cooperation, development cooperation, law enforcement, and much else.

How could a legislature address these complexities? A modern legislature such as the U.S. Congress has an enormous amount of business. Accordingly, it could not address a particular relationship with foreign countries on an ad hoc basis, as events dictate. In principle, it could pass a statute that in great detail explains that the president must do X if the country does Y, where X could be lowering tariff barriers (a certain amount) and Y could be providing military assistance. But given the fluidity and unpredictability of foreign affairs, and Congress's limited time and resources for evaluating relationships with dozens of countries, such a statute would be hard to imagine. While Congress sets tariff policy by incorporating executive-negotiated trade treaties, it also has delegated

¹³⁷ In the following, we flesh out longstanding conventional wisdom that predated the rise of foreign affairs legalism. The literature that discusses this issue is enormous; a few standard (generally skeptical) sources are SCHLESINGER, *supra*; ROSSITER, *supra*. For a more favorable account, see JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS SINCE 9/11* (2005).

immense authority to the executive to suspend trade, impose sanctions, and in other ways punish and reward foreign countries that are uncooperative.

In domestic matters, Congress also delegates but not as frequently. Consider tax policy. Congress sets taxes, which apply to hundreds of millions of people. The sheer volume of affected persons means that only very general rules can be used to regulate. It is impossible for the government to have an individual relationship with every person or firm the way it does with foreign countries. As a result, the government cannot adjust its relationships to people on an individual basis. It can do this with foreign countries. But these relationships, which require constant adjustment in light of changing events and the behavior of the party on the other side, involve constant monitoring and a consistent course of action. Congress is institutionally disabled from engaging in such behavior.

Similar points can be made about courts. There are several reasons why courts try to minimize their involvement in foreign affairs. As we have just seen, there is a practical problem: the absence of congressional involvement. Because Congress passes so few foreign affairs statutes, or passes statutes that simply delegate to the president without clear standards, judges have little statutory law to enforce. Accordingly, if courts are to constrain the executive, they will have to rely on constitutional norms. However, the written constitutional rules touching on foreign affairs are extremely vague, consisting only of the vesting clause, the commander-in-chief clause, the ambassadors clause, a handful of congressional powers (to declare war, to define the law of nations), and the treaty clause.

To constrain the executive, the courts would have to apply subsidiary rules and doctrines that flesh out the vague written standards in the constitution. The courts have done that for the president's domestic powers. Why haven't they done the same for his foreign affairs powers? Imagine, for example, that the bill of rights were applied to foreign policy to the same extent that they are applied to domestic policy. The answer seems to be that judges are even less informed about foreign affairs than legislators are, and even less able to inform themselves. A legislature can at least create a committee that specializes in foreign affairs and takes a leadership role. Courts have no similar ability to divide labor internally and thereby enable specialization.

Courts are also very slow and highly decentralized. An important foreign policy issue arrives on the judiciary's doorstep in the context of a specific legal dispute that might have only a glancing relationship with the issue. Consider *Mingtai v. UPS*, a run-of-the-mill contract dispute between two private firms over liability for a lost package that turned on the explosive issue of whether Taiwan is part of China for purposes of the

Warsaw Convention.¹³⁸ Supposing a judge is even capable of answering this question, one must doubt whether it makes sense to wait for a contract dispute to arise before addressing an issue at the heart of the relationship between the United States and the largest nation in the world. The district court judge may get the answer right or wrong, with appeals up the chain. In the meantime, other district and appellate court judges may disagree. The upshot would be a muddy and potentially destabilizing message produced by a group of non-experts over many years.

We have largely discussed institutional capacity so far but another dimension of the question concerns incentives. One might argue that judges should be given a more prominent foreign affairs role because they are impartial. Katyal and Jinks argue that judges have longer time horizons than the executive because judges serve for life, whereas the executive has a four-year or, at best, an eight-year time horizon.¹³⁹ For this reason, judges are more likely than the executive to take foreign policy positions that are in the long-term interest of the United States.

Impartiality is just the flip side of accountability. Executives (and legislators) face elections so that their incentives will be aligned with the public interest. A number of factors ensure that their time horizons are not too short. First, the executive belongs to a party that has an infinitely long time horizon, and which can exercise at least some control over the president's behavior. Second, executives care about their legacy. Third, the executive faces numerous external constraints that limit its ability to promote short-term outcomes. For example, the bond market reacts negatively to policies that move resources from the future to the present, making it difficult for the government to borrow in the short-term and creating political pressure from bondholders. Fourth, and related, the public cares about the long term as well as the short term. They can thus punish myopic behavior at the polls even though polls are held only at four-year intervals.

For the judiciary, the main problem is accountability. Since federal judges are not elected, they have very weak incentives to act in the interest of the public. Thus, there is always a danger—one that is well-documented¹⁴⁰—that judges will be partial rather than impartial, that they will allow themselves to be influenced by their ideological preferences. Meanwhile, because the public has no ability to discipline judges who make bad foreign policy choices, judges have little incentive to engage in the kind of pragmatic

¹³⁸ See *Mingtai Fire & Ins. Co. v. United Parcel Service*, 177 F.3d 1142 (9th Cir. 1999) (deferring to the executive's position that China's status as a signatory and contracting party to the Warsaw Convention does not bind Taiwan).

¹³⁹ See Jinks & Katyal, *supra*, at 1262-63.

¹⁴⁰ The empirical and political science literature on judicial behavior is enormous. For an introduction, see, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* (2008); CASS R. SUNSTEIN, *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006); JEFFREY SEGAL, & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

balancing that is the essence of foreign affairs. This problem is clear in ATS cases. The executive understands that it needs to cooperate with dictatorships in a range of matters and cannot always punish them for committing human rights abuses (even when the executive generally supports international human rights law). Judges, by contrast, are focused on the violations of international human rights law in the cases before them and are less likely to appreciate the executive's broader, strategic concerns about the foreign policy hazards of provoking foreign countries.

This problem is exacerbated by the fact that judges are typically not cosmopolitan figures. The executive, whatever the personal characteristics of any occupant, is forced to pay attention to international relations because of its responsibility for national security. In the course of dealing with foreign countries, the executive is compelled to consider their values and interests. In the United States, presidents often have significant foreign policy experience; even when they do not, they participate in foreign policy debates and consult with experienced foreign policy advisors. In foreign countries, presidents and prime ministers often serve as foreign ministers before taking office. Judges, by contrast, are intensely local figures. In the United States, judges typically are former prosecutors or law firm partners who have had little contact with foreign issues, aside from the occasional multinational corporation that is a client or defendant, and almost no contact with complex foreign affairs questions. In many foreign countries, judges rise through a civil service bureaucracy, facing run-of-the-mill cases involving commercial matters and crime, and very few cases involving foreign affairs. Given these widely understood facts about the judiciary, the office is unlikely to attract people with a great deal of interest in, and experience with, foreign affairs.

To sum up, the case for giving the judiciary a greater role in foreign affairs has not been made. The judicial office has evolved over the years to handle domestic disputes, not foreign policy disputes, and reorienting it to address foreign affairs would require radical surgery. Judges lack the temperament and ability for addressing foreign affairs, and their impartiality, such as it is, comes at a price: they are not accountable to the public and have little feel for international politics and the public interest. The executive, by contrast, is the primary foreign affairs office because it is best suited for foreign affairs issues. What is claimed to be its major disadvantage—that the executive has a short-term perspective driven by elections—is in fact one of its chief merits, namely, that it is accountable to the public.

C. What Does It Mean to Promote International Law?

We have argued that history shows that the executive has been the primary motor for promoting international law, while the judiciary has more frequently served as break

or (in most cases) a passenger. This record is consistent with the incentives and capacities built into these offices. The executive takes an interest in international law because it has the responsibility for national security; the judiciary does not. And the executive's office is supplied with the tools it needs for addressing foreign affairs; the judiciary lacks those tools.

We have generally assumed that "promoting international law" is a good thing. We take this premise from the foreign affairs legalists. But there are some important ambiguities about this premise, which we will address now.

"Promoting international law" has a traditional meaning that has in recent years come under pressure. Under the traditional view, international law is based on the consent of states. Promoting international law, then, means obtaining the consent of states to new international treaties and institutions, and encouraging states to keep their obligations. An executive might promote international law by consenting, on behalf of its state, to existing multinational treaties; negotiating new treaties; expressing agreement with norms of customary international law; and ensuring that its state complies with its international legal obligations.

In this positivist conception, international law need not always be "good" in the sense of promoting global values. The Nazi-Soviet Pact, which carved up Poland, was a piece of international law and clearly not good. Thus, we should be aware that when we say that the executive is in the best position to promote international law, we mean that the executive can promote international law for ill as well as for good. The precise way to put this point is that the executive has better incentives and capacities for using international law to promote the national interest than the judiciary does. The national interest will not always coincide with the global interest. Nonetheless, if we take the perspective of national interest, then foreign affairs legalism has little to recommend it.

The best case for foreign affairs legalism rests on a different conception of international law. On this view, international law consists of a web of norms that extend beyond ordinary treaty and customary international law, and include jus cogens rules that reflect fundamental values in the international order.¹⁴¹ Typical examples of jus cogens norms include prohibitions on aggression, torture, and genocide. In the hands of some scholars, general human rights norms have become part of a kind of "world constitution."¹⁴² The key idea here is that these norms do not depend on state consent.

¹⁴¹ A peremptory or jus cogens norm "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of the same character." *Siderman de Blake v. Rep. of Arg.*, 965 F.2d 699, 714 (9th Cir. 1992) (internal quotation omitted).

¹⁴² See DUNHOFF & TRACHTMAN, *supra* note 57.

States cannot withdraw their consent from them; any effort to do so is simply a manifestation of an intention to engage in illegal behavior.

Foreign affairs legalism draws its spirit from this conception of international law. The executive shoulders the national interest, which may reflect a selfish or short-sighted preference for behavior that aggrandizes the nation but hurts people in other countries. No national institution can check this behavior except courts because of their independence—their *lack* of accountability to the people. By enforcing and hence preserving jus cogens and related norms, and by developing them, courts promote international law, rightly understood, in the teeth of executive interests.

One is more likely to find this kind of argument in a European international law journal than an American one, but it provides the best case for foreign affairs legalism. Nonetheless, it is seriously flawed.

The idea that jus cogens and other fundamental norms underlie international law and exist in the absence of state consent is highly controversial, to say the least.¹⁴³ It is a throwback to natural law thinking that was repudiated more than a century ago. Natural law ideas were repudiated because in practice states could not agree what they were, and so they could not provide grounds for resolving international disputes. Positivism took over because states could at least refer to the sources of law they had consented to, which could be made as precise as they chose. Further, because states—so far—have expressed their consent to the substance of these norms—against torture, for example—the idea that jus cogens norms somehow transcend state consent has never been tested. It remains in the realm of speculation.

Finally, no one has explained why courts would, and how they could, enforce international legal norms against the interest of their own nations, as perceived by the executive. Judges have no particular incentive to defy their own national governments for the sake of ambiguous international ideals. And if judges did, it is not clear how they could constrain their governments, most of which demand, and receive, freedom of action in foreign affairs.

¹⁴³ For criticisms of the new methodology of CIL, see e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115 (2005); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000).

D. An Alternative View

We are now prepared to state the case for executive primacy in foreign affairs law. Executive primacy holds that courts should, as much as possible, solicit the executive's views on disputes involving foreign affairs and defer to these views except under unusual circumstances. In cases of statutory and treaty interpretation (including the question of whether a treaty is self-executing or creates judicially enforceable rights), the judiciary should defer to the executive's views as much as possible. In cases of federal common law development, the judiciary should give the executive the power to opt out of judge-made doctrines (as in the *Paquete Habana*). When the executive declines to give its views, the judiciary should not necessarily understand its task to be that of promoting international law. It may be proper to interpret statutes so as to avoid violating international law, but only to the extent the alleged international law norm has been endorsed by the executive (in a treaty, by endorsing a particular CIL norm or in other ways).

Similar points apply to constitutional interpretation. It may be proper for judges to take account of foreign and international law when interpreting American constitutional law because these sources of international law provide a fund of knowledge.¹⁴⁴ But courts should not do this in order to promote international law. That is a task for the executive.

The case for executive primacy rests on the constitutional division of labor between the executive and the judiciary. The U.S. Constitution, as interpreted over the years, has given different incentives and capacities to the holders of these offices. Executives are held responsible for national security and the national interest in general. The judiciary is not. Executives who seek to do well thus have strong incentives to advance international law in a way that promotes the national interest. Because Congress has refused to assert itself in foreign affairs thus far, the judiciary must either defer to executive-made foreign policy or invent its own. Because the judiciary has no foreign affairs expertise and, given its decentralization and traditional inward focus, no means for developing such an expertise, it should defer to the executive.

Our case for executive primacy rejects an enhanced role of the judiciary in foreign affairs. If the promotion of international law and an international legal system is in the national interest, the executive—not the judiciary—is the branch best placed to achieve this goal. The political question doctrine,¹⁴⁵ the act of state doctrine,¹⁴⁶ international

¹⁴⁴ See, e.g., Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

¹⁴⁵ See *Goldwater v Carter*, 444 U.S. 996 (1979); *Made in the USA Foundation v United States*, 242 F.3d 1300 (11th Cir. 2001).

¹⁴⁶ The most important case on the act-of-state doctrine is *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398 (1964).

comity doctrines¹⁴⁷ and deference to the executive's treaty interpretations,¹⁴⁸ for example, have properly barred the judiciary from making foreign affairs determinations for which it is poorly suited. Increased deference to the executive would ensure that the most accountable branch continues to exercise primary foreign affairs decisionmaking authority.

Conclusion

Foreign affairs legalism awaits an advocate who not only asserts the value of legalizing foreign relations, but also roots this assertion in a plausible account of judicial motivation and institutional competence. Until such a theory is advanced, the tradition of judicial deference to the executive in matters of foreign affairs deserves continued support.

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¹⁴⁷ One example of the application of international comity is *Ungaro-Benages v Dresdner Bank Ag*, 379 F.3d 1227 (11th Cir. 2004) (deferring to the U.S. executive's and German government's desire to handle Holocaust-related claims through a German Foundation created by Germany rather than through litigation in U.S. courts).

¹⁴⁸ A recent case in which the Supreme Court gave weight to an executive interpretation of a treaty is *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (deferring to the executive's interpretation of the domestic enforceability of ICJ judgments under the Vienna Convention).

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