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TAKING CARE OF TREATIES

Forthcoming Columbia Law Review, vol. 108, 2008

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ABSTRACT

There is little consensus about the scope of the President's powers to cure breaches of U.S. treaty obligations, let alone the influence of decisions by international tribunals finding the United States in breach. Such decisions do not appear to be directly effective under U.S. law. Treaties and statutes address questions of domestic authority sporadically and incompletely, and are suited to the task only if construed heroically; the President's general constitutional authority relating to foreign affairs is sometimes invoked, but its extent is uncertain and turns all too little on the underlying law at issue. Relying on either theory to cope with breaches, accordingly, risks distorting the positive law or vesting the President with a potentially boundless authority – or, in the alternative, risks a recurring gap between our international obligations and our domestic law.

The Take Care Clause affords a surprisingly well-tailored solution. Take care authority has been neglected in recent discourse, and not without reason. On the one hand, it is not obvious that it encompasses treaties, or licenses presidential authority beyond the capacity to ensure compliance within the executive branch; on the other hand, it smacks of unbridled executive power. These objections can be met. As the Article explains, the Take Care Clause includes treaties, including – critically – some treaties conventionally labeled as non-self-executing, and permits presidential authority beyond self-regulation. The text, case law, and practice further support the idea that this authority may be divested by the Constitution, by treaty, or by statute, and must satisfy additional criteria that guard against vesting the president with plenary lawmaking authority.

The Article explains how this theory applies to potential controversies involving compliance with the decisions of international tribunals (like those of the International Court of Justice, or arising under the WTO or the Law of the Sea Convention), legislative decisions by institutions like the Security Council (such as a resolution enabling war crime proceedings against former U.S. officials), and finally treaties that afford no recourse to international mechanisms. The result is a theory that reinforces congressional supremacy without requiring that treaty obligations founder upon it.

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TABLE OF CONTENTS

Introduction.....	1
I. The President’s Predicament.....	5
II. Treaties and the Take Care Clause.....	10
A. Are (All) Treaties Among “the Laws”?	10
1. <i>Including treaties</i>	11
2. <i>The anti-plenary principle</i>	15
3. <i>Including non-self-executing treaties</i>	18
B. How Are Treaties to “be faithfully executed”?.....	24
1. <i>The case for affirmative authority</i>	24
2. <i>Limiting principles</i>	31
III. Taking Care of Treaties (and International Decisions).....	36
A. The Domestic Relevance of ICJ Decisions.....	36
1. <i>Delegated authority and Article 94</i>	37
2. <i>Taking care of Article 94</i>	40
3. <i>Taking care of legal conflicts</i>	43
B. Taking Care of Other International Law.....	48
1. <i>International judicial and arbitral decisions</i>	49
2. <i>International legislative decisions</i>	52
3. <i>Taking care of treaties – without decisions</i>	58
IV. Conclusion: Taking Care of Lawmaking.....	64

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Edward T. Swaine[†]

INTRODUCTION

Suppose the United States breaches a treaty, and Congress does nothing. (Regrettably, this may not be too difficult to imagine.) What can the President do, besides withdraw from the treaty? How is the President's authority affected if the International Court of Justice (ICJ) or some other international institution has confirmed the breach, and prescribed a remedy?

President Bush's controversial attempt to order compliance with an ICJ judgment against the United States revived these questions,¹ but they transcend that dispute. Three answers have been especially prominent. Some contend that ICJ judgments – and perhaps other international decisions – are automatically enforceable under U.S. law, such that presidential authority is surplusage.² Others indicate that the President's foreign affairs powers confer sufficient authority, such that involvement of an ICJ

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While Counselor on International Law at the U.S. State Department from 2005-2006, I was involved with the briefing of cases discussed here, but the views expressed are solely my own.

¹ Memorandum from President George W. Bush to Alberto R. Gonzales (Feb. 28, 2005) [hereinafter Presidential Memorandum], available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>; see Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31) [hereinafter *Avena*].

² See, e.g., Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioner at 8, *Medellín v. Texas*, 75 U.S.L.W. 3398, 2007 WL 120779 (April 30, 2007) (No. 06-984) (arguing that *Avena* “is binding on all courts in the United States and supplies the rule of decision in a state habeas petition.”). Some leading scholars expressed comparable views at an earlier juncture when a provisional measure of less definite force was at issue. See, e.g., Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679 (1998) (arguing that the ICJ order was binding and had the status of a self-executing treaty obligation); Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 686 (1998) (arguing that if the ICJ order was binding, it had the status of self-executing federal law).

judgment (or even an international agreement) is helpful but not strictly necessary.³ A third view suggests that only legislative intervention will suffice, such that international decisions, international agreements, and presidential authority may all be for naught.⁴

This third view has prevailed to date in recent litigation,⁵ and there is reason to think that it may also prevail in the longer term. A recent case dealt a body blow to the notion that ICJ decisions are directly authoritative within the United States, treating them instead as entitled to “respectful consideration” – something closer to the wry “all due respect.”⁶ And while the President’s foreign affairs power enjoyed several victories at the Rehnquist Court’s close,⁷ there remains considerable (and appropriate) skepticism about it,⁸ and the judicial tide may be turning.⁹

Congressional exclusivity, the last theory standing, is not overly kind to international obligations, and even its fidelity to domestic principles is dubious. Some treaties are not supposed to require anything more before they are fully effective as domestic law.¹⁰ Congressional skepticism toward international law and institutions, moreover, suggests that legislative supervision may be hard to come by,¹¹ and the

³ See, e.g., Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 5 (2006). The executive branch, unsurprisingly, has also endorsed this view. See *infra* text accompanying notes 29-32 (discussing U.S. submission in Medellín litigation). Some who might ordinarily support a broad construction of the President’s foreign affairs powers have misgivings about doing so, however, when it trenches on state sovereignty. See *infra* text accompanying note 39 (noting submission by academic *amici* in recent litigation).

⁴ See, e.g., Michael Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309 (2006).

⁵ Ex Parte Medellín, 2006 WL 3302639 (Tex. Ct. Crim. App. 2006) (dismissing application for writ of habeas corpus), *cert. granted*, Medellín v. Texas, 75 U.S.L.W. 3398, 2007 WL 120779 (April 30, 2007) (No. 06-984) [hereinafter Ex Parte Medellín].

⁶ Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006).

⁷ See American Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003); Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

⁸ E.g., Van Alstine, *supra* note 4, *passim*; Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs, 46 WM. & MARY L. REV. 825 (2004); cf. Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000) (attributing narrower dormant foreign relations authority to the treaty power).

⁹ See, e.g., Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2793-98 (2006) (plurality opinion) (rejecting, without mention of deference, the executive branch’s treaty interpretation).

¹⁰ Indeed, some treaties may accomplish ends that conventional legislative authority could not. Missouri v. Holland, 252 U.S. 416, 431-32 (1920).

¹¹ Witness, for example, Congress’ part in the long-running battle over U.N. dues. Britta A. Schnoor, Note, *International Law, the Power of the Purse, and Speaking with One Voice: The Legal Cacophony Created by Withholding U.S. Dues from the United Nations*, 92 IOWA L. REV. 1133 (2007) (describing history of disputes, including Henry J. Hyde United Nations Reform Act of 2005).

superiority of later-in-time statutes over treaties as a matter of domestic (but not international) law means that every attempt at congressional compliance risks legislating further deviation from our international obligations.¹² This is not to say that other two theories are better. Granting conclusive authority to international institutions may be worrisome as a matter of law and democratic accountability;¹³ the President is more accountable, but recognizing a right to implement foreign policy objectives, without making law fundamental to the claim, creates a *lot* of power to account for. The problem is that congressional exclusivity will either let international obligations wither on the vine or encourage extravagant claims about the scope of authority Congress previously delegated, effectively undermining any commitment to legislative supremacy.¹⁴

Is that all there is? A fourth possibility, hinging on the President's responsibility to "take Care that the Laws be faithfully executed,"¹⁵ has been advanced only half-heartedly. This is somewhat surprising. The argument has a textual hook, and take care authority has sometimes been put in capacious terms.¹⁶ Its limitations may be substantive in character, or they may have more to do with the lack of a sponsor: those wary of presidential power, those wary of *limits* on presidential power, and those enthusiastic about internationalist alternatives may all lack enthusiasm for half-way measures. Whatever the explanation, there is little sustained examination of the argument, and waning support for its salience;¹⁷ its use in litigation to date understandably does little to confront its problems, and thus little to promote its serious consideration.

¹² *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (explaining that, if legislation and a self-executing treaty provision cannot be reconciled, the later in time prevails); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(b) (1987) [hereinafter RESTATEMENT (THIRD)] ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.").

¹³ See, e.g., Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 34, 36; see also Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1496-97 (2004) (citing leading critics of international authority).

¹⁴ See also *infra* text accompanying note 191 (noting breadth of potential presumptions and constructions).

¹⁵ U.S. CONST., art. II, § 3.

¹⁶ See, e.g., *In re Neagle*, 135 U.S. 1, 64 (1890) (suggesting that the take care authority extended to "the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution"); see also *infra* text accompanying notes 70-75 (discussing *In re Neagle* and like authority).

¹⁷ See, e.g., Van Alstine, *supra* note 4, at 331-37 (critiquing argument as one facet of a broader movement favoring executive power). Professor Van Alstine, I should note, seems to come to the opposite

This Article fills the gap. Clarifying the relevance of the Take Care Clause is challenging, and the answers are far from obvious. But some of the threshold questions that get posed – such as whether treaties fall within the “Laws” triggering executive authority, or whether the Clause is solely a reminder to the President to abide by the law – may be put to rest. When properly qualified, moreover, take care authority provides a defensible vision of constitutionally legitimate intervention by the President to fulfill our international obligations.

Part I uses the controversy surrounding the Vienna Convention on Consular Relations (VCCR) to illustrate tensions in the conventional account of presidential authority for treaty compliance. Part II establishes the general parameters under the Take Care Clause, explaining how it vests the President with the authority to execute treaties, including some that may conventionally be regarded as non-self-executing, with binding domestic legal effect. As is stressed, this authority is defeasible, meaning that it is subject to *ex ante* restraint by treaty-makers (and the Constitution) and *ex post* restraint by Congress. Part III extends that analysis to circumstances involving ICJ judgments that are binding under Article 94 of the U.N. Charter, then discusses the implications for other kinds of international decisions, Security Council resolutions, and finally treaties that lack any such intervention. The result is a theory that reaffirms executive branch authority to compel compliance with international obligations, but under a limited set of

conclusion about the take care argument’s prevalence. *Id.* at 332 & n. 151 (asserting that “the near consensus view among modern scholars holds that the President’s Take Care Clause duties broadly extend to the domestic enforcement of international law in general . . . Not surprisingly, this consensus view also prevails in the specific circumstances that gave rise to the present administration’s assertion of a unilateral authority to enforce a decision of the ICJ.”); *e.g.*, RESTATEMENT (THIRD), *supra* note 12, § 111 cmt. c (“That international law and agreements of the United States are law of the United States means also that the President has the obligation and the necessary authority to take care that they be faithfully executed.”). There are several possible explanations for the difference in judgment. One is that the sources he cites are all of a certain vintage (namely, 1984-1987); another is that they were focused on the problem of presidential law-breaking, rather than law-implementing; a third is that several covered the waterfront concerning reasons for compliance, rather than focusing on a take-care basis, as here. *See also* Vázquez, *supra* note 2, at 686 (“[E]ven if the treaty-based duty to comply with ICJ orders were judicially unenforceable . . . there would remain the President’s authority to ‘take Care that the Laws be faithfully executed’ . . . If the courts lacked the authority to enforce the ICJ Order, then the President himself could have issued an executive order postponing Breard’s execution.”). In the final analysis, though, whatever consensus there may have been has not re-emerged in the present controversy, *see infra* Part I (discussing Medellín litigation), nor have its difficulties (such as the challenge presented by non-self-executing treaties) been explored.

circumstances, and while preserving superior authority for Congress and a substantial role for the federal courts.

A few methodological points are in order. First, the Article assumes, without justifying, a conventional approach to constitutional interpretation – using text, practice, and case law – because the questions of why this argument may be resisted, and how it might fare, are interesting and important. Second, it does not attempt to evaluate all the advantages and disadvantages of rival bases for enforcing international obligations.¹⁸ Finally, the Article solely concerns treaties and, in particular, focuses on reconciling presidential orders and international decisions (both broadly construed).¹⁹ This said, it is relevant to broader debates regarding the scope of the President’s take care authority, in the foreign relations context and otherwise.²⁰

I. THE PRESIDENT’S PREDICAMENT

Interest in the President’s authority to order compliance with international law – rather than, for once, the old perennial of the President’s authority to *disobey* international law²¹ – has been revived by the repeated violation of U.S. obligations under the VCCR by state and local law enforcement officials. The nature of those violations – which may control that case’s outcome – is not particular material to the more general question, but they involved foreign nationals who were detained by state officials and not advised of their right to communicate with their consulates. This drew international attention after some of those nationals were sentenced to death – and eventually resulted

¹⁸ *But see infra* text accompanying notes 186-197.

¹⁹ “Presidential order” and “international decision” are meant to include binding pronouncements, rendered (respectively) by the President or an international dispute resolution process, in matters directly concerning the United States. The term “treaty” is meant to focus on international agreements submitted for Senate advice and consent; the same analysis applies, for the most part, to congressional-executive agreements, though these may fit uneasily with originalist premises.

²⁰ For a compatible perspective, but without focus on treaties, see Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280 (2006). Significantly, Professors Goldsmith and Manning do not resolve whether the “completion power” they posit stems from the Take Care Clause or some other source. *Id.* at 2303-04.

²¹ *See, e.g.*, Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004); *Agora: May the President Violate Customary International Law? (pts. 1 & 2)*, 80 AM. J. INT’L L. 913 (1986), 81 AM. J. INT’L L. 371 (1987); *Panel Session, The Authority of the United States Executive To Interpret, Articulate or Violate the Norms of International Law*, 80 AM. SOC’Y INT’L L. PROC. 297 (1986).

in several ICJ decisions confirming that the United States, through its states, had breached the VCCR.²²

The executive branch initially limited itself to seeking cooperation from the states, arguing that executive power was limited and that intervention by federal courts would be inappropriate.²³ As the ICJ judgments grew increasingly stringent – culminating in the *Avena* decision, which required the United States to provide “review and reconsideration of the convictions and sentences of the [covered] Mexican nationals”²⁴ – this strategy seemed increasingly untenable. Eventually, on the eve of further proceedings in the U.S. Supreme Court, President Bush issued a memorandum to the Attorney General. After noting the treaties to which the United States was party, the memorandum stated:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the [*Avena*] decision . . . by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.²⁵

This memorandum tried to bring the controversy to a close – together with the U.S. withdrawal from the Optional Protocol²⁶ – but it succeeded only in raising more questions, almost all of which are germane to other disputes. Assuming the President

²² See *Avena*, *supra* note 1; LaGrand (FRG v. U.S.), 2001 I.C.J. 466 (June 27); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

²³ See Mark J. Kadish & Charles C. Olson, *Sanchez-Llamas v. Oregon and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, the Right to Consul, and Remediation*, 27 MICH. J. INT'L L. 1185 (2006); Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT'L L. 666 (1998); e.g., Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390 & 97-8214) (“The ‘measures at [the United States] disposal’ under our constitution may in some cases include only persuasion – such as the Secretary of State’s request to the Governor of Virginia to delay Breard’s execution – and not legal compulsion through the judicial system. That is the situation here.”).

²⁴ *Avena*, *supra* note 1, at ¶ 153(9). The ICJ added further detail, including that this “review and reconsideration” would be conducted by courts and not limited by procedural default rules, so as to allow assessment of the “full weight of the violation of the rights set forth in the Vienna Convention” and a case-by-case evaluation of actual prejudice. determination made as to whether the violation “caused actual prejudice to the defendant in the process of the administration of criminal justice.” *Id.* at ¶¶ 107-114, 138-141. .

²⁵ See Presidential Memorandum, *supra* note 1.

²⁶ Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 324, 596 U.N.T.S. 487 [hereinafter *Optional Protocol*]; see Letter from Condoleezza Rice, U.S. Secretary of State, to Kofi Annan, U.N. Secretary-General (Mar. 7, 2005), http://untreaty.un.org/English/CNs/2005/101_200/186E.doc.

intended to bind state courts,²⁷ there remained the question of how he could. The allusion to the President’s constitutional authority and “the laws of the United States of America” left unstated which provisions were being invoked. The memorandum alluded in passing to the VCCR and the Optional Protocol, but those sources may have been invoked less as *bases* for action than as *reasons* for acting – motivations for presidential action that was legally founded, if at all, on other grounds. The Supreme Court cited the memorandum in remanding for state court proceedings the case of Jose Ernesto Medellín, one of the Mexican nationals at issue before the ICJ, whose VCCR claim had been procedurally defaulted.²⁸ The Court did not, however, reach any decision concerning the memorandum’s source of authority, and left open the possibility that it lacked any authority whatsoever.

In state court, the United States invoked the President’s “constitutionally based foreign affairs powers”²⁹ and “his authority under the United Nations Participation Act and by virtue of the United States’ ratification of the United Nations Charter.”³⁰ It described Article 94 of the Charter as creating a legal and political obligation, insofar as non-compliance involved recourse to the Security Council; given the President’s responsibility for exercising the U.S. vote in the Council, this suggested that the President’s wishes were paramount.³¹ Consistent with that view, it argued that individuals could not themselves invoke directly the *Avena* decision or the VCCR.³² Medellín, naturally, argued that courts *could* rely directly on the VCCR and the *Avena* decision as binding federal law.³³ But he simultaneously seconded the broad view of presidential authority, emphasizing the President’s treaty-making and foreign affairs

²⁷ Arguably it was more consistent with the memorandum’s form, the notion of comity, and principles of federalism to consider it non-binding. The states made just such an argument in the *Medellín* litigation, see State’s Brief in Response at 34-38, Ex Parte José Ernesto Medellín, No. AP-75,207 (Tex. Ct. Crim. App.), and one judge agreed. Ex Parte Medellín, *supra* note 5, * 29 (Cochran, J., concurring) (stressing that the presidential memorandum “looks much more like a memo than a law” and lacked legal effect). But a plurality assumed that it was binding. *Id.* * 9.

²⁸ Medellín v. Dretke, 125 S. Ct. 2088, 2090 (2005) (per curiam).

²⁹ Brief for the United States as Amicus Curiae at 13, Ex Parte Medellín, 2006 WL 3302639 (Tex. Ct. Crim. App. 2006) (No. AP-75,207) [hereinafter U.S. *Ex Parte Medellín* Brief].

³⁰ *Id.* at 14.

³¹ *Id.* at 18, 20-21, 44-45.

³² *Id.* at 34-49.

³³ Brief of Applicant José Ernesto Medellín at 36-44, Ex Parte Medellín, 2006 WL 3302639 (Tex. Ct. Crim. App. 2006) (No. AP-75,207).

powers,³⁴ the binding nature of the determination in its own right,³⁵ the need to ensure U.S. effectiveness in international affairs and to protect Americans abroad,³⁶ and lastly the President’s “authority and duty” to enforce the U.S. treaty obligations in the domestic sphere.³⁷ The State of Texas agreed with the U.S. government as to the unenforceability of *Avena* and the VCCR, but disagreed as to the presidential determination – which, if binding, exceeded the President’s foreign affairs authority.³⁸ State *amici* noted that the U.S. government had never acquiesced in the ICJ’s reading of the treaty, meaning that “[w]hat the President is requiring the state courts to exercise – if he is requiring them to do anything at all – is his *own* policy decision that the state courts should do as the ICJ has asked,” something that amounted more to lawmaking.³⁹

The Texas Court of Criminal Appeals wound up rejecting all the arguments for relief.⁴⁰ A plurality had a simple response to the Take Care Clause. Since the Supreme Court had already concluded that ICJ decisions were only entitled to “respectful consideration,” the President’s attempt to direct state courts to give effect to *Avena* necessarily meant that “the President has acted as a lawmaker”⁴¹ – contrary to Justice

³⁴ *Id.* at 33-36.

³⁵ *Id.* at 45.

³⁶ *Id.* at 46-49.

³⁷ *Id.* at 50.

³⁸ State’s Brief in Response at 39-40, *Ex Parte Medellín*, 2006 WL 3302639 (Tex. Ct. Crim. App. 2006) (No. AP-75,207); *see also* Brief of the States of Alabama, Montana, Nevada, and New Mexico as Amici Curiae in Support of Respondent at 14, *Ex Parte Medellín*, 2006 WL 3302639 (Tex. Ct. Crim. App. 2006) (No. AP-75,207) (“No enumerated power in Article II of the U.S. Constitution authorizes such a mandatory order, and the President’s ‘inherent’ power over foreign affairs has never been stretched so thin.”).

³⁹ Brief of the States of Alabama, Montana, Nevada, and New Mexico as Amici Curiae in Support of Respondent at 15, *Ex Parte Medellín*, 2006 WL 3302639 (Tex. Ct. Crim. App. 2006) (No. AP-75,207).

⁴⁰ According to the court, *Sanchez-Llamas* compelled the conclusion that *Avena* was not binding federal law, and thus could not preempt the relevant provisions of the Texas habeas statute. *Ex Parte Medellín*, *supra* note 5, * 7. A four-judge plurality regarded the memorandum’s attempt to create a domestic “analog” to *Avena* as an unconstitutional attempt to “dictate to the judiciary what law to apply or how to interpret the applicable law” (*id.* *10), and rejected appeal to any “inherent foreign affairs power” (*id.* *11) because the memorandum was “incompatible with the . . . implied will of Congress” and thus at the “lowest ebb” of presidential authority. *Id.* *16 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring)) – although it would apparently have permitted resolution via an executive agreement with Mexico. *Id.* *17. Citing the U.N. Charter and its related statutes was thought to add little, probably because they did not license the types of action – and domestic legal consequences – asserted in the memorandum. *Id.* ** 19-21.

⁴¹ *Id.* * 18.

Black’s admonition in *Youngstown Sheet & Tube* that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”⁴²

The pattern should repeat itself in the Supreme Court, reinforcing the sense that the Take Care Clause plays a bit part in debates over presidential authority. Medellín has again pressed every possible theory for recovery, including the idea that the President has take care authority – but argues that the President is executing the *Avena* decision itself, which is not a treaty, and which Medellín is convinced is directly effective without need of executive assistance.⁴³ On the other hand, the United States – the party entrusted to invoke the President’s claim to be exercising the Take Care Clause – does not cite it.⁴⁴

* * *

The broad spectrum of Medellín’s theories may be expected, but why the official disdain, which may be fatal to redeeming the memorandum on these grounds? Take care authority would be unattractive to the executive branch if it were solely a “duty” as opposed to an “authority” – so that it constrains presidential power rather than enhancing it.⁴⁵ At best, the Take Care Clause is *both*; unlike, say, the general constitutional authority over foreign affairs – which in practical terms is wholly elective – the take care authority constrains even as it legitimates. As such, it may grant the President little more discretion than would a concession that ICJ judgments require direct, automatic enforcement.

⁴² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), *quoted in* Ex Parte Medellín, *supra* note 5, * 18.

⁴³ Brief for Petitioner at 31, Medellín v. Texas, 75 U.S.L.W. 3398, 2007 WL 120779 (April 30, 2007) (No. 06-984) (describing the President as choosing “the means by which the United States would discharge its obligations under the *Avena* judgment”); *id.* at 32-33 (responding to plurality opinion below by contending that the President “did not purport to interpret the [VCCR],” but rather “made clear that [the United States] disagrees with the result reached in *Avena* . . . Rather, the President directed that state courts, in cases brought before them, apply existing federal treaty law as a means of carry that law” – presumably *Avena* – into effect”). *But see infra* text accompanying note 198 (describing approach to executing the U.N. Charter, rather than *Avena*). Even this was a radical expansion of its discussion in the petition, which invoked the Take Care Clause only in arguing that the greater power of concluding an executive agreement with Mexico includes the lesser power of ensuring domestic compliance with treaties. Petition for a Writ of Certiorari at 22, Medellín v. Texas, 75 U.S.L.W. 3398, 2007 WL 120779 (April 30, 2007) (No. 06-984).

⁴⁴ Brief for the United States as Amicus Curiae Supporting Petitioner, Medellín v. Texas, 75 U.S.L.W. 3398, 2007 WL 120779 (April 30, 2007) (No. 06-984) [hereinafter U.S. Medellín v. Texas Brief].

⁴⁵ *See infra* text accompanying notes 115-117.

For reasons discussed below in Part II, this constrained discretion is ultimately the strength of the argument, but it is not a benefit readily embraced. As discussed in Part III, moreover, the VCCR mess is by no means singular: Other treaties feature dispute resolution mechanisms; the Security Council has a lawmaking capacity that vastly exceeds its function in enforcing ICJ judgments; and U.S. actors – not only the executive branch, but also state governments and the judiciary – will almost certainly breach obligations that offer no international recourse, but leave the U.S. reputation for compliance tarnished. Certainly a more exhaustive inquiry into the available theories is warranted.

II. TREATIES AND THE TAKE CARE CLAUSE

Article II, § 3 provides in relevant part that the President “shall take Care that the Laws be faithfully executed.” This *sounds* good, but its meaning is obscure. First, what exactly are “the Laws”? Second, what does it mean to “take Care” of them? Narrow answers to these questions have been founded on textual premises, and broader answers derived from practice, but the better answer seems to be somewhere in between.

A. Are (All) Treaties Among “the Laws”?

The reference in the Take Care Clause to “the Laws” seems, at first blush, straightforward: Most of the Constitution’s references to “the law,” “law,” or “Laws” relate to congressional statutes.⁴⁶ But occasionally – even within Article I – “law” encompasses federal or state law,⁴⁷ state law only,⁴⁸ the law of nations,⁴⁹ or an ambiguous

⁴⁶ See, e.g., U.S. CONST., art. I, § 2, cl. 3 (Congress “by law” directs the census); *id.* art. I, § 4, cl. 2 (Congress may “by law” regulate elections and “by law” set times of assembly); *id.* art. I, § 6, cl. 1 (compensation for legislators is to be “ascertained by law”); *id.* art. I, § 7 (describing presentment and other procedures before a bill can become “a law”); *id.* art. I, § 8 (“uniform Laws” on bankruptcy); *id.* art. I, § 8 (enabling Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers”); *id.* art. I, § 9, cl. 3 (prohibiting any “ex post facto Law”); *id.* art. I, § 9, cl. 7 (limiting expenditures to those appropriations “made by Law”). Cf. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1334 (2001) (citing “distinct evidence that the term ‘Laws’ in the Supremacy Clause is limited to those ‘Laws’ adopted pursuant to Article I, Section 7”).

⁴⁷ U.S. CONST., art. I, § 3, cl. 7 (persons impeached and convicted shall be liable and subject to other punishment “according to Law”).

⁴⁸ U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from enacting any “ex post facto Law, or Law impairing the Obligation of Contracts”); *id.* art. I, § 10, cl. 2 (adverting to state “inspection laws” and “such

class.⁵⁰ Sometimes the text is more precise. For example, care is taken elsewhere in Article II to specify when the “law” concerned is one enacted by Congress.⁵¹ Article III and the Supremacy Clause also distinguish between “the laws of the United States” and “Treaties.”⁵² If those provisions had referred only to “the laws of the United States,” would treaties have been excluded?⁵³ More particularly, does the fact that the Take Care Clause refers only to “the Laws” mean that treaties are outside its ambit?

1. *Including treaties.* While a few have signaled doubt,⁵⁴ the evidence from the framing is consistent with the notion that treaties are among “the Laws” assigned to the President under the Take Care Clause. The drafting history is only suggestive. Madison originally wanted to give a “National Executive” the power to execute “the National Laws,” a formulation that would have applied awkwardly to international laws,⁵⁵ as might “the Laws of the United States” preferred by the Committee of Detail.⁵⁶ Eventually, though, the Committee of Style abbreviated it to “the laws.”⁵⁷ One may

Laws” as relate to import and export duties); *id.* art. III, § 2, cl. 1 (extending judicial power “to all Cases, in Law and Equity,” of relevant types).

⁴⁹ U.S. CONST. art. I, § 8, cl. 10 (congressional authority to “define and punish . . . Offences against the Law of Nations”).

⁵⁰ U.S. CONST. art. I, § 8, cl. 15 (permitting Congress to “provide for calling forth the Militia to execute the Laws of the Union”).

⁵¹ U.S. CONST. art. II, § 1, cl. 6 (“Congress may by Law provide for the Case of Removal, Death, Resignation or Inability”); *id.* art. II, § 2, cl. 2 (“Congress may by Law” provide for the appointment of inferior officers).

⁵² Art. III, § 2, cl. 1 (extending judicial power to cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”); *id.* art. VI, § 2 (establishing supremacy of “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States”). The Supremacy Clause further distinguishes “the Laws of any state.” *Id.*

⁵³ For many, it would make no difference, because the categories already seem to overlap. *See, e.g.,* RESTATEMENT (THIRD), *supra* note 12, § 111(1) (“International law and international agreements of the United States *are law of the United States* and supreme over the law of the several States”) (emphasis added).

⁵⁴ *See, e.g.,* MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 203 (1990) (“[T]he Framers apparently intended to limit presidential enforcement power to laws resulting from legislative action”). *See generally* Jinks & Sloss, *supra* note 21, at 157-60 (describing competing considerations, and weighing evidence, in relating Take Care Clause to presidential authority to violate treaties).

⁵⁵ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1937) (Madison) (May 29). This language or its equivalent persisted for a while. 1 RECORDS 63 (Journal) (June 1); 1 RECORDS 64, 67 (Committee of the Whole); 2 RECORDS 23 (Journal) (July 17); 2 RECORDS 145 (Committee of Detail); *see also* 1 RECORDS 244 (New Jersey Plan) (“the federal acts”); 1 RECORDS 292 (Hamilton Plan) (“all laws passed”).

⁵⁶ 2 RECORDS 171 (Committee of Detail); *see also* 2 RECORDS 158 (Pinckney Plan) (“Laws of the United States”).

⁵⁷ 2 RECORDS 574, 600 (Committee of Style).

speculate that dispensing with the qualifiers – “National,” and then “of the United States” – was intended to admit treaties,⁵⁸ accomplishing more economically what the laundry lists in Article III and the Supremacy Clause did.

Post-ratification experience, including during the era’s formative foreign affairs controversies, speaks more directly to the question. The principal authors of the Federalist Papers, Alexander Hamilton and James Madison, debated presidential authority to issue a proclamation of neutrality as to the conflict between Great Britain and France – authority President Washington claimed notwithstanding obligations owed to France under a Treaty of Alliance and a Treaty of Amity and Commerce. Hamilton, writing as Pacificus, argued comprehensively in favor of the executive branch’s authority to manage foreign affairs. Madison, as Helvidius, pushed the legislative role in making war and entering into treaties.⁵⁹ While opinions differ about how much the essays disagreed and who won,⁶⁰ they were on the same page with respect to the Take Care Clause. Pacificus stated that “[t]he 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.”⁶¹ Helvidius explicitly concurred,⁶² adding “[t]hat the executive is bound faithfully to execute the laws of neutrality, whilst those laws continue unaltered by the competent authority, is true . . . It is bound to the faithful execution of these as of all other laws internal and external.”⁶³

⁵⁸ See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 602 n.65 (2002) (making this point).

⁵⁹ In an exchange anticipating more modern disputes about “failed states,” Helvidius took particular exception to Pacificus’ argument concerning the continued vitality of the Treaty of Alliance in the wake of the French Revolution

⁶⁰ William R. Casto, *Pacificus & Helvidius Reconsidered*, 28 N. KY. L. REV. 612, 613 (2001) (arguing that the Pacificus and Helvidius essays were “not in significant conflict”); *id.* at 612 n.3 (citing those contending that Pacificus and Helvidius were at loggerheads with one another).

⁶¹ Alexander Hamilton, Pacificus No. 1, June 29, 1793, 15 THE PAPERS OF ALEXANDER HAMILTON 33 (Harold R. Syrett & Jacob E. Cooke eds., 1961-1987), reprinted in 4 THE FOUNDER’S CONSTITUTION 65; see also 7 THE WORKS OF ALEXANDER HAMILTON 566 (J.C. Hamilton ed. 1851) (reprinting draft message of March 29, 1796, by Hamilton for Washington) [hereinafter Hamilton’s March 29, 1796 Draft Message] (“Treaties, therefore, in our government, of themselves and without any additional sanction, have full legal perfection as laws.”).

⁶² After repeating a passage from Pacificus No. 1, including as the first sentence the above-quoted passage that “[t]he executive is charged with the execution of all laws, the laws of nations as well as the municipal law which recognises and adopts those laws” – Helvidius affirmed that “[t]he first sentence is a truth.” James Madison, Helvidius No. II, 6 Writings 138, reprinted in 4 THE FOUNDER’S CONSTITUTION 72.

⁶³ *Id.*

There was also substantial – but not total – agreement on the take care authority during subsequent controversies regarding extraditions, beginning with the famous Jonathan Robbins affair. Robbins was arrested in South Carolina based on accusations that he had committed murder aboard a British ship. President Adams, through Secretary of State Pickering, communicated his “advice and request” to a federal district court that Robbins be extradited to Great Britain pursuant to a provision in the Jay Treaty.⁶⁴ The court found it had jurisdiction over Robbins and ordered him turned over to the British.⁶⁵

These actions proved extraordinarily controversial, and President Adams was accused of commandeering the federal judiciary – in service of the British, and against a (purported) U.S. citizen, to boot. In the debate over whether Adams should be censured, Representative Albert Gallatin criticized Adams’ assumption of implementing authority that, in Gallatin’s view, was properly reserved to the House. But his objections hinged on the perception that the treaty was non-self-executing in character – which he surmised from gaps in the treaty and from the British practice of requiring parliamentary implementation – and he acknowledged that otherwise the President was constitutionally enjoined to “take care” that treaties be faithfully executed.⁶⁶ Then-Representative John Marshall had the task of defending President Adams. Although he also made an extensive structural case for executive authority, Marshall’s textual argument stressed the Take Care Clause, agreeing with Gallatin that the President is “charged to execute the laws” and “[a] treaty is declared to be a law” – and disagreeing only as to whether there was such a “total omission” in the treaty as to disable its execution.⁶⁷

⁶⁴ Treaty of Amity, Commerce and Navigation Between His Britannic Majesty and the United States of America, art. 27, Nov. 19, 1794, 8 Stat. 116, 129, T.S. 105; see Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 246-47, 266-68 (1990) (discussing Article 27 and its relation to the Robbins affair); *id.* at 287-99 (discussing President Adams’ request and the subsequent proceedings in federal court).

⁶⁵ United States v. Robins, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175) (digesting opinion); Wedgwood, *supra* note 64, at 299-304. The different rendering of the prisoner’s name in the case caption is generally not followed.

⁶⁶ See A. Gallatin, Observations on Robbins's Case (n.d.), *quoted in* Wedgwood, *supra* note 64, at 336. As Professor Wedgwood observes, Gallatin’s extrapolation from the British decision to adopt implementing legislation was particularly inapposite to the new U.S. constitutional order.

⁶⁷ 10 ANNALS OF CONG. 613-614 (1800) (Rep. Marshall).

Neither side in the Jonathan Robbins affair cemented its understanding of the Constitution: Marshall prevailed with respect to censure,⁶⁸ but President Adams lost the political war, the United States lost its passion for forging extradition treaties, and the executive branch lost its zeal for unilaterally enforcing existing treaties.⁶⁹ Still, there was little if any controversy regarding the shared assumption that treaties fall within the Take Care Clause. Presidents subsequently invoked the Take Care Clause to justify acts carrying out treaty obligations,⁷⁰ and the executive branch seems never to have questioned that view.⁷¹ Supreme Court cases, principally in *dicta*, have taken a broad view of “the Laws” encompassed within the Take Care Clause, and on numerous occasions have specifically included treaties among them⁷² – indeed, without stopping there. The apex was *In re Neagle*, in which the Court – seeking to justify freeing from

⁶⁸ Not to mention libel. *See* *United States v. Cooper*, 25 F. Cas. 631, 641-42 (C.C.D. Pa. 1800) (Chase, J., riding circuit) (instructing a jury that, in essence, Marshall’s view of presidential authority was correct as a matter of law).

⁶⁹ *In re Kaine*, 55 U.S. (14 How.) 103 (1852); *see* *Wedgwood*, *supra* note 64, at 361.

⁷⁰ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 50-51 (2nd ed. 1996) (“Presidents invoked that authority to carry out U.S. obligations to send troops to various parts of Latin America when required by treaty; to extradite persons to a foreign country; to suppress piracy and slave trade; to restore to a foreign government its vessels or other property; to compel U.S. citizens to honor the obligations of neutrality; to intern foreign insurgents when the United States was obligated to do so under an international convention”); WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 78, 85-88 (1925) (stressing that Take Care Clause is “not confined to acts of Congress,” and citing example of Platt Amendment to U.S.-Cuba treaty); QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 217, 227 (1922); QUINCY WRIGHT, *THE ENFORCEMENT OF INTERNATIONAL LAW THROUGH MUNICIPAL LAW IN THE UNITED STATES* 85 (1916) (citing examples suggesting that “executive measures appropriate to the fulfillment of treaty obligations may be effectively used under no authority other than the treaty itself”).

⁷¹ To the contrary, *see, e.g.*, *The Amistad*, 40 U.S. 518, 571 (1841) (argument of Attorney General) (“The executive government was bound to take the proper steps for having the treaty executed ... A treaty is the supreme law; the executive duty is especially to take care that the laws be faithfully executed ...”); *Constitutionality of Legislative Provision Regarding ABM Treaty*, 20 Op. Off. Legal Counsel 246 (1996) (“It belongs exclusively to the President to interpret and execute treaties. This is a direct corollary of his constitutional responsibility to ‘take Care’ that the laws are faithfully executed.”); *accord* *Relevance of Senate Ratification History to Treaty Interpretation*, 11 U.S. Op. Off. Legal Counsel 28 (1987); *Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals*, 10 Op. Off. Legal Counsel 12 (1986); *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. Off. Legal Counsel 185 (1980); 10 U.S. Op. Att’y Gen. 74 (1861).

⁷² *See, e.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring in judgment) (adverting to the President’s “duty to execute [treaties’] provisions”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 668-69 (1952) (Vinson, J., dissenting) (describing “legal obligations,” and more, arising from treaties and requiring presidential enforcement); *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425-26 (1925); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (declaring that “[t]he power to exclude or expel aliens ... is to be regulated by treaty or by act of congress, and to be executed by the executive authority,” regardless of whether the rules are derived from treaties or statutes).

state custody a U.S. marshal charged with murder for acts taken while defending Justice Field – asked rhetorically whether take care authority is “limited to the enforcement of acts of congress or of treaties of the United States according to their express terms; or does it include the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution?”⁷³ Justice Lamar’s vigorous dissent disputed the majority’s constitutional theory and its application in the domestic context, but he conceded that the treaty-making authority conferred a substantially greater power of execution on the executive branch.⁷⁴ If *In re Neagle* is more than sport,⁷⁵ it stands for the proposition that treaties, their penumbras, and the treaty-making power itself act as bases for the exercise of take care authority.

2. *The anti-plenary principle.* A far more cautionary note was later struck in *Youngstown Sheet & Tube Co. v. Sawyer*,⁷⁶ probably the low-water mark for presidential authority. The Court was most focused on the extent of that authority, rather than its legal foundation, but its discussion is also relevant to the threshold question of “the Laws” included within the Take Care Clause. In criticizing the President’s attempt to derive executive power to seize the steel mills from the Take Care Clause, the Court observed that “[t]he President’s order does not direct that a *congressional policy* be executed in a manner *prescribed by Congress* – it directs that a *presidential policy* be executed in a manner *prescribed by the President*.”⁷⁷

⁷³ 135 U.S. 1, 64 (1890). *In re Neagle* invoked the Take Care Clause by analogy, being instead concerned primarily with the used of the word “law” in the federal habeas corpus statute, and the Court also discovered more specific statutory authorization for U.S. marshals and their deputies. *Id.* at 68, 74-75.

⁷⁴ The majority, describing the Koszta episode – in which U.S. personnel had forcibly demanded release of a would-be U.S. citizen abducted by Austria while in Turkey – asked point-blank, “Upon what act of congress then existing can any one lay his finger in support of the action of our government in this matter?” *id.* at 64. Justice Lamar’s answer, for himself and Chief Justice Fuller: “[S]uch action of the government was justified because it pertained to the foreign relations of the United States . . . In reply, therefore, to the question, what law expressly justifies such action? We answer, the organic law, the constitution, which expressly commits all matters pertaining to our diplomatic negotiations to the treaty-making power.” *Id.* at 84-86 (Lamar, J., dissenting). For original correspondence and commentary, see *The Koszta Case* (1853), in 3 JOHN BASSETT MOORE, INTERNATIONAL LAW DIGEST 820, 820-54 (1906).

⁷⁵ See *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) (quoting *In re Neagle*); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 88 (1990) (noting that *In re Neagle* has been invoked to justify substantial exercises of presidential power).

⁷⁶ 343 U.S. 579 (1952).

⁷⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (emphasis added).

This contrast may be understood in several ways, with quite different implications. Conceivably, the Court meant that the President was charged only with executing statutes, excluding treaties (and the Constitution) from the Take Care Clause.⁷⁸ Alternatively, it may have meant to exclude presidential policy that did not purport to enforce some other law; this would authorize implementing treaties, presumably, but would also tend to confine *Youngstown* to its facts.⁷⁹ On a third reading, what *Youngstown* opposes is premising take care authority on some *other* presidential initiative. This would exclude, accordingly, not only presidential policy lacking any other basis in law (as found to be the case in *Youngstown*), but anything dependent on presidential initiative, such as the Commander-in-Chief authority claimed, unsuccessfully, in *Youngstown*.⁸⁰ The implications for treaties are unclear. If bootstrapping were feared only when the President creates authority by himself, treaties pass muster;⁸¹ but if it is also to be avoided when the President controls, in the final instance, whether to create take care authority, they would not.⁸²

⁷⁸ This is suggested by the Court's immediately preceding reference to the Necessary and Proper Clause, with the remark that "the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Id.* at 588; *see also id.* at 633 (Douglas, J., concurring) ("[T]he power to execute the laws starts and ends with the laws Congress has enacted."); *Myers v. United States*, 272 U.S. 52, 177 ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave in his power.").

⁷⁹ Some other theory, presumably, would be required to exclude presidential enforcement of state law. State statutes are indeed "Laws" in any technical sense – but not, significantly, laws of the kind otherwise entrusted to the President's care. There seems to be little support for the notion that they are among the laws encompassed within the Take Care Clause. *Insurrection in a State*, 8 U.S. Op. Att'y Gen. 8, July 19, 1856 (the Take Care Clause "refers primarily to the laws of the United States, and to those of a State or Territory only in the contingency when the case of insurrection therein is presented according to the Constitution and to acts of Congress"); HENKIN, *supra* note 70, at 348 n.57 ("The President has no constitutional authority to execute the laws of the States or of any foreign government"); ALBERT H. PUTNEY, *UNITED STATES CONSTITUTIONAL HISTORY AND LAW* 300 (1908) (under the Take Care Clause, "[t]he laws which [the President] must see executed are those of the United States, not those of the States"). *But see infra* text accompanying note 226 (discussing possibility of taking secondary account of state laws).

⁸⁰ This would exclude most Article II authority from "the Laws," though it is unclear how much take care authority adds to the President's exercise of other Article II powers. Other constitutional authority might remain to be executed. For example, the President might still invoke the Take Care Clause as a basis for enforcing constitutional restrictions on the power of the states.

⁸¹ Senate consent, of course, is necessary. Any international agreement also requires a foreign partner, which limits the potential for self-aggrandizement; the acid test of that consideration, presumably, would be executive agreements.

⁸² Treaties not only require presidential negotiation, but also ratification. (Statutes, in contrast, can be enacted without presidential assent, if the votes exist to override a veto.) Moreover, the modern treaty-making process is dominated by the executive branch. JAMES HART, *THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES* 217 (1925) (noting, in distinguishing the presidential role in treaty-making from legislation, that in the former "[a]t every stage his is the active will"); *id.* at 218 (adding that

The fourth, most persuasive reading suggests that “Laws” should be interpreted so as to mitigate presidential discretion – avoiding an absence of checks on the policy’s “execut[ion] in a manner prescribed by the President.”⁸³ This would challenge a President’s invocation of a constitutional provision not invariably, as would the anti-bootstrapping view, but only if the provision’s open-textured nature meant that executive choices were unconstrained.⁸⁴

Applying this anti-plenary view to *non*-constitutional provisions entails two threshold questions that figured prominently in the early debates. The first concerns whether the law the President seeks to enforce is binding upon him. Resisting Gallatin’s argument in the Jonathan Robbins affair that there was a gap or a defect in the law that President Adams was trying to fill,⁸⁵ Marshall not only denied that there was any such “total Legislative omission,” but emphasized that “[t]he treaty, stipulating that a murderer shall be delivered up to justice, *is as obligatory as an act of Congress making the same declaration*. If . . . there was an act of Congress in the words of the treaty, . . . could the President, who is bound to execute the laws, have justified the refusal to deliver up the criminal, by saying, that the Legislature had totally omitted to provide for the case?”⁸⁶ Marshall’s views reflected the categorical opinion of his contemporaries that treaties were binding upon everyone, including the President.⁸⁷ If not, the argument ran, who would trust us?⁸⁸

treaties are “not ordinances of the President acting alone”). Cf. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 49 (2004) (arguing that “the ‘executive Power,’ in the course of carrying out its fundamental function, can execute only laws that *already exist independently of the exercise of federal executive power.*”).

⁸³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (emphasis added).

⁸⁴ Thus permitting, for example, the combination of the Commander-in-Chief Clause and Take Care Clause thought to license the seizure of American vessels without statutory authorization in *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804), but looking more skeptically on a presidential obligation to protect the “nature of government.” In *re Neagle*, 135 U.S. 1, 64 (1890).

⁸⁵ See *supra* text accompanying note 66.

⁸⁶ 10 ANNALS OF CONG. 614 (1800).

⁸⁷ Consider, for example, the sweeping advice proffered by Chief Justice Ellsworth: “The instant the President and Senate have made a Treaty, the Constitution makes it a law of the land; and of course, all persons and bodies in whatever station or department within the jurisdiction of the United States are bound to conform their actions and proceedings to it.” William R. Casto, *Two Advisory Opinions by Chief Justice Oliver Ellsworth*, 6 GREEN BAG 413 (2003) (reprinting letter from Oliver Ellsworth to Jonathan Trumbull, March 13, 1796); see Hamilton’s March 29, 1796 Draft Message, *supra* note 61, at 567 (“[W]hen a treaty contains nothing but what the Constitution permits, it is conclusive upon all, and all are bound to give it effect.”). The idea that the President would be bound was not considered particularly radical, given the conviction of some that the Congress was legally bound by treaties. *Id.* at 567 (“Can that doctrine be true

The second question is whether presidential authority that would otherwise arise under the Take Care Clause has been displaced by the law in question, or by other laws – ordinarily, in the treaty context, through a commitment made by the original treaty-makers or in statute adopted subsequently by Congress.⁸⁹ As Professors Goldsmith and Manning put it in the statutory context, the President’s executive authority is a *defeasible* one.⁹⁰ In his speech in the Jonathan Robbins affair, Marshall famously declaimed that “Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.”⁹¹ This sense of a default authority pervades the early cases. In *Little v. Barreme*, Chief Justice Marshall appeared favorably inclined toward an assertion of take care authority, based solely on the Commander-in-Chief Clause, to seize American vessels engaged in commerce inconsistent with the hostilities then prevailing between the United States and France.⁹² But the fact remained that Congress had also provided “special authority” and in so doing “prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a *French* port”⁹³ – in effect, displacing presidential assertions of an inconsistent take care authority based on the Constitution.

3. *Including non-self-executing treaties.* Fully applying the anti-plenary approach to treaties requires distinguishing among them, including among non-self-executing treaties – a label everyone uses differently, with varying perceived

which may present a treaty operating as a law upon all the citizens of a country, and yet legally disregarded by a portion of the legislative body?”).

⁸⁸ See, e.g., Letter III of Marcus (Mar. 5, 1788), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 324-25 (Merrill Jensen et al. eds., 1976) (citing opinion of Secretary of Foreign Affairs Jay, and adding that “[i]t seems to result unavoidably from the nature of the thing, that when the constitutional right to make treaties is exercised, the treaty so made should be binding upon those who delegated authority for that purpose. If it was not, what foreign power would trust us?”).

⁸⁹ “Treaty-makers” is meant to refer both to those on the international plane – the states negotiating the treaty – and, on the domestic front, the Senate in imparting consent and the President in ratifying the treaty. This broad view of authority creates the most stringent conditions for the exercise of presidential authority.

⁹⁰ Goldsmith & Manning, *supra* note 20, at 2282.

⁹¹ 10 ANNALS OF CONG. 614 (1800).

⁹² *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804).

⁹³ *Id.* at 177-78.

consequences.⁹⁴ If a treaty provision is self-executing, no legislation is necessary before it acquires domestic force of law;⁹⁵ labeling a provision as non-self-executing is usually (not always) intended to suggest that legislation *is* necessary.⁹⁶ Sometimes non-self-execution is prescriptive in origin: an agreement indicates that further domestic implementation is necessary, or the Senate in consenting (or Congress by resolution) requires it.⁹⁷ Alternatively, the Constitution may require implementing legislation, as when a treaty provision requires the appropriation of money, criminalizes conduct or requires imposing criminal punishment, or amounts to a declaration of war.⁹⁸ In either case, the fact that non-self-executing treaties await further lawmaking suggests to some

⁹⁴ Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) (describing four different doctrines of non-self-execution); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 5 (2002) (describing four different assumptions regarding non-self-execution). Commentaries often describe treaties as self-executing or non-self-executing in the aggregate, but the answer may vary by provision. RESTATEMENT (THIRD), *supra* note 12, § 111 cmt. h.

⁹⁵ See, e.g., *TWA v. Franklin Mint*, 466 U.S. 243, 252 (1984) (stating, in describing the Warsaw Convention as self-executing, that “no domestic legislation is required to give the Convention the force of law in the United States”); *Cook v. United States*, 288 U.S. 102, 119 (1933) (concluding that “in a strict sense” a tariff treaty between the United States and Great Britain “was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (defining “self-executing” as meaning that treaty provisions “require no legislation to make them operative”).

⁹⁶ Sometimes, “non-self-executing” is meant more literally, to connote that a treaty requires implementation by some means – legislative or otherwise. The potential role for presidential take authority is then obvious. RESTATEMENT (THIRD), *supra* note 12, § 111 cmt. h (“[T]he intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation *or appropriate executive or administrative action.*”) (emphasis added); Memorandum by Stephen M. Schwebel, Deputy Legal Adviser, for the Tripartite Advisory Panel on International Labor Standards, Nov. 25, 1980, *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1980 at 394, 395 (Marian Nash Leich ed., 1988) (explaining that a non-self-executing treaty provision “cannot be applied directly by our courts as if it were a statute or other rule of law”; “[r]ather, implementation or ‘execution’ of some kind is required, usually in the form of implementing legislation”); e.g., *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, 155 F. 842, 845 (1st Cir. 1907) (treaties, like statutes, “may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted with certain powers with reference thereto”); *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878) (noting that proscriptive treaties do “not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions”), *cited with approval*, *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886);

⁹⁷ RESTATEMENT (THIRD), *supra* note 12, § 111(4)(a), (b); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

⁹⁸ RESTATEMENT (THIRD), *supra* note 12, § 111(4)(c), cmt. I & rptrs. note 6; Congressional Research Service, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate*, S. Prt. No. 106-71, at 73 (Comm. Print 2001) [hereinafter CRS]; e.g., *The Over the Top*, 5 F.2d 838, 845 (D. Conn. 1925) (“It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing.”).

that they are categorically excluded from the “Laws” contemplated by the Take Care Clause.⁹⁹

A more granular understanding of non-self-execution suggests that conclusion is overbroad. Treaties are usually described as non-self-executing to connote that they require legislation *before individuals may invoke them in courts*; otherwise, the Supremacy Clause means that they are judicially enforceable at those individuals’ behest.¹⁰⁰ This speaks inexactly to the question posed by the Take Care Clause. Perhaps a non-self-executing provision is not “Law of the Land” for all Supremacy Clause purposes, but remains among “the Laws” for the Take Care Clause; to say that a treaty is not yet ripe for an *individual* to enforce *in court* does not necessarily mean it requires legislation before *the President* must heed it. Treating the questions as coterminous has appeal, but supposes a coherent commitment to non-self-execution in the Founding Era that exceeds the evidence.¹⁰¹ Moreover, the oft-repeated rationalization for non-self-

⁹⁹ See, e.g., Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1239 (2007); Van Alstine, *supra* note 4, at 333-34. But see JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 79 (2nd ed. 2003) (“[U]nless a matter lies directly within the exclusive prerogative of Congress, it is otherwise constitutionally precluded, or legislation is required by the international instrument, the President must faithfully execute an otherwise non-self-executing treaty.”). Cf. Curtis J. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 S. CT. REV. 59, 95 (asserting in passing that “the President’s Take Care authority may include some ability to give legal effect to a non-self-executing treaty obligation”); Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1232-33 (2005) (describing “[t]he relationship between the Take Care Clause and non-self-executing treaties [a]s complex and disputed”).

Most commentaries address take care authority for treaties at a more general level, leaving one to piece together their opinion on non-self-execution. See, e.g., RESTATEMENT (THIRD), *supra* note 12, § 111 (providing that international agreements are “law of the United States” such that “the President has the obligation and the necessary authority to take care that they be faithfully executed.”). Professor Henkin’s treatise may be inconsistent. Compare HENKIN, *supra* note 70, at 206-07 (“Self-executing treaties, and other treaties after they are implemented by Congress, are subject to the President’s duty to ‘take care’”), with *id.* at 203-04 (all treaties, self-executing or not, legally bind the United States and constitute the supreme law of the land), and *id.* at 204 (suggesting that even for non-self-executing treaties, “[i]t is [the] obligation [of the President and Senate] to see to it that it is faithfully implemented; it is their obligation to do what is necessary to make it a rule for the courts” if that is proper). Perhaps the President’s obligation is limited to the legislative process – introducing legislation, or not vetoing it – but it is simply not clear. Cf. *id.* at 206-07 (“If a treaty entails domestic regulation and legal consequences in the United States, and is not self-executing, or if it requires appropriation of funds, the President has to seek Congressional action.”).

¹⁰⁰ *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); Vazquez, *supra* note 94, at 695-96 & n.7. As Professor Vázquez notes, other doctrines like standing may also impair direct enforcement. *Id.* at 699 n.20.

¹⁰¹ To the contrary, many expressed an unqualified view that treaties were binding under the U.S. Constitution, including (seemingly) for the President, irrespective of whether those treaties might be enforced by individuals in court. See *supra* text accompanying notes 87-88. This may have amounted to a conviction that all treaties were self-executing. E.g., Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV.

executing treaties, they are not cognizable in the courts because they are first addressed to the political branches,¹⁰² may be perfectly consistent with vesting authority in the President.

It is more constructive, accordingly, to draw a different distinction among treaty provisions, one disaggregating the effects of non-self-execution. One class of treaty provisions might be called *non-executive*: prescriptively non-self-executing (or self-executing) treaty provisions that necessarily inhibit executive branch authority,¹⁰³ constitutionally non-self-executing provisions (all of which preserve congressional primacy),¹⁰⁴ and any provisions that provide constitutionally inadequate direction to the President.¹⁰⁵ The residual, broader class of *executive* provisions comprises all other self-executing and non-self-executing provisions.¹⁰⁶

2095, 2128-29 (1999) (citing near-universal evidence of opinion during Convention and during ratification debates); C.H. McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709, 748 (1958) (“[I]t seems unlikely that the framers intended legislative actions should ever be required to give effect to treaties in domestic law”); cf. Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006) (describing regime of partial self-execution). This suggests that it may be anachronistic to construe the Take Care Clause through the non-self-execution doctrine of *Foster v. Nielsen*, 27 U.S. (2 Pet.) 253, 314 (1829).

¹⁰² See, e.g., *The Head Money Cases*, 112 U.S. 580, 598 (1884) (“A treaty is primarily a compact between independent nations” that depends on governmental honor and good will and, if that fails, on “international negotiations and reclamations”; “[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress.”); *Foster v. Nielsen*, 27 U.S. (2 Pet.) 253, 314 (1829) (“[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (explaining that for “the particular Security Council Resolution on which plaintiffs rely,” the provisions relied on “were not addressed to the judicial branch of our government”).

¹⁰³ This may be evidenced by general non-self-execution provisions – affecting all actors, including potentially the President – in the treaty itself, in a reservation, understanding, or declaration (RUD) to the treaty, or in subsequent legislation. See *infra* text accompanying notes 108, 113 (providing examples). The President’s power would also be limited by provisions delegating enforcement responsibility elsewhere, such as those entrusting an enforcement decision to the prevailing state. Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), Jan. 19, 1981, ¶ 17, U.S.-Iran, 81 DEP’T ST. BULL., Feb. 1981, at 1, reprinted in 1 IRAN- U.S. C.T.R. 3 (1983) (providing that “[a]ny decision of the [Iran-U.S. Claims Tribunal] . . . may be enforced by the prevailing party in the courts of any nation in accordance with its laws.”). The more controversial examples involve international institutions – for example, the inspections regime associated with the Chemical Weapons Convention. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons, January 13, 1993, art. IX & Verification Annex, Part II, 32 I.L.M. 800 [hereinafter CWC]; see John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998) (elaborating constitutional objection to inspection regime).

¹⁰⁴ See *supra* text accompanying note 98.

¹⁰⁵ See McLaughlin, *supra* note 101, at 748 (describing as non-self-executing “treaties [that] impose obligations intended to be discharged through legislative action or fail to provide guides for

To be sure, this distinction is not itself self-executing, any more than the conventional inquiry into non-self-execution. Courts that have difficulty identifying whether a treaty requires further implementation may have equal difficulty deciding whether that implementation must take the particular form of legislation. Just as it may be unclear whether U.S. treaty-makers opposed all invocations of a treaty by individuals, or (only) private rights of action,¹⁰⁷ it may be unclear whether they sought further to prevent executive implementation in the absence of legislation.¹⁰⁸

Whatever its difficulties, the executive/non-executive distinction is both truer to the anti-*plenary* understanding of *Youngstown* and permits more nuanced directions from the treaty-makers. The first inquiry, again, is whether treaties, or the subclass of treaty provisions in question, bind the President. If they do, then the Take Care Clause is implicated; if they do not, then they would not constrain his attempts to execute them, and licensing the President to implement them under the Take Care Clause would confer excessive authority.¹⁰⁹ The executive branch has generally contended that non-self-

executive action”). This would therefore include provisions that violate the anti-*plenary* principle developed in the remainder of this section.

¹⁰⁶ The extent of permissible execution, of course, is another matter, and there may be independent constitutional limitations, like the anti-commandeering doctrine, that prohibit execution by the national government altogether. See *infra* text accompanying notes 162-165.

¹⁰⁷ Compare Bradley & Goldsmith, *supra* note 97, at 421 (arguably that all invocations by individuals were targeted), with David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999) (suggesting that only individual causes of action were).

¹⁰⁸ This distinction is of potential significance for human rights treaties employing non-self-executing declarations, but lacking the kind of proviso used for the Genocide Convention and the Torture Convention. The State Department’s concern – that “the substantive provisions of the treaties would not of themselves become effective as domestic law”, see Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. Exec. Doc. No. 95-2, at v, vi (letter of submittal, U.S. Dept. of State, Dec. 17, 1977) – was consistent with presidential execution; the interest was mainly in warding off any suggestion that they were “directly enforceable law on a par with Congressional statutes.” *Id.* at viii, xv; see *id.* at viii (indicating that “it is . . . preferable to leave any further implementation that may be desired to the domestic legislative and judicial process”) (emphasis added). Presidential execution would also be consistent with some of the stated rationales for non-self-execution. Bradley & Goldsmith, *supra* note 97, at 419-20. It would not, certainly, satisfy any desire to involve the House of Representative in determining the scope of domestic rights. On the other hand, the President could serve the goal of reconciling any minor differences between treaty-based rights and domestic law, particularly if U.S. law already satisfied virtually all treaty obligations.

¹⁰⁹ It appears that the President retains, as a practical matter, the capacity to end the obligation completely – for either self-executing or non-self-executing treaties – but that simultaneously terminates any pretense to take care authority. See *supra* text accompanying note 26 (noting withdrawal of United States from Optional Protocol); cf. *Goldwater v. Carter*, 444 U.S. 996 (1979) (declining to decide whether the President has unilateral authority to terminate treaties).

executing provisions confer authority just as would their self-executing kin.¹¹⁰ However, it has at least once contended that the President may lawfully violate non-self-executing treaties;¹¹¹ if that position were maintained, contrary to the weight of authority, it would surely undermine any claim to take care authority, if not eliminate it.

The second anti-plenary inquiry – whether the President’s take care authority has been limited by the Constitution or by the treaty-makers – dovetails with the shift from speaking in terms of non-self-execution to distinguishing between executive and non-executive provisions. Provisions that constitutionally require implementation by Congress, and that even the Senate and President together could not manage, clearly limit the President’s authority standing alone. Likewise, if state parties expected that legislation would be required prior to *any and all* domestic implementation¹¹² – or if the treaty-makers established that understanding on the domestic plane¹¹³ – the President

¹¹⁰ For example, William Howard Taft – while rebutting more expansive theories of presidential authority, and insisting on locating presidential authority in some “affirmative constitutional or statutory provision” – described the Take Care Clause as encompassing treaties not yet implemented by domestic legislation, and not as being “confined to express Congressional statutes and provisions having force of law in treaties.” TAFT, *supra* note 70, at 139-40, 85-92; *accord* Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185, 186 (1980) (citing foreign affairs powers in support of presidential authority to deploy armed forces abroad, and stating that “[t]he President also derives authority from [the Take Care Clause], 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”).

¹¹¹ Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 U.S. Op. Off. Legal Counsel 163 (1989) (concluding that “the President, acting through the Attorney General, has inherent constitutional authority to order the FBI to investigate and arrest individuals in a manner that departs from international law,” including “unexecuted treaties or treaty provisions that have not become part of the domestic law of the United States.”); *id.* (describing compliance with “an unexecuted treaty [a]s a political issue rather than a legal one,” because it is “not legally binding on the political branches,” so that the President “retains full authority to determine whether to pursue action abridging the provisions of unexecuted treaties”).

¹¹² As Professors Bradley and Goldsmith observe, it has sometimes happened – not, to my knowledge, since World War II – that “international non-self-execution clauses” made treaties (or parts thereof) effective only after Congress passed implementing legislation. Bradley & Goldsmith, *supra* note 97, at 408; *e.g.*, Convention between the United States of America and His Majesty the King of the Hawaiian Islands, Jan. 30, 1875, U.S.-Hawaii, art. V, 19 Stat. 625, 627 (postponing treaty’s effectiveness “until a law to carry it into operation shall have been passed by the Congress of the United States of America”). And a few treaties, again none of recent vintage, have specified that implementation would be accomplished by Congress. Bradley & Goldsmith, *supra* note 97, at 408; *e.g.*, Treaty of Peace Between the United States and Austria, Aug. 24, 1921, U.S.-Aus., 42 Stat. 1946, 1949 (providing that U.S. would refrain from involvement with international treaty body “unless and until an Act of the Congress of the United States shall provide for such representation or participation.”).

¹¹³ For example, for both the Genocide Convention and the Torture Convention, the Senate resolutions of ratification instructed the President not to deposit the U.S. instrument of ratification until Congress had enacted implementing legislation. U.S. Senate Resolution of Advice and Consent to

could not assume authority that had been diverted. Last, but scarcely least, the President's authority remains fully defeasible in other regards. Assuming, for example, that a non-self-execution declaration conditioning U.S. consent to a human rights treaty did not directly oust presidential authority, such authority would remain subject to substantive conditions on U.S. consent and relevant statutory enactments.¹¹⁴

B. How Are Treaties to “be faithfully executed”?

Assume we know what “the Laws” are. What does it mean to “take Care” that they “be faithfully executed”? The initial question is whether the Take Care Clause confers authority of some kind, or rather only reminds us that the President is subject to the law. If authority is entailed, the question of limiting principles becomes paramount.

1. *The case for affirmative authority.* Probably the majority view among commentators is that *de minimis* authority, at most, is conferred by the Take Care Clause. The precise formulation varies. A minimalist conception has the Clause cautioning the President to refrain from acting contrary to law, and probably enables responsibility for ensuring compliance by the executive branch as a whole.¹¹⁵ A broader and more popular variant obliges the President to pursue compliance, according to the letter of law, both within and without the executive branch, with the objective of the Take Care Clause being to negative the executive's assumption of any “dispensing power” to ignore the law

Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, 132 Cong. Rec. S1378 (daily ed. Feb. 19, 1986) (declaration); U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17491 (daily ed. Oct. 27, 1990) (proviso). This meant that there was no internationally binding treaty, non-self-executing or otherwise, available for implementation until after legislation was enacted.

¹¹⁴ For example, legislation implementing the Genocide Convention – which had lacked any non-self-execution declaration – added an extremely broad provision attempting the same thing. 18 U.S.C. § 1092 (providing, in implementing Genocide Convention, that “[n]othing in this chapter shall be construed as . . . creating any substantive or procedural right enforceable by law by any party in any proceeding”).

¹¹⁵ The distinction may be significant for attempts to invoke the Take Care Clause against congressional encroachments into the administration of law. *See, e.g.,* *Myers v. United States*, 272 U.S. 52, 117, 132 (1926) (citing Take Care Clause in support of removal power); Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757 (1979). But it may not materially alter the conception of the clause as imposing duties only. *See, e.g.,* Mary M. Cheh, *When Congress Commands a Thing to be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 275 (2003) (“[I]t is true that the president, to do his job, is impliedly granted those powers which enable him to see that the laws are, in fact, faithfully executed, and he is impliedly given sufficient power to supervise subordinates to see that they are performing their tasks. But, in its essence, this clause is a duty conferred”).

selectively.¹¹⁶ These approaches share the notion that the clause is a duty rather than a power – meaning that, in practice, only the executive branch is subject to it.¹¹⁷

This is a powerful and appealing reading – the dominant theme of the Take Care Clause, certainly, is one of restraint and mindfulness – but ultimately incomplete. The text, often taken to belie any grant of power,¹¹⁸ actually cuts in both directions: to “take Care” of the laws is more capacious than mere obedience; the passive phrasing of the President’s responsibility, “that the laws be faithfully executed,” does not intimate an exclusive focus on self-compliance; and it is odd, to the modern ear, to treat “execute” as synonymous with “comply” (one does not “execute” a speed limit by obeying it).¹¹⁹ The drafting history, insofar as it evolved away from references to a “power,” favors a narrow reading.¹²⁰ But those changes were not explained, and the shift toward obligatory language does not, by itself, contraindicate the notion that power was simultaneously

¹¹⁶ See, e.g., LAWSON & SEIDMAN, *supra* note 82, at 47 (describing the Take Care Clause’s function “as an anti-inference provision by foreclosing any argument . . . that the ‘executive Power’ includes a general power to suspend the laws”); Christopher N. May, *Presidential Defiance of ‘Unconstitutional’ Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 873-74 (1994) (same).

¹¹⁷ See, e.g., WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 149 (1829) (the Take Care Clause “declares what is [the President’s] duty, and gives him no power beyond it. The Constitution, treaties, and acts of congress, are declared to be the supreme law of the land. He is bound to enforce them; if he attempts to carry his power further, he violates the Constitution.”); JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 177-78 (1840) (“[W]e are not to understand, that this clause confers on the President any new and substantial power to cause the laws to be faithfully executed, by any means, which he shall see fit to adopt, although not prescribed by the Constitution, or by the acts of Congress. . . . The true interpretation of the clause is, that the President is to use all such means as the Constitution and laws have placed at his disposal, to enforce the due execution of the laws”); 2 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1151 (1910) (the Take Care Clause “is an obligation but confers in itself no powers,” such that “this obligation is to be fulfilled by the exercise of those powers which the Constitution and Congress have seen fit to confer”).

¹¹⁸ See, e.g., Cheh, *supra* note 115, at 275 (“The language and structure of Article II plainly indicate that this clause is a duty imposed on the president, not a source of power per se.”); Van Alstine, *supra* note 4, at 334-35 (“[T]he Take Care Clause is essentially a duty, not a power . . . Its operative verb thus states that the president ‘shall’ faithfully execute the laws.”); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1198 n.221 (1992) (describing Take Care Clause text as “suggest[ing] an obligation of watchfulness, not a grant of power”).

¹¹⁹ I owe the illustration to John Harrison, though he does not draw the same conclusions from it.

¹²⁰ The language changed from the “power to carry into execution,” see 1 RECORDS 63 (Journal) (June 1), the “power to carry into effect” national laws, 1 RECORDS 66 (Madison) (June 1); 2 RECORDS 23 (Journal) (July 17), and the “power[] . . . to carry into execution” with a “duty to provide for the due & faithful exec—of the Laws of the United States (be faithfully executed) to the best of his ability,” 2 RECORDS 145 (Committee of Detail), before moving in the Committee of Style from a duty to “take care that the laws of the United States be duly and faithfully executed” to the present form. 2 RECORDS 574, 600 (Committee of Style).

conferred.¹²¹ Notably, the Framers eschewed the approach of state provisions that expressly prohibited any dispensing or suspensory power without stating any authority affirmatively.¹²²

There is little genuine appetite for any crabbed construction. In the academy, those favoring a narrow understanding of the Take Care Clause not infrequently compensate by reading the Vesting Clause quite broadly.¹²³ Others argue that the original understanding of the clause, if more confined, must have evolved to keep pace with the modern administrative state.¹²⁴ This reluctance seems to hold for the treaty context. It is widely accepted, for example, that the Take Care Clause authorizes entering into executive agreements in furtherance of treaties.¹²⁵ Academic opinion, accordingly, has shown more than token resistance to the *de minimis* reading of the clause.¹²⁶

Case law and practice, in any event, have consistently seen the President's authority differently. The Supreme Court has repeatedly indicated that the President's own compliance does not exhaust the Take Care Clause's import.¹²⁷ It has also inferred authority beyond that specifically conferred by statute or treaty. The Court has opined, for example, that the United States had standing to bring suit, despite the absence of

¹²¹ As noted below, it might be sufficiently explained as making clear that the laws equally (but not exclusively) bound the President himself.

¹²² See 4 THE FOUNDER'S CONSTITUTION 123-24 (reprinting Virginia Bill of Rights, Virginia Declaration of Rights, Delaware Declaration of Rights and Fundamental Rules, and Vermont Constitution).

¹²³ *E.g.*, Calabresi & Rhodes, *supra* note 118; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

¹²⁴ *E.g.*, JED RUBENFELD, *REVOLUTION BY JUDICIARY* 64 (2005).

¹²⁵ See Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or President Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 248 280-81 (1945); 31 AM. SOC'Y INT'L L. PROC. 92 (1937) (remarks of Albert Lévit). This category may, or may not, overlap perfectly with circumstances in which a treaty *expressly* authorizes follow-on executive agreements. See RESTATEMENT (THIRD), *supra* note 12, § 303(3); *e.g.*, *Wilson v. Girard*, 354 U.S. 524 (1957).

¹²⁶ *E.g.*, 2 CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 256-57 (1902) ("When . . . there is a treaty between the United States and a foreign government, the Executive has the power to surrender a fugitive to a foreign government, *although* Congress has not passed any legislation to make the treaty effectual"); *id.* at 258 (noting that certain treaty provisions involved "were self-operating"); HART, *supra* note 82, at 235 ("The general principle that the President cannot legislate is modified to the extent that he can issue administrative ordinances, not to be sure to create substantial duties of officers, but nevertheless to fill up the interstices of the their regular statutory duties").

¹²⁷ See, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 755 (1999) (adverting to "[a] suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed'"); *Printz v. United States*, 521 U.S. 898, 922 (1997) (contemplating that the President's take care authority properly entrusts the executive branch with the responsibility for implementing the Brady Act).

statutory authorization, in order to “to carry out treaty obligations to a foreign power.”¹²⁸ The right to participate in litigation can have significant consequences,¹²⁹ and sometimes take care authority has been reckoned to go considerably farther. *In re Neagle* proposed a presidential power, exercised through the Attorney General, entitling federal officials to habeas corpus relief; *United States v. Valenzuela-Bernal* subsequently suggested that the Take Care Clause permits not only the prosecution of persons violating U.S. federal criminal statutes, but also their apprehension.¹³⁰

The executive branch, for its part, has relied on the Take Care Clause in the legal defense of a variety of constitutional entitlements.¹³¹ More conspicuously, presidents have relied on take care authority to send troops required under a treaty, to extradite persons to a foreign country, to attack the slave trade, to require private citizens to observe a state of neutrality, and to intern foreign insurgents when obliged to do so by treaty.¹³² President Cleveland articulated a widely held view in describing the Take Care Clause as “equivalent to a grant of all power necessary to the performance of his duty in the faithful execution of the laws,” and “evidently intended as a general devolution of

¹²⁸ *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425-26 (1925). As the Court acknowledged, however, the primary ground for standing was presidential authority to remove an obstruction to interstate and foreign commerce. *Id.*

¹²⁹ For example, in *In re The Nuestra Senora de Regla*, 108 U.S. 92 (1882), the United States appeared in a libel action for the apparent purpose of determining the damages it owed for the capture of a Spanish-flagged private vessel. The Court held that this submission waived its immunity from suit, notwithstanding the U.S. objection that the executive branch could not do so in the absence of “express legislative authority”; the Court replied that executive’s right derived from its duty under the law of nations to submit captured vessels to prize courts for adjudication, given that otherwise the United States would violate its obligations to Spain. *Id.* at 102-103.

¹³⁰ 458 U.S. 858, 863 (1982); *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 684 (1952) (Vinson, C.J., dissenting) (observing that, in the Jonathan Robbins affair, President Adams issued an extradition warrant in furtherance of a treaty without other express authority).

¹³¹ *See, e.g.*, 13 U.S. Op. Off. Legal Counsel 300, Sept. 28, 1989 (legislation that impairs the President’s ability to communicate with Congress and with the American people interferes with take care authority); Authority of the President to Remove the Staff Director of the Civil Rights Commission and Appoint an Acting Staff Director, 2001 WL 34815748 (OLC), March 30, 2001 (attributing appointment power to Take Care Clause); Holdover and Removal of Members of Amtrak’s Reform Board, 2003 WL 24170382 (OLC), Sept. 22, 2003 (attributing removal power to Take Care Clause and the executive power); Maintaining Essential Services in the District of Columbia in the Event Appropriations Cease, 12 U.S. Op. Off. Legal Counsel 290 (1988) (describing as a “necessary adjunct” of take care authority “the power ‘to protect federal property and functions.’”).

¹³² For examples, *see* HART, *supra* note 82, at 225-38 (1925); HENKIN, *supra* note 70, at 51; WRIGHT, CONTROL, *supra* note 70, at 217-18; William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 613-14 (1916); *see, e.g.*, Ex parte Toscano, *supra* (internment); Presidential Power to Use Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185, 186 (1980); Suspension of the Privilege of the Writ of Habeas Corpus, 10 U.S. Op. Att’y Gen. 74, 82 (1861).

power and imposition of obligation in respect to any condition that might arise relating to the execution of the laws.”¹³³

Nevertheless, further scrutiny is warranted by what’s at stake. Assuming the Take Care Clause licenses initiating legal proceedings, and a host of presidential activities *outside* the judicial sphere, could *In re Neagle* possibly be right in suggesting that it also allows the President to generate binding rules of decision?¹³⁴ If the Take Care Clause allowed the President to establish outcome-determinative rules relating to, but not dictated by, U.S. treaties and statutes, it would be an awesome power.¹³⁵ *Youngstown*, among other cases, regards the clause as having precisely the opposite implication: by its reckoning, “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”¹³⁶

This distinction between laws and their execution – however difficult to rationalize¹³⁷ or apply¹³⁸ – has indeed been central to debates over the scope of Take Care authority.¹³⁹ But it plays a smaller role in limiting the power conferred to take care of

¹³³ GROVER CLEVELAND, *PRESIDENTIAL PROBLEMS* 15, 16 (1904).

¹³⁴ The difference seems significant. The United States has argued that the capacity to initiate suit against a state to enforce a treaty obligation necessarily includes the authority to resolve the point in litigation. U.S. *Medellin v. Texas* Brief, *supra* note 44, at 19. But the difference is of course material. In *Sanitary District*, the Court seemed to regard the Attorney General’s “execution” of the Commerce Clause as sufficient to establish standing, not to resolve the case. On the other hand, in *Sanitary District* the only expression of executive authority was via the suit itself – that is, there was no pre-litigation act resembling the President’s VCCR memorandum.

¹³⁵ See, e.g., STORY, *supra* note 117, at 177 (explaining that empowering the President to use “any means, which he shall see fit to adopt . . . would be to clothe him with an absolute despotic power over the lives, the property, and the rights of the whole people. A tyrannical President might, under a pretence of this sort, punish for a crime, without any trial by jury, or usurp the functions of other departments of the government”).

¹³⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) (“The power to make the necessary laws is in Congress; the power to execute in the President”) (quoting *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866)).

¹³⁷ See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1789-1984* at 144 (5th rev. ed. 1986) (“[T]he only power the legislature possesses to delegate is legislative power; yet . . . it is this power precisely that the legislature cannot delegate. Conversely . . . the executive should be incapable of receiving or exercising anything but executive power, from which it must follow either that the executive can never receive any power from the legislature or that when power passes it automatically transmuted from legislative into executive power.”).

¹³⁸ See, e.g., *Printz v. United States*, 521 U.S. 898, 927-28 (1997) (suggesting intractable difficulty of distinguishing “between ‘making’ law and merely ‘enforcing’ it, between ‘policymaking’ and mere ‘implementation’”).

¹³⁹ See, e.g., *In re Neagle*, 135 U.S. 1, 83 (1890) (Lamar, J., dissenting) (“[W]hile it is the president's duty to take care that the laws be faithfully executed, it is not his duty to make laws or a law of the United States. . . . [F]or the president to have undertaken to make any law of the United States pertinent

treaties.¹⁴⁰ The “legislative” component of treaty-making lies within Article II, and unlike statutes, treaties require that the President participate in lawmaking.¹⁴¹ The widely held conviction at the founding as to the need to enable the implementation of treaties – which, because they must allow adaptation to each state’s domestic procedures and conditions, are more likely to leave substantial questions of implementation unresolved – also suggests less compunction about giving relatively robust powers over execution; the founding generation was keen to enable the President to prevent treaty violations that might anger foreign states.¹⁴²

The diminished significance of the legislative/executive divide for treaties was reaffirmed during debates over the House’s role. The Convention defeated a proposal to give Congress an enumerated power “to enforce treaties,” which was struck as “superfluous since treaties were to be ‘laws’”;¹⁴³ this power to “enforce,” presumably, fell to the President – via the Take Care Clause – and not just to the courts. Periodic attempts by the House to recapture a role for treaties touching on Article I largely failed,¹⁴⁴ even as they reaffirmed the understood breadth of the President’s role: those advocating congressional involvement in implementation did not resist describing that

to this matter would have been to invade the domain of power expressly committed by the constitution exclusively to congress.”).

¹⁴⁰ See LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 24-25 (1990).

¹⁴¹ See Hamilton’s March 29, 1796 Draft Message, *supra* note 61, at 559 (“The whole power of making treaties is therefore by the Constitution vested in the President and Senate”); see also *supra* text accompanying note 82 (describing indispensable role of President in treaty-making). This point is independent of recurring disputes as to whether the treaty power as a whole is fundamentally legislative or executive in character.

¹⁴² See, e.g., H. Jefferson Powell, *The President’s Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 *GEO. WASH. L. REV.* 527, 562 (1999). It is difficult to overstate the felt significance of avoiding further U.S. violations of treaties. See, e.g., 1 *RECORDS* 316 (Madison’s notes) (“The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.”); DANIEL GEORGE LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER* (1985); FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973); Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs*, 70 *U. COLO. L. REV.* 1277 (1999). Marshall certainly shared this view. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827) (explaining that under the Articles of Confederation “Congress . . . possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless.”).

¹⁴³ 2 *RECORDS* 182 (remarks of Gouverneur Morris).

¹⁴⁴ Aside, that is, from the sense that particular obligations (like those involving appropriations) would render a treaty provision non-self-executing. See *supra* text accompanying note 98.

role as one “executing” treaties,¹⁴⁵ and everyone took seriously both that Congress would be bound by U.S. international obligations to exercise whatever powers it had¹⁴⁶ and that this duty implied some powers.¹⁴⁷ The House’s advocates, finally, did not generally complain that whatever authority it left on the table would fall to the President, for whom it would be too legislative; the main objection, rather, was that the Senate and the President together were usurping matters confided to Congress by Article I.¹⁴⁸ In short, few seemed to have been concerned that affording the President more robust tools for executing treaties would trench on the legislative function.

All this was unsurprising, again, in light of the argument from necessity, which resonated long after the Constitution’s ratification. What Justice Story called “the duty of the national government to fulfill all the obligations of treaties” had distinctive significance for the President.¹⁴⁹ In the Jonathan Robbins affair, Marshall argued that the Jay Treaty, and the Constitution, should not be read so as to permit the formation of obligations that could not be performed;¹⁵⁰ in the absence of some contrary indication, the

¹⁴⁵ So, for example, Hamilton – drafting for Washington an unused reply to the House’s request to participate in the Jay Treaty – stated that “the House of Representatives have no moral power to refuse the execution of a treaty which is not contrary to the Constitution, because it pledges the public faith; and have no legal power to refuse its execution because it is a law.” Hamilton’s March 29, 1796 Draft Message, *supra* note 61, at 566; *id.* at 559 (critiquing the hypothesized “discretionary right in the House of Representatives to assent or not to a treaty, or what is equivalent, to execute it or not”). The House nonetheless resolved in relevant part that when a treaty stipulated regulations on a subject falling within Article I, “it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress.” 5 ANNALS OF CONG. 771 (1796); *accord* CONG. GLOBE, 42nd Cong., 1st Sess. 835 (1871) (reviving resolution).

¹⁴⁶ See generally HENKIN, *supra* note 70, at 205-06; CRS, *supra* note 98, at 167; U.S. Congress, House of Representatives, Constitution, Jefferson’s Manual, and Rules of the House of Representatives, H.R. Doc. No. 104-272, 104th Cong., 2d Sess., § 596.

¹⁴⁷ *E.g.*, *Prigg v. Commonwealth of Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842) (Story, J.) (“[A]lthough the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon congress to make laws to carry the stipulations of treaties into effect; it has been supposed to result from the duty of the national government to fulfil all the obligations of treaties.”).

¹⁴⁸ An important exception occurred during the skirmish over the 1815 commercial treaty between the United States and Great Britain, in which the House – seeking common ground with the Senate – argued in favor of “taking care” in a different sense: “Should Congress fail to legislate where legislation is necessary, either the public faith must be broken, or to avoid that evil, the executive branch of the Government must be tempted to overstep the boundaries prescribed by the Constitution.” 4 ANNALS OF CONG. 1020 (1816) (reprinting conference committee statement). There is no indication, however, that the Senate accepted the argument. *Id.* at 1022-23.

¹⁴⁹ *Prigg*, 41 U.S. (16 Pet.) at 619.

¹⁵⁰ See 4 THE PAPERS OF JOHN MARSHALL 23, 24-25 (C. Cullen & H. Johnson eds. 1984) (reprinting Virginia Federalist (Richmond, Va.), Sept. 7, 1799, at 3, col. 2) (“There must . . . have been some mode of carrying the provision of the treaty in this respect into execution, or else the article would be

executive – the party most capable of managing foreign intercourse and preventing treaty violations that might endanger the young Republic¹⁵¹ – must step forward.¹⁵² This expectation that the President would actively enforce treaties was not imputed solely to the Take Care Clause, but the emphasis on hewing to the law suggests that the Take Care Clause was part of the solution.

2. *Limiting principles.* Assume now that, in theory, a treaty – including at least some kinds of non-self-executing treaties – is among “the Laws” eligible for execution under the Take Care Clause, and that the President may do more than simply comply with the law’s letter. When does the President’s take care authority to implement treaties seem most suspect, or most above reproach?

Both expansive and limiting applications of take care authority may be found in John Marshall’s formative discussions of international law. His speech in the Jonathan Robbins case was certainly of the broader strain: Representative Marshall included treaties among the “Laws” the President had to heed, and clearly understood that this bestowed authority for performing those obligations.¹⁵³ But Marshall charted a somewhat different course as Chief Justice, particularly in *Brown v. United States*.¹⁵⁴ Evaluating the President’s power to seize enemy property within the United States at the time war was declared – absent, in his view, clear congressional entitlement¹⁵⁵ – Marshall

nugatory; and it would be absurd to suppose the parties meant to stipulate for a thing which could not be performed The treaty has not pointed out any mode, and therefore we must recur to principles and the nature of things in order to discover it.”).

¹⁵¹ 10 ANNALS OF CONG. at 613-14 (“The [Executive] department . . . entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation, seems the proper department to be entrusted with the execution of a national contract, like that under consideration.”).

¹⁵² 10 ANNALS OF CONG. 614 (1800) (“The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed?”).

¹⁵³ See *supra* note 152.

¹⁵⁴ 12 U.S. (8 Cranch) 110 (1814).

¹⁵⁵ That judgment would probably not be shared today. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2093-94 (2005) (describing how *Brown* reflected an era in which Congress “micromanaged wars,” and the expectations for specific congressional authorization were greater than at any subsequent time).

refused to regard such seizures as lawfully executing the laws of war. He supposed the claim to be that “modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power,” which he found inapposite: the laws of war might permit seizure, but did not require it, meaning an authority that was more legislative than executive in character.¹⁵⁶

Though there are plausible extrinsic explanations for the differing results in the Robbins affair and *Brown* – Marshall may have developed a more jaundiced view of international law, or shifted from political advocacy to a judicial frame of mind – they may be more easily reconciled. It might be that treaties, but not the law of nations, were properly the subject of the Take Care Clause, but Marshall did not suggest that. Nor was he likely to have drawn other conclusions based on formal status in domestic law: The treaty provision under examination in the Robbins affair may or may not have been self-executing,¹⁵⁷ and the laws of war at issue in *Brown* were arguably incorporated by Congress’ declaration of war and accompanying legislation.¹⁵⁸

The principal problem, instead, was that the customary norms at issue in *Brown* entailed too much discretion for the President to exercise under the Take Care Clause; they gave the sovereign authority to do something, without indicating sufficiently what it *must* do. This so implicated the sovereign will, being so “flexible” and “subject to infinite modification,” that it could not be entrusted to the executive.¹⁵⁹ The Jay Treaty provision at issue in the Robbins affair, in contrast, involved a defined obligation – one adopted at another state’s prompting – that, while not specifying the mode by which it

¹⁵⁶ *Brown*, 12 U.S. at 128. Justice Story thought that this misunderstood the argument. *See infra* text accompanying note 158.

¹⁵⁷ Marshall certainly argued in Robbins that no further legislative action was necessary, but he maintained at the same time that executive action was indispensable to giving the treaty domestic legal relevance. *Compare supra* text accompanying note 86 (quoting Marshall), *with* Virginia Federalist (Richmond, Va.), Sept. 7, 1799, at 3, col. 2, *reprinted in* 4 THE PAPERS OF JOHN MARSHALL 23, 24-25 109 (C. Cullen & H. Johnson eds. 1984) (“There must . . . have been some mode of carrying the provision of the treaty in this respect into execution, or else the article would be nugatory; and it would be absurd to suppose the parties meant to stipulate for a thing which could not be performed. . . . The treaty has not pointed out any mode, and therefore we must . . . discover it.”).

¹⁵⁸ This was the point emphasized by Justice Story’s dissent: in his view, the declaration of war was an expression of legislative authority vesting the President with the capacity to exploit the right (and heed the limitations) established under international law. 12 U.S. at 153-54 (Story, J., dissenting).

¹⁵⁹ 12 U.S. at 128-29.

was to be employed, did “enjoin[] the performance of a particular object.”¹⁶⁰ Justice Story, dissenting in *Brown*, claimed that the customary laws of war imposed the same discipline, but he was unable to persuade his peers.¹⁶¹

The emphasis on constraining presidential discretion echoes other elements of a principled approach to the Take Care Clause. As previously explained, whether a type of law is eligible to be among “the Laws” to be executed depends in part on whether the law in question binds the President; one must also take special care to determine whether the provision was non-executive in character, such that executing the law would disregard a constitutional directive that a matter rests with Congress, or one emanating from the treaty-makers, that limits presidential power. More generally, nothing gives the President the discretion to disregard other constitutional restrictions.¹⁶² For example, the President is bound, just like Congress, to refrain from “commandeering” state legislatures or state officials,¹⁶³ and equally must respect constitutional liberties.¹⁶⁴ This concern for

¹⁶⁰ 10 ANNALS OF CONG. 614 (1800). Representative Marshall did not, it should be noted, construe the President’s role as purely ministerial, recognizing that “policy may temper the strict execution of the contract.” In particular, he left it ambiguous as to how much latitude the President might have to disregard the treaty obligation; “the question whether the nation has or has not bound itself” to deliver an accused individual was “a question the power to decide which rests alone with the Executive department,” and whether the nation was “bound” might or might not turn solely on the President’s legal construction of the treaty. *Id.* at 614-15.

¹⁶¹ *See, e.g.*, 12 U.S. at 147 (Story, J., dissenting) (“I admit that the executive cannot lawfully transcend that limit; but if no such limit exist, the war may be, carried on according to the principles of the modern law of nations, and enforced when, and where, and on what property the executive chooses.”); *id.* at 149 (“[B]y what rule, then, must he be governed? I think the only rational answer is by the law of nations as applied to a state of war”); *id.* at 153-54 (“[H]e cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. . . . The modern usage of nations is . . . a limitation of this discretion.”).

¹⁶² *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (noting possible “qualifications” to the treaty power); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (suggesting that the treaty power could not “extend[] so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent”).

¹⁶³ *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the federal government may not compel a state to enact or administer a federal program); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government may not compel state non-judicial officers to execute federal law). It is unclear whether these constraints apply, with equal force, to the exercise of the treaty power – but if they did, they would certainly constrain the President’s authority under the Take Care Clause. Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 423-33 (2003). Notably, they do not appear to constrain the federal government’s capacity to direct state judges, at least in the guise of supreme federal law. *New York*, 505 U.S. at 178-79 (noting that “[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal “direction” of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate”).

individual rights, combined with a respect for the practice of the political branches beginning in the mid-nineteenth century, served to deny the President authority to extradite individuals in the absence of treaty or statutory authorization.¹⁶⁵

The anti-plenary approach suggests one further consideration: whether the President may claim to be contributing to a system of faithful execution. Marshall's position in the Jonathan Robbins affair favored the executive over the judiciary, to a degree that should not be overlooked,¹⁶⁶ but he did stress that the judiciary might aid the President in the treaty's execution – and emphasized that, in the matter at hand, the court had shown itself in agreement with the President's authority and his particular determination.¹⁶⁷ Marshall's reasoning was later echoed in the executive branch;¹⁶⁸ presumably, for pragmatic reasons, the appeal to judicial authority would be stronger in instances where the President's authority was more marginal.¹⁶⁹

All this is in keeping with the text of the Take Care Clause. Exhorting the President to take care that the laws “be” faithfully executed – rather than simply stating that the President shall faithfully execute them¹⁷⁰ – suggests favoring authority designed

¹⁶⁴ Reid v. Covert, 354 U.S. 1, 17 (1957) (plurality opinion) (stating that treaty power was limited by the Bill of Rights).

¹⁶⁵ Valentine v. United States, 299 U.S. 5, 8 (1936) (describing extradition as a power that “is not confided to the Executive in the absence of treaty or legislative provision”); *id.* at 10 (describing extradition as “rest[ing] upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law.”). *Valentine* is consistent with the approach taken here: As the Court noted, the treaty in question simply put the extradition of citizens to one side, as a matter not addressed by the agreement, so the only basis for executive authority was a negative one. *Id.* at 10 (“[A]s the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that the statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.”). It could not be said, accordingly, that the President was bound by international law to do anything. See *infra* text accompanying note 269 (discussing distinct treatment of authorizing provisions in connection with Security Council resolutions).

¹⁶⁶ See Wedgwood, *supra* note 64, at 339-51; see also John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 108-24 (2002-2003) (noting particular resistance to Marshall's views about the role for the judiciary in extradition cases).

¹⁶⁷ 10 ANNALS OF CONG. 615-16 (1800).

¹⁶⁸ *The Amistad*, 40 U.S. (15. Pet.) 518, 571 (1841) (argument of Attorney General Gilpin) (“The executive government was bound to take the proper steps for having the treaty executed, and these were the proper steps. A treaty is the supreme law; the executive duty is especially to take care that the laws be faithfully executed; no branch of this duty is more usual or apparent than that which is executed in connection with the proceedings and decrees of Courts.”).

¹⁶⁹ See, e.g., *Jewels of the Princess of Orange*, 2 U.S. Op. Att’y Gen. 496, 499 (1832) (urging strategy for avoiding collision between judicial and executive authority).

¹⁷⁰ Compare the immediately following instruction that the President “shall Commission all the Officers of the United States.” U.S. Const. art. II, § 3, cl. 3.

to promote the law's observance even outside the executive branch. This would not license the President to create courts or, for that matter, new independent agencies.¹⁷¹ But it does suggest that the President is entitled to authority sufficient to promote legal compliance within the United States as a whole – and helping to ensure the President's own obedience – and that this authority should be viewed more favorably when the take care authority is subject to judicial oversight.¹⁷²

The challenge, undoubtedly, lies in making that authority meaningful. *Brown* notwithstanding, modern courts may find it challenging to assess whether excess discretion has been conferred, not the least in the foreign relations context – witness the non-delegation doctrine.¹⁷³ The relevant question, as a matter of positive law, is whether the difficulty of policing such an elusive standard means that it should be disregarded – to which the Supreme Court's answer would likely be no.¹⁷⁴ Critically, moreover, the anti-plenary principle does not confront the problem posed by the non-delegation doctrine – second-guessing Congress¹⁷⁵ – since the entire premise is that Congress has neither endowed nor gainsaid take care authority.¹⁷⁶ As discussed next, the treaty context can also improve considerably the task of judicial administration, and warrant giving at least some exercises of take care authority decisive legal effect.

¹⁷¹ See WRIGHT, CONTROL, *supra* note 70, at 194 (“Although the position of the President as chief executive does not carry with it power to create agencies for enforcing international law and treaties (though such a suggestion is contained in the Neagle case), it has been held to confer a power of directing administrative action of the agencies actually existing through instructions . . .”).

¹⁷² Legislative oversight, too, is built into the approach. See also *infra* Part IV (noting desirability of enhanced lawmaking in general).

¹⁷³ See Swaine, *Constitutionality*, *supra* note 13, at 1536-48 (describing general state of non-delegation doctrine, and particular weakness in foreign affairs realm); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (stating that “congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”).

¹⁷⁴ See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (refusing to discard non-delegation doctrine, despite difficulties in administering the intelligible principle doctrine).

¹⁷⁵ *Whitman*, 531 U.S. at 474-75 (“[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”). Justice Scalia was quoting his earlier dissent in *Mistretta v. United States*, in which he had further explained that “Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.” *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting). That explanation is one wholly sympathetic to take care authority.

¹⁷⁶ See *infra* text accompanying notes 186-197 (contrasting delegation theory at it relates to ICJ decisions).

III. TAKING CARE OF TREATIES (AND INTERNATIONAL DECISIONS)

The argument for using take care authority to remedy U.S. breaches of its consular obligations may seem straightforward – and may have seemed so even prior to the above analysis. A self-executing treaty, at least, incontrovertibly binds the President both internationally and domestically; accordingly, the President should be at liberty to fulfill it. The remaining question, accordingly, is whether the treaty’s substantive and remedial provisions sufficiently constrain the President’s discretion so as to satisfy the anti-plenary principle.

The more intriguing question is the effect of an ICJ decision. Whatever its treaty basis, the actual obligation to abide by the decision is imposed by a different treaty, one that is *not* regarded as self-executing. These two bases may even be at cross-purposes. For example, while the President’s VCCR memorandum purports to implement *Avena*, the executive branch has claimed that doing so is optional, and further stated that it considers the decision mistaken as a matter of treaty interpretation.¹⁷⁷ Following the decision, then, seems either wholly discretionary or closer to the dispensing power than to compliance.

All this reinforces the impression that the U.S. position was not crafted with an eye toward the Take Care Clause. Nevertheless, it may be redeemed on that basis, once the ICJ decision is fully considered. Doing so also informs a fresh look at the exercise of take care authority in the context of other international mechanisms, and even in the absence altogether of international intervention. These situations are examined in turn.

A. *The Domestic Relevance of ICJ Decisions*

According to *Sanchez-Llamas*, an ICJ decision is entitled to “respectful consideration,” but could not control a treaty’s application by U.S. courts.¹⁷⁸ The Supreme Court implicitly rejected any suggestion that *Avena* might be enforced by individuals in its own right – independent, that is, of its bearing on the treaty’s

¹⁷⁷ See, e.g., U.S. *Medellín v. Texas* Brief, *supra* note 44, at 4 (“The President disagrees with the legal interpretations underlying the ICJ’s decision”); accord U.S. *Ex Parte Medellín* Brief, *supra* note 29, at 33-34.

¹⁷⁸ *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2680-84 (2006).

interpretation¹⁷⁹ – by recalling that ICJ decisions have “no binding force except between the parties and in respect of that particular case.”¹⁸⁰

The individuals in *Sanchez-Llamas* were not named in the ICJ proceedings, so one might take the Court to be speaking solely to the effect of an ICJ decision as precedent – and differentiate its effect as a judgment proper for those within the affected class, like Medellín.¹⁸¹ But the Court seems to have contemplated, consistent with the ICJ Statute, that the only true “parties” to ICJ proceedings were the states themselves.¹⁸² *Sanchez-Llamas*’s treatment of ICJ judgments is thus of a piece with prior cases holding that the U.N. Charter – the source of the international obligation to adhere to ICJ decisions,¹⁸³ including those rendered pursuant to the Optional Protocol¹⁸⁴ – is non-self-executing, in the sense that it may not be invoked by individuals in court.¹⁸⁵

This does not, however, exhaust the potential significance of ICJ judgments for the President. Two potential avenues deserved consideration: first, the possibility that Article 94 has delegated authority to the President; and second, the possibility that take care authority permits the President to implement the judgment – and, at the same time, potentially contrary legal considerations.

1. *Delegated authority and Article 94.* The significance of ICJ decisions within the United States is not easily determined from the positive law. Certainly neither the treaty-makers nor Congress expressly delegated to the President responsibility for

¹⁷⁹ *Cf.* Medellín v. Dretke, 125 S. Ct. 2088 (2005) (O’Connor, J., dissenting from dismissal of certiorari) (describing Medellín’s argument that “once the United States undertakes a substantive obligation . . . and at the same time undertakes to abide by the result of a specified dispute resolution process . . . it is bound by the rules generated by that process no less than it is by the treaty that is the source of the substantive obligation.”).

¹⁸⁰ *Sanchez-Llamas*, 126 S. Ct. at 2684.

¹⁸¹ *Cf.* Committee of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 938 (D.C. Cir. 1988) (concluding that Article 94 “does not contemplate that individuals having no relationship to the ICJ case should enjoy a private right to enforce the ICJ’s decision.”).

¹⁸² *Id.* at 2684; *see* Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1031, T.S. No. 993, 1 U.N.T.S. xvi (hereinafter “ICJ Statute”).

¹⁸³ U.N. CHARTER, art. 94 (providing that “[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party”).

¹⁸⁴ Optional Protocol, *supra* note 26, art. I (providing for ICJ jurisdiction over disputes “arising out of the interpretation or application of the Convention”).

¹⁸⁵ *E.g.*, Committee of U.S. Citizens Living in Nicar., 859 F.2d at 938 (construing Article 94 of U.N. Charter and ICJ Statute as indicating “no intent to vest citizens . . . with authority to enforce an ICJ decision against their own government”); Frolova v. USSR, 761 F.2d 370, 374-75 (7th Cir. 1985) (*per curiam*) (citing cases).

ensuring obedience to ICJ judgments. The U.N. Charter and the Optional Protocol suggest no particular role for the President;¹⁸⁶ rather, they state an obligation that is incumbent upon the United States to satisfy by whatever legislative, executive, or judicial means it has. (Likewise, the Senate and President, in committing the United States to those treaties, are best understood as incorporating whatever constitutional division of authority already existed.) Conversely, while the United Nations Participation Act *does* stipulate that it is the President who directs U.S. participation before the ICJ and in the Security Council, it says nothing about dealing domestically with the results of an ICJ proceeding.¹⁸⁷ Indeed, in explicitly addressing the President's authority to implement Security Council resolutions, Congress arguably communicated its understanding that nothing had been, or was being, delegated in connection with the ICJ.¹⁸⁸

The weaknesses in the claim of delegated authority to implement ICJ decisions illustrate how incompletely delegation accounts fulfill the Take Care Clause. Of course the two are intimately related. In exercising delegated authority, the President ultimately relies on the Take Care Clause.¹⁸⁹ Much the same work, consequently, needs to be done in order to sustain a claim to delegated power: If a treaty is not included among “the Laws” encompassed within the Clause, then no delegated authority should be claimed. If one assumed that treaty-makers acted with an exact understanding of the authority entailed by the Take Care Clause, the scope of delegation would still require an understanding of the Clause itself.

¹⁸⁶ *But see* U.S. *Medellin v. Texas* Brief, *supra* note 44, at 11 (contending that it “makes sense to read” the Optional Protocol and the U.N. Charter as implicitly delegating implementing authority to the President).

¹⁸⁷ The United States has argued that one logically entails the other. *See id.* at 13. While that might be more coherent, it is far from a necessary entailment. By analogy, the right to litigate on behalf of the United States entails a right to settle, see *Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928); *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 1999 WL 1262049 (O.L.C.) (June 15, 1999) – but extending the right of settlement into completely different legal systems is more of a stretch.

¹⁸⁸ *See infra* text accompanying notes 261-291 (discussing provisions relating to military action and economic and diplomatic sanctions).

¹⁸⁹ *See, e.g.*, *Skinner v. Mid-America Pipeline*, 490 U.S. 212, (1989) (describing the “discretionary authority that Congress may delegate to the Executive in order that the President may “take Care that the Laws be faithfully executed.”). Of course, the President may also claim to be exercising powers not delegated by Congress, such as the “executive Power.” U.S. CONST. art. II, § 1, cl. 1; *compare* Prakash & Ramsey, *supra* note 123, and Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH L. REV. 545 (2004).

It is doubtful, though, that delegations genuinely account for much of the authority that presidents exercise with respect to treaties. Treaties are bilateral or multilateral instruments, and it will be the rare case in which the parties share an expectation as to which particular components of their diverse constitutional systems will take charge of treaty compliance. At the domestic level, it is also unclear which institution would, or could, vest the equivalent of lawmaking authority in the President.¹⁹⁰ Absent some super-strong (and probably fictitious) presumption as to the authority that treaty-makers have delegated¹⁹¹ – one operable in other international contexts as well – it remains necessary to analyze what the Take Care Clause assigns as a constitutional default.

Focusing on take care authority, rather than on delegation *per se*, also identifies more precisely the type of presidential authority at issue, which is interstitial and harmonizing in character. In the VCCR litigation, for example, it is hard to argue that a particular treaty or statute, or their combination, vests the President with the specific authority employed – the ability to instruct state courts to comply with an ICJ judgment. The basic pitch instead is that the President is somehow responsible for implementing an obligation, imposed upon the United States as a whole, and the authority must exist somewhere in the Constitution, treaties, and federal code.¹⁹² Presidential authority is better regarded as “completing” the positive law, as a logical entailment of a *set* of laws, rather than any particular provision.¹⁹³ The nature of this responsibility, in particular for reconciling competing obligations, is elaborated below, but it suffices to say that this conception of faithful execution better explains the executive branch’s undertaking than does a paint-by-numbers delegation analysis.¹⁹⁴

¹⁹⁰ See Evan Criddle, *Chevron Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1930-31 (2003).

¹⁹¹ Professor Vazquez, for example, suggests reading a treaty as impliedly delegating to the President authority “to take action to comply if he believes it is the national interest to do so.” Vázquez, *supra* note 2, at 689. See also Van Alstine, *supra* note 4, at 365-67 (noting, but resisting, “a claim of implied comprehensive congressional authorization to enforce all formal executive actions in foreign affairs”).

¹⁹² See, e.g., U.S. *Medellín v. Texas* Brief, *supra* note 44, at 5, 16-17.

¹⁹³ See Goldsmith & Manning, *supra* note 20.

¹⁹⁴ See, e.g., U.S. *Medellín v. Texas* Brief, *supra* note 44, at 4 (“The President’s actions are justified by his authority to implement the Optional Protocol and the U.N. Charter.”).

Bottoming this interstitial and harmonizing authority on the Take Care Clause, rather than straining to regard it as an implied delegation, places the constitutional focus in the right place. Such authority will not, of course, invariably be upheld; to the contrary, the approach awakens important constraints not easily imposed on any delegation approach. If, for example, one construes ordinary foreign relations statutes or treaties as implicitly delegating extremely broad authority to the President, it is very difficult to limit such hypothetical delegations,¹⁹⁵ or to place much stock in the remnants of the non-delegation doctrine.¹⁹⁶ Take care authority is premised on a narrower, and more contingent, understanding of the authority that the Constitution presumptively vests in the President.¹⁹⁷ International adjudication, among other things, may more clearly specify the conditions under which presidential execution should be upheld.

2. *Taking care of Article 94.* May the President, by executing Article 94 of the U.N. Charter, establish a legal effect for an ICJ decision that is otherwise lacking?¹⁹⁸

The threshold requirement of “law” fit for the Take Care Clause seems to be met. The United States is certainly obligated as a matter of international law to adhere to the

¹⁹⁵ See *supra* text accompanying note 191 (describing various asserted delegations).

¹⁹⁶ See *supra* text accompanying note 173 (noting difficulties with doctrine).

¹⁹⁷ A still starker contrast is presented by the theory of inherent foreign affairs powers. Certainly an adverse, unremediated ICJ decision affects U.S. foreign relations. Cf. U.S. *Medellín v. Texas* Brief, *supra* note 44, at 4 (“[T]he United States has compelling interests in ensuring reciprocal observance of the Vienna Convention by treaty partners who detain U.S. citizens, promoting foreign relations, and reaffirming the United States’ commitment to the international rule of law”). The desire to prevent imbroglions concerning America’s international obligations was fundamental to the framing. See *supra* text accompanying notes 187-188. But the foreign affairs power really does not need the legal bells and whistles. The President’s function as the sole organ should include avoiding any debilitating controversy, not just those concerning legal affairs. This might support presidential authority to implement a (non-binding) resolution of the U.N. General Assembly condemning the death penalty, or a diplomatic protest from Mexico against the failure of the United States to treat Mexican interests with the respect they deserve. Cf. Brief Amicus Curiae of the United Mexican States at 11-14, *Medellín v. Texas*, 75 U.S.L.W. 3398, 2007 WL 120779 (April 30, 2007) (No. 06-984) (urging review based on possible damage to U.S.-Mexico relations). A case could even be made that foreign policy favors pardoning state prisoners on death row or abolishing state death penalty provisions outright. See Brief of the States of Alabama, Montana, Nevada, and New Mexico as Amici Curiae in Support of Respondent at 22-23, *Ex Parte José Ernesto Medellín*, No. AP-75,207 (Tex. Ct. Crim. App.). It would be preferable to have a principled basis for distinguishing among these circumstances.

¹⁹⁸ To be clear, the President would be executing Article 94 rather than *Avena* itself. It is not obvious that any judicial decision – as opposed to the constitutional, statutory, or treaty provision it applies – is the proper basis for authority under the Take Care Clause. See HENKIN, *supra* note 70, at 347 n.50 (reporting Story’s view that President lacked authority to carry out awards by foreign consuls absent congressional legislation); Arthur S. Miller, *The President and Faithful Execution of Laws*, 40 VAND. L. REV. 389, 399 (1987) (inquiring whether judicial decisions are among the “Laws” to be enforced, and tentatively answering affirmatively).

decision.¹⁹⁹ Under Article 94, states “undertake[] to comply with” ICJ decisions in cases to which they are parties; this undertaking would be undermined were parties to assume obligations no greater than those for non-parties,²⁰⁰ or if the legal significance of decisions were indistinct from that of advisory opinions.²⁰¹ Any ambiguity in the Charter should be resolved by the general duty of states under international law to comply with the decisions of international tribunals to which they have submitted disputes.²⁰² While Article 94(2) also provides for possible referral to the Security Council in the event of noncompliance, this scarcely detracts from the international legal obligation to comply.²⁰³

Whether non-self-executing treaties like the U.N. Charter bind the President under *domestic* law is admittedly a closer question,²⁰⁴ and Article 94(2) makes it yet more difficult. Although *Sanchez-Llamas* addressed individual enforcement only, it implied that international remedies like that afforded by Article 94(2) are inconsistent with any domestic legal effect.²⁰⁵ For reasons previously explored, this would invert the

¹⁹⁹ This has been the U.S. position, win or lose. See, e.g., U.S. *Medellín v. Texas* Brief, *supra* note 44, at 4 (describing the “United States’ international law obligation to comply with . . . *Avena*”); 80 DEP’T STATE BULL., July 1980, at 69 (statement proclaiming that “[u]nder the U.N. Charter, Iran is bound to obey the Court’s judgment” in hostages proceedings, and must do so “to pursue its international interests as a law-abiding member of the international community, entitled to the respect and cooperation of other nations”); cf. *Committee of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 934 (D.C. Cir. 1988) (“The United States’ contravention of an ICJ judgment may well violate principles of international law.”).

²⁰⁰ See also ICJ Statute, *supra* note 182, art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case”).

²⁰¹ Compare U.N. CHARTER, art. 96 (advisory opinion function).

²⁰² SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 127 (1965) (explaining that Article 94 “merely casts in the form of a conventional rule that which already exists as a general principle of customary international law. . . .”); accord Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT’L L. 1, 2-3 (1960).

²⁰³ See LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 555-58 (3d ed. 1969); 2 BRUNO SIMMA, *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1174-79 (2nd ed. 2002). As the State Department Legal Adviser explained when the Charter was originally under consideration, the point of adding Article 94(2) was not to detract from the legal standing of Article 94(1) and ICJ decisions, but rather to reinforce their significance; the uncertain prospect of Security Council action seems to have been fully appreciated, and undermines any suggestion that it was essential to the decisions’ force. The Charter of the United Nations, Hearings before the Senate Comm. Foreign Relations, 79th Cong., 1st Sess., at 331 (1945) (Green H. Hackworth) (“[A]ll that was intended by [Article 94(2)] was to show that the states expected that the decisions of the Court would be complied with, and that if they were not complied with, the complaining party would have a right to bring the matter to the attention of the Council for whatever that might be worth.”).

²⁰⁴ See *supra* text accompanying notes 94-114.

²⁰⁵ See *Sanchez-Llamas*, 126 S. Ct. at 2684-85 (“While each member of the United Nations has agreed to comply with decisions of the ICJ ‘in any case to which it is a party,’ . . . the Charter’s procedure for noncompliance – referral to the Security Council by the aggrieved state – contemplates quintessentially *international* remedies . . .”).

appropriate presumption: If Article 94 does impose an international legal obligation, it ordinarily comprises a “law” that the President must execute under the Take Care Clause. Article 94, furthermore, seems to fall comfortably within the category of non-self-executing obligations that, even if not appropriate for judicial enforcement by individuals, may be available for presidential implementation – so-called “executive” treaties. Nothing in it necessarily requires the President to exercise authority that is peculiarly within the province of Congress. Nor does it appear that the treaty-makers or Congress tried to displace presidential authority; Article 94 simply left to the states parties the means of adhering to decisions in their particular constitutional systems.²⁰⁶ As an initial matter, therefore, the Take Care Clause would seem to incorporate presidential actions that hew to obligations created by Article 94 – as where the executive order sticks to the parties specified by the ICJ (like Medellín), and makes responsible only those subject to the judgment and the underlying treaty (like the states maintaining custody of those whose rights were violated).²⁰⁷

The anti-plenary principle also asks whether the treaty binding the President affords an inappropriate degree of discretion. Nothing suggests that would invariably or routinely be the case. A typical ICJ judgment is more specific than the average treaty provision, self-executing or otherwise. Were Article 94 considered instead on an as-applied basis, *Avena* would fare well: *Avena* itself followed other increasingly specific

²⁰⁶ To that extent, at least, it supports the view expressed in U.S. briefs that the political branches “would have discretion to choose how to comply” with ICJ judgments. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at 34, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). But that does not give the President, upon U.S. ratification, the authority to refuse altogether. The failure presupposed by Article 94(2) might occur despite the President’s best efforts: other domestic actors might continue their violations nonetheless; Congress might override presidential efforts; or constitutional restrictions might inhibit the President’s efforts. Even if Article 94(2) somehow implies an *elective* capacity on the President’s part, consistent with the Constitution, to engage in massive resistance of ICJ decisions – “[i]n particular circumstances,” to “decide that the United States will not comply with an ICJ decision and, if Security Council measures are proposed, direct a veto, consistent with the United Nations Charter,” see U.S. *Ex Parte Medellin* Brief, *supra* note 29, at 21 – that would simply spell the end of any take care authority.

²⁰⁷ It should be acknowledged, though, that this construction depends on the U.S. government’s understanding that the ICJ’s decision equates to the judgment. *Compare Avena*, *supra* note 1, at ¶ 151 (indicating that “the conclusions reached . . . in the present Judgment do . . . apply to other foreign nationals finding themselves in similar situations in the United States”), with U.S. *Ex Parte Medellin* Brief, *supra* note 29, at 31 (stressing that the determination “applies only to the 51 individuals whose rights were determined in the *Avena* case. The scope of the President’s determination is thus consistent with the scope of the ICJ’s decision with respect to each of the individual cases before it.”); *id.* at 18 n.2 (noting understanding of judgment).

ICJ decisions, and required that the United States establish a judicial process to perform a particular task (“review and reconsideration of the convictions and sentences”), under a particular standard (actual prejudice), and subject to a particular constraint (barring use of procedural default rules).²⁰⁸ While the judgment certainly left some room for debate, as would any judicial decision, it was far from a blank check.²⁰⁹ To be sure, the ICJ left it to the United States to implement the judgment “by means of its own choosing.”²¹⁰ But less was left to the *President’s* own choosing. The ICJ engendered a binary decision – according to which the United States complied with, or defied, its judgment – with indifference as to which domestic actor, and by which domestic procedure, that judgment was executed; on the view presented here, the U.S. choice was made by the Take Care Clause. If that was insufficiently constraining, it calls into question a wide range of presidential power.

Finally, the President’s memorandum also appears to contribute to a system of faithful execution. The ICJ itself indicated that the *Avena* judgment was to be administered by courts and, to that extent, limited the President’s discretion. The memorandum reiterated that role – “by having State courts give effect to the decision in accordance with general principles of comity in cases” – and further enhanced the judicial responsibility by leaving to the courts the articulation of any actual prejudice standards, as well as the application of that standard to particular cases.

3. *Taking care of legal conflicts.* Discussion to this point has danced around a central problem beautifully illustrated by the *Medellin* mess – that laws and decisions do not always align. Not only did the executive branch steadfastly resist the ICJ’s approach to the VCCR, but it continues to regard *Avena* as wrongly decided.²¹¹ This means that the presidential memorandum, while citing the VCCR as one of its legal bases, appears to have opted for *Avena* at the expense of what it deems to be the better understanding of

²⁰⁸ *Avena*, *supra* note 1, at ¶¶ 153(9), 140-41, 121, 113.

²⁰⁹ To illustrate, Justice Breyer’s suggestion in *Sanchez-Llamas* that procedural default hearings might be satisfactory “review and reconsideration,” and that default rules might be maintained if states afforded alternatives like ineffective-assistance-of-counsel claims, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2699-2700 (2006) (Breyer, J, dissenting), was easily dismissed as having been foreclosed by the ICJ. 126 S. Ct. at 2686 n.6; see Bradley, *supra* note 99, at 107 (calling argument “creative”).

²¹⁰ *Avena*, *supra* note 1, at 72.

²¹¹ See *supra* text accompanying note 177.

the VCCR. As if that weren't enough, the President's asserted power to override state procedural default rules seems to contradict earlier representations that the United State was bound – at least in the absence of further legislation – to respect state law.²¹² This arguably undermines any claim by the President to be faithfully executing the law.

Appearances notwithstanding, the take care approach is tailor-made for instances like these, in which multiple obligations need to be completed and reconciled within the national legal order. Such problems do not resolve themselves. The international plane permits pervasive conflicts among treaty obligations,²¹³ even within the same treaty scheme; for example, once the Optional Protocol's dispute resolution mechanism has run its course, the ICJ's opportunity to redress conflicts between its decisions and its sense of the underlying treaties is sharply circumscribed.²¹⁴ The international order, furthermore, maintains indifference toward any further complications added by domestic law, such as those arising in a federal system.²¹⁵ Even domestically, discrepancies are routine when the federal government is administering a single statute, let alone several treaties and related statutes.

The Take Care Clause gives a limited authority to resolve this sort of conflict in entrusting the President not with executing “the Law,” but rather with taking care of “the Laws.”²¹⁶ Even if this means, literally, each and every law – rather than all laws simultaneously – this vests the President with responsibility for executing the greater mass of laws, a function that requires exercising discretion not prescribed by any

²¹² See *supra* text accompanying note 23. These comments did not address whether Congress was powerless; presumably the less said about the full extent of federal authority, particularly that which could not be guaranteed, the better.

²¹³ SEYAD ALI SADAT-AKHAVI, *METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES* (2003); International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* at 10-20, UN Doc. A/CN.4/L.682 (April 13, 2006).

²¹⁴ The ICJ is permitted to revisit its decision upon the application of a party to it. See ICJ Statute, *supra* note 182, art. 60. But that provision has only been successfully employed twice. See ROSENNE'S *THE WORLD COURT* 124 (Terry D. Gill ed. (6th rev. ed. 2003)).

²¹⁵ See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”); *LaGrand Case (F.R.G. v. U.S.)*, 1999 I.C.J. 9, 16 ¶28 (Provisional Measures of Mar. 3) (stating that “the international responsibility of a State is engaged by the action of the component organs and authorities acting in that State, whatever they may be”).

²¹⁶ Michael Van Alstine, who was uncommonly attentive in high school, informs me that this is the difference between an uncountable noun and a countable plural.

particular one.²¹⁷ The President must heed the laws' hierarchy in seeing to their execution – for example, by recognizing conflicts between the Constitution and statutory responsibilities²¹⁸ and preferring later-in-time statutes and treaties.²¹⁹ Conflicts between the executive branch's understanding of a legal source and the judiciary's are also commonplace. While faithful execution might conceivably require the President to persist in the face of adverse precedent, the argument is just as often put the opposite way,²²⁰ and there are compelling reasons for permitting discretion as to when to yield.²²¹ To be sure, the obligation to follow the ICJ is not equal to the obligation to follow the Supreme Court.²²² But the pragmatic arguments are nonetheless compelling – certainly, an obligation to observe preferred national constructions in the teeth of adverse

²¹⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (Vinson, C.J., dissenting) (“Unlike an administrative commission confined to the enforcement of the statute under which it was created . . . the President is a constitutional officer charged with taking care that a mass of legislation be executed”); Proposed Executive Order Entitled “Federal Regulation,” 5 Op. Off. Legal Counsel 59, 60 (1981) (“The ‘take care’ clause charges the President with the function of coordinating the execution of many statutes simultaneously”); CORWIN, *supra* note 137, at 144 (“[A]ny particular statute is but a single strand of a vast fabric of laws demanding enforcement; nor . . . can all these be enforced with equal vigor, or with the same vigor at all times. The President’s duty to ‘take care that the laws be faithfully executed’ has come, then, to embrace a broad power of selection among the laws for this purpose”); *cf.* *Van der Weyde v. Ocean Transport Co.*, 297 U.S. 114, 117-18 (1936) (“Congress requested and directed the President to give notice of the termination of the treaty provisions in conflict with the act. . . . [I]t was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law.”).

²¹⁸ This is hotly contested, but the view seems to have had bipartisan support within the executive branch. Presidential Authority to Decline to Execute Unconstitutional Statutes, 8 Op. Off. Legal Counsel 199 (1994), available at <http://www.usdoj.gov/olc/nonexecut.htm>; see generally Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 2004 LAW & CONTEMP. PROBS. 105 (describing ongoing debate).

²¹⁹ *Cf.* Presidential Discretion to Delay Making Determinations under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, 19 U.S. Op. Off. Legal Counsel 306 (1995) (stating that “[i]n general, if the President’s legal obligations appear to conflict, we believe that his overriding duty to ‘take Care that the Laws be faithfully executed,’ . . . requires him to attempt to discover some reasonable means by which the conflict could be resolved and both duties discharged.”); *id.* (given conflict between the Chemical and Biological Weapons Control and Warfare Elimination Act and the National Security Act, the former (and later-arising) should be preferred since Congress anticipated tensions within the prior statute).

²²⁰ See, e.g., Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1389-90 (1991). As Professor Merrill has observed, the question turns in part on whether judicial decisions are themselves regarded as among “the Laws” that are to be faithfully executed. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 54 (1993); see *supra* text accompanying note 198.

²²¹ *Cf.* *United States v. Mendoza*, 464 U.S. 154, 159-64 (1984) (holding that doctrine of nonmutual offensive collateral estoppel does not apply against the United States).

²²² If for no other reason than that the Supreme Court’s position is constitutionally reinforced. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2673 (2006) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

international awards would play havoc with any duty to comply²²³ – and the obligation to comply with an ICJ judgment plausibly trumps the need to stick to the executive branch’s own view of the treaty,²²⁴ at least when the judgment had a rational basis.²²⁵

One aspect of the President’s VCCR memorandum particularly strains the Take Care Clause argument: namely, that the treaty provision being followed (Article 94 of the U.N. Charter) is considered non-self-executing, while the treaty being betrayed (the VCCR) is self-executing. But this is not fatal. As previously explained, conventional distinctions between self-execution and non-self-execution are inapposite to questions of presidential authority, and there are contrary hierarchical principles on the other side – in particular, deference to judicial constructions.²²⁶ The limitations on the President’s authority are also worth recalling. The international obligation to comply with the ICJ strictly limits its injunctive potential,²²⁷ and it would be a different matter (and nearly inexplicable) were the memorandum to extend *Avena* to *other* U.S. cases while

²²³ See *supra* text accompanying note 202 (describing international duty to comply). The United States has previously regarded itself as bound to accept arbitral awards “even in the fact of a decision proclaiming certain theories of law which it cannot accept.” Letter from the Secretary of State to the Norwegian Minister (Bryn), Feb. 26, 1923, *reprinted in* 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1923 (1938).

²²⁴ Or even, arguably, the obligation to adhere to the reasoning of the Supreme Court. See *Breard v. Greene*, 523 U.S. 371, 375-76 (1998) (per curiam) (finding state procedural default rules consistent with the VCCR); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2682-88 (2006) (same). The United States has stated that “[j]ust as *Breard* would not stand in the way of legislation that provided for the implementation of the *Avena* decision, it does not stand in the way of the President’s determination that the *Avena* decision should be given effect.” U.S. *Ex Parte Medellin* Brief, *supra* note 29, at 34. But this compares unfavorably with Marshall’s declaration, in his Jonathan Robbins speech, that “[t]he treaty, stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of Congress making the same declaration” (see *supra* text accompanying note 86); in *Medellin*, rather than saying that Article 94 (or the ICJ decision) is akin to an act of Congress, the United States is likening the *presidential memorandum* to such an act. The difference is substantial, particularly on the anti-plenary principle.

²²⁵ Indeed, had the executive branch espoused the ICJ’s view in *Breard* and *Sanchez-Llamas*, it probably would have prevailed. Cf. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685 (2006) (noting, following remark that the ICJ’s views were due “respectful consideration,” that the executive branch’s understanding of the VCCR was due “great weight”) (internal quotations omitted).

²²⁶ It would be especially difficult to contend that non-self-executing obligations are irrelevant altogether. The Take Care Clause should permit the consideration of legal rules not directly within its compass – such as state law, which by hypothesis is not among “the laws” for the President (see *supra* note 79) – in the proper execution of other laws that are. In *Ponzi v. Fessenden*, 258 U.S. 254 (1922), the Supreme Court affirmed the Attorney General’s authority, despite the absence of express statutory license, to transfer a federal prisoner to state court for trial on state criminal charges. Such authority might be located, the Court reasoned, in the Take Care Clause, in (seemingly tangential) statutory authority generally allowing federal officials to see to the safety and custody of U.S. prisoners, and principles of comity. *Id.* at 261-63.

²²⁷ See *supra* text accompanying notes 180-182 (noting parties encompassed by Article 94 obligation).

continuing to maintain that it was wrong on its merits.²²⁸ Treaty terms, as reckoned by the executive branch and U.S. cases, still limit the scope of the President's discretion in every other regard. The origin of these limits also bears mention. It is the U.N. Charter and the Optional Protocol, consented to by the Senate, that limit the President's authority under the VCCR in the event of dispute resolution, not some unilateral choice by the executive branch. Respecting these limits to take care authority is consistent with Representative Marshall's admonition that "Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract."²²⁹

* * *

The VCCR controversy is unusual in important regards. The odds that the ICJ and the Supreme Court will show such mutual and sustained interest in U.S. treaty breaches are rather long, and not improved by the U.S. withdrawal from the Optional Protocol.²³⁰

Nevertheless, the issues posed by the controversy are of continuing significance, and Article 94 remains very much in play. The United States is party to over 75 treaties providing for ICJ jurisdiction, including important multilateral agreements on human rights,²³¹ intellectual property,²³² the environment,²³³ and international criminal law,²³⁴ as

²²⁸ That position would, however, be compatible with a claim to the exercise of the President's foreign affairs powers, which may often subordinate legal to political considerations.

²²⁹ 10 ANNALS OF CONG. 614 (1800).

²³⁰ *But see* Van Alstine, *supra* note 4, at 366 (noting the "exceptional constellation of treaties" at issue in the VCCR controversy, "which is unlikely to recur").

²³¹ *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984).

²³² *See, e.g.*, Universal Copyright Convention, July 24, 1971, art. 15, 25 U.S.T. 1341, 943 U.N.T.S. 178, T.I.A.S. 7868; Patent Cooperation Treaty, June 19, 1970, art. 59, 28 U.S.T. 7645, 1160 U.N.T.S. 231, T.I.A.S. 8733; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, art. 28, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.

²³³ *See, e.g.*, UN Framework Convention on Climate Change, May 29, 1992, art. 14, 31 I.L.M. 849; Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293, 26 I.L.M. 1529.

²³⁴ *See, e.g.*, International Convention Against the Taking of Hostages, Dec. 17, 1979, art. 16, T.I.A.S. No. 11,081, 1316 U.N.T.S. 203, 18 I.L.M. 1456; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 12, 22 U.S.T. 1641, T.I.A.S. No. 7192; United Nations Convention

well as numerous bilateral treaties.²³⁵ While many of these obligations are born of an era when the United States was (somewhat) more enamored of international tribunals,²³⁶ it has continued to enter into treaties that rely on the ICJ to resolve disputes – even volunteering for ICJ jurisdiction when it is not required, just as it did in entering the Optional Protocol.²³⁷ Accordingly, it is entirely possible that the United States will again be the respondent, and the loser, in ICJ proceedings. If recent cases are any indication, the jurisdictional basis for the claim against the United States may not be apparent until the time of filing.²³⁸

B. Beyond Article 94: Taking Care of Other International Law

While ICJ decisions under Article 94 have continuing significance, they capture only part of the potential compliance and take care issues facing the U.S. government. Analogous problems may be posed by other kinds of international decisions, and by treaties in which no decision is rendered at all.

Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, art. 32, Treaty Doc. 101-4, 28 I.L.M. 493.

²³⁵ These include friendship, commerce, and navigation (FCN) treaties with states that are not always on the friendliest terms. *See, e.g.*, Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, U.S.-Iran, art. 21, 8 U.S.T. 899; Treaty of Friendship and Commerce, Nov. 12, 1959, U.S.-Pak., 12 U.S.T. 110; Convention of Establishment, Protocol, and Declaration, Nov. 25, 1959, U.S.-Fr., 11 U.S.T. 2398.

²³⁶ In modern bilateral investment treatments, successors to many of the FCN treaties, such provisions have been replaced with state-to-state arbitration options. *See* Office of the United States Trade Representative, 2004 U.S. Model Bilateral Investment Treaty (BIT), art. 37, *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

²³⁷ The U.N. Convention Against Transnational Organized Crime, for example, provided for ICJ jurisdiction over disputes when state parties could not promptly agree to the terms of arbitration, but allowed states to opt out of that provision. *See* U.N. Convention Against Transnational Organized Crime, Dec. 13, 2000, arts. 35(2)-(3), S. Treaty Doc. No. 108-16, 2000 WL 34248775. The United States did not. United Nations Convention Against Transnational Organized Crime, Declarations and Reservations, available at http://www.unodc.org/unodc/crime_cicp_signatures_convention.html#declaration.

²³⁸ In addition to the VCCR cases, see *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment [2003] I.C.J. 161 (merits judgment premised on Treaty of Amity, Economic Relations, and Consular Rights); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14 (June 27) (merits judgment premised in part on Treaty of Friendship, Commerce and Navigation); *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, 1996 I.C.J. 9 (Order of Feb. 22) (relying on Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation and Convention on International Civil Aviation).

1. *International judicial and arbitral decisions.* The United States is a party to hundreds of treaties providing for various forms of ad hoc arbitration, compulsory dispute resolution, or other means of resolving treaty-based disputes.²³⁹ If the take care theory described here is accepted, such arrangements may give rise to presidential authority: that is, if an adverse finding against the United States is legally binding as a matter of international and domestic law, if the President's authority is not displaced by Congress or by the Constitution, and if the obligation does not vest the President with excessive discretion, the President must yet exercise that authority consistent with the international decision and with other federal law.

Notwithstanding these conditions, the President's take care authority may seem to be of worrisome breadth, so it is useful to note examples of its limitations. The World Trade Organization (WTO) is the international organization that most frequently presses for U.S. accommodation. Its Dispute Settlement Body (DSB) employs appointed panels and a permanent Appellate Body to adjudicate disputes between members; once this process has run its course, failure to comply with the rulings or recommendations of the terminal DSB report may result in a further decision authorizing the winning party to impose trade sanctions on the loser.²⁴⁰ Whether DSB reports are appropriate for the exercise of take care authority might in theory turn on whether the reports are binding under international law,²⁴¹ or whether the remedy was within the President's constitutional competence (as might be questioned, for example, if the violation was inherent in a federal statute).²⁴² But domestic legislation probably resolves the matter. According to the Uruguay Round Agreements Act, no WTO provision overrides U.S.

²³⁹ See Ku, *supra* note 3, at 31 (suggesting that a review of treaties indicated "that the U.S. is a party to nearly 300 agreements to international dispute resolution").

²⁴⁰ See Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), Annex 2, Legal Instruments--Results of the Uruguay Round vol. 31, 33 I.L.M. 1226, 1226-27 (1994). Under the DSU, if a member state has not complied with a final panel or Appellate Body report's rulings or recommendations within a reasonable period of time, the DSB may authorize compensation or suspension of concessions. *Id.* arts. 21-22.

²⁴¹ See John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109 (2004) (arguing that reports are binding, and reviewing debate).

²⁴² This is usually the case. See, e.g., WTO Appellate Body Report: United States--Subsidies on Upland Cotton, WT/DS 267/AB/R (Mar. 3, 2005) [hereinafter Appellate Body Cotton Report], available at http://www.wto.org/english/tratop_e/dispu_e/267abr_e.pdf.

law.²⁴³ Consistent with that, DSB reports were made non-self-executing in the deepest, non-executive, sense: according to the legislative history, some or all reports can be implemented only via statute,²⁴⁴ and they do not bind the executive branch or justify altering federal law.²⁴⁵ In so doing, Congress and the executive branch both acknowledged the potential for presidential authority and averted it.

The President's authority under the North American Free Trade Agreement (NAFTA) is also cabined, albeit in a different fashion. Chapter 19 allows review of U.S. antidumping and countervailing duties by binational arbitral panels, the decisions of which are final and binding.²⁴⁶ By statute, those decisions bind U.S. agencies, which puts to rest any question of their status in domestic law – and, by the same token, gives rise to take care authority under the implementing statute rather than under NAFTA itself.²⁴⁷ That responsibility is relaxed if part of the implementing statute is held unconstitutional,

²⁴³ Uruguay Round Agreements Act, § 102(a)(1)-(2), 19 U.S.C. § 3512(a)(1)-(2); *accord* Uruguay Round Agreements, Statement of Administrative Action, H.R. DOC. NO. 103-316, pt. 1, at 659 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 [hereinafter SAA]; *see* 19 U.S.C. §3512(d) (providing that the SAA is authoritative).

²⁴⁴ H.R. REP. NO. 103-826, pt. 1, at 25 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773 (“[A]ny dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by the Congress unless consistent implementation is permissible under the terms of the statute.”); *see also* S. REP. NO. 103-412, at 13 (1994). The SAA is somewhat broader, indicating that the same principle applies to any federal law (not just statutes) deemed WTO-incompatible. SAA, *supra* note 243, H.R. DOC. NO. 103-316, at 1032-33, 1994 U.S.C.C.A.N. at 4318 (“Reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.”). The SAA (but not the Act) also declares that the agreement lacks effect on state law, and that DSB reports likewise do not “automatically” preempt state law, but does not directly opine whether implementation is reserved for Congress. SAA, *supra* note 243, H.R. DOC. NO. 316, at 670, 1994 U.S.C.C.A.N. at 4050.

²⁴⁵ *Id.* at 1032-33, 1994 U.S.C.C.A.N. at 4318 (“[N]either federal agencies nor state governments are bound by any finding or recommendation included in such reports. . . . [P]anel reports do not provide legal authority for federal agencies to change their regulations or procedures or refuse to enforce particular laws or regulations . . .”). The overall intent seems to be to foreclose using take care authority in any judicial context. *See id.* (“[T]he United States will not seek to introduce a panel report into evidence in any civil suit brought by the United States challenging a state law or regulation on the ground that it is inconsistent with a Uruguay Round agreement”). The President might yet try to construe U.S. statutory law in a manner consistent, if possible, with the results of dispute settlement process. *See supra* note 244 (quoting H.R. Rep. No. 103-826); *e.g.*, *Hyundai Electronics Co. v. United States*, 53 F. Supp. 2d 1334, 1343-44 (C.I.T. 1999) (citing, *inter alia*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).

²⁴⁶ North American Free Trade Agreement, Dec. 8, 1992, Can.-Mex.- U.S., art. 1904, 32 I.L.M. 289.

²⁴⁷ 19 U.S.C.A. § 1516a(g)(7)(A) (providing that for certain decisions made by a binational panel or extraordinary challenge committee, “the administering authority or the Commission shall, within the period specified by the panel or committee, take action not inconsistent with the decision”).

in which case the President has discretion to “accept” an adverse decision on behalf of the United States.²⁴⁸ Perhaps this implies that the President otherwise lacks such discretion – or, more likely, it is simply a severance provision – but again that is a function of the statutory scheme.

Not all agreements are so carefully neutralized, and it is worth turning to a third and unresolved example: the U.N. Convention on the Law of the Sea (UNCLOS).²⁴⁹ Despite bipartisan support for U.S. ratification,²⁵⁰ significant opposition remains, including legal concerns about provisions that delegate authority to UNCLOS institutions.²⁵¹ One hot button is the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, which has compulsory jurisdiction over disputes relating to the treaty’s seabed provisions.²⁵² Article 39 of Annex VI provides that Chamber decisions “shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of th[at] State Party.”²⁵³ The United States is contemplating a declaration to render Chamber decisions enforceable “only in accordance with procedures established by implementing legislation,” subject to any constitutionally-required review, and “without precedential effect in any court of the United States.”²⁵⁴ Article 39 would also be subject to a second, more general declaration concerning non-self-execution.²⁵⁵

The first declaration may be founded on a (misplaced) objection to placing Chamber decisions on a footing equivalent to the U.S. Supreme Court.²⁵⁶ Both

²⁴⁸ *Id.* § 1516a(g)(7)(B) (holding that, in such event, the relevant agencies must “take action not inconsistent with such decision”). One such challenge was recently rebuffed, with the court noting the very limited jurisdiction of U.S. courts over the binational process. *Coalition for Fair Lumber Imports, Executive Committee v. United States*, 471 F.3d 1329, 1332-33 (D.C. Cir. 2006).

²⁴⁹ United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force on Nov. 16, 1994) [hereinafter UNCLOS].

²⁵⁰ *E.g.*, *Former Legal Advisers’ Letter on Accession to the Law of the Sea Convention*, 98 AM. J. INT’L L. 307 (2004).

²⁵¹ *See, e.g.*, Ku, *supra* note 3, at 64-65; Jack Goldsmith & Jeremy Rabkin, *A Treaty the Senate Should Sink*, WASH. POST, July 2, 2007, at A19.

²⁵² UNCLOS, *supra* note 249, art. 188b.

²⁵³ UNCLOS, *supra* note 249, annex VI, art. 39.

²⁵⁴ *See* Proposed Text of Resolution of Advice and Consent to Ratification, § 3(22), S. Exec. Rep. No. 108-10 at 21 (2004), *reprinted in* 150 Cong. Rec. S2712 (daily ed. Mar. 11, 2004) (setting out proposed declarations and understandings, as approved by the Senate Committee on Foreign Relations).

²⁵⁵ *Id.* § 3(24), S. Exec. Rep. No. 108-10 at 22.

²⁵⁶ *Cf.* S. Exec. Rep. No. 108-10, *supra* note 254, at 14 (noting, without describing, “potential constitutional concerns regarding direct enforceability of [Article 39] in U.S. courts”); Ku, *supra* note 3, at

declarations, however, are designed to prevent private parties from invoking Chamber decisions in U.S. courts²⁵⁷ – raising the question whether these would amount to treaty reservations, which are not permitted under the UNCLOS,²⁵⁸ or at least prevent the United States from complying with its obligation to ensure judicial enforcement of Chamber decisions. These repercussions may be tempered by the availability of take care authority. The President could, consistent with the UNCLOS, pursue the enforcement of Chamber decisions in U.S. courts, thereby mitigating any violation arising from the U.S. bias against private enforcement.²⁵⁹ It is a finer question whether that approach would be consistent with the proposed declarations, were they finally adopted by the Senate as a whole²⁶⁰ – but if they clarified the President’s role, that would ratify an authority that the President would have enjoyed in the absence of any declarations at all.

2. *International legislative decisions.* Just as international tribunals have challenged domestic conceptions of courts and the judicial role, international institutions increasingly challenge domestic distinctions between legislative and executive power.²⁶¹ The United Nations Security Council is one such hybrid, and it poses take care issues –

65 (hinting at constitutional objections relating to Supreme Court authority). The provision appears, on its face, to be designed to insure the finality of decisions, not to threaten the Supreme Court’s authority over the rendering of precedent in U.S. courts.

²⁵⁷ S. Exec. Rep. No. 108-10, *supra* note 254, at 14 (noting problems posed by direct enforcement of Article 39 decisions); *id.* at 15 (explaining that “this declaration states that the Convention and Agreement do not create private rights of action or other enforceable legal rights in U.S. courts”); *id.* at 177, 178 (reprinting responses to additional questions submitted by William H. Taft IV, Legal Adviser, Department of State) (noting concerns regarding private enforcement of Article 39 decisions, and suggesting the possibility of a U.S. understanding).

²⁵⁸ Ku, *supra* note 3, at 65; see UNCLOS, *supra* note 249, art. 309 (“No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”).

²⁵⁹ S. Exec. Rep. No. 108-10, *supra* note 254, at 14 (noting that “article 39 does not require any particular manner in which Chamber decisions must be made enforceable”). *But see id.* at 177, 178 (Taft responses) (suggesting that, absent understanding, the UNCLOS would require that Chamber decisions be enforceable through private causes of action).

²⁶⁰ In submissions to the Senate, the executive branch noted the possibility of executive implementation of UNCLOS obligations through executive orders or less formal means, without specific reference to Article 39. S. Exec. Rep. No. 108-10, *supra* note 254, at 177, 178 (Taft responses). Proposed declaration 22, however, might be read to exclude executive implementation prior to the adoption of implementing legislation, despite the fact that it appears to have been aimed at precluding private enforcement only. *See supra* text accompanying note 254.

²⁶¹ *See, e.g.,* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 61-63 (2005) (describing emerging and distinctive character of international lawmaking); *cf.* Krzysztof Skubiszewski, *International Legislation*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1255, 1255 (Rudolf Bernhardt ed., 1995) (suggesting that international legislation should be assessed, approximately, by criteria used for domestic legislation).

quite apart from its function in enforcing ICJ decisions – that illustrate the risks and rewards of the theory.

The Security Council’s best-known function involves its capacity to authorize Member States to use force in circumstances that would otherwise violate international law.²⁶² These decisions, though rare, have potentially dramatic consequences under U.S. law. President Truman, for example, cited Security Council support for military action in Korea,²⁶³ President George H.W. Bush indicated that Council authorization would suffice to license invasion of Iraq,²⁶⁴ and President Clinton invoked U.N. authority to invade Haiti.²⁶⁵ Each treated Security Council authorization as a critical, if not necessary indispensable, component of his domestic legal justification.

The take care theory espoused here offers little support. Relying solely on Security Council authorization trenches on Congress’ war powers.²⁶⁶ The U.N. Participation Act, moreover, not only establishes a different mechanism for assisting the United Nations – special agreements under Article 43, which have never been pursued – but further requires congressional approval of such agreements,²⁶⁷ and seems to signal Congress’ view that the President is not entitled to respond independently in the wake of Security Council authorization.²⁶⁸ More fundamentally, Article 42 resolutions *authorize*

²⁶² U.N. CHARTER, art. 42.

²⁶³ Consistently but disingenuously, apparently. Louis Fisher, *Sidestepping Congress: Presidents Acting under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1259-64 (1997).

²⁶⁴ *Id.* at 1264-69 (citing statements by Bush and Cheney); Thomas M. Franck, *Declare War? Congress Can’t*, N.Y. TIMES, Dec. 11, 1990, at A27; for a rebuttal, see *The Gulf War: Collective Security, War Powers and Laws of War*, 85 AM. SOC’Y INT’L L. PROC. 1, 8-13 (1991) (remarks of Peter Raven-Hansen).

²⁶⁵ Fisher, *supra* note 263, at 1270-71.

²⁶⁶ *E.g.*, JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 11 (1993). *But see* Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: . . . The Old Order Changeth*, 85 AM. J. INT’L L. 63, 74 (1991) (“When the President commits U.S. forces to a UN police action in accordance with Article 42 of the Charter, it is because the U.S. Government is obliged by international law to comply. Such compliance by the President with international law is not prohibited – indeed, it is required – by the Constitution.”); David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 U. COLO. L. REV. 1491 (1999) (arguing for internationalist transformation of war powers).

²⁶⁷ The Act permits the President to negotiate Article 43 agreements with the Security Council, subject to congressional approval; the President is not required to seek additional authorization before acting under an agreement. 22 U.S.C. § 287d.

²⁶⁸ The Act notes, cautiously, that nothing in it “shall be construed as an authorization to the President by the Congress to make available to the Security Council . . . armed forces, facilities, or assistance” beyond those specified in the special agreements. *Id.* Compare, *e.g.*, ELY, *supra* note 266, at

military action by Member States, but do not *require* anything of them. As suggested by Chief Justice Marshall’s opinion in *Brown v. United States*, there is a meaningful difference between international obligations that enjoin every state actor, including the President, to accomplish something, and measures that allow the United States to do something it otherwise could not – without dictating whether it should be done by the President or someone else.²⁶⁹

Military action, with its special international and domestic rules, is no longer the Security Council’s stock in trade. Since the end of the Cold War, the Council has increasingly employed its authority under Article 41 to adopt “measures not involving the use of armed force” – principally economic sanctions – and to call on Member States to apply them.²⁷⁰ These decisions are binding under international law,²⁷¹ unlike use of force decisions, moreover, they are often injunctive rather than merely permissive in character. Nonetheless, they do not routinely pose take care issues. The President has longstanding domestic statutory authority to adopt economic sanctions,²⁷² and the U.N. Participation Act specifically authorizes the President to implement Security Council decisions taken pursuant to Article 41.²⁷³ Appropriately, recent executive branch orders have cited the Act as a legal basis, “in view of” Security Council resolutions, rather than claiming to implement resolutions of their own accord.²⁷⁴

But take care authority may nevertheless be relevant. First, when the Security

151-52 n.60 (construing U.N. Participation Act to gainsay presidential action); Fisher, *supra* note 263, at 1249-54 (same), *with* Franck & Patel, *supra* note 266, at 69-70.

²⁶⁹ See *supra* text accompanying notes 154-161 (discussing *Brown*). This is consistent with the view espoused by some that the Security Council resolutions “authorize[ing]” Member States to use military force are not legally binding upon them. See 1 SIMMA, *supra* note 203, at 463.

²⁷⁰ U.N. CHARTER, art. 41.

²⁷¹ U.N. CHARTER, art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”); *id.* art. 48 (“The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine,” and “[s]uch decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”); see 1 SIMMA, *supra* note 203, at 739.

²⁷² International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§1701-06 (2000); *Dames & Moore v. Regan*, 453 U.S. 654, 671 (1981) (broadly construing presidential authority under IEEPA).

²⁷³ 22 U.S.C. § 287c.

²⁷⁴ See, e.g., Exec. Order No. 13224, 66 Fed. Reg. 49,079, 49,079 (Sept. 23, 2001).

Council adopts a decision without invoking Article 41,²⁷⁵ the U.N. Participation Act is literally inapplicable – and yet the Council decision may bind the President.²⁷⁶ Second, decisions may require immediate implementation before legislation can be adopted – unlike a treaty, the ratification of which may be delayed until domestic conformance is certain.²⁷⁷ Third, the breadth of recent resolutions suggests that the Security Council may adopt measures exceeding authority delegated to the President under the U.N. Participation Act or other domestic statutes: there is a difference, certainly, between the “economic relations,” “means of communication,” and property subject to U.S. jurisdiction covered by the Act, and any measure “not involv[ing] ‘the use of force,’” which is the only topical limitation on the Council’s authority under Article 41.²⁷⁸

Most of the Council’s work has little to do with the United States and the President’s take care authority.²⁷⁹ The U.S. veto in the Security Council minimizes the chances that the United States will be subject to unwelcome obligations²⁸⁰ – meaning

²⁷⁵ See, e.g., S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001); S.C. Res. 1540, U.N. Doc. S/1540 (2004), reprinted in 43 I.L.M. 1237 (2004) (regulating the prevent proliferation of weapons of mass destruction and delivery systems); S.C. Res. 955, U.N. Doc. S/955 (1994) (creating International Criminal Tribunal for Rwanda); S.C. Res. 827, U.N. Doc. S/RES/827 (1993) (International Criminal Tribunal for Yugoslavia).

²⁷⁶ This is uncontroversial with respect to decisions taken under Chapter VII that simply fail to reference Chapter 41 (and which do not involve the use of force). There is also a credible argument that Article 25 makes legally binding measures not taken under Chapter VII at all. 1 SIMMA, *supra* note 203, at 456-58 (concluding that maintaining to the contrary is “not tenable,” and citing other possible sources of authority); James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 428-29 (1998).

²⁷⁷ See, e.g., S.C. Res. 1373, *supra* note 275 (deciding that states must freeze certain accounts “without delay”).

²⁷⁸ See *Prosecutor v. Tadic* (Jurisdiction), No. IT-94-1-AR72, ¶¶ 35 (Oct. 2, 1995), 35 ILM 32 (1996) (“[T]he measures set out in Article 41 are merely illustrative *examples* which obviously do not exclude other measures. All the Article requires is that they do not involve ‘the use of force.’ It is a negative definition.”). Limits (such as they are) on the Council’s Article 41 authority are instead imposed by other portions of the Charter, the principal of proportionality, and (potentially) *jus cogens* principles. 1 SIMMA, *supra* note 203, at 739; T.D. Gill, *Legal and Some Political Limitations on the Power of the Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, 26 NETHERLANDS Y.B. INT’L L. 33 (1995).

²⁷⁹ Some types of Security Council measures are not likely to be used in connection with the United States proper – for example, the administration of territory. See, e.g., S.C. Res. 942, U.N. Doc. S/RES/942 (Sept. 23, 1994) (imposing territorial settlement plan on Bosnian Serbs). And there has been less enthusiasm concerning “offensive” application of the Take Care Clause to purely foreign matters. HENKIN, *supra* note 70, at 52 (“[T]here is nothing to suggest that the ‘take care’ clause was intended to extend to violations of international obligations to the United States, committed outside the United States, by those not subject to the laws of the United States”); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 70-71 (1993) (same).

²⁸⁰ U.N. CHARTER, art. 27(3).

that, unlike Libya, the United States is unlikely to be forced to surrender its nationals for criminal trial.²⁸¹ Yet there remain scenarios that are highly salient to the President's domestic powers. The Council has increasingly adopted resolutions transcending particular crises and particular states,²⁸² and even veto-holders have cause to accept being constrained themselves in order to achieve external benefits. If the United States sometimes ratifies multilateral treaties in order to provide marginal support for the agreement and for foreign compliance – even when its consent is not necessary to bring the treaty into force, and cannot force another state to join – it will be all the more likely to make the tradeoff for Security Council legislation that *does* directly affect the legal obligations of other states.²⁸³ The recent anti-terrorism initiative fits this description.

The Security Council also sometimes targets particular Member States at their own behest, or at least with their acquiescence.²⁸⁴ While it is highly improbable that a President would enable take care authority actually focusing on his or her own administration, things do change hands from time to time. A sitting President just might accept a Security Council resolution aimed at a prior administration, or attempt to bind the hands of successors. Either enterprise may run into domestic constraints. For example, a backward-looking decision enabling a foreign or international tribunal to investigate and try U.S. war crimes might confront soft norms against using non-delegated presidential authority for extradition,²⁸⁵ or statutes that create defenses or

²⁸¹ S.C. Res. 748, U.N. Doc. S/RES/748 (1992) (requiring Libyan compliance with prior requests); S.C. Res. 731, U.N. Doc. S/RES/731 (1992) (requesting that Libya cooperate with requests for surrender of its nationals for trial by other states); Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 3, ¶¶ 39-42 (Order of Apr. 14) (finding prima facie legal obligation on the part of Libya and the United Kingdom to comply with S.C. Res. 748, and denying provisional relief).

²⁸² For descriptions of this important phenomenon, see Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 *FORDHAM INT'L L.J.* 542 (2005); Paul C. Szasz, *The Security Council Starts Legislating*, 96 *AM. J. INT'L L.* 901 (2002); Stefan Talmon, *The Security Council as World Legislature*, 99 *AM. J. INT'L L.* 175 (2005); see also Swaine, *Constitutionality*, *supra* note 13, at 1515-17 (discussing issue and noting prior scholarship).

²⁸³ As an illustration of the former, consider the Chemical Weapons Convention; of the latter, consider S.C. Res. 1540. See *supra* notes 103, 275.

²⁸⁴ Thus, for example, the Security Council's decision ordering the establishment of a Special Tribunal for Lebanon at the behest of Lebanon's President, see S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007), or the arms embargo against Yugoslavia adopted at the behest of Yugoslavia, S.C. Res. 713, U.N. Doc. S/RES/713 (Sept. 25, 1991). Other examples are less apposite, such as the many instances in which Member States have sought assistance with internal hostilities, or the United Kingdom's support for sanctions against Rhodesia while it was the administering power. See 1 *SIMMA*, *supra* note 203, at 739.

²⁸⁵ See *supra* text accompanying note 165 (citing *Valentine v. United States*). In contrast to *Valentine*, a Security Council resolution would by hypothesis have provided a binding basis for presidential

immunities²⁸⁶ and limit cooperation with certain international tribunals;²⁸⁷ Congress may also preterm (or endorse) authority following a Security Council resolution.²⁸⁸ But domestic reversals are no panacea. Security Council resolutions are distinctly sticky – once a Permanent Member’s veto is yielded, and a resolution adopted, attempts to overturn it can be stymied by another Member’s veto – which means that a President can help establish an international obligation that the United State cannot undo.²⁸⁹ The fact that Congress may override the resolution’s domestic effects does not diminish the continuing international legal effect, which in turn may influence the exercise of Congress’ power.

Security Council resolutions would still have to satisfy the anti-plenary principle. Bracketing the question of congressional defeasance, presidential implementation of an order for specific action with respect to war crimes prosecutions – which would be subject to international judicial supervision as well – would seem in the abstract to satisfy that hurdle. Whether this is a plausible or generally applicable circumstance is open to question. Resolutions are typically less detailed than are treaties or domestic statutes, and the need to achieve consensus among Member States with different legal systems and

action. And unlike run-of-the-mill cases involving presidential action against individuals not otherwise subject to international law, an individual subject to Security Council action may have assumed individual responsibility without retaining immunities. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1, ¶ 61 (Feb. 14) (noting that the immunity of an incumbent minister of foreign affairs would not be retained, inter alia, for certain non-official acts done during the period in office once that period is at an end, or before certain international criminal tribunals).

²⁸⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in 10, 18, and 28 U.S.C.).

²⁸⁷ American Servicemembers’ Protection Act (ASPA), Pub. L. 107-206, 116 Stat. 820, *codified at* 22 U.S.C. 7420 et seq. (adopting measures designed to inhibit the involvement of the United States and its citizens with the International Criminal Court). Notably, cooperation with ad hoc international criminal tribunals is specifically exempted. *See* 22 U.S.C. § 7423. It seems unreasonable to read this exemption as delegating authority to the President, but take care authority may be apt – barring, at least, reasonable inferences from other statutes governing cooperation with international tribunals. *See* National Defense Authorization Act for Fiscal Year 1996, § 1342, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (establishing cooperation with tribunals for Rwanda and Yugoslavia).

²⁸⁸ The last-in-time rule would credit any such statutes. *Diggs v. Schulz*, 470 F.2d 461 (D.C. Cir. 1972) (refusing to enjoin congressional statute at variance with Security Council resolution imposing trade embargo on Rhodesia), *cert. denied*, 411 U.S. 931 (1973); *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976) (refusing to enjoin U.S. Department of Commerce from permitting import of sealskins from Namibia in violation of Security Council resolution).

²⁸⁹ U.N. CHARTER, art. 27(3); *see* Swaine, *Constitutionality*, *supra* note 13, at 1538-40, 1609-11 (discussing problem of “reverse vetoes” in the Security Council and the international delegations issues presented).

political dispositions often results in compromised terms.²⁹⁰ But successive, clarifying resolutions may be easier to arrange than treaty amendments.²⁹¹ More context-specific resolutions are also possible, even if that simultaneously decreases the prospect that the United States will subject itself to them.

The resulting potential of take care authority for Security Council resolutions warrants attention, favorable or otherwise, and painstaking review. If such authority is thought too broad, it may motivate revisiting the consensus that a broad range of Security Council actions are legally binding, or encourage scrutiny of resolutions to see whether they conform to the anti-plenary principle. Within the Security Council, the United States might pursue greater particularity as to the legal grounds for (and desired effect of) any action, or show greater caution in expanding the Council's ambit. Finally, on the home front, Congress' attention might be invited – perhaps in amending the U.N. Participation Act or the American Servicemembers' Protection Act, to cope with particular kinds of resolutions, or more generally, as discussed in Part IV below.

3. *Treaties – without decisions.* The example of the Security Council indirectly illustrates more pervasive phenomena. As Security Council resolutions grow more ambitious, they begin to usurp the functions of consensual treaty-making,²⁹² thereby recalling the basic case: to what does take care authority for treaties amount in the *absence* of any international decision? For example, if a presidential order simply articulated the view that the VCCR required disapplying state procedural default rules, without benefit of *Avena*, would it be given the same weight?

Absent an international decision, the President's take care authority relates to the treaty's substance – as opposed to its dispute resolution mechanisms – and as such approaches the vexed question of whether the executive branch enjoys *Chevron*

²⁹⁰ For example, the initial anti-terror resolution, Security Council Resolution 1373, left it to every state to define the “terrorist acts” and “funds” that were at its core. Talmon, *supra* note 282, at 189-90 (discussing these and other ambiguities, and exploitation of the definition of terrorism by Syria).

²⁹¹ Certainly the procedures are less formal, do not require recourse to domestic processes, and involve fewer states. On the other hand, successive resolutions increase the choke points for any states wielding a veto.

²⁹² Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874-75 (2003); *see, e.g.*, Swaine, *Constitutionality*, *supra* note 13, at 1517 n.90 (describing debate over this issue with S.C. Resolution 1540).

deference in treaty interpretation.²⁹³ Assuming the framework's premise makes sense in the statutory context, it translates only imperfectly to treaties.²⁹⁴ Claims for strong, *Chevron*-style deference must initially address whether the situation is compatible with the fiction that Congress delegated power to act with the force of law.²⁹⁵ Treaties pose additional problems at this threshold: treaties cannot be interpreted according to just one party, and other states would not have acquiesced in giving the U.S. executive branch a trump whenever its interpretation is not unreasonable;²⁹⁶ at the domestic level, it is unclear how the Senate and the President could delegate lawmaking authority to the President;²⁹⁷ and *Chevron* may not apply to delegations to the President anyway.²⁹⁸ Perhaps deference could be redeemed on the basis of expertise, but that could not easily justify the conclusive authority given reasonable agency interpretations under *Chevron* – instead crediting only its persuasive force, not unlike the deference given the ICJ²⁹⁹ – and

²⁹³ *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²⁹⁴ It is only marginally easier to import those norms for the task of interpreting foreign relations statutes. Compare Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007), with Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007).

²⁹⁵ Under *Chevron*'s "step one," courts ask whether a statute is clear. If not, "step two" inquires whether an agency interpretation is reasonable; if it is, the agency view is binding. *Chevron U.S.A.*, 467 U.S. at 842-43. The Supreme Court's subsequent cases suggest a threshold "step zero" – never consistently employed – that must be satisfied before the framework is even applied. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193, 222-28 (2006) [hereinafter Sunstein, *Step Zero*]. It seems to involve reconsideration of whether Congress delegated, though it is widely acknowledged that the whole idea of congressional intent to delegate under any given statute is fictive. Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2589-91 (2006).

²⁹⁶ See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 705 (2000); Criddle, *supra* note 190, at 1930-31; Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1301 (2002); Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 592 (2007).

²⁹⁷ See *supra* text accompanying note 190.

²⁹⁸ Compare, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376-79 (2001) (arguing that presidential involvement enhances case for *Chevron* deference), with Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing against *Chevron* deference to presidential directives in the absence of an express statutory grant of authority).

²⁹⁹ Compare *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (regarding agency pronouncements as "not controlling upon the courts by reason of their authority" but nonetheless guiding courts and litigants "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade"), with *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (describing ICJ judgments as entitled to "respectful consideration"). It is possible, however, that *Skidmore* deference may amount to something more, or that *Skidmore*-class rules may sometimes warrant exceptional treatment. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349-50 (2007) (interpretive rules will ordinarily only "persuade" a reviewing court, "but will not necessarily 'bind' a reviewing court") (emphasis added); *id.* at

seems to encounter the same threshold objections.³⁰⁰ Basing deference on the President's foreign affairs powers, finally, abandons the *Chevron* framework for new challenges. The responsibility to speak for the nation does not readily justify deferring to defer to domestic pronouncements,³⁰¹ and the President's role in treaty-making scarcely explains why we would defer to lawmaking that does not take that form.³⁰²

Take care authority could not supply a complete justification for *Chevron* in the treaty context, since the two domains overlap in a relatively narrow set of circumstances. Sometimes take care authority is exercised when issues of deference are irrelevant: for example, when the President is simply ensuring that the executive branch itself is acting within the law, or when executive branch actions are for constitutional or statutory reasons shielded from judicial review.³⁰³ When, as in these cases, the propriety of executive branch action is not before a court, there is no need to resolve the tug-of-war between deference and the responsibility of courts to declare what the law is.³⁰⁴ Take care and deference issues *do* overlap, potentially, when courts are forced to evaluate the legal effect of a President's treaty implementation, but even then the fit is imperfect. Because take care authority is germane only when treaty provisions bind the United

2350 (“[I]nterpretive rules ... enjoy no *Chevron* status as a class”) (emphasis in original). The difference, in any event, “often won’t matter.” Sunstein, *Step Zero*, *supra* note 295, at 229-30.

³⁰⁰ Some have urged *Skidmore*-level deference for executive branch treaty interpretation. Professor Criddle, for example, suggests that *Skidmore*, unlike *Chevron*, applies to “statutes that fall within agencies’ expertise but are not congressionally committed to their discretion.” Criddle, *supra* note 190, at 1933-34. If so, this means it would circumvent some problems associated with transplanting *Chevron* to the treaty context. But the distinction is sharper than the case law probably permits. *Skidmore* deference seems as much occasioned by other factors (particularly less formal procedures), and dependent on some congressional commitment. *E.g.*, *Long Island*, 127 S. Ct. at 2349-50 (rejecting argument that “even if the third-party regulation is within the scope of the statute’s delegation,” it was interpretive and thus entitled only to *Skidmore* deference, by pointing to indications that agency was employing its full rulemaking authority); *Mead*, 533 U.S. at 237 (suggesting *Skidmore* applies “where statutory circumstances indicate no intent to delegate *general* authority to make rules with force of law, or where such authority was not invoked”) (emphasis added).

³⁰¹ Compare Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 197 (2006) (citing, as basis for deference, the President’s role in conducting foreign relations), with Bradley, *Chevron*, *supra* note 296, at 702 (noting problem of non-diplomatic pronouncements).

³⁰² Compare Ku & Yoo, *supra* note 301, at 197 (citing, as basis for deference, “the President’s unique constitutional role as the maker of treaties under Article II”), with Bradley, *supra* note 296, at 702 (“Where does the executive branch obtain the constitutional authority to in effect create law governing Article II treaties without first obtaining additional senatorial advice and consent?”).

³⁰³ Deference may, however, animate jurisdictional doctrines. Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 610-14 (1976).

³⁰⁴ Sunstein, *Step Zero*, *supra* note 295, at 189 (describing *Chevron* as “creat[ing] a kind of counter-*Marbury* for the administrative state”).

States, the President could not claim take care authority to implement treaties to which the United States was not party, nor provisions for which U.S. compliance was not at issue.³⁰⁵

Subject to these qualifications, a *Chevron*-type perspective – were that favored – arguably favors substantial deference in cases of overlap, even in the absence of an international decision. For reasons previously stated, it is difficult to maintain that treaties actually or presumptively delegate gap-filling authority to the President, not the least because other states are exceedingly unlikely to have licensed foreign officials to deviate from the otherwise-preferred understanding of a treaty. But from a *Chevron* vantage, some kind of delegation – or at least a rebuttable presumption of delegation – is most tenable when the only authority being claimed is one to fulfill treaty obligations, even if only partway.³⁰⁶ If Congress may fairly be required to correct a broader range of potential errors in the administration of domestic statutes, it may not seem unreasonable to make treaty-makers oust this far narrower range of presidential authority if it is not to their liking. Additional limits are built into the *Chevron* framework. The familiar two-step analysis excludes presidential action that is excluded by the treaty or in any event appears unreasonable,³⁰⁷ the preference for formal agency procedures arguably promotes

³⁰⁵ *Sarai v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006), for example, reversed a dismissal of an Alien Tort Statute action brought against a London-based mining company for activities in Papua New Guinea. The court of appeals accorded “serious weight” to a State Department submission as to the disruptive effect of lawsuit, but did not regard it as conclusive as to the basis for judgment – the political question doctrine – which it did not directly address. *Id.* at 1081-84. If, on remand, the President were to weigh in on the merits of the plaintiffs’ claim that the company violated the U.N. Convention on the Law of the Sea, it could not invoke take care authority, since the United States is not a party to UNCLOS – and, even if it were, its own fulfillment of the treaty’s obligations would not be at stake.

³⁰⁶ That assumption would reach its limits, however, if the attempt to fulfill U.S. obligations unavoidably imposed a ceiling on U.S. fulfillment or posed a conflict with other treaty provisions. That is unlikely to arise frequently, but it is not beyond reason. In *Sanchez-Llamas*, for example, the United States suggested that recognizing an individual right for foreign nationals to decide whether to notify their consulates would conflict with bilateral agreement that require mandatory notification. Brief for the United States as Amicus Curiae Supporting Respondents at 21-22, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 05-51 & 04-10566). Supposing that to be so, were the President to implement the VCCR by adopting a mandatory notification program, even for those states not benefiting from an extant bilateral agreement, that might infringe the individual rights also conferred by the VCCR.

³⁰⁷ See *supra* text accompanying note 295.

deliberation and accountability,³⁰⁸ and the case law arguably checks self-aggrandizement.³⁰⁹

A take care approach is nevertheless superior in assessing the relevant considerations, and ultimately more equivocal. That approach does not dwell on whether a treaty or statute hypothetically delegated authority; instead, the Take Care Clause is understood to delegate a limited, defeasible authority to ensure, in the absence of contrary instruction from the Congress or the Constitution, that treaty obligations are fulfilled. The key question then becomes whether according binding authority to presidential orders affords an improvident amount of discretion to the President. Under *Chevron*, the absence of an international decision might actually favor greater deference: it allows continued ambiguity that is more consistent with space for delegated gap-filling, and a presidential determination might seem more genuine, legitimate, and deliberative if not reached under duress. A take care approach points in the opposite direction, since the absence of an international decision diminishes the constraints on presidential implementation. Rather than being pressed for compliance by another institution, the occasions for intervention are much more at the President's election.³¹⁰ Rather than being faced with an essentially binary decision – to comply with an international decision or not – the President enjoys greater flexibility in elaborating on the provision's terms.

Could binding, *Chevron*-level authority nonetheless be sustained on a take care analysis? If so, the most promising conditions involve some identifiable capacity for course correction. The most significant factor would be the capacity to legally confront an executive order. Given the difficulty foreign states have in pursuing judicial relief in the United States,³¹¹ the feasibility of judicial review turns to a substantial degree on

³⁰⁸ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001) (considering Congress' choice of "a relatively formal administrative procedure" to promote "fairness and deliberation"); Sunstein, *Step Zero*, *supra* note 295, at 225-26.

³⁰⁹ See Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 208-62 (2004) (detailing spectrum of instances in which courts have shown concern about agency self-interest in making deference decisions).

³¹⁰ It is unlikely, of course, to be totally random: other states may be objecting, or the United States may be subject to decisions they regard as non-binding, as were both the case prior to *Avena*.

³¹¹ In *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999), the Supreme Court cast doubt on the ability of foreign states to secure jurisdiction over either the United States or the several states. As to the former, the per curiam order noted "imposing threshold barriers": no evident waiver of U.S. sovereign immunity, and doubt whether Article III, § 2, cl. 2 applied when to cases when the German citizen involved was not an ambassador or consul. *Id.* at 112; see *Ex Parte Republic of Peru*, 318 U.S. 578,

whether the treaty provision in question is self-executing – in the sense that it may be invoked by individuals in court.³¹² International recourse – the availability of some dispute resolution mechanism, even if it has not (by hypothesis) yet been realized – is also salient. Even an optional mechanism to which the United States is not party may in theory temper U.S. positions, given the possibility that it will one day subscribe and open its administration of the treaty to scrutiny. These factors encourage the United States toward dispute resolution mechanisms, at least to the extent it believes the mechanism will render decisions (favorable to the United States or not) that coincide roughly with ends it wishes to promote. If the United States believed (as it did not) that the VCCR constrained state criminal proceedings, expected that the ICJ would agree, and worried that it might lack authority in the absence of an ICJ decision, it would not begrudge the Optional Protocol.

Finally, if conclusive deference *were* somehow owed a presidential order, that should be qualified if the order is contrary to an international decision rendered via a treaty-based dispute resolution mechanism;³¹³ in that case, the order is at best owed *Skidmore*-level deference based on executive branch expertise.³¹⁴ The rationale for this limitation is straightforward. Whatever the strength of any positive delegation argument, or the basis for resisting claims of implied defeasance under the take care theory, it seems especially dubious that treaty-makers would have anticipated that a particular state's government would retain binding authority even in the teeth of contrary, authoritatively

583 n.3 (1943) (noting that “[t]he United States has never been held to be a ‘State’ within this provision”). Other bases for action against the United States may exist, but the usual avenues for skirting immunity are not available. *See, e.g.,* *Miller v. United States*, 67 Fed. Cl. 195, 199-200 (Fed. Cl. 2005) (holding that Tucker Act did not provide basis for action claiming violation of human rights treaty, since such in such activities the United States was acting in its sovereign capacity). *But see* *Garreaux v. United States*, 2007 WL 2193886, *10 (Fed. Cl. 2007) (accepting, for purposes of Indian treaty claim, that the “case is founded either upon an ‘Act of Congress’ (if the treaty can be so characterized) or, at least, upon an ‘express or implied contract with the United States’”). As to the states, the Court noted that such a suit was in “probable contravention of Eleventh Amendment principles.” 526 U.S. at 112. *But see* Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765 (2004) (arguing for original and exclusive jurisdiction over actions by foreign states claiming violations of treaties by U.S. states).

³¹² *Cf. supra* text accompanying note 107 (noting views of Professors Bradley and Sloss). Of course, a treaty may also be non-self-executed but already implemented, which would cure the problem.

³¹³ This would exclude, for example, decisions rendered by international tribunals or other organizations not charged with responsibility by the underlying treaty or its protocols – as when the ICJ, for example, construes a treaty in connection with a case established on a different jurisdictional basis.

³¹⁴ *Cf. Wu, supra* note 296, at 590-91 (suggesting *Skidmore*-level deference as a minimum).

rendered decisions. Whether this defeasance extends to contrary decisions rendered in cases not involving the United States, or involving the United States and some third party, is certainly debatable; including them may be particularly inappropriate if the treaty made clear that decisions had no value as precedent.³¹⁵ Just as the capacity of international decisions to license presidential orders should not be exaggerated, so too their capacity to divest domestic capacity.

IV. CONCLUSION: TAKING CARE OF LAWMAKING

This Article's basic claim is that the Constitution confers limited authority on the President as a function of treaty obligations, and that the source of this authority shapes and constrains it – as do other laws for which the President is responsible – while permitting the United States to fulfill its international commitments. It has also suggested that the scope of executive power conferred by the take care approach is substantially less than any imagined by claims based on the President's foreign affairs powers, and that the discretionary component actually compares favorably to any theory of implied delegation.

This said, the consequences of the Take Care Clause may be worrisome, and legitimate questions remain as to whether it licenses undue executive branch authority relative to other domestic actors, like the U.S. states or Congress. For this reason, it is important to emphasize the opportunities it affords. As discussed previously, Congress sometimes endorses, and sometimes truncates, the President's authority to implement treaties. The U.N. Participation Act, for example, explicitly permits the President to implement certain Security Council resolutions adopted under Article 41 of the Charter; at the same time, it rebuts any inference that Congress has delegated authority to implement resolutions involving the use of force, and the statutes implementing multilateral trade agreements limit both the automatic domestic effect of those agreements and their potential for enabling executive branch authority.

³¹⁵ See, e.g., ICJ Statute, *supra* note 182, art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”).

These varied reactions make it difficult to surmise any particular congressional expectation as to the default rule – what authority the President possesses in the absence of legislative direction – and likewise impair any factually-premised argument for presumptions favoring or disfavoring delegated authority. But they do suggest that Congress is willing to limit presidential authority when it sees fit. Just so, Congress may take matters into its own hands, and resolve them on a case-by-case basis. It might, for example, endorse take care authority as it has with Article 41 resolutions, adding types of international institutions and decisions as it sees fit, or truncate take care authority, as it has in the trade context. Prophylactically, U.S. treaty-makers could of course limit the opportunities for international intervention and for reinforcement of take care authority, whether by bowing out of dispute resolution altogether or requiring specific consent prior to any actual proceedings.³¹⁶

Congress might also adopt a more overarching approach, addressing treaties or international decisions en masse. It could enact legislation explicitly vesting the President with relevant implementing authority, or choose instead a sort of Rules (Dis)Enabling Act to prevent treaties or international decisions from licensing executive branch authority. If that were resisted – because, respectively, it ratified freewheeling executive authority or impaired interstitial or emergency actions – Congress might take a more procedural course. For example, Congress might require the President to notify it of any adverse international decisions, much as it has to provide notice of executive agreements,³¹⁷ require a standstill period before implementing any decisions,³¹⁸ and limit the executive branch’s authority to enter into international settlements or other measures that arguably bind U.S. hands.

³¹⁶ See, e.g., U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, 132 Cong. Rec. S1378 (daily ed. Feb. 19, 1986) (attaching condition providing that “before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case”).

³¹⁷ Case-Zablocki Act, 1 U.S.C. § 112b; for details of this regime and discussion of its efficacy, see CRS, *supra* note 98, at 209-33.

³¹⁸ The analogous Case-Zablocki Act does not require advance notice before executive agreements are concluded, but only prompt notice thereafter. Other statutes do, however, impose waiting periods before executive agreements on certain subjects-matter are permitted to take effect. See CRS, *supra* note 98, at 235-38 & table X-3.

The danger in any general solution, and the relative virtue of a more piecemeal approach, coincides with the original motivations for take care clause authority. The best remedy, on this view, would not focus solely on expanding the capacity to produce international legislation, or retracting domestic authority. The objective of positive law, like the Constitution, should instead be to align the allocation of domestic authority with the existence of international obligations – as the Take Care Clause permits, but does not require.