INTERNATIONAL LAW AND THE DOMESTIC SEPARATION OF POWERS

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This Article uncovers the forgotten role that international law has played in shaping the separation of foreign affairs powers between Congress and the President. Although the use of international law in constitutional interpretation is viewed today with deep skepticism, historically international law shaped how constitutional actors, especially ones outside the courts, understood the allocation of foreign affairs powers between the political branches. Importantly, international law did not play a neutral role in the power struggle between the branches. Rather, it bolstered the President’s expansive foreign relations powers vis-à-vis Congress in ways that continue to affect the distribution of powers today. This history holds lessons for contemporary constitutional interpretation, including the extent to which international law should constrain the President.

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INTERNATIONAL LAW AND THE DOMESTIC SEPARATION OF POWERS

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

These examples involve three very different areas of foreign relations law – war powers, recognition, and treaty-making. Yet they have much in common. All raise constitutional questions of the separation of powers between Congress and the President. All showcase aggressive assertions of Presidential power to act either in the absence of Congressional legislation or in defiance of it. And all are defended by their supporters not so much based on the Constitution’s text, but rather based on past practice.

One other similarity is that these examples all relate to questions of international law. The Libya intervention raised international legal questions regarding the use of force; the power at issue in the passport case is the power to accord recognition as a matter of international law to foreign nations; and the intellectual property agreement would create international legal obligations for the United States. But those focused on the separation of powers would be forgiven for letting this similarity pass unnoticed. In

the briefs, legal opinions, and academic commentary relating to these three examples of expansive Presidential power, international law is mentioned at most only in passing. The relevant law – the interpretation of the Constitution – is taken to be a purely domestic matter.

These examples thus reveal the absence of international law from the interpretive principles used today to determine the constitutional separation of powers. While international law can be an input for other principles of interpretation – for example, textualists might look to international law in determining the meaning of the phrase “declare war” in Article I, section 8 – constitutional actors and commentators today do not treat international law as a direct principle of constitutional interpretation in the separation of powers context. This absence should not be surprising if constitutional interpretation is a purely domestic matter, and there are many who think it should be. Justices Scalia and Thomas, for example, treat international law as “irrelevant to the meaning of our Constitution” and their belief is shared by numerous members of Congress and distinguished legal scholars. What is surprising, however, is that even those who consider international law to be a guiding principle in other areas of constitutional interpretation do not seem to see it as similarly important to the separation of powers. While they defend international law as an interpretive principle for most aspects of constitutional law – the territorial reach of the Constitution, the scope of the federal government’s powers, principles of federalism, and individual rights – they do not describe it as similarly relevant to the separation of powers.

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4 See infra Part IV.
5 A few notes on terminology. First, my focus on this article is on the separation of powers between the President and Congress in the foreign affairs context. Nonetheless, for shorthand I often use the broader term “separation of powers” rather than the more precise “separation of foreign affairs powers”. Second, I use the term “international law” in its usual sense of encompassing both customary international law and treaties, although, from my examination, of the two customary international law has mattered more as a principle of constitutional interpretation. Third, throughout I use the term “constitutional actors” to refer to members of the three branches of the federal government who play a role in deciding what acts are constitutional.
6 Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2053 n.12 (2010) (Thomas, J., dissenting); see also, e.g., H.R. 973, 112th Cong. (2011) (bill introduced in the House with about fifty co-sponsors that would limit federal courts’ use of foreign law); S. Res. 92, 109th Cong. (2005) (proposed resolution introduced in the Senate expressing sense that the use of foreign law in constitutional interpretation is appropriate only if it informs the “original meaning” of the Constitution); see also academic sources cited infra note 18. These objections are typically applied to both comparative and international law, often combined under the label of “foreign law,” and generally except the use of these sources as inputs for originalism.
7 See, e.g., Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int’l L. 1, 12-27, 33-87 (2006); see also sources cited infra note 49. As discussed infra note 46, there is a limited exception for the separation of powers regarding the conduct of hostilities (as
In other words, regardless of the role that international law plays in other areas of constitutional interpretation, its bearing on the separation of powers is starkly limited.

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

Importantly, the role that international law has played in the separation of powers has not been a neutral one. Instead, constitutional actors have typically relied on international law in ways that have strengthened the powers of the President vis-à-vis Congress. Along with using international law as an input for other interpretive principles, constitutional actors have relied on international law in two main ways. First, they have sometimes used international law as a principle that directly guides constitutional interpretation. Nineteenth-century proponents of the President’s sole power to recognize foreign nations, for example, asserted that international law only recognized the pronouncements of executive actors, and therefore that the Constitution necessarily entrusted the power of recognition to the President. While international law could in theory be used to favor the powers of either Congress or the President, in practice most uses of international law favored the President because of the close connection perceived between executive action and international law. Second, constitutional actors have relied on international law as an alternative source of legitimacy for Presidential actions where the constitutional basis for these actions was otherwise lacking or unclear. While these precedents were initially understood and explained primarily in terms of international law, they ultimately became precedents for expansive Presidential powers as a matter of constitutional law.

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

The role that international law has played in strengthening executive power in turn holds implications both for how we understand the separation of powers today and for the relationship between Presidential power and international law. International law helped grow Presidential power, and members of Congress accepted this growth, in part because international law was also understood to impose certain constraints on Presidential action. As this connection has eroded, however, it has created a situation where neither the original Congressional checks envisioned at the Framing nor the international legal checks recognized in the hundred-and-fifty years that followed are understood to serve as strong constraints on Presidential foreign affairs powers. This problematic situation has led to what Eric Posner and Adrian Vermeule recently termed the “Executive Unbound.” This Article thus ends with suggestions for how to recapture the interplay between international law and the separation of powers in a way that restores some constraints on Presidential power.

The rest of this Article develops and supports the themes outlined above. Part I identifies three ways in which international law can influence constitutional interpretation: first, as an input for other principles of constitutional interpretation; second, as a direct principle of constitutional interpretation; and third, as an alternative source of legitimacy for actions that ultimately become constitutional precedents. Part II highlights what I call the “separation-of-powers anomaly”: the fact that while many constitutional actors and commentators today accept international law as a direct principle of constitutional interpretation in certain areas of constitutional law, they do not treat it as similarly relevant to the separation of powers. Part III shows how international law has in fact been used in the past by constitutional actors – particularly actors situated in the political

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branches – in all three of the ways described in Part I to help enhance the President’s foreign affairs powers. More specifically, I focus on the roles played by international law in the separation of powers in three key areas: recognition, war powers regarding entry into hostilities, and treaty-making. Part IV uses the three current examples mentioned at the beginning of this Article to show how these enhanced Presidential powers continue today under the guise of reliance on past practice, even though their international legal roots are now obscured and any limits set by international law are thus lost. Finally, Part V considers the lessons this forgotten history holds for constitutional interpretation today, including the extent to which international law should constrain the President.

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

In recent years, the role of international law in constitutional interpretation has proved astonishingly contentious. Not only has it been the subject of heated debate within Supreme Court decisions and among legal scholars, but it has become a cause célèbre in the public sphere more generally. Backlash against the Supreme Court’s use of international law in constitutional decision-making has gone so far as to trigger the introduction of Congressional legislation to curtail the use of foreign law by federal courts. Justifying the need for such legislation, the chief sponsor of one recent bill explained that by “interject[ing] international law into their rulings,” Supreme Court justices have shown “transparent disregard for the Constitution.”

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

9 Sandy Adams, Ban Foreign Law from Courts; We Make Our Own Laws, WASH. TIMES, Mar. 10, 2011; see also H.R. 973, 112th Cong. (2011) (bill introduced by Representative Adams and co-sponsors to limit federal courts’ use of foreign law).
This Part describes all three roles that international law can play in constitutional interpretation. I begin with international law’s role as an input for other theories of constitutional interpretation, then turn to its more contentious role as a direct principle of constitutional interpretation. Lastly, I discuss how international law might influence constitutional interpretation by serving as an extra-constitutional source of legitimacy.

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

The least controversial role that international law plays in constitutional interpretation is to serve as an input for other principles of constitutional interpretation. If one believes, for example, that the Constitution should be interpreted according to its text’s ordinary meaning at the time of the Framing, then the law of nations at the time of the Framing will obviously be relevant for interpreting the clauses in the Constitution that implicitly or explicitly reference international legal standards. Scholars applying this approach have accordingly looked to the law of nations at the time of the Framing in understanding the meaning of terms like “declare war” that appear in the Constitution’s text.\(^9\)

Here international law serves as an input for a form of textualism, but it can also be an input for other interpretive approaches. Those who apply a textualism that considers the evolving meaning of words, for example, could look to the evolving meaning of “treaty” in international law to interpret the clauses of the Constitution that refer to treaties.\(^11\) Similarly, those who emphasize the original intentions of the Framers could find international law at the time of the Framing to be relevant to understanding these intentions.\(^12\) As yet another example, structural constitutionalists

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\(^9\) E.g., Michael D. Ramsey, Textualism and War Powers, 69 U. CHI. L. REV. 1543, 1545 (2002) (looking to international law around the time of the Framing to understand the textual meaning of the “declare war” clause); Anthony J. Bellia Jr. & Bradford R. Clark, The Law of Nations as Constitutional Law, 98 VA. L. REV. 729, 732 (2012), (exploring “the original public meaning of several specific constitutional powers—such as the power to recognize foreign nations, the war power, and the powers to authorize reprisals and captures—which can only be understood against background assumptions provided by the law of nations”); see also Ingrid Brunk Wuerth, International Law and Constitutional Interpretation: The Commander-in-Chief Clause Reconsidered, 106 MICH. L. REV. 61, 82-95 (2007) (looking to international law to interpret the scope of the commander-in-chief power at the time of the Framing).

\(^11\) E.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 cmt. c and reporters’ note 2 (1987) (asserting that the “references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law” and then looking to twentieth century international law to define the reach of this concept).

\(^12\) This approach seems to be underlying Justice Scalia’s use of international law in his
guided by the tripartite scheme set forth by Justice Jackson in *Youngstown* could view international law, or at least certain forms of international law, as inputs comparable to Congressional legislation – i.e., as having the power structurally to put the President at his maximum authority (category 1) or alternatively at his “lowest ebb” (category 3).  

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

**B. International Law as a Principle of Constitutional Interpretation**

A more controversial role that international law can play in constitutional interpretation is to directly influence the process of constitutional interpretation. International law will never be the sole principle used for interpreting the Constitution, but it can serve as an influential supplement to other interpretative approaches. Constitutional actors and commentators who look to international law as a principle of interpretation typically do so by presuming that the Constitution should be interpreted to maximize conformity with international law. The strength of this presumption can vary from the lightest of touches to a substantial recent dissent in *Arizona v. United States*, 566 U.S. ___ (2012) (relying on international law at the time of the Framing in interpreting the boundaries of state and federal sovereignty).  

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

The Supreme Court’s decision in *Roper v. Simmons* illustrates how international law can serve as a principle of constitutional interpretation. In holding that the death penalty is an unconstitutional punishment for crimes committed by minors, the Supreme Court applied a faint—very faint—presumption in favor of reading the Constitution to be in accordance with international legal norms, which bar the use of the death penalty against minors. These international legal norms did not apply directly to the United States (which had never consented to the treaty provisions setting forth these norms), but the Court nonetheless viewed them as “instructive” and providing “respected and significant confirmation” for its conclusion.

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

*Roper* and the other Supreme Court cases at the center of the recent

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15 *Id.* at 575.
16 *Id.* at 624 (Scalia, J., dissenting).
17 Chief Justice Roberts made this point at his confirmation hearing. *See* Transcript: *Day Two of the Roberts Confirmation*, WASH. POST, Sept. 13, 2005 (noting a “concern” based on “democratic theory” with regard to citing foreign law in constitutional interpretation); *see also*, e.g., Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J. L. & PUB. P. 475, 476 (2009) (“the notion that [developments in constitutional law] may be brought about by changes in foreign law violates basic premises of democratic self-governance”).
controversy deal mostly with the interpretation of individual rights provisions in the Constitution. But scholars sympathetic to the use of international law as a principle of constitutional interpretation have demonstrated that in the past the Supreme Court has taken a similar approach in other areas of constitutional law. Sarah Cleveland shows that the Supreme Court has used international law as a “background principle” of constitutional interpretation not only in individual rights cases, but also in past cases dealing with the territorial reach of constitutional rights, the extent of the federal government’s powers, and federalism. Professor Cleveland’s far-reaching survey brings what is probably the widest scholarly lens applied to the issue of international law’s role in constitutional interpretation. Yet, as I discuss in Part II.B, even Professor Cleveland finds little role for international law as a background principle of constitutional interpretation in the context of separation-of-powers disputes.

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

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20 Cleveland, supra note 7, at 33.

21 Id. at 33-62.
C. International Law as a Source of Extra-Constitutional Legitimacy

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

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

Professor Pildes treats policy considerations as the main source of extra-constitutional legitimacy. But international law itself could also be a source of such legitimacy. Decision-makers could justify actions that violate or aggressively push the boundaries of the Constitution in part on the grounds that these actions are appropriate under international law. The Libya conflict itself provides a possible example of this. In using force in Libya,


23 Pildes, supra note 22, at 1421.
President Obama had the sanction of international law – the Security Council of the United Nations had authorized the intervention – and indeed it is unlikely that he would have ordered the use of force without this authorization.\textsuperscript{24} This international authorization in turn may have played a role in reducing domestic resistance to President Obama’s decision to keep using force despite the absence of Congressional authorization.\textsuperscript{25} Accordingly, even if this international authorization did not affect the constitutional question as a matter of \textit{doctrine}, it may nonetheless have affected the constitutional resolution as a matter of \textit{politics}.

One need not approve of international law serving as an extra-constititutional source of legitimacy in order to accept that, as a descriptive matter, it may in fact do so. Two further factors help explain why it may have been especially influential at various times in the past. The first is that respect for international law within the U.S. political community has not been constant over time. If in recent times politicians have scored points by describing international law as a dangerous threat to American values, at other times in our history – such as the time of the Framing or right around the end of World War II – international law was treated in the political discourse with intense and at times overwhelming respect.\textsuperscript{26} The greater the public respect for international law, the more international law justifications might be accepted as sources of extra-constitutional legitimacy.

The second reason international law’s influence may have been greater in the past has to do with a particular constitutional argument. The Take Care Clause in Article II provides that the President is to “take Care that the Laws be faithfully executed,”\textsuperscript{27} but its text does not specify whether these


\textsuperscript{27} U.S. CONST. art. II, § III.
“Laws” include international law. Recently, the Supreme Court has suggested that this reference to “Laws” excludes many treaties, and similar reasoning might justify a conclusion that “Laws” also excludes customary international law. In the past, however, up to at least as recently as the 1980s, the Take Care Clause was commonly understood to apply to international law. The Take Care Clause thus served as a bridge between the Constitution and international law, at least where actions by the President were concerned. Where the President acted to execute international law, he could justify his actions as a matter of constitutional law on the ground that he was taking care of international law even where he was acting without any other plausible bases of constitutional power.

II. THE SEPARATION-OF-POWERS ANOMALY

One of the striking developments of constitutional law since the Framing has been the rise of Presidential power. This is especially true where foreign affairs powers are concerned. If the Constitution poses an “invitation” for the President and Congress to “struggle for the privilege of directing American foreign policy,” as Edwin Corwin famously observed, 28

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

29 E.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. c (1987); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185, 186 (1980). This understanding was articulated as far back as the Washington Administration. Pacificus Number I (June 29, 1793), in ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATE OF 1793-1794, at 16 (Morton J. Frisch, ed., 2007) (hereinafter PACIFICUS-HELVIDIUS DEBATE) (stating that “Our Treaties and the laws of Nations form a part of the law of the land” with regard to the Take Care Clause); Helvidius Number II (Aug. 31, 1793), in id. at 72 (considering it a “truth” that the “executive is charged with the execution of all laws, the laws of nations as well as the municipal law which recognizes and adopts those laws”); see also Restoration of a Danish Slave, 1 Op. Att’y Gen. 566, 570-71 (1822).

then the President is the accepted winner. While struggles continue over the allocation of foreign affairs powers between the two political branches, the “lion’s share” of power lies clearly with the President.\(^{31}\)

Doctrinally, constitutional actors both within and outside the courts now justify the President’s enormous foreign affairs powers through a variety of interpretive principles, most prominently the embrace of past practice as a “gloss” on lawful Presidential power. But, interestingly, today these principles do not include international law. International law is certainly understood to inform the constitutional separation of powers via the first of the three roles described in the prior Part, more specifically as an input for textualism and originalism.\(^{32}\) But even constitutional actors and commentators who are sympathetic to the use of international law as a direct principle of interpretation in other areas of constitutional law do not seem to see it as playing that role for the separation of powers. This is a curious anomaly, especially since foreign relations law is the area of constitutional law with the most direct connections to international law.

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

A. Executive Power and its Doctrinal Defenses

The checks and balances developed by the Framers have not held up well against the “maxim attributed to Napoleon that ‘[t]he tools belong to the man who can use them.’”\(^{33}\) The text of the Constitution grants the President only a few clear foreign affairs powers: the role of the commander in chief, the authority to receive ambassadors, and the powers, by and with

\(^{31}\) Corwin, supra note 30, at 208.

\(^{32}\) See supra note 10; see also, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, The Law of Nations as Federal Common Law, 109 Colum. L. Rev. 1, 5-6 (2009) (arguing that a distinction in the law of nations at the time of the Framing between perfect and imperfect rights informs how the judicial branch should understand the separation of powers between it and the political branches on matters that relate to customary international law).

\(^{33}\) Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).
the advice and consent of the Senate, to make treaties and appoint ambassadors. But Presidents began taking expansive views of their foreign affairs powers as early as the Washington Administration and aggressively resisted Congressional encroachment on their perceived prerogatives. Today, the additional foreign affairs powers recognized as belonging to the President, either solely or concurrently with Congress, include the following: to formulate foreign policy for the United States; to be the “sole organ” of communication with other nations on behalf of the United States; to represent the United States at international organizations; to recognize foreign nations; to waive obligations owed to the United States by other nations; to enter into executive agreements with other nations that are binding as a matter of international law and in at least some instances can preempt state law; to interpret treaties in the first instance; to withdraw the United States from treaties; and to authorize the use of force abroad by U.S. troops in pursuit of U.S. interests, at least up to a certain threshold of engagement. The divergence between the President’s real and paper powers is so great that Louis Henkin has observed that “[w]hat the Constitution says and does not say, then, cannot have determined what the President can and can not do.”

What has determined what the President can and cannot do? There are vast literatures in history and political science on this subject, but those interested in law tend to focus on two sets of legal principles which have explicitly or implicitly authorized the expansion of Presidential power. First, there are justiciability rules such as the political question doctrine which courts have developed to avoid making difficult decisions about the constitutional scope of Presidential power. The effect of these rules is to shift decision-making about the limits of Presidential power from the courts to executive branch lawyers, who have stronger institutional reasons for siding with the President. Second, and more importantly for purposes of

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34 U.S. CONST., art. II.
35 HENKIN, supra note 30, at 31.
36 Political science approaches emphasize institutional features that have given the President a practical edge over Congress, such as his advantages as a unitary rather than collective actor, and the influence of the party system on the relationship between the political branches. See, e.g., Bradley and Morrison, supra note 22, at ___; Daryl J. Levinson & Richard H. Pildes, Separation of Parties, not Powers, 119 HARV. L. REV. 2311, 2314-15 (2006). Historical approaches tend to focus on the times and circumstances of particular Presidents. E.g., G. Edward White, The Transformation of the Constitutional Regime of Foreign Relations, 85 VA. L. REV. 1 (1999).
37 See Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 COLUMBIA L. REV. 1448, 1502 (2010) (noting that although the Office of Legal Counsel seeks to provide its best view of the law, this role “need not carry the ‘pretense’ of true neutrality”); JACK GOLDSMITH, THE TERROR PRESIDENCY 35 (2007) (remarking that “[l]egal advice to the President from the Department of Justice is neither like advice from a
this Article, there are interpretive principles governing constitutional interpretation. Not all of these principles tend to favor expansive executive power, and none do so all the time. Constitutional scholars who emphasize the original intent of the Framers, for example, tend to disapprove of today’s expansive Presidential power, as do scholars who emphasize the structural importance of robust checks and balances.\textsuperscript{38} Scholars who emphasize a textual approach can disagree among each other dramatically over the degree to which the Constitution’s text supports expansive Presidential powers.\textsuperscript{39} Yet expansive Presidential power has one particular ally among the principles of interpretation – an ally so important that it arguably dwarfs the other principles in importance in the separation of powers context. This is reliance on past practice, which “is a mainstay of decisionmaking and debates concerning the scope of presidential power.”\textsuperscript{40}

Reliance on past practice has widespread acceptance as an interpretive principle among constitutional actors. As early as 1796, President Washington defended his view of the limited role held by the House of Representatives in treaty-making in part on the ground that this reflected the practice to date.\textsuperscript{41} Since then, constitutional actors have considered the presence (or absence) of past practice in resolving virtually all separation-of-powers disputes. In theory, of course, past practice can cut in favor of either the President or Congress. In actuality, however, past practice has furthered gradual accretions of Presidential power because the


\textsuperscript{39} Consider, for example, the debate over whether and to what extent the Vesting Clause of Article II is a source of unenumerated Presidential powers. \textit{Compare} Prakash & Ramsey, \textit{supra} note 30 with Bradley & Flaherty, \textit{supra} note 30.

\textsuperscript{40} Curtis A. Bradley & Trevor W. Morrison, \textit{Presidential Power, Historical Practice, and Legal Constraint}, __ COLUM. L. REV. __ (forthcoming 2013). Another important ally is functionalist reasoning. In \textit{United States v. Curtiss-Wright Export Co.}, for example, Justice Sutherland emphasized that the President needed broad foreign affairs powers “if, in the maintenance of our international relations, embarrassment -- perhaps serious embarrassment -- is to be avoided and success for our aims achieved.”

\textsuperscript{41} George Washington, Message to the House of Representatives, Declining to Submit Diplomatic Instructions and Correspondence (March 30, 1796), \textit{available at} http://millercenter.org/president/speeches/detail/3461 (emphasizing that “in this construction of the Constitution every House of Representatives has heretofore acquiesced; and until the present time, not a doubt or suspicion has appeared to my knowledge that this construction was not the true one”).
President, as a unitary actor unhindered by the collective action challenges that constrain Congress, has both the incentives and the abilities to push the boundaries repeatedly.\textsuperscript{42}

As Curtis Bradley and Trevor Morrison argue in a forthcoming paper, however, the concept of past practice is curiously undertheorized. Constitutional actors and scholars will sometimes further define past practice in terms of two factors: first, the amount of past practice on point, and, second, the extent to which Congress has acquiesced in this past practice.\textsuperscript{43} But this breakdown only begs further questions in terms of what counts as past practice on point or as congressional acquiescence. Professors Bradley and Morrison focus on acquiescence and show that how acquiescence is defined can dramatically affect the extent to which it is satisfied.\textsuperscript{44} Acquiescence could be understood to mean the absence of any Congressional legislation regarding a Presidential practice, or it could mean the lack of objection from any members of Congress regarding this practice, or it could mean Congressional legislation explicitly or implicitly approving a Presidential practice. The meaning chosen will significantly affect the extent of acquiescence because some of these forms of acquiescence (i.e., the absence of Congressional legislation) are easier to come by than others (i.e., the presence of affirming legislation). While Professors Bradley and Morrison focus on acquiescence, this Article will consider in Part IV how broad or narrow treatments of past practice can similarly affect what is

\textsuperscript{42} Bradley & Morrison, \textit{supra} note 22, at __.
\textsuperscript{43} In his concurrence in \textit{Youngstown Sheet & Tube Co. v. Sawyer}, Justice Frankfurter offers the most famous articulation of these factors:

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

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (going on to link this argument to the Vesting Clause in Article II). In calling for a “systematic, unbroken” practice that is “never before questioned” by Congress, Justice Frankfurter sets a high bar to their being met, and he appears to require both factors for past practice to count at all. Quite commonly, however, constitutional actors relying on past practice take a looser approach and require less robust levels of past practice and/or acquiescence. \textit{E.g.}, Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (quoting the Frankfurter language and also quoting looser language from \textit{United States v. Midwest Oil Co.}, 236 U.S. 459, 474 (1915) about the need for a “‘long-continued practice, known to and acquiesced in by Congress’” and in practice applying a fairly shallow inquiry into both factors); Libya Memorandum, \textit{supra} note 1, at 4-9 (quoting Justice Frankfurter’s reference to the historical “gloss” but not further quoting his stringent requirements for this gloss to be satisfied).

\textsuperscript{44} Bradley & Morrison, \textit{supra} note 22, at __.
understood to be constitutional.

B. The Absence of International Law

International law does not currently feature among the interpretive principles used to resolve separation of powers questions. While international law certainly plays a role in current separation-of-powers disputes, it does so almost exclusively as an input for other means of constitutional interpretation – most notably originalism and textualism. While international law has been found to be a direct principle of interpretation in almost all areas of constitutional law,\(^45\) it is rarely seen as such in the context of the separation of foreign affairs powers – even though these powers are the ones most directly connected to international law.

This fact is evident from a look at the extensive scholarship in the last decade on the role of international law in constitutional interpretation. Except for some work on the conduct of hostilities,\(^46\) this scholarship does not discuss international law’s role in the separation of powers, other than to the extent that it is an input for other principles of constitutional interpretation. Sarah Cleveland, for example, shows at length how international law serves as an input for interpreting clauses in the Constitution that relate to the separation of powers,\(^47\) but when considering the role that international law can play as a “background principle for constitutional analysis,” she covers almost every area of constitutional law except the separation of powers.\(^48\) Another lengthy historical treatment of international law in constitutional interpretation by Steven Calabresi and Stephanie Zimdahl finds that the Supreme Court “rarely cites foreign

\(^45\) See Cleveland, supra note 7, at 33-62.

\(^46\) Ingrid Wuerth, for example, argues that international law can be a valuable “second-order tool of constitutional interpretation” in assessing the scope of the President’s Commander-in-Chief powers. Wuerth, supra note 10, at 74-82. Nonetheless, even with regard to the conduct of hostilities, much of the literature considering the relationship between international law and Presidential power does not consider the role that international law might play as a direct principle of constitutional interpretation in the separation of powers. Rather, it looks at (1) how international law influences the interpretation of Congressional statutes that in turn enable constrain the President, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 517-22 (2004) (plurality opinion) (relying on the law of war in interpreting a Congressional statute); or (2) how international law serves as a direct principle of constitutional interpretation with regard to individual rights, e.g., id. at 531-35 (suggesting that international law might offer guidance as to what would satisfy Hamdi’s due process rights).

\(^47\) See Cleveland, supra note 7, at 12-27 (covering separation-of-powers related issues where the Constitution makes “express reference to international law or to a concept of international law”).

\(^48\) Id. at 33-63; see also id. at 63-87 (treating individual rights related issues in a separate section, but with an analysis that similarly shows international law’s use as a background principle of constitutional interpretation).
sources of law in structural constitutional cases,” with the exception of some federalism decisions.\(^49\)

There are several possible reasons why international law might not be seen as a relevant principle for resolving separation-of-powers disputes by those who treat it as such in other areas of constitutional law. Perhaps international law is not and has not been particularly relevant to separation-of-powers issues for structural reasons. International law is sometimes said to speak to the *substance* of what states can and cannot do rather than to the *process* by which they do it. Since the separation of powers is a question of internal process, international law might not shed any light upon it. Vicki Jackson, for example, claims that “international law simply does not address many important constitutional issues having to do with the structure of government.”\(^50\) But this claim suggests too strong a divide between substance and process. While international law may not dictate the constitutional structures of government, it may influence these structures. For one thing, not all international law is about substance. Some of it does have to do with process, such as default rules governing treaty-making and other communications between nations. For another thing, even where international law is substantive, nations might benefit from using it in designing their internal structural rules. Actions that violate international law, for example, are likely to generate more international friction than actions that comply with international law, and so nations might wish to set a higher internal threshold for engaging in such actions.

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


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

III. INTERNATIONAL LAW AND EXECUTIVE POWER

Constitutional decision-making related to foreign affairs begins and often ends with the President and Congress, with the courts weighing in little, late, or never. So to see what role international law has played in the separation of foreign affairs powers, one must focus on constitutional decision-making by Congress and the executive branch rather than within the courts.

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

The history of recognition, war powers, and treaty-making in the United States could each fill many volumes. My review here is necessarily selective, and two caveats in particular apply. First, although I cover all three of the roles discussed in Part I that international law has played in

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51 Cleveland, supra note 7; Calebresi & Zimdahl, supra note 49. The other sources cited supra note 49 also focus overwhelmingly on the Supreme Court. (For an interesting recent exception focusing on the role of comparative law in the process of Congressional legislation-making, see forthcoming work by Katerina Linos.) Constitutional scholarship more generally, however, is increasingly taking into account the role of the political branches in shaping constitutional law. E.g., Keith E. Whittingdon, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001).
shaping the constitutional division of foreign affairs powers, I pay particular attention to international law’s role as a direct principle of constitutional interpretation and as an extra-constitutional source of legitimacy. I do this because these roles are the least accepted, and thus the most interesting, as a matter of legal doctrine today. Second, I mostly discuss moments of constitutional decision-making where the decision-makers took international law into account. This over-emphasizes the direct influence of international law in the constitutional separation of powers, since I do not give equal attention to moments that lack evidence of decision-makers taking international law into account. My aim here is to show that international law has mattered in shaping the domestic separation of powers, not to try to quantify the precise degree across history that it has done so.

A. Recognition

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

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

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52 President Jackson, Texas message, Dec. 21, 1836, in 1 John Bassett Moore, A Digest of International Law 99 (1906).
executive’s position. By a few decades into the twentieth century, the view that the executive branch had the sole power of recognition was widely accepted.

1. President Washington’s Recognition of France

The French Revolution first presented the question of which part or parts of the federal government held the constitutional power to recognize foreign powers. Following the overthrow of King Louis XVI, the Washington Administration had to decide whether to recall its ambassador as European countries were doing, whether to continue the payments of the war debts it owed to France to France’s revolutionary government, and whether to receive the ambassador sent by that government – practical questions that effectively also raised the question of whether or not to recognize the new government of France.\(^{53}\)

The decisions made by the Washington Administration would ultimately become a key precedent for claims of a concurrent or even exclusive Presidential recognition power. Importantly, however, the focus within the Washington Administration in resolving these questions was not on the constitutional power of the President to make these decisions but rather on the international legal obligations of the United States. In a recent pair of articles, Robert Reinstein has shown how decision-making within the Washington Administration on this issue was driven by the aim of strict compliance with international law.\(^{54}\) As set forth by the theorist Emer de Vattel – a favorite source on international law for the Founding generation – nations were to “take for their rule the circumstance of actual possession” in deciding whether to engage in diplomatic relations with new governments.\(^{55}\)

This principle of international law, as Washington Administration officials understood it, played a key role in their deliberations. When Secretary of the Treasury Alexander Hamilton, who was no fan of the revolutionary government, asked John Jay for advice on whether there was some basis for

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\(^{54}\) Reinstein, Recognition, supra note 53, at 839-42; Reinstein, Executive Power, supra note 53, at 380, 422-28.

\(^{55}\) Emer de Vattel, The Law of Nations bk. 4 § 68 (T.J. Hochstrasser, trans., 2008); see also Reinstein, Recognition, supra note 53, at 839. Although the Washington Administration viewed international law as requiring recognition where there was de facto possession, this view may not have accurately reflected the European custom of the time. See generally Julius Ludwig Goebel, The Recognition Policy of the United States (1915) (arguing that the U.S. approach did not in fact represent existing international law, although it shaped international law going forward).
limiting the reception of the ambassador sent by the revolutionary government, Jay offered him no support. Instead, Jay emphasized that “they who actually administer the government of any nation are by foreign nations to be regarded as its lawful Rulers” and insisted that it is the “Duty … of the United States strictly to observe that conduct towards all nations, which the laws of nations prescribe.”

As these recognition-related questions unfolded over 1792 and 1793, it is striking how little Washington Administration officials appeared to reflect on whether the President could constitutionally make recognition decisions on his own. The first written constitutional justification that I am aware of occurs in the essays of Pacificus, written anonymously by Alexander Hamilton some months after the recognition questions were resolved. Hamilton remarked that “the right of the Executive to receive ambassadors and other public ministers … includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will, and ought to be recognized, or not.”

One might infer from this argument, along with the absence of other debate on the issue, that there really was no constitutional question – that the constitutional right of the President to make these recognition decisions on his own was so settled in light of the Receive Ambassadors Clause that there was simply no need to discuss the issue. But this conclusion seems unlikely given the treatment of the Receive Ambassadors Clause during the debates over the ratification of the Constitution. At that time, none other than Hamilton described the clause as “more of a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government.” In light of this, Hamilton’s later treatment of the Receive Ambassadors Clause as a positive source of recognition power seems suspiciously like a post hoc justification.

The absence of focus on the constitutional question suggests that international law served here as an extra-constitutional source of legitimacy. Recognition was not a controversial decision domestically (unlike the Neutrality Controversy that soon followed), and it seems that the Washington Administration officials simply focused on making sure the

56 Draft Proclamation prepared by John Jay, enclosed in Letter from John Jay to Alexander Hamilton (Apr. 11, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON 309 (Harold C. Syrett & Jacob E. Cooke, eds., 1969); see also Reinstein, Executive Power, supra note 53, at 426 (discussing this exchange). For a discussion of other Washington Administration correspondence emphasizing that diplomatic relations should turn on actual possession, see Reinstein, Executive Power, supra note 53, at 422-423.


58 THE FEDERALIST NO. 69 (Alexander Hamilton).
United States was obeying international law, as a responsible nation would do, without even initially digesting whether or not they were the proper actors within the nation to make these decisions. In doing so, however, the Washington Administration established the important constitutional precedent that the President could make at least some recognition determinations by himself.

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

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

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

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59 Reinstein argues that the Take Care Clause was the “source of executive power upon which Washington relied,” Reinstein, Executive Power, supra note 53, at 379, but this justification also did not surface in the writings of Washington Administration officials until the Pacificus essays.

60 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall on Mar. 7, 1800). Precursors include Pacificus Number I (June 29, 1793), supra note 57, at 11 (describing the executive branch as “the organ of intercourse between the Nation and foreign Nations”); Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 378 (Julian P. Boyd et al. eds, 1961) (asserting that the “transaction of business with foreign nations is Executive altogether”); cf. Act of July 27, 1789, § 1, 1 Stat. 28 (1789) (establishing Department of Foreign Affairs to conduct communications with foreign nations according to the President’s orders).

61 QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 15 (1922). This representative authority could perhaps have been thought of as the federal government generally, see 1 Op. ATT’Y GEN. 513 (describing the “national government as the sole and exclusive organ of communication with foreign nations”), but the further requirement
Interpreting the Constitution to be in compliance with this principle of international law, as Marshall and others appear to have done, the question arose whether Congress or the President served as this authority. Under the Articles of Confederation, this role necessarily fell to the Continental Congress, but there were strong arguments in favor of the President having this authority under the Constitution. Not only did John Locke’s theory of executive power suggest that this role fell naturally to the executive, but in addition the President was favored by strong functional arguments – what if an urgent issue came up and Congress was not in session? – and by the fact that at least some direct communication between the President and foreign governments was clearly contemplated by the Receive Ambassadors Clause. These factors suggested that the President should have some role as the representative of the United States to foreign government, and the international law requirement of a single representative authority elevated the President to holding this power solely. The President’s role as the “sole organ” (which numerous constitutional actors since Marshall have echoed) in turn ultimately bolstered arguments for a sole Presidential recognition power and for other Presidential foreign affairs powers.

During the decades that followed the Washington Administration, however, both political branches took a mostly cooperative approach to the

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62 See Prakash & Ramsey, supra note 30, at 266-68. Professors Prakash and Ramsey treat Lockean theories of executive power as the basis of the sole organ doctrine. But international law has also played an important role, in two respects. First, international law and theories of executive power, particularly those powers related to foreign affairs, were closely intertwined, with some theorists justifying one by way of the other. E.g., 1 Blackstone at 249 (explaining that the king has the treaty-making prerogative because “it is by the law of nations essential to the goodness of a [treaty] that it be made by the sovereign power”); see VATTEL, supra note 55, at bk. 4, § 55-55 (identifying international law norms governing communications between nations). At the very least, international law identified the need for a single representative, even if theories of executive power signaled the actor that would fill that need. Second, in practice, important actors in American foreign relations law have rooted the sole organ doctrine primarily in international law. Quincy Wright’s treatise on The Control of American Foreign Relations Power, for example, makes “the requirement of international law that states maintain a definite authority to which foreign states may complain of violations of international law and from which they may expect satisfaction on the basis of that law alone” a centerpiece of his entire argument. WRIGHT, supra note 61, at 15.

63 The Senate acknowledged this proposition early on, see Senate Foreign Relations Committee Report of Feb. 15, 1816 (“The President is the constitutional representative of the United States with regard to foreign nations”); and the Supreme Court famously embraced it in United States v. Curtiss-Wright Export Co, 299 U.S. 304, 319 (1936).
recognition power. James Monroe sought the backing of Congress in recognizing Latin American countries breaking away from Spain, and Andrew Jackson accepted a Congressional role in the recognition of Texas as a matter of political desirability (although noting that he reserved comment on the constitutional question). From the Congressional side, Henry Clay produced a report claiming that recognition could be accomplished in multiple ways, including exclusively by the President, by the President and the Senate together, or by Congress. This period of cooperation was perhaps helped by the fact that, at least prior to the Civil War, the constitutional actors deemed themselves as constrained by what the Washington Administration had viewed as the international legal principles governing recognition.

Yet hints of an exclusive Presidential power of recognition were emerging. Secretaries of State John Quincy Adams and William Seward asserted that the recognition power lay exclusively with the President, and Presidents increasingly emphasized their “sole organ” power. In one notable instance, Ulysses S. Grant vetoed two trivial joint resolutions by Congress – resolutions that simply responded to congratulations sent by foreign nations – on the ground that the “Constitution of the United States, following the established usage of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers.” This language suggests that international law, or at least international custom, was serving as a direct principle of constitutional interpretation with regard to the power to deal with other states.

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

International law played a role in perhaps sharpest exchange between Congress and the executive branch over recognition during the nineteenth century – the debate over whether and when to recognize Cuba during its
war of independence. In December 1896, the Senate Foreign Relations Committee voted to send a resolution recognizing Cuba as independent to the floor of the Senate. This decision came well before the President was ready to recognize Cuba and prompted an immediate, angry rebuttal by Secretary of State Richard Olney. “The power to recognize the so-called Republic of Cuba as an independent State,” Olney claimed, “rest[s] exclusively with the Executive.”

His remarks in turn provoked outrage among Senators, and helped fuel a lengthy floor debate over the constitutional allocation of the recognition power. Senators on both sides of the issue drew on international law in their constitutional interpretation.

In asserting a Congressional power of recognition, Senator Augustus Bacon of Florida relied on international law’s status as domestic law in the United States. In language that bears a striking resemblance to the Supreme Court’s subsequent *Paquete Habana* decision, Bacon emphasized that “[i]nternational law is part of the law of this land and will be administered by the courts of this country, both Federal and State, without any distinct legal enactment either by Congress or by any State government.” Because international law is domestic law, he reasoned, Congress as the body in charge of making domestic law should have the responsibility for the international legal decisions such as recognition. Bacon’s structural argument met with skepticism, however, as other Senators pointed out that his reasoning suggested that only Congress should make recognition decisions, while past practice since the Washington Administration’s recognition of France suggested that the President had at least a concurrent power to do so.

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

> Resolutions of … legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity. . . . Congress can help the Cuban insurgents by legislation in many ways, but it cannot help

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69 Olney Opposes Recognition of Cuba by America, NORFOLK VIRGINIAN 1 (Dec. 20, 1896).

70 29 CONG REC. 747 (1897) (statement of Sen. Bacon); cf. The Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination”).

71 CONG REC. 747 (1897) (statement of Sen. Bacon); see also id. at 746 (similar).

72 Id. at 747-49 (exchanges between Sen. Bacon and Sens. Gray and Platt).
them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct.73

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

4. Exclusive Presidential Recognition in the Twentieth Century

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

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

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73 29 Cong. Rec. 670 (1987); also available as Sen. Doc No 56, 54th Cong, 2nd Session. There is a touch of originalism in Senator Hale’s argument, as he asserts that “[a]l[l] of these considerations were familiar to the statesmen who framed the Federal Constitution,” but the argument is not framed as a solely originalist one. In addition to Senator Hale, Senator John Morgan of Alabama also relied on international law in interpreting the Constitution to give the President the recognition power as a “mere piece of diplomatic authority which he derives under the law of nations, which are recognized in the Constitution.” 29 Cong. Rec. 684 (1897) (statement of Sen. Morgan).

74 10 James Daniel Richardson, A Compilation of the Messages and Papers of Presidents, 1789-1897, at 153-155 (1899); see also Senate Discusses Cuba, N.Y. Times 1 (Apr. 21, 1898) (noting that a version of the resolution that would explicitly have recognized Cuba did not pass). The joint resolution also authorized the President to use force against Spain to further Cuban independence, see id., and later defenders of an exclusive Presidential power of recognition would argue that this resolution was an authorization of intervention only, not an act of recognition. E.g., Wright, supra note 61, at 271.

75 Edwin S. Corwin, The President’s Control of Foreign Relations 79-80 (1917) (quoting Senator Hale’s memorandum); see also id. at 82 (alluding again to the fact
exclusive Presidential recognition power based on the President’s role as the representative organ for the United States under international law.\textsuperscript{76} Significantly, Wright saw international law not only as the basis for a Presidential power of recognition, but also as a potential constraint on this power. More specifically, he suggested that the President’s recognition powers might be constitutionally limited to situations where recognition was in fact warranted by international law – i.e., to situations where the government to be recognized did in fact have territorial control.\textsuperscript{77}

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

\textit{Belmont} did not mention any role for Congress in recognition, although it did not expressly reject such a role either. Eventually, however, the Supreme Court would go further in dicta in \textit{Banco National de Cuba v. Sabbatino} to suggest that the recognition power is “exclusively a function of the Executive.”\textsuperscript{79} The Court did not further explain this dicta, simply making this statement in passing without any citation. With the development of this dicta, however, those seeking to justify the President’s sole recognition power no longer needed to rely directly on international law as a background principle of constitutional interpretation. Instead, they could simply cite this dicta as demonstrating that constitutional provisions such as the Receive Ambassador Clause entrusted the recognition power to the President.\textsuperscript{80} The role that international law had played in shaping the constitutional allocation of the recognition powers thus faded into obscurity.

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

\textsuperscript{77} Id. at 269-70.

\textsuperscript{78} 301 U.S. 324, 330 (1937).

\textsuperscript{79} 376, U.S. 398, 401 (1964). This same shift can be seen from the \textit{Restatement (Second) of Foreign Relations Law}, which described the President as having the recognition power without expressly discussing whether Congress had a concurrent recognition power, to the \textit{Restatement (Third) of Foreign Relations Law}, which treats the President’s recognition power as exclusive. See \textit{Restatement (Second) of Foreign Relations Law of the United States § 106(2) (1965); Restatement (Third) of the Foreign Relations Law of the United States § 204 (1987)}.

\textsuperscript{80} E.g., \textit{Restatement (Third) of the Foreign Relations Law of the United States § 204 cmt. a & reporters’ note 1 (1987)}. 
B. War Powers

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

As a legal matter, Office of Legal Counsel memoranda now justify this shift by reference to the historical gloss. A close look at the past practices that underlie this gloss, however, reveals that international law has helped shape the constitutional distribution of war powers in all three of the ways discussed in Part I – as an input for other principles of constitutional interpretation, as a direct principle of constitutional interpretation and as an extra-constitutional source of legitimacy. As Edwin Corwin once observed, “from the first it has devolved upon [the President] to protect American rights and to discharge American duties under the law of nations; and, as commonly happens, the path of duty became in time a road to power.” Among other practices, international law helped justify the many minor engagements undertaken solely under Presidential authority and also more major commitments undertaken by Presidents acting without Congress in asserted response to treaty commitments of the United States.

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81 I focus here only on international law’s role in shaping decisions to use force in the first place. International law has also played an important role in shaping the constitutional allocation of war powers with regard to the conduct of existing hostilities. As early as Brown v. United States, 12 U.S. 110 (1814), the Supreme Court used international law in interpreting the constitutional scope of the President’s powers to conduct hostilities. Id. at 124-28 (concluding that, in the absence of specific Congressional authorization, the President did not have the constitutional power to seize enemy property within the United States in violation of a “modern” rule of international law). Perhaps because the Supreme Court has weighed in more frequently on the separation of powers with regard to the conduct of hostilities than with regard to the other areas of foreign relations law explored in this Article, existing scholarship has already explored how international law has helped shape the constitutional allocation of powers with regard to the conduct of hostilities. See supra note 46.

82 CORWIN, supra note 30, at 236 (further suggesting that the Take Care Clause helped bolster this growth in Presidential power); see also id. at 241 (“Thanks to the same capacity to base action directly on his own reading of international law … the President has been able to gather to himself powers with respect to warrmaking which ill accord with the specific delegation in the Constitution of the war-declaring powers of Congress”)

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1. Minor Engagements

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

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

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

This passage hints at two principles of international law. One – the one directly relevant to the case – is the principle that nations are responsible for protecting their citizens from abuse and seeking reparations or revenge for injuries to them. But international law does not directly speak to what branch of government bears responsibility for fulfilling this responsibility. To attribute this responsibility to the President, Justice Nelson draws an analogy to another principle of international law – the sole organ doctrine – reasoning that because the President acts as the sole organ under international law, he must also be responsible for fulfilling the international legal role of protecting U.S. citizens.

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84 8 F. Cas. 111 (C.C. S.D.N.Y. 1860); see also, e.g., CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 232-33 (2011) (including this case).

85 Id. at 112.

86 VATTEL, supra note 55, at bk II, § 71 (“whoever uses a citizen ill, indirectly offends the State, which ought to protect this citizen, and his sovereign should revenge the injuries, punish the aggressor, and if possible obligate him to make entire satisfaction”).

87 For a discussion of some other instances where the international legal principle of protecting or avenging one’s citizens is used to bolster the President’s power to authorize the use of aggressive force in the nineteenth century, see CURRIE, supra note 83, at 122-23.
In *Durand*, Justice Nelson also noted that Greytown was “an irresponsible and marauding community.” Although he did not elaborate on this point, there is an implication that it is appropriate for the President to independently authorize the use of force against such communities, as opposed to more responsible states. International law authorized the punishment of “mischievous” nations, and in any event such communities might be less akin to nations than to pirates, who were understood to be the enemy of all. These international legal principles in turn might influence the constitutional allocation of powers, either by suggesting that attacks on such communities did not amount to “war” or because the President would be independently authorized to conduct these attacks under his increasingly recognized role as the constitutional enforcer of international law.

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

International law thus provided a constitutionally significant distinction regarding what communities the President could use force against without the need for Congressional authorization. This distinction mattered beyond Greytown and can be found in the thinking of constitutional actors as late as President William Howard Taft. Reflecting on presidential power, he observed that what constitutes ‘war’ [as a constitutional matter] … is sometimes a nice question of law and fact. It really seems to differ with the character

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88 8 F. Cas. at 112.
89 Vattel, supra note 55, at bk II, § 70.
90 Franklin Pierce, Message to Congress of Dec. 4, 1854, in 7 Richardon, supra note 74, at 2815; see also Currie, supra note 83, at 120 (noting the constitutional implications). President Buchanan would later back away from his predecessor’s justification of the attack. See Louis Fisher, *The War Power: Original and Contemporary* 20 (2009).
91 Cong. Globe, 35th Cong., 1st Sess. 1727 (1858). For another example, see, e.g., Currie, supra note 83, at 115 & 120 n. 34 (noting that President Tyler viewed Congressional authorization as needed for military intervention to protect American civilians provided that the intervention would be “agst a civilized nation”).
of the nation whose relations with the United States are affected. The unstable condition as to law and order of some Central American republics creates different rules of international law from those that obtain in governments that can be depended upon to maintain their own peace and order. “92

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

Important as these international-law-based distinctions may have been, however, they would ultimately get swallowed up by a more expansive understanding of Presidential war powers – one which used the precedents created in line with these distinctions without recognizing their importance. One common approach taken by twentieth century supporters of broad Presidential war powers was to list simply all prior independent Presidential uses of force without discussing the justifications given for them. In 1941, for example, Senator Connally of Texas offered up a list of “85 incidents” of Presidential authorizations of military missions abroad without Congressional authorization93 in the course of arguing that, prior to the U.S. entry into World War II, the President had the constitutional authority to send thousands of U.S. troops to Iceland to repel any German threat there. Senator Connally’s list included mostly minor uses of force, typically against non-state communities or the Central American countries considered distinctive for international law purposes by Taft. One entry reads: “Cuba 1823: to pursue and break up an establishment of pirates” and another “Fiji Islands 1840: to punish natives for an attack upon Americans.”94 But rather than considering the nuances of these practices, Senator Connally offered them up as wholesale endorsements of Presidential power to use force abroad on behalf of U.S. interests. Such simplified aggregations would later be embraced by executive branch officials seeking to justify unilateral Presidential uses of force.

2. Treaties as a Basis for Presidential Uses of Force

Treaties have helped enhance the President’s war powers vis-à-vis

93 87 Cong. Rec. 5930-31 (1941); see also id. at 5929 (statement of Sen. Connally) (making clear that the list focuses on Presidential actions not specifically authorized by Congress).
94 Id. at 5930-31.
Congress in three main ways. First, there is a long-standing constitutional debate about whether or not the President can use force without Congressional approval which he would otherwise need where treaty commitments obligate or, more commonly, authorize this use of force. The more widely accepted view today is that he cannot, but past precedents going the other way have informed the current scope of the President’s war powers. Second, where treaties authorize U.S. action, Presidents can use this fact as an extra-constitutional source of legitimacy that bolsters their arguments in favor of the use of force. Third, in its early days, the U.N. Charter was deemed by some constitutional actors to influence the constitutional allocation of power between the President and Congress not only in the two ways just suggested, but also by reshaping the international law of war.

The relationship between the Congressional power to declare war and the treaty power shared by the President and the Senate hinges on whether Congressional authorization is needed where a treaty commits or authorizes the United States to go to war under certain conditions and these conditions have been satisfied. These questions first arose very early in U.S. constitutional history, but to date they have appeared most dramatically in relation to the Korean and Vietnam Wars.

In committing U.S. troops to the Korean War without Congressional authorization, President Truman relied heavily on the fact that, in response to North Korea’s attack, the U.N. Security Council had voted to recommend that Member States “furnish such assistance to [South Korea] as may be necessary to repel the armed attack and to restore international peace and security in the area.” The executive branch’s use of the Security Council Resolution was three-fold. First, executive branch officials and supporters argued that, as a matter of constitutional doctrine, the Security Council Resolution removed any need for Congressional authorization. The State Department memorandum justifying the intervention argued that the President was authorized to carry out the Security Council’s recommendation under his Take Care Clause power and that doing so was a

95 A precedent question is whether the United States can enter into such treaties in the first place. While this issue has been debated, see, e.g., 1 WESTEL WOODBURY WILLoughby, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 290 (1929), in practice U.S. treaties have done so. One Senate Foreign Relations Committee report has suggested that mutual defense and other such treaties should at least “implicitly” reserve a right for the United States to decide whether to act militarily, in order to preserve a role for the House of Representatives in warmaking. See S. EXEC. REP. NO. 95-12, at 74 (1978).

96 See Wright, supra note 61, at 227; Corwin, supra note 75, at 158-63. For a discussion of how this argument was used to justify President’s Roosevelt’s intervention in Cuba in 1906 under the Platt Amendment, see Taft, supra note 92, at 74-76.

97 S.C. Res. 83 (1950).
“paramount” interest of the United States. Second, Congressional supporters claimed that the Security Council Resolution had the effect of making the intervention a “police action” rather than a “war” within the meaning of the Constitution— in effect arguing, as President Taft had done decades earlier, that evolving international law shapes the meaning of “war” for constitutional purposes. But these arguments all had weak points. Importantly, the Security Council had not undertaken action directly and nor had it required anything of Member States. Instead, it had simply recommended that Member States take action— facts which weakened the Take Care Clause argument because it meant the United States had no international legal obligation to carry out the Security Council mandate and which weakened the “police action” argument because it meant that for all practical purposes the response would come from individual states rather than directly from a centralized international authority. Moreover, the legislative history behind the approval of the U.N. Charter in the Senate and of its implementing legislation in Congress more generally indicated a Congressional assumption that further Congressional action would occur before the United States used force on behalf of the Security Council.

But while the doctrinal arguments were weak, the extra-constitutional legitimacy conveyed by the Security Council Resolution was strong. At least initially, members of Congress were nearly unanimous in applauding the intervention in Korea—and while some of this approval rested on

98 Dep’t of State Memorandum of July 3, 1950, reprinted in H. REP. NO. 81-2495, at 61, 65-67 (1950). The memorandum also argued that the intervention lay within the President’s sole authority based on the numerous nineteenth century Presidential uses of force, using the reasoning discussed supra note 93 and accompanying text. Id. at 64, 67-68.


100 In particular, Congress assumed that there would be a further agreement with the United Nations, approved by the Senate or Congress, whereby the United States placed a certain number of troops at the Security Council’s disposal. The President would be then be able to authorize use of these troops, but any additional troop use would need further Congressional approval. This agreement, however, was never made. See Michael J. Glennon, The Constitution and Chapter VII of the United Nations Charter, 85 AM. J. INT’L L. 74, 77-81 (1991); but see Turner, supra note 99, at 559-63 (arguing that even in the absence of the additional agreement, the President has the constitutional authority to commit troops on behalf of the United States).

101 Turner, supra note 99, at 565-77; see also HENKIN, supra note 30, at 382-383 n.37 (noting that Congress came to approve an extension of the draft and an appropriation for the war).
anti-communist fervor, much of it also rested on a desire to bolster the recently created United Nations. Senator Ralph Flanders, for example, emphasized that he did not think the President had the power to initiate such a use of force under “ordinary circumstances,” but that the use of force here “gets its justification from the preservation of the usefulness and very existence of the United Nations.” Majority Leader Scott Lucas viewed the Security Council Resolution as “a fact that cannot be stressed too much.” Indeed, some evidence suggests that President Truman was quite consciously trying to capitalize on the extra-constitutional legitimacy conferred by the situation in order to establish a constitutional precedent for the future on the President’s independent ability to use force.

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

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102 E.g., 96 Cong. Rec. 8540 (statement of Sen. Knowland) (expressing both anti-communist views and pride that “we are operating at this time through the United Nations”); id. at 9543 (statement of Sen. Saltonstall) (stating that “we are in Korea because under the United Nations Charter … we are attempting to keep peace”); id. at 9544 (statement of Sen. Connally) (noting “serious obligations resting upon us as a nation because of our plighted faith to support the United Nations”).

103 96 Cong. Rec. 9541 (1950).


106 See generally Department of State Memorandum of Mar. 4, 1966, reprinted at 112 Cong. Rec. 5504 (1966). In addition to relying on the SEATO Treaty, the memorandum argued 1) that the President had the independent power to commit U.S. troops to Vietnam as commander-in-chief (citing the Korean War, among others, as a precedent and also relying on the dubious numeric reasoning discussed supra note 93 and accompanying text) and 2) that the Gulf of Tonkin Resolution constituted Congressional authorization. See 112 Cong. Rec. at 5507-09.

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

As importantly, however, the State Department’s justification for the Vietnam War reveals how opportunistically prior precedents like the Korean War can be used. As discussed above, the defenses of President Truman’s intervention in Korea relied heavily on the U.N. Security Council Resolution not simply because the U.N. Charter was a treaty commitment of the United States, but also because the U.N. Charter was seen as a transformative treaty commitment that conveyed powerful extra-constitutional legitimacy and altered the meaning of war in international law in ways that had constitutional ramifications. In Vietnam, however, there was no supportive Security Council Resolution. One might think that the State Department memorandum would have noted these comparative points of weakness, but its constitutional discussion made scant mention of them.\footnote{108} Instead, the comparisons drawn by the State Department only emphasized the constitutional strengths of the Vietnam intervention compared to Korea:

In the Korean conflict, where large-scale hostilities were conducted with an American troop participation of a quarter of a million men, no declaration of war was made by the Congress. The President acted on the basis of his constitutional responsibilities. While the Security Council, under a treaty of this country – the United Nations Charter – recommended assistance to the Republic of Korea against the Communist armed attack, the United States had no treaty commitment at that time obligating us to join in the defense of South Korea. In the case of South Vietnam we have the obligation of the SEATO Treaty and clear expressions of congressional support. If the President could act in Korea without a declaration of war, a fortiori he is authorized to do so now in Vietnam.\footnote{109} This discussion demonstrates just how easily past practices can be used to justify still more expansive practices down the road. The State Department memorandum ignores or downplays factors that were important to President Truman’s constitutional war powers at the time of the Korean intervention – the Security Council Resolution, the paramount interest in having the United Nations be a success, the support of most members of Congress – in favor of a narrative of unbounded, unilateral Presidential action. This fluid use of the Korean War precedent, like the use of minor nineteenth-century engagements, helped develop the current, extraordinarily broad understanding of the President’s war powers.

\footnote{108} \textit{Id.} at 5507-09. The memorandum did discuss the absence of a Security Council Resolution in the section addressing the intervention’s legality under international law. \textit{Id.} at 5505-06.  
\footnote{109} \textit{Id.} at 5509.
C. Sole Executive Agreements

The text of the Constitution provides only one clear way for the United States to make international agreements. This is the Treaty Clause, which gives the President the power to make treaties with the advice and consent of two-thirds of the Senate. Today, however, the President enters into many international agreements under his own authority. Known as sole executive agreements, these tend to be more modest international legal commitments than treaties approved through the Treaty Clause, but they still serve as a substantial source of Presidential foreign affairs powers.\footnote{110}

As with recognition powers and war powers, international law has bolstered the President’s power to make sole executive agreements.\footnote{111} Historically, constitutional actors used international law in all three of the ways described in Part I in determining and defending these increased powers. More specifically, international law helped justify the President’s power to enter into the two types of sole executive agreements that form the roots of this power: first, agreements settling claims between U.S. nationals and foreign nations; and second, temporary agreements, known as \textit{modi vivendi}, with other nations pending more permanent arrangements. As with recognition (though in a less pronounced way), the sole organ doctrine played a part in these developments, and so did several other principles of international law.

1. Claims Settlement Agreements

Claims settlement agreements were the earliest type of sole executive agreements and have done the most to establish the President’s power to enter into sole executive agreements. These agreements initially settled the claims of U.S. citizens against foreign nations, although they have now come to have broader scopes.\footnote{112} The first involved \textit{The Wilmington Packet},

\begin{itemize}
\item \footnote{110} For discussions of the reach of sole executive agreements, see, e.g., Michael D. Ramsey, \textit{Executive Agreements and the (Non)Treaty Power}, 77 N.C.L. REV. 133 (1998); Bradford Clark, \textit{Domesticating Sole Executive Agreements}, 93 VA. L. REV. 1573 (2007).
\item \footnote{111} I focus here only on sole executive agreements, but international law has also strengthened the President’s hand in other forms of international agreements. For example, the sole organ doctrine helped persuade the Senate to abdicate a formal pre-negotiation role with regard to treaties made through the Treaty Clause, see Senate Foreign Relations Committee Rep. of Feb. 15, 1816, although the best evidence suggests that the Framers intended the Senate to play both pre-negotiation and post-negotiation roles, see Jean Galbraith, \textit{Prospective Advice and Consent}, 37 YALE. J. INT’L L. 247, 256-58 (2012).
\item \footnote{112} Ingrid Brunk Wuerth, \textit{The Dangers of Deference: International Claim Settlement by the President}, 44 HARV. INT’L L.J. 1, 1 (2003). Historically, sovereign immunity principles made it difficult or impossible for private citizens to pursue these claims on their own. \textit{Id.} at 21.
\end{itemize}
a privately owned American ship that was seized by a Dutch privateer in a way that the United States believed violated a treaty between the Netherlands and the United States. In 1799, the U.S. diplomat posted to the Netherlands entered into an agreement with his Dutch counterpart whereby the Dutch government paid a sum of money to the United States on behalf of the American owners of the cargo and in return was released of all claims. From the perspective of foreign relations law, the most interesting thing about the settlement process is the lack of evidence suggesting that the U.S. executive branch officials involved ever considered whether they had the constitutional power to make the agreement. They seem to have simply assumed that they had this power – an assumption which presumably was influenced as a matter of extra-constitutional legitimacy by the fact that, as a matter of international law, this was the kind of thing that foreign offices did for their citizens.

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

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114 There is no mention of the constitutional question, for example, in the lengthy compilation of documents in MILLER, supra note 113, at 1073-1103, related to The Wilmington Packet.

115 Andrew Jackson, Veto Message of Mar. 3, 1835, in 3 RICHARDSON, supra note 74, at 146.

116 E.g., United States v. Belmont, 301 U.S. 324, 330 (1937) (relying on the “sole organ” doctrine); Ozanic v. United States, 188 F.2d 228, 231 (2d. Cir. 1951) (Hand, L.) (“The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations”); Dames & Moore v. Regan, 453 U.S. 654, 682-83 (1981) (quoting this language from Ozanic); see also Myres S. McDougal & Asher Lans, Treaties
In addition to the sole organ doctrine, constitutional actors also derived the President’s power to enter into claims settlement agreements from the international legal responsibility of nations to look after the interests of their citizens – a responsibility that, as discussed earlier, was understood to lie primarily with the executive. “In making [claims settlement agreements],” explained a Department of State Memorandum in 1922, “the Executive has taken appropriate steps to obtain redress for infringement of rights of American citizens under treaties and under international law.”

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

and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: Part I, 54 Yale L.J. 181, 249-250 (1945) (attributing claims settlement power to the sole organ doctrine); id. at 268 (“International law and practice provide that claims by citizens of one government against another government may be prosecuted only through the foreign office of the claimant’s government”).

117 Memorandum of the Solicitor for the Department of State (Nielsen), sent to Senator Lodge by the Under Secretary of State (Phillips), Aug. 23, 1922, excerpted in 5 Green Hayword Hackworth, Digest of International Law 390 (1943); see also, e.g., James F. Barnett, International Agreements Without the Advice and Consent of the Senate, 15 Yale L.J. 63, 75 -76 (1905) (explaining, in a section on claims settlement agreements, how “one of the principal duties of the department of state relates to the protection of American citizens abroad.”).

118 Ramsey, supra note 110, at 165-71. The Supreme Court drew a similar textualist distinction between “Treaties” for purposes of the Treaty Clause and “Agreements or Compacts” for purposes of the State Compacts Clause as far back as Holmes v. Jennison, 39 U.S. 540, 571-72 (1840) (Taney, J), although this decision related to vertical separation of powers rather than to their horizontal separation.

119 Ramsey, supra note 110, at 165-71 (discussing the issue with much more nuance).

120 See id. at 204 (making this argument in the claims settlement context). To the contrary, however, scholars who think the meaning of “treaties” in the Constitution should be understood in light of current rather than eighteenth-century international law have argued that, in light of developments in international law, important international commitments can be “agreements” rather than “treaties” and that this is relevant for
law, however, may be historically less important than the uses of the sole organ doctrine and the responsibility for the protection of American citizens in the development of the President’s claim settlement powers, however, as there is little evidence that the executive actually relied on it during the formative periods.

2. Modi Vivendi

A *modus vivendi* is “an arrangement of a temporary and provisional nature concluded between subjects of international law which gives rise to binding obligations on the parties.”121 As with claim settlement agreements, it came to be accepted that Presidents could enter into *modi vivendi* under their sole constitutional powers. Some *modi vivendi* were procedural in nature, setting forth the ground rules that would govern a treaty negotiation. The President’s authority to enter into these was accepted as flowing from his sole organ power, but constitutional actors have also used this power to justify other more substantive *modi vivendi*, such as provisional agreements on boundary disputes or fishing rights pending their final resolutions.122

One particularly bold use of a *modus vivendi* was made by Theodore Roosevelt with the Dominican Republic. He had negotiated a treaty with the Dominican Republic that would, among other things, place the United States in charge of collecting the Dominican Republic’s customs revenue.123 When the Senate did not immediately have the votes needed for its advice and consent, President Roosevelt simply arranged a *modus vivendi* that effectively implemented the customs-collections provisions of the treaty.124 This sharply reduced the relevance of the Senate’s review of the treaty and,

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122 The Acting Secretary of State (Adee) to the Swedish Charge d’Affaires ad interim (Ekengren), Mar. 22, 1907, M.S. Department of State file 3959/1, in 5 *Hackworth, supra* note 117, at 393 (explaining that to “the executive department of the government is confided the general authority over foreign intercourse, and, as a necessary incident to such authority, the executive possesses a large and undefined power to enter into compacts and agreements relating to almost every topic properly subject to international negotiation. A typical illustration of an agreement within the competence of the Executive … is the ordinary case of a *modus vivendi*.”); cf. Watts v. United States, 1 Wash. Terr. 288, 294 (1870) (deeming the power to make a *modus vivendi* over a boundary to be “a necessary incident to every national government” and further stating that it “adheres where the executive power is vested”).

123 For a detailed discussion, see W. Stull Holt, *Treaties Defeated by the Senate* 212-229 (1933).

124 Id. at 222-23.
as Roosevelt well knew, was a move of dubious constitutionality. During the angry debate that followed in the Senate, President Roosevelt’s chief defender, Senator John Spooner of Wisconsin, had very little to offer in the way of constitutional justifications. One of his few arguments, however, drew upon international legal principles. He claimed that the *modus vivendi* was appropriate because the pending treaty created an “obligation of honor” upon both parties to act in a way that would respect the terms of the future treaty. Although Spooner did not elaborate on this “obligation of honor,” it invokes an international legal principle that nations owe some duties to each other regarding a treaty from the time a treaty is signed, not just after it is ratified. Spooner then argued that this obligation meant that the “President not only had a constitutional right to [enter into the *modus vivendi*], but it was his duty … to this body where the treaty is pending to do it.” Spooner’s argument is yet another example of the use of international law as a background principle of constitutional interpretation, albeit a particularly unconvincing and opportunistic one.

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

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125 Roosevelt later observed that “[t]he Constitution did not explicitly give me the power to bring about [the modus vivendi]. But the Constitution did not forbid my doing what I did. I put the agreement into effect, and I continued its execution for two years before the Senate acted.” Theodore Roosevelt, *An Autobiography* 551 (1913).


127 Id. at 1425-26.

128 In the eighteenth century, this doctrine was so strong that nations were understood to be obligated to ratify treaties that they signed, see Galbraith, *supra* note 111, at 265-68. Today, vestiges of this doctrine remain in the principle that signatories to a treaty are obliged not to take acts that would defeat its “object and purpose” prior to its entry into force. Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.


130 *See*, e.g., George Sutherland, *Constitutional Power and World Affairs* 120-21 (1918); 1 Miller, *supra* note 113, at 697; Corwin, *supra* note 75, at 119-23; Quincy Wright, *supra* note 61, at 237-46. Where sole executive agreements relate to military affairs, however, they are often justified by reference to the commander-in-chief clause. *E.g.*, Corwin, *supra* note 75, at 117-18. Interestingly, the Supreme Court’s dicta in *United States v. Curtiss-Wright Export Co.* supporting international agreements made other than through the Treaty Clause does not specifically rely on the claims settlement agreements or *modi vivendi*, although it does rely on international law more generally. 299 U.S. 304, 319 (1936) (stating that “[t]he power to make such international agreements as do not constitute treaties in the constitutional sense … [while not] expressly affirmed by
doctrine have played in helping build the President’s sole executive agreement powers therefore reaches beyond these two particular types of agreements.

IV. PAST PRACTICE TODAY

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

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

A. Zivotofsky

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

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

Throughout the briefing and oral argument, past practice formed the backbone of the executive branch’s assertion of an exclusive recognition power. The brief for the Secretary of State emphasized that “[l]ongstanding executive practice, congressional acquiescence, and judicial precedent establish … [that the President has] the exclusive power to recognize foreign states and their governments.” It devoted six pages to the past practices of recognition, including President Washington’s decision to recognize the revolutionary government of France and the back-and-forth between Congress and the President over the recognition of Cuba. At

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132 116 Stat. 1350, 1366 (2002). In a signing statement, President George W. Bush had stated that this statutory provision (and other associated ones) unconstitutionally interfered with his recognition powers. See 566 U.S. at __, 132 S. Ct. at 1425.
135 Zivotofsky v. Secretary of State, 571 F.3d 1227, 1231 (2009) (asserting that is has been “clear from the earliest days of the Republic” that the recognition power “belongs solely to the President”); see also id. at 1245 (Edwards, J., concurring) (concluding that the statute “impermissibly intrudes on the President’s exclusive power to recognize foreign sovereigns”).
137 Brief for Respondent at 18-24, Zivotofsky v. Clinton, 566 U.S. __, 132 S. Ct. 1421
oral argument, the Solicitor General also spent substantial time on historical practice and argued that it was “critical as a matter of history … that there is not a single piece of legislation that has passed both houses of Congress and come to the President purporting to recognize a foreign nation.”\footnote{Oral Argument Transcript at 25, Zivotofsky v. Clinton, 566 U.S. __, 132 S. Ct. 1421 (2012); see also id. at 25, 28-30 (discussing past practice).}

Although the executive branch lawyers emphasized past practice, they did not mention international law’s role in shaping past practice or otherwise treat international law as relevant to the constitutional question. The brief for the Secretary of State treated the past practices as growing out of domestic considerations. When it relied on the Washington Administration’s decision to recognize the revolutionary government of France, it did not mention the role that international law played in this constitutional precedent; and although its discussion of the dispute over the recognition of Cuba referenced Senator Hale’s memorandum, it does not note the international-law-based reasoning underpinning this memorandum.\footnote{Brief for Respondent at 18-24, Zivotofsky v. Clinton, 566 U.S. __, 132 S. Ct. 1421 (2012). The Reply Brief for Zivotofsky, however, does claim that international law shaped the Washington Administration’s decision. Reply Brief at 5-7, Zivotofsky v. Clinton, 566 U.S. __, 132 S. Ct. 1421 (2012) (citing Professor Reinstein’s work). Justice Kennedy asked one question of Zivotofsky’s counsel in relation to this argument, Oral Argument Transcript at 55-56, Zivotofsky v. Clinton, 566 U.S. __, 132 S. Ct. 1421 (2012), but the discussion of the recognition power in the Court’s eventual opinion made no reference to international law. See generally 566 U.S. __, 132 S.Ct. 1421.}

The treatment of the sole organ doctrine is particularly striking. It is mentioned, to be sure, but its international legal underpinnings are not. Instead, the brief treats the sole organ doctrine as reflecting a principle of domestic expediency – one aimed at “avoiding conflicting foreign-policy pronouncements among the three branches.”\footnote{Brief for Respondent at 27, Zivotofsky v. Clinton, 566 U.S. __, 132 S. Ct. 1421 (2012).}

By ignoring how international law has helped shape past practice, constitutional actors in the executive branch present a much stronger case for the President’s recognition power than they otherwise would. There are two reasons why this is the case. First, by ignoring international law, these actors miss alternative explanations for why past practices occurred and thus miss the nuances that these past practices contain. In the Solicitor General’s retelling, the Washington Administration’s decision to recognize France becomes a decision “that this is an exclusive power” of the President\footnote{Oral Argument Transcript at 28, Zivotofsky v. Clinton, 566 U.S. __, 132 S. Ct. 1421 (2012) (emphasis added); see also id. at 25 (similar); Brief for Respondent at 27, Zivotofsky v. Clinton, 566 U.S. __, 132 S. Ct. 1421 (2012) (characterizing the Washington Administration’s decision as to which the constitutional issue was exclusive).} rather than a decision as to which the constitutional issue was
considered barely if at all (let alone considered in terms of whether the power was concurrent or exclusive), and the decision-making was instead driven by the aim of complying with the law of nations. The Solicitor General similarly misses a likely explanation for the absence of Congressional statutes proclaiming recognition. Rather than signaling congressional acceptance of an exclusive Presidential recognition power, this absence instead might instead show respect for the international legal principle that states conduct their official business through a single representative authority. Congress might accordingly consider itself entitled to participate in the internal decision-making process about recognition (as shown by nineteenth-century legislation closely tied to recognition), while leaving it to the President to undertake the official act of recognition out of respect for international law. This in turn might suggest that Congress can constitutionally legislate on matters that have a close nexus with recognition, such as birthplace designations on U.S. passports, but that do not constitute official communications between nations. By overlooking the role that international law played in shaping past constitutional practice, the Solicitor General air-brushes out these nuances and enables a broader claim of Presidential power.

Second, the disinterest in international law’s role in shaping constitutional precedents allows constitutional actors to avoid otherwise troubling questions about the significance of these precedents. As discussed earlier, there is currently a heated debate over whether it is appropriate to use international law as a principle of constitutional interpretation. Those who think the answer is no should surely be wary of relying heavily on past practices that were built in part on constitutional reasoning drawn from international law. And those who think the answer is yes should consider whether changes in international law since these past practices should be taken into account in determining the constitutional distribution of the recognition powers going forward. International law today places less emphasis on single lines of communication between nations, for example, than was true in the nineteenth century.\textsuperscript{142} By glossing over how international law has shaped the internal distribution of the recognition power, constitutional actors can ignore these questions and simply accept past practices as givens.

B. Libya

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

In its memorandum, OLC’s use of international law was notably limited. Unlike the State Department’s memorandum on the President’s use of force in Korea, the OLC memorandum did not directly rely on international law in its constitutional interpretation. Instead, for OLC, the only legal relevance of the Security Council’s resolution was that it triggered an “important” U.S. interest – namely, “preserving the credibility and effectiveness of the United Nations Security Council.”\textsuperscript{146} Gone was the argument that the President had the independent authority under the Take Care Clause to implement a Security Council Resolution, and gone was the claim that the Security Council Resolution changed the nature of the action from “war” to “police action”.\textsuperscript{147} Instead, OLC simply relied on past practice, mostly of recent vintage, including a 1980 OLC Memorandum on Presidential Power to Use the Armed Forces Abroad without Statutory Authorization and the OLC memoranda supporting the 1992 intervention in

\textsuperscript{143} David D. Kirkpatrick et al., \textit{Allies Open Air Assault on Qaddafi’s Forces}, N.Y. TIMES, Mar. 20, 2011, at A1.
\textsuperscript{144} Libya Memorandum, \textit{supra} note 1, at 5.
\textsuperscript{145} Id. at 6.
\textsuperscript{146} Id. As noted \textit{supra} note 25 and accompanying text, the Security Council Resolution may have also been tacitly used as a source of extra-constitutional legitimacy.
\textsuperscript{147} See \textit{supra} notes 98-99 and accompanying text. Intriguingly, several foreign relations law scholars felt it necessary to articulate why, in their view, the Security Council Resolution did not change the legal analysis presented – even though the Obama Administration was not formally arguing otherwise. See Michael J. Glennon, \textit{The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion}, HARV. NAT’L SEC. J. FORUM 1, 7-14, at http://harvardsj.org/wp-content/uploads/2011/04/Forum_Glennon.pdf; Statement by Louis Fisher before the Senate Committee on Foreign Relations, “Libya and War Powers” at 1,3, June 28, 2011, \textit{available} at http://www.foreign.senate.gov/imo/media/doc/Fisher_Testimony.pdf. These responses may reflect frustration with the role the Security Council Resolution was playing as an extra-constitutional source of legitimacy.
Somalia, the 1994 intervention in Haiti, and the 1995 deployment to Bosnia.\textsuperscript{148}

These prior OLC memoranda in turn relied heavily on past practices in which international law played a role, but ignored or watered down how international law helped justify these practices. In terms of minor engagements, the memoranda simply emphasized the large number of times the President has used force abroad with little discussion of the contemporaneous justifications given for these uses.\textsuperscript{149} Durand v. Hollins and the bombardment of Greytown became straightforward precedents for the President’s power to respond to attacks against American citizens without any consideration either of the international legal roots of this power or the relevance of Greytown’s piratical character.\textsuperscript{150} Even more interesting was the way the memoranda relied on treaty-based precedents and yet downplayed the importance of the treaty obligations in describing these precedents. All four memoranda explicitly used the Korean War as a precedent but described it in ways that minimized the role that international law played in its constitutional justification.\textsuperscript{151} (This occurred even though

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


\textsuperscript{151} Two memoranda used the Korean and Vietnam War as precedential support for unilateral Presidential power to initiate hostilities. Presidential Power Memorandum, \textit{supra} note 150, at 187-89 (treating Korean and Vietnam Wars as appropriate precedents for Presidential initiation of hostilities, although noting the need of Congressional approval for
the interventions at issue in the Haiti and Somalia memoranda were, like the Korean War, authorized by the U.N. Security Council, and one might therefore think the international legal reasoning used in the Korean War would have been applicable.) None of the four memoranda suggested that the Security Council’s role might affect whether the intervention constitutes a “war”. Only the oldest of these memoranda – the 1980 one – reiterated the claim that the President has authority under the Take Care Clause to use force to advance U.S. international legal commitments and the memorandum was hesitant to treat the Korean War as an example of this authority.152 The later three memoranda simply dropped the Take Care Clause justification altogether.153 These three memoranda did rely on the one remaining use of international law for constitutional purposes made during the Korean War: the claim that support for the United Nations constitutes a key U.S. interest. Even here, however, the argument was watered down: where this was a “paramount” U.S. interest in the Korea Memorandum, it slipped to being a “vital” U.S. interest in the Somalia and Bosnia, and Haiti interventions154 – and, as noted above, dwindled still further in the Libya Memorandum to being simply an “important” U.S. interest.155

Constitutional decision-making on the use of force has thus become almost entirely divorced doctrinally from international law, even though international law helped justify past practices on which the current doctrine relies. This divorce has important implications for the President’s power to

sustaining the operations); Bosnia Memorandum, supra note 149 (citing approvingly to Vietnam and Korean Memoranda as support for unilateral Presidential action without reference to their treaty-based arguments, although noting in a footnote that it was “unnecessary” to consider whether Presidential power reached as far as to cover the Korean War). The other two used it only as described infra note 154.

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

153 This abandonment of the Take Care Clause argument by the executive branch thus predates the Supreme Court’s decision in Medellin v. Texas discussed supra note 28.

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

155 Libya Memorandum, supra note 1, at 6, 10, 12; see also id. at 12 (quoting the Bosnia Memorandum for the word “vital” although not directly applying it to the Libya intervention).
initiate military interventions without Congressional support. On the one hand, international law no longer provides a direct boost to Presidential power as a matter of doctrine (although it may still serve as a source of extra-constitutional legitimacy). This is not very significant, however, because international law is no longer directly needed for these boosts – instead, constitutional actors can support sole Presidential uses of force simply by pointing to past practices without further considering the international legal roots of these practices. On the other hand – and more significantly – the divorce between constitutional decision-making and international law means that international law no longer supplies any recognized *limits* on the President’s power to initiate military interventions. International law has ceased to be used as a boundary between constitutionally acceptable and constitutionally dubious independent Presidential uses of force; instead, recent OLC memoranda treat the President as having the constitutional authority to initiate the use of force in violation of international law.\(^\text{156}\)

\[C. \text{ The ACTA}\]

As with the Libya intervention, the constitutional question of whether the United States can ratify the Anti-Counterfeiting Trade Agreement as a sole executive agreement has so far remained outside the courts. The ACTA is an international agreement negotiated among an important group of developed countries that mandates strong enforcement efforts and tough penalties for intellectual property violations.\(^\text{157}\) U.S. law already satisfies most or all of the ACTA’s requirements,\(^\text{158}\) but, if the United States were to ratify the ACTA, it would be committed to these requirements as a matter of international rather than simply domestic law. Because the ACTA is controversial – its ratification is opposed by some influential organizations who deem it too harsh an enforcement regime\(^\text{159}\) – it would be very difficult

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


\(^{159}\) Id. at 3 (noting concerns raised by a coalition that includes Google, Facebook, Microsoft, and eBay). Advocacy groups favoring Internet freedom such as EFF are also opponents. See, e.g., https://www.eff.org/deeplinks/2012/01/we-have-every-right-be-furious-about-acta. Resistance to ACTA has already led the European Parliament to reject it. http://www.guardian.co.uk/technology/2012/jul/04/acta-european-parliament-votes-
for the President to obtain the advice and consent of two-thirds of the Senate in support of it (or alternatively to get Congress to approve it as a congressional-executive agreement). As a result, the constitutional question is critically important to whether the United States will ratify the ACTA. If the President has the power to ratify this agreement as a sole executive agreement, then he can do so whenever he chooses; but if he needs Congress or the Senate, then ratification will be impossible or, at best, a difficult fight that requires the expenditure of significant political capital.

Unlike with Zivotofsky and the Libya intervention, the executive branch has not produced any extensive, publicly available explanation of why it considers that the President can constitutionally ratify the ACTA as a sole executive agreement. To date, we only have brief assertions by executive-branch officials – mostly contained in letters responding to the inquiries of a member of Congress160 – plus some academic scholarship exploring the constitutional question in more depth.161 As support for its argument that the ACTA can be ratified as a sole executive agreement, the executive branch has relied primarily on past practice. The oldest practice it cites is the 1947 General Agreement on Tariffs and Trade (GATT),162 and it also cites a “long line” of later, more minor trade agreements which were ratified as sole executive agreements.163

160 See sources cited supra note 3. Some commentators have read the Obama Administration as claiming it can ratify the ACTA as an ex ante congressional-executive agreement, since a letter by State Department Legal Advisor Harold Koh notes that the “ACTA was negotiated in response to express Congressional calls for international cooperation to enhance enforcement of intellectual property rights.” Koh Letter, supra note 3, at 2; Jack Goldsmith, The Doubtful Constitutionality of ACTA as an Ex Ante Congressional-Executive Agreement, Lawfare Blog (May 21, 2012), at http://www.lawfareblog.com/2012/05/the-doubtful-constitutionality-of-acta-as-an-ex-ante-congressional-executive-agreement/. I view this argument as a secondary one, however, since (1) Koh’s letter does not disavow the sole executive agreement justification, see generally Koh Letter, supra note 2; and (2) as a matter of statutory construction, it is difficult to read the statute cited in Koh’s letter as Congressional authorization of ACTA’s ratification, see Goldsmith, supra. An even more recent speech by Koh suggests that he would view an executive branch ratification of ACTA as falling on a spectrum between ex ante congressional-executive agreement and a sole executive agreement. http://www.state.gov/s/l/releases/remarks/199319.htm.


162 USTR Fact Sheet, supra note 3.

163 Kirk Letter, supra note 3, at 1; Koh Letter, supra note 3, at 2. The Supreme Court has not ruled on the constitutionality of these sole executive agreements but has held that they should not affect its interpretation of previously enacted Congressional statutes. See Quality King Distributors v. L’Anza Research Int’l, 523 U.S. 135, 153-54 (1998) (finding three of the executive agreements later cited in the Kirk Letter to be “irrelevant” to a statutory interpretation question before it).
The executive branch’s limited public defense of its position makes analysis of its legal reasoning and of the historical pedigree it relies upon more difficult than with Zivotofsky and the Libya intervention. Nonetheless, it seems that international law is not playing any direct role in the constitutional question of whether the President can ratify the ACTA as a sole executive agreement. The executive branch pronouncements on this question, such as they are, do not suggest that international law is playing any direct part; and nor does the scholarship produced to date on the issue.164 Like the other examples, however, this does not mean that international law not influenced the constitutional analysis, but rather than any such influence must lie in how international law helped develop the past practices that built the President’s sole executive agreement power. As discussed earlier, international legal concepts indeed help develop these practices, including ones in the claims settlement and *modus vivendi* context that helped cement the President’s sole executive agreement power.165

**V. RETHINKING PRESIDENTIAL POWER**

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

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164 See generally sources cited *supra* notes 3 and 161.

165 Additionally, in the specific context of the GATT, early executive branch justifications relied on the President’s sole organ powers. Authority of the President with Respect to Various Provisions of the General Agreement on Trades and Tariffs, *printed in Extension of Reciprocal Trade Agreement Act: Hearing on H.R. 1211 Before the Sen. Finance Comm.*, 81st Cong. 1051 (1947) (asserting that “[u]nder the Constitution of the United States the President, as the organ of the United States Government for the conduct of foreign affairs, has broad authority to discuss any matter of foreign relations with other governments and to come to tentative agreements with them as to how such matters should be handled”(citing later to *Curtiss-Wright*)). The relevance of the GATT as a precedent for sole executive trade agreements is far more complicated that USTR’s reference to it in its Fact Sheet on ACTA suggests. President Truman embraced a “provisional” agreement applying the GATT pending the GATT’s formal ratification in a way similar to Theodor Roosevelt’s *modus vivendi* with the Dominican Republic (although the provisional agreement lasted far longer, as the GATT itself was never ratified). The executive branch defended this provisional agreement as a mixture of a sole executive agreement and an ex-ante congressional-executive agreement. See Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 751-58 (1998).
that international law could play in separation of powers interpretation today. I argue that reintegrating international law into this interpretation would not only have the sanction of history, but would also have functional benefits.

A. Skepticism about Past Practice

There are several reasons why past practice is important to constitutional interpretation. It can serve as an input for originalist thinking (as when it signals the views of constitutional actors who themselves had been Framers), but it can also stand alone as a principle of constitutional interpretation. Professors Bradley and Morrison suggest that it can have the Burkean quality of “reflect[ing] the collective wisdom generated by the judgments of numerous actors over time.”\textsuperscript{166} It also can serve the same values of consistency, predictability, efficiency, and protection of reliance interests that respect for precedent serves in the context of judicial decision-making.\textsuperscript{167} But, as with judicial precedents, the power of past practice to actually advance these values is not absolute. Oliver Wendell Holmes Jr. warned against overreliance on past practice when he complained about following a rule simply because it was “laid down in the time of Henry IV” – and noted that it was “still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”\textsuperscript{168} Prior practices may not fit a present situation, even if these prior practices were wise ones for their times. Moreover, these prior practices may reflect poor initial decision-making or be narrower than their subsequent invocations suggest.

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

\textsuperscript{166} Bradley & Morrison, supra note 22, at __.
\textsuperscript{167} Id. at __.
\textsuperscript{168} Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).
scholars who do not favor the use of international law in constitutional interpretation might not wish to rely on past practices which are grounded on such uses. And those constitutional actors who do favor the use of international law in constitutional interpretation should be concerned about relying on past practices where these practices rest in part on international legal principles that have since faded or vanished entirely. The sole organ doctrine that spurred the President’s recognition power, for example, is no longer as important to international law as it was in the nineteenth century. To give another example, international law regarding the use of force has changed dramatically since it was used in establishing past practices in the nineteenth and early twentieth centuries, and it now sets rigorous doctrinal limits on when the use of force is permissible. Such developments raise serious questions about whether the premises undergirding past practices still remain valid.

Second, and more generally, the uses of past practice explored in this Article suggest that the strength and applicability of past practices are often overstated by supporters of increased Presidential power. Too often, constitutional actors take broad characterizations of past practice at face value without looking closely to see whether these are in fact warranted. The original D.C. Circuit opinion in *Zivotofsky* is a good example. The court simply accepted the executive branch’s claim that past practice established the President’s exclusive recognition power not long after the Framing, stating in its opinion that it has been “clear from the earliest days of the Republic” that the recognition power “belongs solely to the President.” Had the court looked closely at the actual past practice, however, it would have discovered that nineteenth century precedents did not resolve whether the President’s recognition power was exclusive or concurrent with Congress (and indeed arguably favored the latter position).

Although these two points favor increased scrutiny of separation-of-powers arguments based on past practice, they do not necessarily negate these arguments. The grounds on which past practices are based may remain entirely or mostly applicable today; the importance of efficiency and respect for reliance interests may be sufficient to justify the continuance of the practice; or there may be other reasons why its continuance is desirable. My claim is simply that arguments based on past practice should be treated more warily than is presently the case. The executive branch may have incentives to inflate the significance of past practices supporting

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169 See Brief for Appellee Secretary of State at 23, *Zivotofsky* v. Secretary of State, 571 F.3d 1227, 1231 (2009), available at 2008 WL 2756232 (claiming that “[f]or at least 150 years, it has been settled law that recognition of foreign sovereigns is a constitutional power vested exclusively in the President”).

170 *Zivotofsky* v. Secretary of State, 571 F.3d 1227, 1231 (2009).
Presidential exercises of power, but the other branches should be cautious in accepting such claims. Greater scrutiny of the sources and scope of past practices relied on the executive branch might lead courts to substantially different outcomes in separation-of-powers cases.

B. Using International Law Going Forward

As shown earlier, international law is now used little if at all as a principle of constitutional interpretation in current separation-of-powers jurisprudence, but it plays an indirect role due to its influence on past practice. Here, I suggest that international law should once again be used as a direct principle of constitutional interpretation in the separation of powers context. The use of international law as a direct tool of separation-of-powers interpretation would help define the limits of appropriate Presidential power in a historically defensible and functionally desirable way. I first describe the general approach I am proposing, then explain why I think this approach would be appropriate, and finally give examples of how this approach might be applied.

Overview. The President’s vastly expanded foreign relations law powers pose a conundrum for constitutional law. On the one hand, this expansion is troubling from a structural and to some extent a functionalist perspective, as the loss of checks raises the risk of Presidential abuse of power. On the other hand, it is hard to identify the appropriate legal limits to the President’s powers, especially when he acts in the “zone of twilight” occasioned by Congressional silence.\(^\text{171}\) The hodge-podge of available interpretive principles enables great flexibility at the expense of restraints. Calls for restraints often rely on a return to a single interpretive approach, such as originalism, which is too constraining, or attempt to base limits in purely functionalist considerations, an approach which lacks a solid grounding in law.\(^\text{172}\)

Returning international law to the set of principles used in constitutional interpretation would increase the restraints on the President’s constitutional powers in a defensible and, for many, desirable way.\(^\text{173}\) Broadly speaking,

\(^{171}\) See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

\(^{172}\) E.g., Daniel Abebe, The Global Determinants of U.S. Foreign Affairs Law, __ STAN. J. INT’L L. __ (forthcoming 2013) (arguing that the President’s foreign affairs powers should be interpreted to vary based on the strength of external constraints upon the President).

\(^{173}\) The international law used as a principle of constitutional interpretation in the separation of powers context differs from the international law used in Roper in that, as far as I have seen, it is international law that applies to the United States. Accordingly, my proposal here deals only with international law that is applicable to the United States.
this approach would create a presumption of constitutionality to Presidential actions in furtherance of international law applicable to the United States and would create a presumption against constitutionality where the President acted in violation of international law applicable to the United States. (No presumption would apply to Presidential action that was merely permitted by international law or that did not implicate international legal obligations.) This presumption would not necessarily be determinative of the constitutionality of Presidential action, as the ultimate answer would turn on the application of the full set of interpretive principles. But it would return to this set a principle that is historically relevant, functionally appealing, and reasonably clear.

This presumption would complement but differ from how international law can be used in relation to the structural framework set forth by Justice Jackson in *Youngstown*. As noted earlier, forms of international law such as self-executing treaties can have the same effect as statutes in terms of authorizing the President to undertake certain activities (*Youngstown* category 1) or alternatively setting constraints on him (*Youngstown* category 3). But the use of international law that I am proposing here – the use of international law as a direct principle of constitutional interpretation – would operate in a different way. Rather than dictating which category Presidential action fell within, this principle would instead operate by helping determine what is permissible action within each category. Most importantly, international law could help determine 1) what the President can do within the “zone of twilight”; and 2) where the boundary lies between concurrent Presidential and Congressional powers (where Congress has the last word) and exclusive Presidential powers.

A parallel to the presumption I am proposing can be found in the federalism context. In recent years, the Supreme Court has relied on federalism as an interpretive principle to limit the President’s constitutional power. In *Medellin v. Texas*, for example, the Court interpreted the President’s foreign affairs power to settle claims with foreign nations narrowly where these powers were used to “reach[] deep into the heart of the State's police powers.” A court could similarly interpret the President’s foreign affairs powers narrowly where these powers were used in a way that would run afoul of international law.

*Explanation.* Why might it make sense to use international law as a principle of constitutional interpretation in the separation of powers context? I will not attempt to answer this question as a matter of first-order constitutional theory. Rather, I focus here on suggesting that there are

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174 See *supra* note 13 and accompanying text.
practice-based and functionalist benefits to using international law in this way.

First, past practice itself suggests that international law can appropriately serve as a principle of constitutional interpretation. International law is not a “new source” of constitutional interpretation, but rather an old one. Accordingly, as Sarah Cleveland has observed, “historical practice answers the legitimacy objection that international law is ‘foreign’ to the American constitutional tradition.” Moreover, returning international law to the constitutional principles used in separation-of-powers disputes makes sense in light of historical practice. As this Article has shown, Presidents accrued power in the past in part by using international legal arguments, which in turn have helped deter Congress and the courts from resisting these exercises of power. Later Presidents then expanded on these practices by relying on them without recognizing their international legal roots. In essence, the President’s current powers make use of all the gains gotten from international law without also being responsive to the limits set by international law. By returning international law to the interpretive set, the approach I propose would recover the boundary that international law used to help set between permissible and impermissible sole Presidential action.

Second, this approach also has functional benefits. Violations of international law by the President are likely to aggrieve other countries and create international frictions. In such situations, it is especially important to make sure that the action furthers U.S. interests, and the congressional backing called for by the presumption help ensure this. Conversely, where President acts in furtherance of international law, the likelihood of international strife is reduced. The risk to U.S. interests is lessened, and congressional backing is therefore less important. The fit is not perfect – some actions in violation of international law will doubtless cause little international tension, and some actions in furtherance of it will cause much tension – but it offers an improvement over the current doctrinal divorce between the scope of Presidential power and the international consequences of its exercise.

176 Contra Alford, supra note 18, at 57-58.
177 Cleveland, supra note 7, at 7.
178 Cf. Wuerth, supra note 10, at 75-82 (arguing that, historically, the permissible boundaries of the President’s commander-in-chief power were shaped by international law).
179 The functional value of this appeal is suggested by the fact that the Supreme Court has interpreted certain Congressional statutes to incorporate international law in ways that constrain the President to act in accordance with international law. This is particularly true regarding the interpretation of statutes relevant to the detention and trial by military commission of alleged Al Qaeda combatants. See Hamdi v. Rumsfeld, 542 U.S. 507, 521
In addition, as a practical matter, using international law might also reduce the current malleability of separation-of-powers interpretation. The scope of interpretive principles and their range of arguable applications currently leave constitutional actors with great flexibility in resolving constitutional questions. Executive branch actors in particular can manipulate the tools of constitutional interpretation to find expansive Presidential powers. As a tool, international law would not be immune from such manipulation but it would have some protections from it. For one thing, while some aspects of international law are famously murky, others are clear and straightforward. For another, even in the murky areas, executive branch actors will be subject to constraining incentives that do not confront them in the use of tools like past practice. Interpretations of past practice are relevant primarily for understanding the scope of executive power. By contrast, interpretations of international law are relevant for international law itself today, in addition to whatever relevance these interpretations may have for the scope of executive power. Even if an interpretation of international law might bolster Presidential power, the President might be reluctant to advance this interpretation if it had unfortunate ramifications for the United States’ dealings with other nations. Therefore, unlike interpreting past practices in favor of executive power, interpreting murky areas of international law as sanctioning Presidential action may run against other foreign policy interests.

Examples. As examples, consider how this approach might apply in relation to President Obama’s military intervention in Libya. This intervention was authorized by international law in one of its most robust manifestations—a U.N. Security Council resolution. OLC did not view this authorization as doctrinally relevant to the constitutional question, however, and instead defended the constitutionality of the President’s actions based on past practice. My approach would lead to this same result, but the international law posture would matter, and past practice would matter less. Under my approach, the international law posture would bolster the President’s claim that this intervention fell within his commander-in-chief powers—just as, long ago, President Taft used international law in assessing when the President could use military force without Congress. But had there been no U.N. Security Council Resolution (as is the case currently with regard to Syria), then the President’s actions would probably have violated international law on the use of force. Thus, under my


180 Specifically, I focus on the Obama Administration’s initial decision to use force in Libya. Its decision to continue involvement in Libya raises separate questions under the War Powers Resolution. See supra note 148.
approach but not under the approach taken by OLC, such an intervention would probably have required some form of Congressional authorization. I say “probably” because some scholars have argued that international law permits and indeed encourages the use of force for humanitarian intervention even in the absence of a Security Council Resolution. The executive branch could thus defend such an intervention by interpreting international law in this way, but if it did so it would have to accept the foreign policy consequences that would flow from such an understanding of international law.

For another example, consider the question of whether the recognition power at issue in Zivotofsky is an exclusive Presidential power or instead shared concurrently with Congress. As discussed earlier, claims of an exclusive Presidential power of recognition relied heavily on the argument that international law required or at least strongly encouraged this. But international law today is silent as to whether the domestic authority to make recognition decisions rests. (International law does set some standards as to what constitutes a permissible act of recognition, but the President’s approach does not clearly violate these standards.) Therefore, under my approach, the D.C. Circuit and the Supreme Court should be wary of placing too much weight on the sole organ doctrine or on the past practice alleged to support claims of an exclusive Presidential power. There may be other reasons to support the claim that recognition is an exclusive Presidential power – and therefore that Congress cannot constitutionally legislate on the matter – but the debate should be held on these terms rather than on a heavy reliance on past practice.

Turning to the third example that runs through this paper, the question of whether the President can ratify the ACTA as a sole executive agreement is one as to which international law can provide little guidance. International law today does not dictate the domestic processes that states must undertake to enter into international agreements. And while past international law principles like the sole organ doctrine have helped to grow the President’s sole executive agreement powers in the past, their role has not been as strong as with regard to recognition and so they have had less effect on past practice and on Congressional acquiescence in this past practice. Accordingly, my argument has few implications for delineating the boundaries of the President’s power to make sole executive agreements.

As these examples suggest, the rejuvenation of international law as a principle of constitutional interpretation, accompanied by more skepticism

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181 International law might further suggest that the President cannot by himself undertake certain acts of recognition (i.e., acts of recognition that are so absurd that they fail to meet even the relatively malleable international law standards for according recognition). See Quincy-Wright, supra note 61, at 269-70.
towards past practice, would often serve to increase the limits on Presidential power relative to its current, expansive scope. As a practical matter, then, the executive branch might resist this approach and prefer to rely only interpretive principles (like reliance on past practice read broadly) that support the most expansive set of Presidential powers. This problem is not a unique one – it confronts every argument in favor of limiting Presidential power. Neither are the solutions, which are judicial employment of this approach and the development of an ethos within the executive branch that respects this approach. The historical relevance of international law to the separation of powers, which this Article has demonstrated, increases its legitimacy as a judicial tool that courts could use to limit executive power.

VI. CONCLUSION

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

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

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

But the recovery of memory is only a first step. The revelation that the sentry had been posted to protect long-vanished snowdrops led the czar

to reassign him – or so one hopes. Similarly, once we begin to understand how the President’s powers vis-à-vis Congress were shaped by international law, then we can begin to rethink the roles that international law should play in expanding or constraining Presidential power.