

**UNRATIFIED TREATIES, DOMESTIC POLITICS,  
AND THE U.S. CONSTITUTION**

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**I. Introduction**

Many commentators who favor expansions in international law also favor restrictions on Executive authority. What these commentators often fail to recognize is the potential for conflict between these two commitments. In this article, I consider one example of this potential conflict: the effect under international law of signed but unratified treaties.

Under contemporary treaty practice, a nation's signature of a treaty, especially a multilateral treaty, typically does not make the nation a party to the treaty. Rather, nations become parties to treaties by an act of ratification or accession – either by depositing an instrument of ratification or accession with a depository (for multilateral treaties) or exchanging instruments of ratification (for bilateral treaties). The signing of treaties, under this practice, is (at most) an indication that the terms of the treaty are satisfactory to the executive institution in that nation charged with negotiating and signing treaties and does not constitute a promise that the nation will become a party to the treaty.

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Despite the modern separation of signature and ratification, many international lawyers and academics contend that when a nation signs a treaty, it is bound not to take actions that would defeat the object and purpose of the treaty, until such time as it makes clear its intention not to become a party to the treaty. This obligation is reflected in Article 18 of the Vienna Convention on the Law of Treaties, a treaty that itself governs the formation, interpretation, and termination of treaties. Although the United States has not joined the Vienna Convention, many commentators claim that Article 18 reflects customary international law that is binding on nations that have not joined the Convention, and the United States has not denied that claim.<sup>1</sup> In addition, some commentators have made broad claims about the content of the object and purpose obligation, arguing in essence that it binds signatory nations not to violate any of the “core” or “important” provisions in a treaty.<sup>2</sup> This claim is frequently made, for example, in connection with the U.S. signature of human rights treaties, such as the Convention on the Rights of the Child.

Treaties are signed for the United States by the President and his agents. As a result, any international obligations that the United States incurs as a result of signing a treaty will be triggered by unilateral executive action. This sort of unilateral Executive authority, however, appears to be in tension with the process specified in Article II of the Constitution for making treaties, which requires the advice and consent of two-thirds of the Senate.<sup>3</sup> As I will explain, this tension is not eliminated by the existence of the

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<sup>1</sup> *See infra* TAN 20-23.

<sup>2</sup> *See infra* TAN 92.

<sup>3</sup> *See* U.S. CONST. art. II, § 2, cl. 2 (stating that the President has the power to make treaties, “by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur”).

President's power to enter into "sole executive agreements," which, whatever its scope, must be less extensive than the Article II treaty power.

The extent of this constitutional tension, however, depends on the breadth of the signing obligation. The drafting history of Article 18 suggests that the signing obligation was intended to be significantly narrower than some commentators have assumed. In particular, this obligation is best construed as precluding only actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification. Considered in these terms, the obligation has little relevance to many types of treaties, such as human rights treaties, where pre-ratification conduct inconsistent with the treaty is not likely to undo the bargain reflected in the treaty. Adopting this narrow interpretation of the object and purpose obligation helps reduce the gap between presidential authority under the Constitution and international law. Nevertheless, because there is still some potential for constitutional conflict, and the object and purpose obligation is undefined in the text of the Vienna Convention, the Senate should be attentive to this issue if it is to preserve its already diminished role in the treaty process.

Part II of this article describes the effect, under modern international law, of signing a treaty. Part III discusses the reasons why the United States might sign but not ratify a treaty, and the ways in which the United States might disavow a signed but unratified treaty. Part IV argues that signing obligations are in tension with the U.S. constitutional process for making treaties, and that this tension is not eliminated by the President's power to conclude sole executive agreements. Part V explains how the

drafting history of Article 18 of the Vienna Convention suggests that the scope of the object and purpose obligation is narrower than is sometimes assumed.

## **II. Legal Effect of Signing**

Under international law, a nation does not become a party to a treaty until it expresses its “consent to be bound.”<sup>4</sup> This consent can be expressed in a variety of ways, including through a nation’s signature of the treaty. Under modern practice, however, signature is not typically regarded as a manifestation of consent to be bound, especially for multilateral treaties. Instead, consent is manifested through a subsequent act of ratification – the deposit of an instrument of ratification or accession with a treaty depositary in the case of multilateral treaties, and the exchange of instruments of ratification in the case of bilateral treaties.<sup>5</sup> It has also long been settled that the act of signing a treaty does not obligate a nation to ratify the treaty.<sup>6</sup> This separation of signature and ratification for modern treaties is a reflection of the fact that the domestic law of many countries today requires that the executive obtain legislative approval before concluding treaties.

When the Western world was composed primarily of monarchies, signature was typically viewed as consent to be bound, since monarchs (and thus their agents) had the

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<sup>4</sup> VIENNA CONVENTION ON THE LAW OF TREATIES, arts. 2(1)(b), 11-17, May 23, 1969, 1155 U.N.T.S. 331; *see also* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 75 (2000).

<sup>5</sup> *See* CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. Prt. 106-71, 106th Cong., 2d Sess. 39, at 113 (2001) [hereinafter “CRS Study”].

<sup>6</sup> *See, e.g.*, AUST, *supra* note 4, at 83; J. MERVYN JONES, FULL POWERS AND RATIFICATION 79 (1946); ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES 87-88 (1938).

authority to unilaterally bind their nations to treaties.<sup>7</sup> The central issue under that regime was one of agency, *i.e.*, whether the purported representative of the monarch actually had the authority to make the commitment.<sup>8</sup> “Ratification,” under that regime, referred simply to the monarch’s confirmation that the agent had acted with authority in signing the treaty.<sup>9</sup> The modern separation of signature and ratification can be traced back to the period of the U.S. and French revolutions, when those two countries began adding a clause to the Full Powers they gave to their negotiators reserving ratification.<sup>10</sup> The United States nevertheless repeatedly had to remind other countries during the nineteenth century that its signature did not constitute a promise of ratification.<sup>11</sup> Eventually, “European governments ceased to protest against the American practice; and unratified treaties became a common feature of international relations.”<sup>12</sup> Even in the United States, there was a holdover of the older notion of ratification, whereby some U.S. courts, consistent with the international presumption at that time, deemed treaties that were ratified by the United States to be retroactive to the time of the U.S. signature.<sup>13</sup>

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<sup>7</sup> See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 582 (6th ed. 2003); FRANCIS O. WILCOX, *THE RATIFICATION OF INTERNATIONAL CONVENTIONS* 21-22 (1935).

<sup>8</sup> See, *e.g.*, JOSE SETTE CAMARA, *THE RATIFICATION OF INTERNATIONAL TREATIES* 23-28 (1949).

<sup>9</sup> See Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 *MAINE L. REV.* 263, 268 n.12 (1980).

<sup>10</sup> See JONES, *supra* note 6, at 74.

<sup>11</sup> See *id.* at 76-77; see also, *e.g.*, 5 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 189 (1906) (describing treaty negotiation with Spain in 1819 in which Secretary of State John Quincy Adams explained to the Spanish minister that “by the nature of our Constitution, the full powers of our ministers never are or can be unlimited”).

<sup>12</sup> JONES, *supra* note 6, at 77.

<sup>13</sup> See J. Mervyn Jones, *The Retroactive Effect of the Ratification of Treaties*, 29 *AM. J. INT’L L.* 51 (1935); see also Edward T. Swaine, *Unsigning*, 55 *STAN. L. REV.* 2061, 2069 n.38 (2003).

This view was eventually abandoned both in the United States and abroad, and the modern presumption under international law is that treaties do not operate retroactively.<sup>14</sup>

Throughout its history, the United States has signed numerous treaties that it has not subsequently ratified.<sup>15</sup> This phenomenon has been especially evident in the last several decades. During this period, the United States has signed, but has not yet ratified, a variety of important multilateral treaties. These treaties include significant human rights agreements such as 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 of All Forms of Discrimination Against Women (signed in 1980); and the Convention on the Rights of the Child (signed in 1995). They also include important environmental treaties such as the Kyoto Protocol on Global Warming (signed in 1998); the Rio Convention on Biological Diversity (signed in 1993); and an agreement revising the seabed mining provisions of the Law of the Sea Convention (signed in 1994). Another example of a signed but unratified treaty, much discussed in connection with the post-September 11 war on terrorism, is the First Additional Protocol to the Geneva Conventions (signed in 1977).

The lack of U.S. ratification of these treaties to date does not necessarily mean that the United States will not become a party to them. At least since World War I, it has not been uncommon for a significant period of time to elapse between U.S. signature and ratification of a treaty. Two particularly dramatic examples are the Geneva Protocol for

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<sup>14</sup> See VIENNA CONVENTION, *supra* note 4, art. 28.

<sup>15</sup> See CHRISTIAN L. WIKTOR, UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA, 1776-1976 (9 vols. 1976-1994) (documenting over 400 treaties that the United States signed but did not ratify between 1776-1976); *see also* U.S. DEPT. OF STATE, LIST OF TREATIES SUBMITTED TO THE SENATE, 1789-1934 (1935); SENATE FOREIGN RELATIONS COMMITTEE, PENDING TREATIES (updated June 30, 2006), at <http://foreign.senate.gov/treaties.pdf>.

the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, which the United States signed in 1925 but did not ratify until 1975, fifty years later,<sup>16</sup> and the Convention on the Prevention and Punishment of the Crime of Genocide, which the United States signed in 1948 but did not ratify until 1989, forty-one years later.<sup>17</sup> Another example of a signed treaty that may eventually be ratified by the United States is the Convention on the Elimination of All Forms of Discrimination Against Women. The United States signed this Convention in 1980. In 2002, despite objections from the Bush Administration, the Democratic-controlled Senate Foreign Relations Committee voted to send the Convention to the full Senate for advice and consent.<sup>18</sup> Although no vote was held at that time in the Senate, many supporters of the Convention continue to be hopeful of U.S. ratification.<sup>19</sup>

Although signing is not typically viewed today as a manifestation of consent to be bound to a treaty, many international law academics and lawyers contend that signing does impose certain obligations on the signatory country. This contention is based on a provision in the Vienna Convention on the Law of Treaties, a treaty that regulates the formation, interpretation, and termination of treaties. Article 18 of the Vienna Convention states that a nation that signs a treaty is “obliged to refrain from acts which would defeat the object and purpose” of the treaty “until it shall have made its intention

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<sup>16</sup> See PROTOCOL FOR THE PROHIBITION OF THE USE IN WAR OF ASPHYXIATING, POISONOUS OR OTHER GASES, AND OF BACTERIOLOGICAL METHODS OF WARFARE, June 17, 1925, 26 U.S.T. 571 (entered into force Feb. 8, 1928; for the United States Oct. 4, 1975).

<sup>17</sup> See CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, opened for signature Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951; for the United States Feb. 23, 1989).

<sup>18</sup> See James Dao, *Senate Panel Approves Treaty Banning Bias Against Women*, N.Y. TIMES, July 31, 2000, at A1.

<sup>19</sup> See, e.g., Ellen Chesler, *International Holdout; Around the World, Empowering Women is Considered Essential. So Why Isn't America on Board?*, THE AMERICAN PROSPECT, at A27 (Oct. 2004).

clear not to become a party to the treaty.”<sup>20</sup> Although the United States has not ratified the Vienna Convention, Executive Branch officials have stated on a number of occasions that they view at least much of the Convention as reflecting binding customary international law.<sup>21</sup> Moreover, when the Executive Branch initially sought Senate ratification of the Vienna Convention, State Department officials specifically described the Article 18 object and purpose obligation as a codification of customary international law, and State Department officials have since repeated this description.<sup>22</sup> In addition, although some scholars have described the relationship between Article 18 and customary international law as uncertain, the *Restatement (Third) of Foreign Relations Law* lists the Article 18 obligation as a settled rule.<sup>23</sup>

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<sup>20</sup> VIENNA CONVENTION, *supra* note 4, art. 18.

<sup>21</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 145 & n.2 (1987) (documenting Executive Branch statements). Customary international law is the law of the international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” *Id.*, § 102(2). The United States has *signed* the Vienna Convention. There is a *renvoi*-like question of whether the Article 18 object and purpose obligation applies, as a matter of customary international law, to the U.S. signature of the Vienna Convention itself and, if so, what that obligation entails. For example, as a signatory to the Vienna Convention, is the United States perhaps bound not to violate Article 18 because doing so would defeat the object and purpose of *that* treaty? For reasons discussed below in Part V, the answer should be no.

<sup>22</sup> The Nixon Administration signed the Vienna Convention in 1970 and transmitted it to the Senate in 1971. In its Letter of Submittal to the President, the State Department described the Convention as “set[ting] forth a generally agreed body of rules to govern all aspects of treaty making and treaty observance.” Letter of Submittal from William P. Rogers to President Richard M. Nixon, Oct. 18, 1971, in Message from the President of the United States Transmitting the Vienna Convention on the Law of Treaties, 92d Cong., 1st Sess. 1 (Nov. 22, 1971). In commenting on Article 18’s object and purpose rule, the State Department observed that “[t]his rule is widely recognized in customary international law.” *Id.* at 2. In response to a 1979 letter from fourteen senators expressing concern about possible legal obligations that might be entailed by U.S. signature of the Law of the Sea Convention, Ambassador Elliot Richardson stated that signature “imposes no obligation other than refraining from acts which would defeat the object and purpose of the treaty,” and that “[t]he Vienna Convention provisions, including Article 18, are for the most part codifications of customary international law.” 1979 DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 692. And, in 2001, in answer to a question for the record posed by Senator Jesse Helms, Secretary of State Colin Powell reaffirmed the State Department’s view that Article 18 reflects customary international law. See 2001 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 212-13 (Sally J. Cummins & David P. Stewart eds.).

<sup>23</sup> See RESTATEMENT (THIRD), *supra* note 21, § 312(3); see also *id.* cmt. i & reporters’ note 6; Rogoff, *supra* note 9, at 284. *But cf.* AUST, *supra* note 4, at 94 (“There is not only uncertainty as to whether [Article 18] reflects customary law, but also the extent of the obligation.”); LORI F. DAMROSCH ET

If the United States is bound under international law not to defeat the object and purpose of treaties that it has signed but not ratified, then this means that the President's (or, more typically, his agent's) unilateral act of signature can bind the United States to certain international legal obligations. Commentators have made a variety of claims in recent years concerning U.S. obligations under signed but unratified treaties. For example, Article 37(a) of the Convention on the Rights of the Child prohibits the use of the death penalty for anyone who committed their offense under the age of eighteen, and some commentators claimed that U.S. execution of such juvenile offenders – something permitted in a number of U.S. states before the Supreme Court's recent decision in *Roper v. Simmons*<sup>24</sup> – violated the object and purpose of the Convention.<sup>25</sup> Another example concerns the Comprehensive Nuclear Test Ban Treaty. Despite the Senate's rejection of that treaty in 1999 (by a vote of 51 to 48, which meant that the treaty lacked even

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AL., INTERNATIONAL LAW: CASES AND MATERIALS 476 (4th ed. 2001) (“Whether Article 18 as it now stands is declaratory of prior customary law is uncertain.”); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 135 (7th rev. ed. 1997) (“There is some authority for this rule in customary law, but the matter is controversial.”); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES, 1945-1986, at 149 (1989) (noting that “article 18 . . . is in many circles regarded as highly controversial, at least with regard to the question of whether it is declaratory of customary international law or is innovative”); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 43 (2d ed. 1984) (noting that Article 18 “in all probability constitutes at least a measure of progressive development”); Konstantinos Magliveras & Dimitris Bourantonis, *Rescinding the Signature of an International Treaty: The United States and the Rome Statute Establishing the International Criminal Court*, 14 DIPLOMACY & STATECRAFT 21, 27 (2003) (“[T]here is no uniform approach as to whether [Article 18] has the force of customary international law or not.”).

<sup>24</sup> 125 S. Ct. 1183 (2004). In *Roper*, the Supreme Court held that the execution of juvenile offenders (i.e., those who commit capital offenses while under the age of 18) constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. Although the Court did not rely on the U.S. signature of the Convention on the Rights of the Child, it did note that every nation in the world except for the United States and Somalia had ratified the Convention. *See id.* at 1199. In his dissent, Justice Scalia argued, in reference to the U.S. failure to ratify the Convention, that “[u]nless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position.” *Id.* at 1226 (Scalia, J., dissenting).

<sup>25</sup> See, e.g., *Panel Discussion, Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 FORDHAM L. REV. 2793, 2812 (1999) (comments of Professor William Schabas). *But see* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 512-13 (2002) (disputing this claim).

majority, let alone two-thirds, support), the Clinton Administration and some commentators maintained that the United States still had an obligation under the treaty to avoid testing nuclear weapons by virtue of its earlier signature.<sup>26</sup> Still another example is the First Additional Protocol to the Geneva Conventions. Commentators have claimed that, notwithstanding the Reagan Administration's disavowal of that Protocol, the Carter Administration's signature of it continues to bind the United States to various obligations, such as limitations on the use of weaponry.<sup>27</sup>

### III. Domestic Politics of Unratified Treaties

There are a number of reasons why the United States might sign a treaty and then fail to ratify it. A president might submit a treaty to the Senate and have it defeated there,

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<sup>26</sup> See, e.g., Bill Gertz, *Albright Says US Bound by Nuke Pact*, WASH. TIMES, Nov. 2, 1999, at A1 (quoting letter from Secretary of State Madeleine Albright to foreign ministers referring to the United States' "obligations as a signatory under international law"); Remarks by President Clinton at Press Conference on the Comprehensive Test Ban Treaty (Oct. 14, 1999) (statement by President Clinton at a press conference that, "I signed that treaty, it still binds us unless I go, in effect, and erase our name – unless the President does that and takes our name off, we are bound by it."), at <http://www.fas.org/nuke/control/ctbt/text/101499clintonstatement.htm>; Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT'L L. 405, 463-64 (2003) (arguing that "resumption of U.S. testing by means of nuclear explosion would defeat the object" of the CTBT); cf. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 102, 139 & n.15 (2000) (stating that "the United States presumably remains bound under customary international law (as evidenced by Article 18 of the Vienna Convention on the Law of Treaties) to refrain from acts that would defeat the object and purpose of the CTBT," but noting that "[w]hether that obligation requires that the United States refrain from nuclear testing is unclear"). Senator Trent Lott countered that "the Senate vote serves to release the United States from any possible obligations as a signatory of the negotiated text of the treaty." Bill Gertz, *Lott Hits Clinton's Stance on Nuke Pact*, WASH. TIMES, Nov. 3, 1999, at 1. In arguing that there continues to be an object and purpose obligation under this treaty, some commentators have noted that the treaty remained on the Senate's Executive Calendar despite that body's rejection of the treaty. See, e.g., Murphy, *supra*. For a discussion of the President's power to withdraw a treaty from Senate consideration, see David C. Scott, Note, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447 (2002).

<sup>27</sup> See, e.g., Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 107 (2002); see also Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 94 (2001) ("Although the United States has not yet ratified Protocol I, it has signed the Protocol (during the Carter Administration), and therefore it has an international obligation 'to refrain from acts which would defeat the object and purpose of the treaty' pending ratification or Senate defeat.").

although this happens only rarely. (Two prominent examples are the Versailles Treaty that established the League of Nations, and the Comprehensive Nuclear Test Ban Treaty.) More likely, a president might withhold submission of the treaty to the Senate because of perceived opposition in that body, perhaps with the hope that the Senate's position (and, perhaps relatedly, its composition) would change. This appears to have been the case, for example, with the Convention on the Rights of the Child, which the Clinton Administration signed in 1995 but did not submit to the Senate. Or a president may submit a treaty to the Senate and have it languish there, once its supporters in the Senate realize that they do not have sufficient votes for advice and consent. One apparent example is the Convention on the Elimination of All Forms of Discrimination Against Women, which was approved by the Senate Foreign Relations Committee in 1994 and then sent to the full Senate for consideration, but which the full Senate sent back to the Committee. (As noted above, the Committee sent this treaty back to the full Senate in 2002, but the Senate once again failed to act on it.) A president might also sign a treaty without being committed to ratification, perhaps in an effort to stay involved in subsequent negotiations related to the treaty or in the institutions established by the treaty, or for symbolic political benefits.

Another reason why a treaty might be signed by the United States but go unratified is a change of policy occurring as a result of a new presidential administration. Such a change of policy has occurred on a number of occasions. For example, President Carter signed the SALT II nuclear reduction treaty in 1979, but the Reagan Administration announced in 1982 that the United States had no intention of ratifying that treaty. Secretary of State Alexander Haig explained to the Senate Foreign Relations

Committee that “[t]his proposal has been abandoned by this administration,” and that “we consider SALT II dead and have so informed the Soviets.”<sup>28</sup> Similarly, the Reagan Administration announced in 1987 that it would not ratify the First Additional Protocol to the Geneva Conventions on the laws of war, which President Carter had signed in 1977. President Reagan explained in a message to the Senate that the Protocol was “fundamentally and irreconcilably flawed,” that the problems with the Protocol were “so fundamental in character that they cannot be remedied through reservations,” and that he therefore had “decided not to submit the Protocol to the Senate in any form.”<sup>29</sup>

A more recent example is the treaty establishing the International Criminal Court, which was promulgated in 1998 and, after receiving the requisite number of ratifications, entered into force in 2002.<sup>30</sup> Under that treaty, an international court, based in The Hague, Netherlands, has jurisdiction to try the offenses of genocide, crimes against humanity, and war crimes. Despite expressing a number of concerns about what he called “significant flaws” in the treaty, President Clinton signed it shortly before leaving office.<sup>31</sup> The Bush Administration subsequently announced, however, that the United States had no intention of becoming a party to that treaty.<sup>32</sup>

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<sup>28</sup> See Nuclear Arms Reduction Proposals: Hearings Before the Senate Comm. on Foreign Relations, 97th Cong. 2d Sess. 121 (1982).

<sup>29</sup> See Message from President Ronald Reagan to the Senate of the United States Transmitting Protocol II Additional to the Geneva Conventions, Jan. 29, 1987, *reprinted in* 81 AM. J. INT’L L. 910 (1987). Among other things, President Reagan expressed concern that the First Additional Protocol would “grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war.” *Id.* at 911. Some commentators have perceived a conflict between that concern and the Bush Administration’s post-September 11 treatment of some terrorists as enemy combatants.

<sup>30</sup> See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1988, art. 120, U.N. Doc. A/Conf. 183/9, 37 I.L.M. 999, 1066 (1998). As of September 2006, 102 nations were parties to this treaty. See United Nations Treaty Collection, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>.

<sup>31</sup> See Statement by the President, Signature of International Criminal Court Treaty (Dec. 31, 2000), at <http://usinfo.state.gov/topical/pol/usandun/00123101.htm>. In his signing statement, President

At least in the case of the International Criminal Court, there appears to have been specific concern about the potential effect of the object and purpose obligation imposed by Article 18 of the Vienna Convention. In announcing the Bush Administration's decision not to ratify the treaty, John Bolton, then the Under Secretary of State for Arms Control and International Security, sent a letter to Kofi Annan, the Secretary-General of the United Nations, stating that "the United States does not intend to become a party to the treaty," and that "[a]ccordingly, the United States has no legal obligations arising from its signature [of the treaty]," an apparent reference to Article 18 of the Vienna Convention.<sup>33</sup> That same day, in defending the Bush Administration's action before the Center for Strategic and International Studies, an Administration official stated that the Administration's actions were "consistent with the Vienna Convention on the Law of Treaties."<sup>34</sup> And, in an even more direct reference to Article 18 of the Convention, the

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Clinton expressed the view that, with signature, the United States would "be in a position to influence the evolution of the Court," whereas "[w]ithout signature, we will not." *Id.* Senator Jesse Helms complained that "President Clinton's decision to sign the Rome treaty establishing an International Criminal Court in his final days in office is as outrageous as it is inexplicable. . . . Today's action is a blatant attempt by a lame-duck President to tie the hands of his successor." Helms' Press Release on Clinton's Signature (Dec. 31, 2000), at [http://www.amicc.org/docs/Helms\\_Sign.pdf](http://www.amicc.org/docs/Helms_Sign.pdf).

<sup>32</sup> See Press Statement, International Criminal Court: Letter from John Bolton to UN Secretary General Kofi Annan (May 6, 2002), at [www.state.gov/r/pa/prs/ps/2002/9968.htm](http://www.state.gov/r/pa/prs/ps/2002/9968.htm). See also Curtis A. Bradley, *ASIL Insight: U.S. Announces Intent Not to Ratify International Criminal Court Treaty* (May 2002), at <http://www.asil.org/insights/insigh87.htm> (discussing the U.S. announcement).

<sup>33</sup> Press Statement, *supra* note 32. Before being appointed to this position, Mr. Bolton had expressed concern that President Clinton's signature of the International Criminal Court treaty would bind the United States not to defeat the object and purpose of the treaty. See John R. Bolton, *Unsign that Treaty*, WASH. TIMES, Jan. 4, 2001, at A21; see also John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L & CONTEMP. PROBS. 1, 47-48 (2000) (expressing concern about the Clinton Administration's claim that the United States was still bound by the object and purpose of the Comprehensive Test Ban Treaty despite the Senate's rejection of it); John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 211-12 (2000) (criticizing the Clinton Administration's reliance on the object and purpose of the treaty after it had been rejected by the Senate).

<sup>34</sup> Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C. (May 6, 2002), at <http://www.state.gov/p/9949.htm>. In a separate statement, Secretary of Defense Donald Rumsfeld explained several concerns that the Administration had about the treaty: "the lack of adequate checks and balances on powers of the ICC prosecutors and judges; the dilution of the U.N. Security Council's authority over international criminal prosecutions; and the lack

U.S. Ambassador for War Crimes Issues explained in a press conference that the Administration's announcement would help the United States preserve its flexibility because "when one is a signatory . . . the state commits to not taking actions that would be designed to defeat the object and the purpose of the treaty."<sup>35</sup>

One can only speculate about the Administration's specific concerns relating to obligations that might have been associated with the U.S. signature. We do know, however, that the International Criminal Court treaty requires parties to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court," and to "comply with requests for arrest and surrender."<sup>36</sup> It is conceivable that, as a signatory, the United States would have been called on to assist the court – for example, by extraditing a suspect who was within U.S. jurisdiction or by providing evidence within U.S. control. The Administration may well have had this sort of obligation in mind, since the same day that the Administration announced that it would not become a party to the treaty, the State Department's ambassador for war crimes stated that the court

"should not expect any support or cooperation from the United States government. If the prosecutor of the [court] seeks to build a case against an individual, the prosecutor should build the case on his or her own effort and not be dependent or reliant upon U.S. information or cooperation."<sup>37</sup>

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of an effective mechanism to prevent politicized prosecutions of American servicemembers and officials." News Release, Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002), at [http://www.defenselink.mil/news/May2002/b05062002\\_bt233-02.html](http://www.defenselink.mil/news/May2002/b05062002_bt233-02.html).

<sup>35</sup> Pierre-Richard Prosper, Foreign Press Center Briefing (May 6, 2002), at <http://fpc.state.gov/9965.htm>.

<sup>36</sup> See ROME STATUTE, *supra* note 30, arts. 86, 89.

<sup>37</sup> Prosper, *supra* note 35. Congress subsequently enacted the American Servicemembers' Protection Act of 2002, which broadly precludes federal, state, and local government assistance to the International Criminal Court. See Pub. L. 107-206, 116 Stat. 820, tit. II (Aug. 2, 2002). The Act also authorizes the President to use "all means necessary and appropriate" to obtain the release of U.S. and allied soldiers and government employees detained or imprisoned by or on behalf of the court. *Id.*, § 2008.

The Bush Administration might also have been concerned that its plan to conclude non-surrender agreements with individual nations, pursuant to which these nations promise not to deliver U.S. personnel to the International Criminal Court, would be viewed as an effort to defeat the object and purpose of the treaty. The United States has now concluded non-surrender agreements with approximately 100 countries.<sup>38</sup> In doing so, the United States has sought to obtain the benefit of Article 98(2) of the International Criminal Court treaty, which provides that the Court “may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”<sup>39</sup> Some commentators have suggested, however, that the non-surrender agreements violate the object and purpose of the treaty.<sup>40</sup>

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<sup>38</sup> See U.S. State Department, “Article 98 Agreements and the International Criminal Court,” at <http://www.state.gov/t/pm/art98/>. The American Servicemembers’ Protection Act, *supra* note 37, prohibits certain types of assistance to countries that refuse to conclude Article 98 agreements with the United States. The President has the authority under the Act, however, to waive the prohibition, and he has done so for some countries. See, e.g., Memorandum from President George W. Bush to the Secretary of State, “Waiving Prohibition on United States Military Assistance with Respect to Various Parties to the Rome Statute Establishing the International Criminal Court,” at <http://www.whitehouse.gov/news/releases/2006/10/print/20061002-7.html>.

<sup>39</sup> ROME STATUTE, *supra* note 30, art. 43.

<sup>40</sup> See, e.g., Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT’L L. REV. 1115 (2004); James Crawford, Philippe Sands & Ralphe Wilde, *Joint Opinion, In the Matter of the Statute of the International Criminal Court* (June 5, 2003), at [http://www.humanrightsfirst.org/international\\_justice/Art98\\_061403.pdf](http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf). Because of its notification that it does not intend to become a party to the treaty, the United States is not bound to the object and purpose obligation for that treaty. Commentators have argued, however, that nations that are parties or signatories to the treaty are violating international law if they sign these agreements with the United States.

There has of course been substantial debate over the policy wisdom of the U.S. decision not to ratify the International Criminal Court treaty.<sup>41</sup> There also has been some debate over whether it was legally proper for the United States to “unsign” that treaty. Dean Harold Koh, for example, has questioned the validity of what he describes as the “novel U.S. tactic of unsigned the [International Criminal Court] Treaty.”<sup>42</sup> That “unsigned” allegation is, in fact, somewhat misleading. The United States did not attempt to physically remove its signature. Rather, it simply announced that it did not intend to become a party to the treaty. Moreover, there seems to be little question that a nation is entitled to declare its intention not to become a party to a treaty after signing it. In fact, Article 18 of the Vienna Convention appears to contemplate exactly this possibility when it states that a nation’s object and purpose obligation continues until the nation “shall have made its intention clear not to become a party to the treaty.”<sup>43</sup> Nor could this action have violated the familiar *pacta sunt servanda* rule for treaties – that is, that nations are obligated to comply with their treaty obligations in good faith – because that principle applies only to treaties that a nation has ratified.<sup>44</sup> In addition, there does

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<sup>41</sup> Compare, e.g., David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47 (2001-02), with Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

<sup>42</sup> Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1508 (2003); see also Editorial, *New Era in War Crimes Justice*, N.Y. TIMES, May 4, 2002, at A12 (“No country has ever unsigned a treaty – it is not clear if such a thing exists.”); William J. Aceves, *The President’s Roman Holiday*, SAN DIEGO UNION-TRIBUNE, Sept. 5, 2002, at B11 (asserting that “the decision to ‘unsign’ the Rome Statute is unique in the history of international law”); Michael Kelly, *Ignoring Criminal Treaty Harms U.S. Legacy*, USA TODAY, April 16, 2002, at 12A (asserting that “[s]ignature removal is unprecedented in American international legal practice”).

<sup>43</sup> VIENNA CONVENTION, *supra* note 4, art. 18. See, e.g., Hans Blix, *Developing International Law and Inducing Compliance*, 41 COLUM. J. TRANSNAT’L L. 1, 5 (2002) (“Clearly, in the cases where signature does not signal the state’s consent to be bound, a simple but formal announcement by a government clarifying that it will not proceed with ratification or any other form of confirmation will be enough to terminate the limited legal effects that flowed from the signature.”).

<sup>44</sup> See VIENNA CONVENTION, *supra* note 4, art. 26 (“Every treaty in force is binding *upon the parties to it* and must be performed in good faith.”) (emphasis added).

not seem to be any question that the Executive Branch is a proper institution for making this intention clear, since it is the institution exclusively responsible for signing treaties, and no treaty can be ratified without the President's agreement.<sup>45</sup>

Some commentators have suggested that the Bush Administration, by publicly opposing the treaty instead of simply withholding ratification, displayed a lack of good faith,<sup>46</sup> but this is far from clear. In a sense, all the Administration did was openly reveal to the other treaty parties the United States' true intentions so that the other parties could act accordingly.<sup>47</sup> Viewed this way, the Bush Administration's actions may reflect greater good faith than the Clinton Administration's decision to sign the treaty knowing that it was not likely to be accepted by either the Senate or the incoming presidential

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<sup>45</sup> In this sense, "unsigned" is a more straightforward issue of Executive power than termination of treaties that have already been ratified, since, unlike the signing power, the President shares the ratification power with the Senate. Nevertheless, presidents have unilaterally terminated ratified treaties. For example, President Bush terminated the Anti-Ballistic Missile Treaty with Russia in 2002, and President Carter terminated a defense treaty with Taiwan in 1979. In 2005, Secretary of State Condoleezza Rice sent a letter to the Secretary-General of the United Nations announcing that the United States was withdrawing from the Optional Protocol to the Vienna Convention on Consular Relations, which the United States had ratified in 1969, and which gave the International Court of Justice jurisdiction to decide certain disputes. For discussion of whether and to what extent the President has authority to terminate treaties, see, for example, DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* (1986); Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 *NW. U. L. REV.* 577 (1980); and Louis Henkin, *Editorial Comment, Litigating the President's Power to Terminate Treaties*, 73 *AM. J. INT'L L.* 647 (1979).

<sup>46</sup> See sources cited above in Note 42. Another concern was that the Administration's action would set a precedent that would encourage other nations to terminate the effect of their signatures of treaties. See Swaine, *supra* note 13, at 2064-65 (describing this concern). This concern is questionable. As noted, the Vienna Convention already contemplates the termination of the effect of signatures, so the Administration's action does not change what should have already been evident in international law. Moreover, even if it is now more evident that nations have the option of terminating the effect of their signatures, it is not clear whether or to what extent nations will exercise this option. After all, they already had the options of not signing the treaty, and of not ratifying it. Whether adding still another option in this process will change national behavior is uncertain, given the complicated reasons nations have for signing and ratifying treaties. Cf. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002) (suggesting that many nations ratify human rights treaties even if they are not committed to compliance with the treaties). To date, there is no evidence suggesting that the Bush Administration's actions concerning the International Criminal Court treaty have in fact prompted other nations to terminate the effect of their signatures on this treaty or any other treaty.

<sup>47</sup> See Swaine, *supra* note 13, at 2062 ("Unsigned, on this view, was simply being forthright, and by providing more accurate information about the U.S. position, better enabled other signatories and non-parties to promote their own interests.").

administration.<sup>48</sup> Moreover, in order for a nation to terminate its obligations under Article 18, it is arguable that a nation must give formal international notice of its intention not to ratify a treaty. If so, the Bush Administration's decision to send a letter to the UN Secretary-General appears to be more faithful to Article 18 than other U.S. efforts to disassociate itself with treaty signatures, such as with the Kyoto Protocol and First Additional Protocol to the Geneva Conventions.

The variation in how administrations have handled unratified treaties relates in part to the fact that the Executive Branch has multiple audiences. In signaling its intent not to be bound by a treaty, the Executive Branch has both an international audience consisting of, in particular, the other treaty parties, and a domestic audience consisting of domestic interest groups and their supporters in Congress who favor or oppose the substance of the treaty.<sup>49</sup> At times, the Executive Branch may attempt to suggest to the other treaty parties that it has no intention of ratifying, while leaving the matter somewhat ambiguous in order to avoid the domestic fallout associated with clearly disavowing the treaty (emanating from both supporters of the particular treaty and opponents of other treaties who may demand similar disavowals).<sup>50</sup> Whether such ambiguous expressions are sufficient to negate Article 18 obligations is unclear.

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<sup>48</sup> The Supreme Court had decided *Bush v. Gore* prior to President Clinton's signing of the treaty.

<sup>49</sup> In other words, there is what the political scientist Robert Putnam has referred to as a "two-level game." See Robert D. Putnam, *Diplomacy and Domestic Costs: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); see also DANIEL DREZNER, LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL INSTITUTIONS (2002).

<sup>50</sup> The Bush Administration's statements concerning the Kyoto Protocol are a good example. Shortly after the Administration took the above-described actions concerning the International Criminal Court treaty, the Under Secretary of State for Global Affairs, Paula Dobriansky, responded to a letter from the Competitive Enterprise Institute requesting that the United States take steps to make clear that it had no intention of ratifying the Kyoto Protocol. See Letter from Paula Dobriansky to Christopher C. Horner dated May 14, 2002, at <http://www.cei.org/gencon/003,03044.cfm>. Ms. Dobriansky noted that "President Bush and this administration have made clear on numerous occasions that the Kyoto Protocol is fatally flawed and that the United States will not participate in it," and she stated that "[w]e have gone to

#### IV. The Treaty Clause and the Executive Agreement Power

The above-discussed signing obligations raise a constitutional issue for the United States. Article II of the Constitution specifies a particular process for making treaty commitments, a process that requires the President to obtain the advice and consent of two-thirds of the Senate. The Founders had a number of reasons for including this senatorial advice and consent requirement, including their desire to protect state interests, check executive power, and limit the number of international commitments that the country entered into.<sup>51</sup> As Alexander Hamilton explained in *Federalist No. 75*, it was thought essential at the Founding that both the President and a portion of the legislature participate in the treaty process: “The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.”<sup>52</sup> The object and purpose obligation embodied in Article 18 of

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considerable lengths, internationally, over the past year to make our position with respect to the Kyoto Protocol clear and unambiguous.” *Id.* Ms. Dobriansky did not make clear, however, whether the Administration believed that it had terminated any obligations associated with the U.S. signature of the Protocol, and she did not explain why the Administration would not send a letter to the Secretary-General concerning the Protocol, as it had done for the International Criminal Court treaty. A somewhat similar example is the State Department’s failure to answer a 2003 letter from Senator Jon Kyl asking for clarification of the status of the Comprehensive Nuclear Test Ban Treaty. *See* Al Kamen, *A Nomination on Hold*, WASH. POST, Aug. 9, 2004, at A13 (referring to an unanswered 2003 letter from Senator Kyl to Secretary of State Colin Powell). *But cf.* Response of the Secretary of State to a Question for the Record of Senator Biden (No. 12), Committee on Foreign Relations, Feb. 16, 2005, *reprinted at* 151 Cong. Rec. S8532 (daily ed. July 20, 2005) (noting that “the U.S. does not support the CTBT and will not become a party to it”).

<sup>51</sup> *See generally* Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 PERSP. AM. HIST. 233 (1984); Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271 (1934).

<sup>52</sup> THE FEDERALIST PAPERS 451 (Clinton Rossiter ed., 1961); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 557 (1833) (“The president is the immediate author and finisher of all treaties . . . . But no treaty, so formed, becomes binding upon the

the Vienna Convention, however, appears to contemplate the imposition of binding international commitments through the President's unilateral act of signature. Moreover, because Article 18 imposes no time limitation on ratification, these commitments may continue for many years.

To be sure, it is difficult to argue that the Article II treaty process is the *only* way in which the United States can constitutionally enter into binding international agreements. The Constitution, in limiting state involvement in foreign affairs, refers not only to "Treaties" – the term used in Article II – but also to "Agreements" and "Compacts," thus suggesting that there may be some international agreements that are not subject to the Article II process.<sup>53</sup> And, in fact, the United States has entered into many binding international agreements in its history without going through the Article II process. This has been especially true in the period since World War II, when the vast majority of international agreements entered into by the United States have not gone through the two-thirds senatorial consent process. Indeed, in the 50-year period between 1939 and 1989, the United States entered into 11,698 "executive agreements" (i.e., agreements concluded outside of the Article II process) and only 702 Article II treaties.<sup>54</sup>

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country, unless it receives the deliberate assent of two thirds of the senate."); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 187 (1836) ("In some republics, as in that of the United States of America, the advice and consent of the senate is essential to enable the chief executive magistrate to pledge the national faith in this form.").

<sup>53</sup> See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998). Article I, Section 10 of the Constitution completely prohibits states from entering into any "Treaty, Alliance, or Confederation," and requires them to obtain congressional consent before entering into any "Agreement or Compact." See U.S. CONST. art. I, § 10.

<sup>54</sup> See CRS Study, *supra* note 5, at 39.

This sort of longstanding historical practice is often given significant weight in constitutional interpretation, especially in the foreign affairs area.<sup>55</sup>

A large majority of U.S. executive agreements have been congressional-executive agreements – that is, agreements made with the *ex ante* or *ex post* approval of a majority of Congress.<sup>56</sup> Nevertheless, there are a number of examples of what are called “sole executive agreements” – that is, international agreements concluded solely by the President. Although many sole executive agreements have concerned relatively minor or routine matters, some of them have had significant effect, and several Supreme Court decisions have held that these agreements (primarily involving settlement of claims and recognition of foreign governments) are not only binding but also operate as preemptive federal law.<sup>57</sup>

There has been significant academic debate over the legitimacy of congressional-executive agreements.<sup>58</sup> Although most commentators accept that these agreements are at least sometimes constitutionally valid, many commentators believe that the congressional-executive agreement power is narrower than the Article II treaty power.

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<sup>55</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936).

<sup>56</sup> See C.H. McLaughlin, *The Scope of the Treaty Power in the United States, II*, 43 MINN. L. REV. 651, 721 (1959) (concluding that of executive agreements entered into between 1938 and 1957, only 5.9% were based exclusively on the President’s constitutional authority); INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES, A Study Prepared for the Senate Committee on Foreign Relations by the Congressional Research Service, 95th Cong., 1st sess. 22 (Comm. Print) (1977) (finding that in the period 1946–1972, 88.3% of executive agreements were based at least in part on statutory authority, 6.2% were based on treaties, and 5.5% were based solely on executive authority).

<sup>57</sup> See *American Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003) (settlement of war-related claims); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (settlement of claims against foreign nation as part of resolution of hostage crisis); *United States v. Pink*, 315 U.S. 203 (1942) (agreement giving effect to Soviet property claims as part of recognition of Soviet Union); *United States v. Belmont*, 301 U.S. 324 (1937) (same).

<sup>58</sup> Compare, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); and David Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998); with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

These commentators note, for example, that despite the frequent use of congressional-executive agreements, presidents generally have not attempted to use them for subjects such as human rights or arms control, and the Senate has indicated that it would resist such an attempt.<sup>59</sup> Rather, congressional-executive agreements are most commonly used for agreements relating to international trade and commerce – for example, the GATT and NAFTA trade agreements – an area in which Congress has particularly broad authority. Moreover, there are a number of examples in which presidents have used the Article II senatorial consent process even though that process reduced the likelihood of legislative approval of the treaty – for example, with respect to the Comprehensive Nuclear Test Ban Treaty.<sup>60</sup>

In any event, regardless of how one comes out on the proper scope of congressional-executive agreements, there are much stronger reasons for concluding that the sole executive agreement power is narrower than the Article II treaty power. After all, sole executive agreements do not have the process protections of congressional-

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<sup>59</sup> See, e.g., Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998); Peter J. Spiro, *Constitutional Method and the Great Treaty Debate*, 79 TEXAS L. REV. 961 (2001); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001); see also CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 473-74, 477 (2d ed. 2006) (documenting Senate insistence that significant arms control agreements be concluded pursuant to the Article II process). *But see* RESTATEMENT (THIRD), *supra* note 21, § 303 cmt. e (suggesting that treaties and congressional-executive agreements are completely interchangeable). In 1999, the full Congress passed legislation that prohibits the United States from becoming a party to the International Criminal Court by any means other than by an Article II treaty. See 22 U.S.C. § 7401.

<sup>60</sup> It is also worth noting that a central reason that the United States did not ratify the Vienna Convention on the Law of Treaties when it was submitted to the Senate by President Nixon is that the Senate was concerned that provisions in the treaty would further legitimize executive agreements. See CRS Study, *supra* note 5, at 46-47; Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 295-98 (1988); see also *infra* TAN 114-15. It seems unlikely, therefore, that presidents have complete freedom of discretion in choosing whether to conclude an agreement as an Article II treaty or an executive agreement, as some commentators have assumed. See Lisa Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 PRES. STUDIES Q. 440 (2005); John Setear, *The President's Rational Choice of a Treaty's Pre-Ratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5 (2002).

executive agreements – namely, approval by a majority of Congress – and sole executive agreements have been used much less often than congressional-executive agreements (and thus benefit less from historical gloss). Moreover, sole executive agreements, because they are not authorized by Congress, fall into a lower category of presidential power under Justice Jackson’s influential framework from the *Youngstown* steel seizure case. Under that framework, presidential power is at its highest when the President acts with the approval of Congress, as is the case with congressional-executive agreements, but is in a lower, intermediate category when the President acts without such approval, as is the case with sole executive agreements.<sup>61</sup>

Although the Supreme Court has approved of sole executive agreements in several decisions,<sup>62</sup> it has not discussed the scope of the sole executive agreement power, and it seems unlikely that the Court would hold that the President has the authority to bypass both the Article II process and Congress whenever he wishes. Like the bicameralism and presentment requirements for federal legislation, the procedural requirements for making treaties are part of the Constitution’s checks and balances, and, as such, they are unlikely to be deemed by the Court to be merely voluntary.<sup>63</sup> Moreover,

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<sup>61</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006) (citing Justice Jackson’s concurrence).

<sup>62</sup> See *supra* Note 56.

<sup>63</sup> Cf. *Clinton v. New York*, 524 U.S. 417 (1998) (invalidating Line Item Veto Act based on failure to comply with procedural requirements for legislation); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto provision based on failure to comply with procedural requirements for legislation). In *Federalist No. 69*, Alexander Hamilton distinguished the proposed President from the British monarch, noting that the President, unlike the British monarch, could not make treaties on his own. See THE FEDERALIST PAPERS, *supra* note 5, at 419. See also Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 918 (2004).

under current case law, treaties are not subject to the same federalism limitations that apply to federal legislation,<sup>64</sup> making the process requirements particularly significant.<sup>65</sup>

For these reasons, although there is much academic debate about executive agreements, almost all commentators agree that the President's power to enter into sole executive agreements is narrower than the President's power to enter into Article II treaties. As Professor Louis Henkin (who is otherwise supportive of executive agreements, especially congressional-executive agreements) notes, the view that sole executive agreements are completely interchangeable with Article II treaties "is unacceptable, for it would wholly remove the 'check' of Senate consent which the Framers struggled and compromised to write into the Constitution."<sup>66</sup> Many commentators assume, therefore, that sole executive agreements are valid only if they are related to an independent constitutional power of the President, such as the President's implied power to determine which governments the United States recognizes, the President's Commander in Chief power, or the President's power to receive

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<sup>64</sup> See *Missouri v. Holland*, 252 U.S. 416 (1920). For academic discussion of the relationship between the treaty power and U.S. federalism, compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); and Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000); with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000). See also Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); Edward Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

<sup>65</sup> See, e.g., David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003).

<sup>66</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 222 (2d ed. 1996); see also 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 649 (3d ed. 2000) ("That the power to conclude executive agreements coincides perfectly with the treaty power is untenable . . . since such a conclusion would emasculate the structurally crucial senatorial check on executive discretion that the Framers so carefully embodied in the Constitution.").

ambassadors.<sup>67</sup> Others claim that such agreements are valid only if they involve one-time or short-term commitments.<sup>68</sup>

These limitations are at least roughly consistent with the Supreme Court's decisions that have approved sole executive agreements.<sup>69</sup> The agreement at issue in the *Belmont* and *Pink* cases related to U.S. recognition of the Soviet Union and thus concerned the President's recognition power. The agreement at issue in *Dames & Moore* concerned the resolution of the Iranian hostage crisis and thus arguably related to the Commander in Chief power. In addition, the agreements in each of these three cases involved the one-time settlement of claims against a foreign government.<sup>70</sup>

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<sup>67</sup> See, e.g., RESTATEMENT (THIRD), *supra* note 21, § 303(4); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 121 (1965); CRS Study, *supra* note 5, at 26. An early sole executive agreement related to the Commander in Chief power was an agreement made by President Madison with Great Britain during the War of 1812 concerning treatment of prisoners of war. See *Cartel for the Exchange of Prisoners of War*, May 12, 1813, U.S.-Gr. Brit., 2 Miller 557. For debate over whether the Article II “vesting clause” (which provides that “the executive Power shall be vested in a President of the United States of America”), is also a source of presidential power, compare Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (arguing that it is), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (arguing that it is not).

<sup>68</sup> See, e.g., Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998). In *Holmes v. Jennison*, 39 U.S. (15 Pet.) 540 (1840), the Supreme Court held that Vermont could not extradite a criminal suspect to Canada because, even though the extradition arrangement did not constitute a formal “treaty,” it did constitute an “agreement” and thus was precluded by Article I, Section 10 of the Constitution because of the absence of congressional authorization. The Court quoted Vattel's description of “treaties” as compacts made “either for perpetuity, or for a considerable time,” and his statement that, “The compacts which have temporary matters for their object, are called agreements, conventions, and practices. They are accomplished by one single act, and not by repeated acts.” *Id.* at 572; see also 3 E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 160 (1758) (Charles G. Fenwick trans., 1916). A classic example of a one-time agreement is a claims settlement. For documentation of the longstanding practice of settlement of claims through executive agreement, see, for example, SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 85 (1904); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claims Settlement by the President*, 44 HARV. INT'L L.J. 1 (2003). A common short-term agreement is a *modus vivendi*, which is “an instrument recording an international agreement of temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character.” UN Treaty Collection, Treaty Reference Guide, at <http://untreaty.un.org/English/guide.pdf>. For examples of *modi vivendi* accomplished through executive agreement, see CRANDALL, *supra* note 57, at 87-88.

<sup>69</sup> See cases cited *supra* Note 56.

<sup>70</sup> It is also worth noting that Congress appears to have acquiesced in the longstanding practice of presidential settlement of claims. See *Dames & Moore*.

The Supreme Court's recent decision in *American Insurance Association v. Garamendi* does not change this conclusion. In *Garamendi*, the Supreme Court held that a California statute was preempted because it posed an obstacle to the achievement of Executive Branch policy as embodied in certain executive agreements relating to the settlement of Holocaust-era claims.<sup>71</sup> Although the case involved fully concluded international agreements, there is language in the Court's opinion that could be read as suggesting that the Executive might have a unilateral power to preempt state law in foreign affairs. In particular, the Court noted that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy" and that "there is executive authority to decide what that policy should be."<sup>72</sup> Despite this broad language, the Court did not suggest that the Executive had unlimited authority to preempt, even through executive agreements. Indeed, in observing that "*valid* executive agreements are fit to preempt state law, just as treaties are,"<sup>73</sup> the Court can be read as suggesting that there are limits on the circumstances under which executive agreements will be found valid. More importantly, the Court emphasized that the executive agreements at issue there concerned settlement of claims, and that "executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice" that "has received congressional acquiescence throughout its history."<sup>74</sup> If the sole executive agreement power were plenary, the Court

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<sup>71</sup> See 539 U.S. 396 (2003).

<sup>72</sup> *Id.* at 415.

<sup>73</sup> *Id.* at 416.

<sup>74</sup> *Id.* at 415. The dissenters further noted that the Court's "cases do not catalog the subject matter meet for executive agreement, but we have repeatedly acknowledged the President's authority to make such agreements to settle international claims." *Id.* at 436 (Ginsburg, J., dissenting).

would not have needed to emphasize the historical support for, and congressional acceptance of, this type of agreement.

The Executive Branch is currently relying on *Garamendi* in an effort to have state courts enforce a decision of the International Court of Justice (ICJ). In the *Avena* decision, the ICJ held that the United States was obligated to provide “review and reconsideration” of the convictions and sentences of fifty-one Mexican nationals on death row throughout the United States, as a result of violations of their rights under the Vienna Convention on Consular Relations.<sup>75</sup> After this decision, the Executive Branch took the position that the ICJ had erred in its construction of the Convention, and that the ICJ’s decision did not by itself provide any legal ground for providing relief in U.S. courts to the Mexican nationals.<sup>76</sup> Nevertheless, President Bush issued a memorandum determining that state courts in the United States would, “in accordance with general principles of comity,” provide review and reconsideration for the fifty-one cases.<sup>77</sup> In arguing that this memorandum preempts state procedural default rules that would otherwise preclude such review and reconsideration, the Executive has maintained that *Garamendi* supports a presidential power to unilaterally preempt state law in order to implement treaty obligations – in this case, a treaty obligation to comply with the ICJ’s decision.<sup>78</sup>

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<sup>75</sup> See Case Concerning *Avena* and other Mexican Nationals (Mexico v. United States of America), 2004 ICJ REP. 12 (Mar. 31).

<sup>76</sup> See Brief for the United States as Amicus Curiae Supporting Respondent at 9 (Feb. 2005), *Medellin v. Dretke*, at <http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.pdf>.

<sup>77</sup> See Memorandum from President Bush to the Attorney General, Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), reprinted at [http://brownwelsh.com/Archive/2005-03-10\\_Avena\\_compliance.pdf](http://brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf).

<sup>78</sup> See Brief for the United States, *supra* note 76, at 50.

Regardless of the merits of this claim, the Executive Branch's effort to create preemptive federal law here involves implementation of ratified treaty obligations and thus is distinguishable from the imposition of obligations through a signed but unratified treaty. It is arguable, for example, that the President has authority under the Take Care Clause of the Constitution to preempt state law that otherwise would pose an obstacle to U.S. compliance with a treaty.<sup>79</sup> A power to preempt state law outside the context of the Take Care Clause is a power to make law, and both precedent and constitutional structure confirm that the President does not have general lawmaking power. Most famously, the Supreme Court stated in the *Youngstown* case that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."<sup>80</sup> Indeed, as noted above, the requirement that the President obtain the advice and consent of the Senate for treaties was specifically intended to be a separation of powers check on what would otherwise be presidential lawmaking authority.<sup>81</sup> Moreover, the general lack of a unilateral executive lawmaking power stems not only from principles of separation of powers, but also from principles of federalism: normally the President is dependent on Congress or the Senate, where the states are represented, in order to displace state law.<sup>82</sup>

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<sup>79</sup> See Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. (forthcoming); see also *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) ("Under the [Take Care] clause [the President's] duty is not limited to the enforcement of acts of Congress according to their express terms. It includes 'the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.'" (citation omitted)); *In Re Neagle*, 135 U.S. 1, 64 (1890) (stating that the President's duty under the Take Care Clause includes "the enforcement of acts of Congress or of treaties of the United States according to their express terms," as well as "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution"). The Take Care Clause provides that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

<sup>80</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>81</sup> See *supra* TAN 51-52.

<sup>82</sup> See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 80 TEX. L. REV. 327 (2001); see also Denning & Ramsey, *supra* note 63.

In sum, it seems likely that there are some obligations to which the President cannot constitutionally bind the United States on the international plane. For example, even if the United States could constitutionally enter into a treaty to abolish the death penalty,<sup>83</sup> the President presumably would lack the power on his own, as a matter of domestic law, to obligate the United States to abolish the death penalty. Such a commitment would not fall within his independent constitutional powers, especially with respect to the use of the death penalty at the state level. Nor is there historical practice supporting the use of sole executive agreements, or even congressional-executive agreements, for such human rights obligations. Assuming this is correct, the President similarly should not be able to bind the United States to these sorts of obligations as a result of the purported object and purpose obligation associated with signing a treaty.<sup>84</sup>

That said, there are some obligations that the President presumably could commit to unilaterally by means of signature. As the Court noted in *Garamendi*, in the area of

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<sup>83</sup> It is possible that Congress lacks the power to abolish the death penalty at the state level. *Cf.* *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress exceeded its authority under the Commerce Clause in criminalizing the possession of firearms near schools). The Supreme Court has held, however, that the treaty power is not limited to the scope of Congress's legislative powers, see *Missouri v. Holland*, 242 U.S. 416 (1920), and it is uncertain whether there are any subject matter limitations on the treaty power, see Bradley, *The Treaty Power and American Federalism*, *supra* note 64, at 429-33.

<sup>84</sup> In this respect, I disagree with Professor Michael Glennon's claim that "[t]he President clearly possesses the authority to sign treaties and in view of the effect accorded signature by international law, he may constitutionally infer from that signature the further authority to act so as not to defeat the object or purpose of a signed treaty." MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 173 (1990). Professor Glennon proceeds to qualify his claim by stating that the President "cannot exceed his own independent powers," *id.*, but the effect of this qualification is unclear, since he also states that "these powers are again properly viewed as encompassing the authority to carry out obligations incurred by the United States by virtue of its status as a treaty signatory." *Id.* In other words, I am skeptical of the claim, implicit in Professor Glennon's argument, that Article 18 of the Vienna Convention, by virtue of its purported status as customary international law, has increased the President's constitutional authority. By analogy, if customary international law started treating signature as constituting consent to be fully bound by a treaty, that would not give the President the domestic authority to start ratifying treaties unilaterally through signature. Instead, he presumably would need to obtain the Senate's advice and consent before engaging in signature.

foreign affairs “the President has a degree of independent authority to act.”<sup>85</sup> Thus, for example, as Commander in Chief, the President might be able to make a binding commitment not to test or use certain weapons, at least in the absence of a contrary directive from Congress, and at least for the duration of his administration. President Reagan did so in the context of the SALT II Treaty: even though he announced that the United States would not ratify that treaty,<sup>86</sup> he also stated that the United States would voluntarily “refrain from actions which undercut [the treaty] so long as the Soviet Union shows equal restraint”<sup>87</sup> – a decision that may have been within his independent powers as Commander in Chief. An analogous issue is the power of the President to direct *provisional* application of at least some treaties prior to their ratification. With respect to that issue, the State Department has stated that such provisional application is proper “so long as the obligations undertaken are all within the competence of the President under U.S. law.”<sup>88</sup>

To return to the example of the International Criminal Court treaty, it seems unlikely, under the above analysis, that President Clinton could have constitutionally bound the United States to extradite suspects to the court. Unlike the command of troops or the recognition of foreign governments, it is difficult to argue that the President has an independent power of extradition. Indeed, the Supreme Court has expressly held that

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<sup>85</sup> 539 U.S. at 415.

<sup>86</sup> See *supra* TAN 28.

<sup>87</sup> 18 Weekly Comp. Pres. Doc. 730 (May 31, 1982).

<sup>88</sup> Written Reply of Mark B. Feldman, Deputy Legal Adviser of the Department of State, to Questions Presented by Senator Jacob K. Javits, 74 AM. J. INT’L L. 917, 931 (1980); see also CRS Study, *supra* note 5, at 113-16. Cf. RESTATEMENT (THIRD), *supra* note 21, § 312 reporters’ note 7 (“Provisional commitment . . . reflects an understanding that the President has some implied authority to commit the United States on a provisional basis. How far that authority extends is not clear . . .”).

extradition can be accomplished only by means of a treaty or statute.<sup>89</sup> As the Court has explained, “there is no executive prerogative to dispose of the liberty of the individual.”<sup>90</sup> President Clinton might have had the independent power to commit the United States to other obligations, however, such as providing evidence within the federal government’s control – perhaps pursuant to his Article II authority to “take Care that the Laws be faithfully executed” (since the evidence would facilitate the enforcement of international criminal law). The principal point, however, is that he would not have had unlimited constitutional authority to bind the United States to assist the International Criminal Court merely by his act of signature.<sup>91</sup>

## V. Drafting History of Article 18

The extent to which there is a gap between international law and the U.S. Constitution concerning the effect of unratified treaties depends on the breadth of the object and purpose obligation. The drafting history of Article 18 of the Vienna Convention suggests that this obligation is narrower than some commentators appear to

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<sup>89</sup> See *Valentine v. U.S. ex rel. Neidecker*, 299 U.S. 5, 8 (1936) (stating that extradition “is not confided to the Executive in the absence of treaty or legislative provision”). *But see* QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 237 (1922) (noting two controversial examples of unilateral Executive extraditions).

<sup>90</sup> 299 U.S. at 9. In the Jonathan Robbins case, in which John Marshall famously defended the authority of President Adams to extradite a suspect to Great Britain, the President was relying on the U.S.-British extradition treaty. See John Marshall, *Address Before the House of Representatives* (Mar. 7, 1800), in 10 *Annals of Cong.* 596, 613-14 (Washington, Gales and Seaton 1851); see also Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *YALE L.J.* 229 (1990).

<sup>91</sup> Customary international law might impose obligations on the United States even when the President acts beyond his domestic constitutional authority. *Cf.* VIENNA CONVENTION, *supra* note 4, art. 46 (allowing for only a narrow *ultra vires* defense to treaty obligations). But these obligations would not be effective domestically in the United States, since, whatever its status in the U.S. legal system, customary international law does not trump the Constitution. For a description of the academic debates over the domestic status of customary international law, see Curtis A. Bradley, Jack L. Goldsmith, and David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 *HARV. L. REV.* (forthcoming 2007).

assume. Instead of imposing an obligation to comply with the important terms of the treaty, as some commentators have suggested,<sup>92</sup> the drafters of Article 18 appear to have intended to preclude only actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification. For many treaties, it is difficult to conceive of actions that would have this effect.

A 1935 Harvard research project that attempted to codify international law, the law of treaties portion of which was an early precursor to the Vienna Convention, stated that a signatory nation was “under no duty to perform the obligations stipulated” in the treaty until the nation ratified the treaty, but that “under some circumstances” the nation would be obligated as a matter of “good faith” to “refrain from taking action which *would render performance by any party of the obligations stipulated impossible or more difficult.*”<sup>93</sup> Subsequently, the International Law Commission of the United Nations, led

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<sup>92</sup> See, e.g., Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171, 173 (2003) (“As a matter of international law, core treaty obligations attach earlier in the incorporation process – that is, upon *signature* of the treaty.”) (emphasis in original); see also Barbara Crossette, *U.N. Endorses a Treaty to Halt All Nuclear Testing*, N.Y. TIMES, Sept. 11, 1996, at A3 (quoting Professor Thomas Franck for the proposition that “[t]he Vienna Convention provides that between the time of signing and ratifying, a state has a legal obligation *not to act in a manner inconsistent with the agreement*”) (emphasis added). An arguably similar issue arises with respect to the attachment of reservations to the ratification of a treaty. Article 19 of the Vienna Convention on the Law of Treaties prohibits reservations to a treaty that are “incompatible with the object and purpose of the treaty.” Some commentators have claimed that this prohibition disallows reservations to core or important treaty provisions. For a critique of this claim based on the text and drafting history of Article 19, see Bradley, *Juvenile Death Penalty*, *supra* note 25, at 503-05. In any event, there is a potentially important difference in the wording of Articles 18 and 19: Article 18 refers to actions that “would defeat” the object and purpose of a treaty, whereas Article 19 refers to reservations that are “incompatible with” the object and purpose of a treaty. Moreover, Article 18 is focused on the interim period between signature and ratification, whereas Article 19 is focused on the ongoing relationship between a party and a treaty it has ratified, further suggesting that their scope may be different.

<sup>93</sup> 29 AM. J. INT’L L. SUPP. 778 (1935) (emphasis added). See also SAMUEL B. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 344 (2d ed. 1916) (stating that a treaty “is in good faith provisionally binding from the date of signing in the sense that neither party may, without repudiating the proposed treaty, voluntarily place itself in a position where it *cannot comply* with the conditions as they existed at the time the treaty was signed”) (emphasis added). *But cf.* JONES, *supra* note 6, at 81 (“It has also been suggested that a State must not do anything between signature and ratification that would render ratification superfluous or useless. . . . There is no evidence in the practice of States to prove the existence of any such rule.”).

by a series of four prominent Rapporteurs, spent two decades drafting the Vienna Convention, building on the work of the Harvard Research Project.<sup>94</sup>

The initial Rapporteur, J.L. Brierly, concluded that even the modest obligation referred to in the Harvard research project was moral rather than legal in nature.<sup>95</sup> He subsequently explained that, while “[a] certain amount of material exists concerning an alleged obligation on the part of States not to do anything, between the signature of a treaty on their behalf, and its ratification, that would render ratification by other States superfluous or useless,” the material supporting even this narrow obligation was “of too fragmentary and inconclusive a nature to form the basis of codification.”<sup>96</sup> Perhaps not surprisingly in light of the position of the Rapporteur, the possibility of including such an obligation in the proposed treaty was initially discussed and rejected.<sup>97</sup> Importantly, even the leading supporter during the discussion of including such an obligation emphasized that it would simply prohibit nations from taking actions “calculated to make the ratification of the treaty *impossible*.”<sup>98</sup>

A subsequent Rapporteur, Hersch Lauterpacht, believed that the obligation did have legal status, but he still described it narrowly as “prohibit[ing] action in bad faith deliberately aimed at *depriving the other party of the benefits* which it legitimately hoped

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<sup>94</sup> See Frankowska, *supra* note 60, at 290-91.

<sup>95</sup> See 1951 Yearbook of the International Law Commission, vol. I, at 34; 1951 Yearbook of the International Law Commission, vol. II, at 73. See also CAMARA, *supra* note 8, at 63 (“[T]he rule laid down by the Harvard Research Group embodies no principle of International Law. It belongs to the vague and dubious field of international morals.”).

<sup>96</sup> 1952 Yearbook of the International Law Commission 54 (emphasis added).

<sup>97</sup> See 1951 Yearbook of the International Law Commission, vol. I, at 39-42.

<sup>98</sup> *Id.* at 42 (comments of Jesús M. Yepes from Columbia) (emphasis added).

to achieve from the treaty and for which it gave adequate consideration.”<sup>99</sup> The subsequent reporters, Gerald Fitzmaurice and Humphrey Waldock, continued to focus on actions that would impair the ability of the parties to comply with or obtain the benefits of the treaty.<sup>100</sup> Lauterpacht explained, for example, that the purpose of the interim obligation is to “prohibit action in bad faith deliberately aimed at depriving the other party of the benefits which it legitimately hoped to achieve from the treaty.”<sup>101</sup> And Waldock’s proposed draft of the obligation referred to acts “calculated to frustrate the objects of the treaty or to impair its eventual performance.”<sup>102</sup>

The Vienna Convention’s drafting history suggests that the object and purpose obligation is designed to ensure that one of the signatory parties – typically in a bilateral arrangement – does not change the status quo in a way that eliminates or substantially undermines the reason for entering into the treaty.<sup>103</sup> A paradigmatic example would be a situation in which a treaty called for the return of certain objects, and a signatory destroyed the objects before ratification.<sup>104</sup> A similar example would be a situation in which a treaty called for ceding certain territory to another state, and a signatory nation ceded the territory to some other state in the meantime.<sup>105</sup> A less certain example, but

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<sup>99</sup> 1953 Yearbook of the International Law Commission 110 (emphasis added). As this statement suggests, the drafters of the object and purpose obligation may have had in mind primarily bilateral rather than multilateral treaties. *See also, e.g.*, 1965 Yearbook of the International Law Commission 92 (“When drafting [what became Article 18] the Commission had been thinking mainly of bilateral treaties.”) (comments of Roberto Ago, delegate from Italy).

<sup>100</sup> *See* Rogoff, *supra* note 9, at 308-10.

<sup>101</sup> *Id.* at 307.

<sup>102</sup> *Id.* at 309.

<sup>103</sup> *See also, e.g.*, AUST, *supra* note 4, at 94 (“The signatory state must therefore not do anything which would affect its *ability* fully to comply with the treaty once it has entered into force.”) (emphasis in original).

<sup>104</sup> *See* AUST, *supra* note 4, at 94.

<sup>105</sup> *See id.* at 94-95.

one potentially encompassed by this view of the object and purpose obligation, would be a situation in which a treaty called for the parties to reduce their armaments (such as nuclear weapons) by a certain percentage, and one of the signatories secretly and substantially increased its overall armaments prior to ratification. Whatever its precise implications, the object and purpose obligation under this view does not suggest either a general obligation to comply with a signed treaty, or an obligation to comply with its “important” or “core” provisions.<sup>106</sup>

The narrow construction of the signing obligation suggested by the drafting history is consistent with the text of Article 18. The text does not provide that nations must comply with a treaty they have signed, or even that they must comply with some of its terms. Instead, it simply provides that signing nations must not take actions that would “defeat” the “object and purpose” of the treaty. Furthermore, the Vienna Convention provides separately for provisional application of treaties that are not yet in force, suggesting that Article 18 was not intended to mandate such application.<sup>107</sup>

A broader construction of Article 18 would undermine the significance of ratification, which today represents the usual manifestation of consent to be bound. As one commentator explains:

“It is sometimes argued that a state which has not yet ratified a treaty must, in accordance with Article 18, nevertheless comply with it, or, at least, do nothing inconsistent with its provisions. The argument is clearly wrong, since the act of ratification would then have no purpose because

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<sup>106</sup> There is no analogue to even the narrow version of the Article 18 obligation under domestic principles of agency law. Under that law, when an agent signs a contract but lacks the authority to bind the principal, the principal has no interim legal obligation as a result of the signature. *See generally* RESTATEMENT (THIRD) OF AGENCY, chap. 4 (2006).

<sup>107</sup> *See* VIENNA CONVENTION, *supra* note 4, art. 25.

the obligations to perform the treaty would not then be dependent on ratification.”<sup>108</sup>

The tension between a broad Article 18 obligation and constitutional systems like the United States that divide the treaty power is another reason for construing it narrowly.<sup>109</sup>

Furthermore, it is far from clear that, even from a purely international perspective, a broad signing obligation would be desirable. Among other things, a broad obligation may cause states to be less willing to sign treaties in the first instance, or may cause them to more readily disavow signatures. Indeed, broad claims about the signing obligation may have contributed to the United States’ controversial decision to “unsign” the International Criminal Court treaty. The usefulness of a broad signing obligation in addressing strategic bargaining problems is also unclear, given the vague nature of the “object and purpose” test, the difficulty of enforcing the obligation, the ability of states to terminate the effect of a signature, and the lack of a duty to ratify.<sup>110</sup>

Viewed in the narrow terms discussed above, there may not be many object and purpose obligations that fall outside of the President’s independent powers to act, at least when the President is acting unopposed by Congress. For example, if the United States was acting contrary to a provision in a human rights treaty by continuing to employ the death penalty, its actions would not undermine its (or other nations’) future compliance

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<sup>108</sup> AUST, *supra* note 23, at 94. See also Jan Klabbers, *How to Defeat a Treaty’s Object and Purpose Pending Entry Into Force*, 34 VAND. J. TRANSNAT’L L. 283, 293-94 (2001) (“[T]o hold that a violation of a provision of a treaty prior to its entry into force would defeat the treaty’s object and purpose is tantamount to saying that the treaty actually assumes legal force upon signature rather than upon ratification.”).

<sup>109</sup> Cf. W. Michael Reisman, *Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35 VAND. J. TRANSNAT’L L. 729, 743 (2002) (“Ratification of treaties in republican systems such as that found in the United States is a critical bulwark of separation of powers and checks and balances. If the international system henceforth assigns legal validity to unratified treaties, that bulwark will be breached.”).

<sup>110</sup> See Swaine, *supra* note 46, at 2078-83.

with the treaty, since it could always stop the death penalty after ratifying the treaty.<sup>111</sup> To return again to the International Criminal Court treaty, it may be that the United States would not have had *any* significant obligations to the court by virtue of its mere signature of the treaty.<sup>112</sup> If so, there may be an irony here whereby exaggerated claims about the object and purpose obligation helped push the United States to publicly oppose the treaty (although there were of course many other reasons for the U.S. opposition).<sup>113</sup>

More generally, the object and purpose obligation may have little relevance to certain types of treaties, such as human rights treaties. Human rights treaties are not reciprocal in the traditional sense – nations do not receive direct benefits from other nations' compliance, and noncompliance by other nations has relatively little effect on a nation's ability to comply. As a result, for these treaties, it is difficult to envision pre-ratification conduct that would substantially undermine the ability of the treaty parties to comply with, or benefit from, the treaty. Even if a nation enacted new human rights restrictions after signature, this would not prevent it from repealing those restrictions once it ratifies the treaty.

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<sup>111</sup> It could be argued that a continued use of the death penalty by the United States after its signature of a treaty banning the death penalty would involve a form of irreversibility, since the punishment is obviously irreversible as to the individuals executed. The executed individuals, however, would not be covered by the treaty (since the United States would not be a party to the treaty until ratification), and the United States' ability to comply with the treaty *after* ratification would not have been impaired by the pre-ratification executions, just as its ability to comply with the treaty would not have been impaired by executions carried out prior to its signature of the treaty. This is assuming, as would normally be the case, that the treaty addresses itself only to a class of individuals and not to particular individuals.

<sup>112</sup> For the ICC treaty, however, it is arguable that the U.S. practice of concluding non-surrender agreements would impair the ability of the parties to obtain the benefits of the treaty, if those benefits include equal exposure to possible prosecution. *See supra* 40.

<sup>113</sup> The effort to increase the obligations on signatory nations can be seen as part of a more general effort by advocacy groups, international institutions, and some scholars to relax formal and consent-based requirements for the imposition of international obligations. Other examples might include a less practice-based conception of customary international law, restrictions on the ability of nations to opt out of customary international law, the concept of *jus cogens* norms that are binding without regard to state consent, and severability of purportedly invalid treaty reservations. *See Bradley, supra* note 25, at 540-41.

Nevertheless, the potential for some conflict between the Constitution and the object and purpose obligation, and the uncertainty about the scope of that obligation, suggest that, if the United States does eventually ratify the Vienna Convention on the Law of Treaties, the Senate may wish to include an understanding with its advice and consent that clarifies the obligation imposed by Article 18.<sup>114</sup> Although Article 18 was not historically the focus of the Senate Foreign Relations Committee's concerns about the Vienna Convention, the Committee's concerns are relevant to this issue. The Committee was concerned that Article 46 of the Convention, which precludes a nation from invoking a violation of its internal law as a basis for invalidating a treaty unless the violation was "manifest and concerned a rule of its internal law of fundamental importance," might bind the United States to international agreements made by the President without the two-thirds Senate consent specified in Article II of the Constitution (because this requirement might not be considered "manifest" given the extensive U.S. practice of concluding agreements outside of this practice). The Committee proposed that the Senate give its advice and consent to the Convention subject to an understanding and interpretation, which would have made clear that the two-thirds Senate consent requirement is an internal law of the United States of fundamental importance and that no treaty as defined by the Vienna Convention would be valid in the absence of either such Senate consent or approval by Congress. The State Department found the understanding and interpretation to be unacceptable (presumably because the Department wanted to preserve the Executive Branch's historic ability to enter into executive agreements), and efforts to

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<sup>114</sup> For a discussion of the validity of reservations, understandings, and declarations, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PENN. L. REV. 399 (2000).

work out a compromise were not successful.<sup>115</sup> The Article 18 object and purpose obligation, as we have seen, implicates a related concern, by legitimizing international obligations created through executive action.

Of course, if Article 18 reflects customary international law, it may not matter for this purpose whether the United States ratifies the Vienna Convention.<sup>116</sup> As noted above, however, there is uncertainty about whether and to what extent Article 18 does reflect customary international law.<sup>117</sup> Here there may be a further irony. The Bush Administration's statements regarding the International Criminal Court treaty – which have been heavily criticized as antithetical to international law – could be read as an acceptance of a potentially broad object and purpose obligation. In these statements, the Administration explained that it was acting consistently with the Vienna Convention and suggested that, by declaring its intent not to ratify, it was *ending* its object and purpose obligations. Moreover, the Bush Administration did not deny the binding effect of Article 18, and, as noted above, there are statements by State Department officials in both the Bush Administration and earlier administrations suggesting that Article 18 is binding as a matter of customary international law.<sup>118</sup>

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<sup>115</sup> See generally CRS Study, *supra* note 5, at 43-49; see also DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1974, at 195-98 (Arthur W. Rovine ed., 1975); CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, at 1236-37 (Marian Nash (Leich) ed. 1993).

<sup>116</sup> The relationship between signed but unratified treaties and the creation of customary international law, an issue relevant, for example, to Alien Tort Statute litigation, is beyond the scope of this article. Cf. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 162 (2d Cir. 2003) (stating, in Alien Tort Statute case, that “only States that have ratified a treaty are legally obligated to uphold the principles embodied in that treaty, and the treaty only evidences the customs and practices of those States”). Also beyond the scope of this article is the relevance of unratified treaties to the interpretation of provisions of the Constitution. See *supra* Note 24 (discussing Supreme Court's reference to an unratified treaty in *Roper v. Simmons*).

<sup>117</sup> See *supra* Note 23.

<sup>118</sup> Furthermore, the Bush Administration's action of sending a formal letter to the United Nations terminating the effect of its signature of the International Criminal Court treaty may make it difficult for the Administration to argue that it has no object and purpose obligation with respect to other treaties – such as

The Bush Administration's arguable acquiescence in a broad object and purpose obligation might have been inadvertent, but it also might reflect the different institutional perspectives of the Executive Branch and the Senate. The Bush Administration, although usually worried about similar efforts by international lawyers to expand the binding effect of international law, may not be overly troubled by the object and purpose obligation, because it tends to enhance the Executive Branch's powers. After all, it allows the Executive Branch the authority, under international law at least, to create – and, by a subsequent declaration of intent not to ratify, repeal – binding obligations purely by unilateral action. That this sort of flexibility may serve the Executive's interests, however, does not mean that it is not of constitutional concern, especially with respect to its effect on the Senate's already diminished authority over treaties.<sup>119</sup>

## **Conclusion**

The phenomenon of signing but not ratifying treaties poses a little noticed constitutional issue for the United States. Modern international law purports to impose “object and purpose” obligations on the United States merely based on an Executive signature, even though the Constitution divides the treaty power between the President and the Senate. Furthermore, some commentators have made expansive claims about the content of these obligations. Even taking into account the complication of executive agreements, signing obligations pose constitutional concerns for the United States. These

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the Kyoto Protocol and the Comprehensive Nuclear Test Ban Treaty – that it has denounced through less formal means.

<sup>119</sup> Whether the Senate (or at least the Senate Foreign Relations Committee) will make a serious effort to preserve its institutional interests, as opposed to party or individual reelection interests, is a difficult question, especially when the Senate is controlled by members of the President's party. *Cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

concerns are reduced, however, if one adopts a narrow construction of Article 18 of the Vienna Convention, something that is supported by the drafting history of that Article.

Even so, there is still likely to be some gap between the president's independent constitutional authority and the international law of signing obligations. As a result, it may be desirable for the United States when signing some treaties to make clear that it will not consider itself bound by the obligations in the treaty unless and until it completes the ratification process, or for the President to seek the Senate's advice and consent prior to signing some treaties. In addition, if the United States eventually ratifies the Vienna Convention, the Senate may wish to attach an understanding to its advice and consent clarifying the effect of Article 18.

There may be additional policy prescriptions worth considering, both at the domestic level and the international level. The United States is not obligated to sign treaties prior to ratification, and it may be that it should do this less often, particularly where quick ratification does not seem likely. At the international level, it may make sense for nations to adopt a statute of limitations for signing – such as three years – after which time a state would not longer be regarded as a signatory. Such a limitations period would not prevent states from joining later through accession, but it would eliminate the uncertain limbo status that currently exists with respect to signing, and it might even encourage more timely ratifications.