THE PRESIDENT'S RATIONAL CHOICE OF A TREATY'S PRERATIFICATION PATHWAY: ARTICLE II, CONGRESSIONAL-EXECUTIVE AGREEMENT, OR EXECUTIVE AGREEMENT?

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ABSTRACT

A president who chooses to seek legislative approval of a treaty risks delay, textual modification, and even outright defeat. Neither the Constitution nor Congress nor the courts constrain this choice. The president nonetheless often seeks legislative approval before ratifying a treaty, whether through the constitutionally specified process of obtaining Senate advice and consent or the extraconstitutional congressional-executive agreement. Why? This article argues that the president risks the hazards of seeking legislative approval in order to send other nations a costly, credible signal of U.S. commitment to the obligations of the treaty. First, the article examines in general terms the choice to seek legislative approval at all and, if sought, which path of legislative approval to employ. Second, the article argues that signaling theory explains why presidents systematically allocate certain issue areas (for example, trade liberalization or arms control) to certain preratification pathways (for example, the congressional-executive agreement or the Article II pathway).

In international law, a nation conveys its formal promise to adhere fully to the terms of a given treaty by sending a “letter of ratification” from its head of state to the treaty depositary.¹ Under the domestic law of many nations, the head of state may not legally ratify a treaty without first obtaining legislative approval. Section 2 of Article II of the U.S. Constitution embodies one such approval mechanism: the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”

This constitutional provision has caused some U.S. presidents great grief. In order to represent the United States personally at the post-Armistice bar-

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¹ For a rational-choice perspective on this and other aspects of the international law governing the validity, degree of obligation, and termination of treaties, see John K. Setear, An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law, 37 Harv. Int’l L. J. 139 (1996).

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gaining, Woodrow Wilson became the first sitting president to leave the United States. When Wilson tendered to the Senate the laboriously negotiated final text of the Treaty of Versailles (including the Covenant of the League of Nations), 49 senators voted to give the Senate’s consent to ratification, while only 35 senators voted in the negative—a clear majority in favor of presidential ratification, but several votes short of the necessary two-thirds majority. Neither Wilson nor the League ever recovered from the U.S. failure to ratify the treaty. More recently, the Senate’s vote of 48 in favor of and 51 against giving advice and consent to the Comprehensive Test Ban Treaty was a decisive rejection of the agreement under the two-thirds rule. Under a simple-majority rule, the Clinton administration would have come close to success—and perhaps even achieved it if, with victory possible, the administration had expended greater resources on supporting the treaty and on granting favors to change disinclined minds.

Furthermore, a host of treaties have been submitted to the Senate only to languish without definitive floor action. Treaties in this category—and submitted to the Senate before 1995—include the Convention on the Law of the Sea, Protocol II to the Geneva Conventions, the Convention on Biodiversity, the Convention on the Elimination of All Forms of Discrimination against Women, and the Vienna Convention on the Law of Treaties. In some cases—including the Kyoto Protocol to the Framework Convention on Climate Change, the Convention on the Rights of the Child, amendments to the Anti-Ballistic Missile (ABM) Treaty clarifying the difference between strategic- and theater-level missile defense, and the treaty that would constitute an International Criminal Court—the president has not even submitted the treaty to the Senate. Unless the president believes in negotiating and agreeing preliminarily to such treaties, but not actually having the nation fully bound by them, then the failure even to submit a treaty to the Senate for advice and consent presumably indicates the president’s belief that the treaty could not garner the approval of the Senate.

The mere fact that the executive does not always prevail in a domestic political struggle should not be surprising, of course. Certainly, in a system of separated powers as well as checks and balances, one cannot expect the president of the United States always to prevail. In this particular instance, however, there is something odd about the president’s willingness to suffer defeat or delay at the hands of the Senate: the president does not need the approval of two-thirds of the Senate before he can ratify a treaty. As a practical

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2 For a more extensive list, see Foreign Relations Majority Staff (U.S. Senate), Pending Treaties, December 19, 2001 (http://foreign.senate.gov/briefing/treaties.pdf, visited April 8, 2002).

matter, a twenty-first-century president plainly has available to him not only the Article II process but also two alternative preratification routes:

1. he may make use of the Article II procedure and submit an agreement to the Senate and obtain a two-thirds-majority vote, or
2. he may submit an agreement to both chambers of Congress as a "congressional-executive" agreement and obtain a simple-majority vote from each house, or
3. he may entirely bypass both chambers of Congress and simply declare the treaty in question to be an "executive agreement" (called by many a "sole executive agreement") not requiring any consent from Congress before ratification.4

The president has in fact ratified important international agreements using each of these pathways. The North American Free Trade Agreement (NAFTA) was a congressional-executive agreement: it garnered a favorable vote in the Senate of only 61 to 38, but it was also submitted to the House, where the vote was 234 members in favor and 200 representatives opposed. The president ratified NAFTA shortly thereafter. The treaty expanding the General Agreement on Tariffs and Trade (GATT) and constituting the World Trade Organization (WTO) took a similar preratification pathway, as did the Strategic Arms Limitation Talks (SALT) I treaty between the United States and the Soviet Union (the first major arms control agreement of the Cold War). The original GATT agreements were not submitted to Congress at all, nor was President Roosevelt's destroyers-for-bases deal preceding U.S. entry into World War II, nor were treaties resolving huge financial claims stemming from the Russian Revolution and, much later, from the Iranian Revolution.

In none of these cases did the House or Senate object. In addition, no subset of Congress or private individual has succeeded in litigation that attempts to invalidate such presidential action. Indeed, the courts often consider the issue to be a "political question" entirely outside their purview to resolve. Furthermore, for his part, no president has attempted to restyle a treaty to change its preratification pathway after the initial selection, despite the delays or occasional outright defeats resulting from legislative consideration.

The implicit bargain struck among all three branches appears to be straightforward and stable: the president may choose whichever (single) preratification pathway he wishes. This situation presents several puzzles:

1. Why would a rational president ever choose not to make use of executive

4 The president sometimes ratifies a treaty without a postnegotiation vote by Congress and asserts that the ratification was authorized by some previous statutory enactment of Congress. These agreements resemble the standard executive agreement in many ways, although some analysts include these agreements as congressional-executive agreements. Strict categorization of such agreements is not necessary for the analysis undertaken here.
agreements when such a pathway avoids the potential for delay and defeat extant in seeking legislative approval?
2. Given that presidents do seek legislative approval before ratifying some agreements, when would a rational president choose the congressional-executive pathway rather than the Article II pathway?
3. Why do Congress and the federal judiciary allow the president to choose whichever preratification pathway he desires, given that the president sometimes bypasses one or both chambers of Congress and that the courts' unqualified support of the president removes them from an active role in an important area of constitutional decision making?

This article concentrates on the first two questions and, although it describes judicial deference to the president in his choice of preratification pathway, generally leaves to another day an analysis of the precise motivations of the legislative and judicial branches. Focusing on the president, the article concludes the following:

1. The president does not use his choice of preratification pathway to maximize the chances that he will be able to ratify the candidate treaty.
2. The president’s general willingness to seek legislative approval is consistent with an effort to generate a credible signal of durable U.S. commitment to the obligations of the treaty in question.
3. The president’s allocation of particular treaty types to particular preratification pathways (such as the typical allocation of trade liberalization agreements to the congressional-executive pathway) is consistent with a finer-grained signaling process driven chiefly by domestic legal and political factors, including the president’s practical control over the instruments necessary to effect compliance with the treaty and the likelihood that rational external audiences will need greater reassurance about the broader political commitment of the United States to the treaty.

The remainder of the article begins with a brief review of the relevant literatures and preratification pathways open to the president. The article then examines several factors that, under a signaling-oriented theory, plausibly explain the president’s general willingness to employ preratification pathways requiring legislative approval. The next section compares the determinants of success under the Article II preratification pathway with those under the congressional-executive agreement. Next, the article argues that signaling theory explains the tendency of presidents through time to assign treaties in particular broad issue areas to the same preratification pathway. Finally, the article elaborates on the assumption, typically made throughout with only minimal explanation, that neither the Constitution nor Congress nor the courts constrain the president’s choice of preratification pathway in any clear, meaningful fashion.
I. **Preexisting Scholarship and Preratification Pathways**

A. **Three Strands of Scholarship**

Two strands of legally oriented literature touch upon the issues relevant to these puzzles of preratification approaches. One focuses on rational-choice approaches to separation-of-powers issues. The majority of these analyses adopt a public-choice perspective in which the branches of government pursue some end not entirely coincident with the public interest; all assume that the branches of government (or the individuals within them) act in a rational, instrumentalist, and often strategic fashion. The other strand of legal scholarship, more traditional and much larger, more or less ignores the incentives facing various branches of government and instead focuses on the textual (constitutional) and historical legitimacy of congressional-executive and executive agreements. A third strand of relevant scholarship comes not from law but from political science. As part of a larger work that examines legislative influence on foreign policy in democracies, Lisa Martin presents evidence to support the hypothesis that the president cannot easily evade congressional approval when he makes international commitments.

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Cameron examines “veto bargaining” between the president and the Congress in the light of his wealth of theoretical, statistical, and descriptive insights.9

Of these three strands, all approach, but none makes direct contact with, the endeavor here. The legal writings on rational-choice separation-of-powers issues provide a useful backdrop for any analysis of such issues, but they simply ignore treaties. Given the many unusual features of the preratification pathways as opposed to the legislative pathway, these writings are helpful, but no more. The legal writings on preratification pathways for treaties explore what the president and Congress may do while still hewing to the Constitution, but these writings say little about what the president should do, especially given that the choice of preratification pathway is his. This article, in contrast, takes for granted the general acceptability of all three preratification procedures but examines closely the president’s use of his discretion.

The political science writings come closest to the heart of this article. Cameron’s work on veto bargaining, confined as it is to the traditional legislative process and especially the executive veto, is helpful but not directly on point. Martin, however, addresses exactly the same topic as this article: the president’s choice of a preratification pathway for a treaty. Her conclusions are broadly consistent with the subject and conclusions of this article. The analysis here, however, is less statistical and more contextual. This article, but not Martin’s, considers the role of the judiciary, distinguishes between executive agreements and congressional-executive agreements,10 explores the relationship between the preratification pathway and the need (if any) for subsequent implementing legislation, and explains broad patterns in the choice of preratification pathway by subject matter along lines that Martin does not examine.

B. Preratification Pathways

This section briefly describes ordinary legislation and then contrasts this process with each of the three preratification pathways open to the president.

In ordinary legislation, the Congress sends to the president a bill that it has drafted (at least formally) and then voted upon favorably by at least a simple majority in both chambers.11 The president may within 10 days of presentation take action to approve (that is, sign into law) or disapprove (that is, veto) the bill, or he may take no action at all. Signature or inaction, except in the rare case of the “pocket veto” in which Congress adjourns before the

10 Compare Martin’s broad dichotomy: “Executive agreements, in comparison [to the Article II procedure], are not mentioned in the Constitution. They are approved through a number of different mechanisms, from a formal legislative vote to sole executive approval.” Martin, supra note 8, at 54.
11 The relevant constitutional text is at U.S. Const., art. I, § 7.
10-day window has closed, results in the bill’s becoming law. The Congress may override an ordinary veto with a two-thirds majority in both chambers, while a pocket veto is final. Abrogation of a statutory law generally requires the passage of a repealing statute (absent its effective repeal by a court on constitutional grounds).

The Article II preratification process shares few characteristics with legislation. The president drafts the initial text (in conjunction with the heads of state of other nations), although the Senate may effectively amend the text by conditioning its advice and consent upon various reservations, understandings, or declarations. The president transmits that text only to the Senate. A two-thirds majority is necessary for approval. Even after a favorable senatorial vote, the president may choose not to ratify the treaty in a “veto” that the Senate cannot override. In addition, the president has broad discretion to abrogate the treaty’s obligations upon the United States in international law, while Congress can abrogate the text that it drafts only with another act of legislation (and thus only with the potential for presidential participation, in the form of the executive veto).

The congressional-executive agreement, which is not set forth in the Constitution, saw scattered use early in U.S. history, with a rise in prominence after World War II. Congressional approval, and with it presidential ratification, is contingent upon a simple majority in both chambers. The president negotiates the proposed text with foreign heads of state, but Congress may amend it. As with the Article II procedure, the president may unilaterally and decisively choose not to ratify the treaty or decide later to terminate the treaty after its ratification.

The president has used (sole) the executive agreement throughout U.S. history, but its employment exploded during and after World War II with the increase in the complexity of, and U.S. involvement in, international politics around the globe.\textsuperscript{12} This pathway is simplicity itself: the president negotiates an international agreement and then ratifies it without any legislative action at all. The president may terminate such a treaty without the consent of Congress.

II. POSTRATIFICATION FACTORS AS THE CRUCIAL DETERMINANT OF PRERATIFICATION PATHWAY

As will be discussed in more depth below, neither the Constitution nor Congress nor the courts place any meaningful constraints on the president’s choice of preratification pathway.\textsuperscript{13} Extensive federal practice contradicts any assertion that only the Article II procedure is a constitutionally permissible preratification pathway. Congress has made no use of its many tools to combat

\textsuperscript{12} For a general history of the executive agreement, see Margolis, supra note 8.

\textsuperscript{13} See Section V infra.
the president's discretion to choose a preratification pathway. When litigants have challenged the president's choice, the courts have deferred to the executive branch. (Such a situation should certainly perturb those who believe that governmental bureaucracies are relentlessly expansionist: the judiciary and the legislature have voluntarily forsworn all but the most perfunctory efforts to govern the president's choice of preratification pathway.)

In light of the passivity of the other branches, the president's frequent decisions to forgo the executive agreement in favor of a preratification pathway that requires congressional participation are puzzling. Why should the president give up the ability to ratify immediately and exactly the text that he negotiated with other nations in favor of the possibility of textual modification, lengthy delay, or outright defeat?

This section argues that the likelihood of ratification and the purity of the ratified text are not the only maximands of a rational president. An examination of postratification legal rights and requirements under domestic U.S. law can provide both a general explanation of the president's decision to choose a preratification pathway involving legislative approval and a rationale for the more specific variation in pathway choice by subject matter area that has been observed. In general, seeking legislative approval can serve as a costly, credible signal by the president of his commitment to the treaty in question. If obtained, legislative approval amplifies this signal. This section discusses the alternative to an executive agreement as "legislative approval," a phrase meant to include both the congressional-executive agreement and the Article II procedure. Later sections treat these alternatives to the executive agreement as distinct.

The discussion of the previous section focused on presidential and legislative interaction before ratification. Two legal facts are especially relevant after the president's ratification of a treaty. First, while ratification binds the United States to an in-force treaty in terms of its international legal obligations, the status of those obligations within the domestic legal system must often await congressional implementing legislation.14 Unless a treaty is "self-executing" (and few are), then Congress decides through ordinary legislation (with its presentation to the president for a possible veto) whether the agreement gives rise to private causes of action or instead simply binds each part of the federal government in its dealings with other federal governmental entities. Congress determines through ordinary legislation how nationwide obligations (such as a particular reduction in the production of ozone-depleting substances) are to translate into concrete obligations for particular private actors (whether as an equivalent percentage reduction for each producer, or as quotas for different producers that reflect different percentage

reductions, or as an overall quota and set of allocations that the producers may modify through tradable emissions permits, and so on).

Second, as mentioned in the description of preratification pathways, the president frequently terminates U.S. obligations under a treaty on his own even if the treaty’s preratification pathway involved legislative approval.15

Both of these factors undermine the president’s ability to garner political credit from informed audiences for the ratification of a treaty characterized by the president as an executive agreement. The president may immediately ratify a treaty so characterized and thereby initially avoid congressional delay or textual tampering, but is ratification a significant event when the president may be unable to elicit the legislative cooperation necessary for actual implementation of the agreement? Cooperation between the president and Congress may be especially problematic in an era in which only three of the 17 Congresses since 1969 have seen both chambers controlled by the president’s party. Furthermore, even if Congress passes the requisite implementing legislation, will the president’s successors in the White House refrain from unratifying the treaty? The election of a president occurs every 4 years. For that and other reasons, only three of the 10 presidents between Franklin Delano Roosevelt and George W. Bush (exclusive) served a full 8 years. The time between ratification and the installation of a successor shrinks further given that a new president is unlikely to accomplish many foreign policy initiatives during his first year of office.16 The president’s audiences must even discount the significance of ratification by the likelihood that the very president who ratifies the treaty will change his mind and terminate the agreement while still in office.

In such a situation, the president may wish to send a credible, costly signal of both his own and his country’s commitment to the treaty.17 Legislative approval may fit the bill—and the treaty. The president who seeks legislative approval incurs some costs with certainty. He must prepare a letter of trans-

15 There are a number of legal rationales for such a withdrawal, such as a change in circumstances contemplated by the treaty text, the utilization of a withdrawal clause that requires no reasons whatsoever, or the breach of the treaty by another party. For rational-choice discussions of some of the international legal rules governing the extinction of obligations, see Setear, supra note 1, at 201–3, 206–10 (default rule on termination and change in circumstances); John K. Setear, Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility, 83 Va. L. Rev. 1 (1997) (actual and optimal international legal rules governing a nation’s response to another nation’s treaty breach).

16 Martin’s regression analyses uncover a significant (negative) independent effect of the president’s first year in office on the number of Article II treaties ratified, though the use of executive agreements remains quite similar from year of term to year of term. Martin, supra note 8, at 70.

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mittal to Congress. He must plot out his strategy for obtaining legislative approval and then monitor the process as it proceeds. He must make such efforts to persuade the general public as he deems necessary. He also incurs some costs in the probabilistic sense. Congress may significantly modify the president's desired text, leaving the president with the awkward choice of either withholding his ratification of the treaty or accepting a treaty that is significantly different from the one that he negotiated. In either case, the president may also find that he must renegotiate the treaty with the foreign nation (or nations) involved before it (or they) consider themselves bound to the new text. Congress may delay approval of the treaty and thereby place in limbo the president's ability to garner political credit for the agreement. Congress may even bring the treaty to a floor vote and fail to provide sufficient votes for approval. In each case, the president fails to obtain the outcome that he desires. He may also suffer reputational losses, whether with Congress or with voters, if they see the outcome as evidence of presidential indecision or incompetence. A foresighted president may attempt to avoid these costly outcomes by crafting the negotiated text appropriately, but bargaining in the shadow of Congress then imposes upon the president a cost in the form of forgone opportunities to include certain provisions in the text.

A president who seeks legislative approval thereby provides a costly, and thus credible, signal of his own commitment to ratify the agreement in question. The president's decision, especially the inclusion of the legislature in the preratification process, also signals that U.S. support for the agreement is durable.

One may infer some degree of durability simply from the president's willingness to send a costly signal in the first place if, as seems likely, the wagering of political capital by the president on preratification approval also signals some degree of presidential commitment to the agreement after its ratification. To think otherwise would imply that the president garners high benefits from the act of ratification but few marginal benefits from the actual execution of the treaty, a situation that would require a nearly exclusive focus on publicity rather than outcome.

The role of the legislature in signaling durability largely depends, of course, upon its approving the agreement. At the moment that the president chooses the preratification pathway, therefore, the signal of durability that results from legislative approval is a matter of probability rather than certainty. If the legislature approves the agreement, then, like the president, Congress has

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18 Such "audience costs" are thought by some to be sufficiently prominent to serve as an explanation even for unintended wars. See James Fearon, Domestic Political Audiences and the Escalation of International Disputes, 88 Am. Pol. Sci. Rev. 577 (1994).

19 On some occasions this factor may actually be a benefit to the president, as when he successfully claims in an international negotiation that he must palliate the Congress with a textual change that is in fact closer to his own desired position as well. See Robert Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 Int'l Org. 427 (1988).
presumably wagered some of its political capital on the success of the agreement and expended other scarce resources (staff time, polling questions, and so on) on the approval. To the degree that shifts in congressional policy are more difficult to effect than changes in presidential policy—perhaps owing to the much larger number of formal decision makers in Congress—then legislative approval is not only an additional but also a more certain indicator of durable U.S. commitment to the treaty. The value of legislative approval in signaling durability is especially great in light of the fact that Congress must participate in any postratification enactment of implementing legislation. Once implementing legislation passes—we are, however, now twice removed from the moment of pathway selection, once for a hypothesized preratification approval and again for hypothesized implementing legislation—then the United States will be much more durably committed. Both chambers of Congress will have by necessity participated in the process. In addition, implementing legislation cannot be undone, at least in the formal sense, by the president alone—nor, given the requirements of ordinary legislation, be undone by Congress alone unless it possesses the two-thirds majority in both houses necessary to override a presidential veto.20

Furthermore, legislative approval in a democracy may demonstrate the breadth or durability of popular support for the agreement in a broader or more public fashion, and thus signal broader or more durable commitments, than would exclusively executive action. The more localized nature of a member’s constituency implies a broader quality of aggregated support if a majority of members is to approve a treaty. In addition, Congress often has greater difficulty in keeping its deliberations from the public than does the president. A decision to seek legislative approval thus implies a certain presidential confidence not only in legislative approval specifically but also in the reception to be accorded the treaty more generally by the public.

III. THE PRESIDENT’S CHOICE BETWEEN THE TWO PRERATIFICATION PATHWAYS THAT INVOLVE LEGISLATIVE APPROVAL

The previous section argues that a president who wishes to send a credible, durable signal of personal and U.S. commitment to a treaty should seek its approval by Congress. This section compares the two pathways involving legislative approval, the Article II procedure and the congressional-executive agreement, in terms both of the durability signaled by success in obtaining legislative approval and of the likelihood of such success.

20 If only legislation can repeal legislation, then the formal status of implementing legislation does not change merely because the president takes some action, namely, terminating the treaty that the legislation implements. The ongoing practical status of legislation implementing a terminated treaty is less clear.
A. Durability

Obtaining legislative approval under the Article II procedure implies a more durable commitment in at least two ways. First, the 6-year term of senators makes for a slower potential turnover from supporters to opponents of the measure in question. Suppose that the president obtains exactly a two-thirds-majority vote of the full Senate. The next election cycle can result in a Senate that would withhold its advice and consent to the same treaty only if every senator up for reelection had been a treaty supporter and lost to a candidate opposed to the treaty. Ordinarily, of course, about two-thirds of those up for reelection would be treaty supporters, in which case a change from two-thirds support for the treaty to two-thirds opposition in a single election cycle is impossible. Indeed, if one assumes a random association between those supporting the treaty and those facing reelection and assumes the usual rate of success for incumbents, then the typical election cycle sees roughly seven treaty supporters lose their seats. At that rate of turnover, and still assuming that every incumbent loses to a treaty opponent, then 4 years must elapse before even a simple majority of the Senate comes to disfavor the treaty.

The congressional-executive agreement implies a much less durable commitment. The agreement may meet with legislative approval by as slim a margin as one vote in each chamber of Congress. Within 2 years, the likelihood that the opponents could gain one vote seems high. All of the members of the House who voted for the agreement, regardless of the overall margin of support, must in fact face the risks of a reelection effort.

Second, obtaining the two-thirds majority required for advice and consent under Article II presumably shows a deeper or broader support for the treaty in question than do the simple majorities sufficient for legislative approval of a congressional-executive agreement. As discussed below, the likelihood of obtaining approval for a congressional-executive agreement based purely on party loyalty is much greater than the likelihood of obtaining the requisite support for an Article II treaty. More generally, a president who can muster twice as much support as opposition from a legislative body (as is necessary under the Article II procedure) presumably demonstrates a greater depth of commitment from that body than a president who garners one more vote for a treaty than its opposition can muster (as is sufficient, if obtained in both houses, for a congressional-executive agreement). To the degree that support in the Senate correlates with a more general depth of commitment to the treaty, one would expect the Senate to be less affected by a change in the presidency.

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21 Between 1946 and 1994, about one in three senators up for reelection either chose not to run or failed to win reelection. See Vincent McGuire, Re-election Rates of House and Senate, 1946-1994, n.d. (http://spot.colorado.edu/mcguire/RELECT.html, visited April 4, 2002). Assuming exactly a two-thirds majority of the full Senate for the treaty, and assuming no correlation between treaty support and proximity of election, then about 22 senators up for reelection (two-thirds of 33) would be treaty supporters, and roughly seven of those (that is, one-third of 22) would fail to return to their seats.
treaty in the United States, then the successful employment by the president of the Article II procedure signals a more credible commitment than the congressional-executive agreement.

The same two-thirds-majority rule that combines with staggered 6-year senatorial terms to provide a signal of great durability also presumably increases the likelihood that the president’s attempt to secure legislative (namely, senatorial) approval will fail. As we shall see presently, however, such a comparative judgment depends in part upon contestable characterizations of the treaty approval process.

**B. Likelihood of Approval**

This section first examines the difference between garnering the support of the median member in each chamber of Congress and obtaining the support of two-thirds of the Senate, treating in both cases the preferences of legislators as exogenous. This section then examines differences between the Article II and congressional-executive pathways when the preferences of legislators vary with presidential effort expended in persuasion.

*Two Median Members of Congress or One Extreme Senator?* What are the broadest outlines of the president’s choice among the three preratification pathways? Plainly one consideration will be whether the president can obtain the necessary legislative approval. With the executive agreement, of course, this criterion is irrelevant: no legislative approval is necessary. If the president is considering the Article II procedure or the congressional-executive procedure, however, then he would be prudent to ponder his chances of success in Congress.

At the poles of legislative support for the treaty, the choice between a congressional-executive agreement and the Article II procedure does not affect the outcome. If the president has the support of both two-thirds of the Senate and a majority of the House, then either pathway will result in approval. If he lacks the support of a simple majority in both chambers, then neither pathway will result in approval. A bare majority in both chambers requires the president to choose the congressional-executive pathway to obtain approval. A president supported by at least two-thirds of the Senate but less than a majority of the House, in contrast, must choose the Article II pathway to obtain legislative approval.

A glance at the twentieth century’s distribution of power by party in Congress and the White House implies that the congressional-executive agreement is much likelier to result in legislative approval than the Article II procedure. Never has there been a twentieth-century Congress in which the president’s party controlled two-thirds or more of the Senate but less than half of the House. There have been five electorons producing a two-thirds majority in the Senate, but always accompanied by at least a simple
majority in the House. There have been roughly 30 Congresses in which the president's party had a simple majority in both houses. There have therefore been more than two dozen twentieth-century Congresses from which, on a straight-party vote, the president could obtain approval for a congressional-executive agreement but not an Article II agreement. There have been no Congresses from which, on a straight-party vote, the president could obtain approval for an Article II agreement but not a congressional-executive agreement. Party loyalty is not perfectly correlated with support for an Article II treaty, of course—or the only treaties ratified under Article II in the last 2 decades would have come to the Senate floor in either 1993 or 1994. Nonetheless, party affiliation is a rough-and-ready proxy for whether a member of Congress will support a treaty.

The difference between the two pathways has narrowed over time, however. Of the 30 instances of twentieth-century party dominance of all three institutions, only nine occurred in the second half of the twentieth century: 1950, 1952 (the only instance of Republican dominance), 1960–66, 1976–78, and 1992. In the last 20 years, only once has a party controlled all three institutions. Regardless, there have been no situations in which 100 percent party loyalty would result in legislative approval only under the Article II pathway.

Variations by Preratification Pathway in Biases against Legislative Approval. The analysis above implicitly assumes that the preferences of legislators are exogenous to the president's (and his opposition's) efforts regarding the treaty in question: the preferences of the members of Congress simply exist, and the wise president chooses his treaty approval pathway as best he can. We now instead assume that the preferences of those in Congress are a reflection of nothing but the resources expended by the president or his opposition to influence them (or their constituents). The focus thus shifts to the comparison, across treaty approval pathways, between the size of the president's minimum winning coalition and that of his opponents' minimum blocking coalition.

Given the two-thirds majority required to obtain legislative approval with the Article II pathway, the president must persuade at least twice as many senators as the opposing side if he is to prevail. Under the congressional-executive pathway, in contrast, the president must persuade a majority of both chambers, while his opposition need only obtain the support of a majority

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of either chamber to block approval. The minimum blocking coalition is thus 51 (senators), while the president’s smallest winning coalition numbers 269 (51 senators + 218 representatives). The president must persuade more than five times as many members as his opposition if he is to prevail in a congressional-executive agreement. By this measure, then, legislative approval is actually more likely to occur along the Article II pathway than along the pathway that treats the international accord as a congressional-executive agreement.

One alternative to this personal-politics model is a representative-politics model in which the president and his opposition must convince not individual members of Congress but rather their constituents (who, in turn, whether directly or indirectly, convince their representatives). This alternative conception makes little difference in the House, with its generally equal ratio of representatives to constituents. In the Senate, however, the vastly unequal ratios of senators to constituents—a senator from California represents 60 times as many individuals as a senator from Wyoming—mean that the arithmetic of the representative-politics model differs substantially from that of the personal-politics model.

Under the assumptions of the representative-politics model, those who seek to defeat an advice-and-consent resolution in the Senate need to persuade only the two senators from each of the 17 least populous states (thereby providing 34 votes, enough to defeat the advice-and-consent motion). Those 17 states contain roughly 20 million people. The smallest winning coalition for the president requires the support of the senators from the 34 least populous states, which contain approximately 90 million people. While the president who chooses the Article II procedure must persuade twice as many senators as his opposition in the personal-politics model, he must persuade more than four times as many citizens as his opposition if he is to succeed along the Article II pathway in the representative-politics model.

Under the congressional-executive pathway, the president can prevail by persuading any 218 representatives. (Unless he focuses his attentions on those in the largest states, his persuasion of the representatives’ constituents will yield a majority of senators as well.) Half of the representatives, of course, together represent roughly half of the total U.S. population of 280 million.

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24 All of the population figures discussed in this subsection are as stated in the 2000 Census of the United States at U.S. Census Bureau, Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000 (Excel file), December 28, 2000 (http://www.census.gov/population/www/cen2000/respop.html, visited April 3, 2002). A more sophisticated analysis would use likely voters, rather than citizens, for the relevant calculations.

25 The antimajoritarian nature of the Article II procedure is particularly vivid in this population-driven example. If just over half of the citizens in the 17 smallest states dis favored a particular treaty (and thus motivated their senators to vote against the treaty), while every other citizen in the United States favored the treaty, then the 3.6 percent of the U.S. populace that backed the antitreaty senators would dictate the outcome even though the other 96.4 percent of the U.S. populace favored the treaty in question.
TABLE 1
PRERATIFICATION PATHWAYS

<table>
<thead>
<tr>
<th>Endeavor</th>
<th>By Number of Members</th>
<th>By Constituents (in Millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>To carry an advice-and-consent resolution under Article II</td>
<td>67</td>
<td>90</td>
</tr>
<tr>
<td>To defeat an advice-and-consent resolution under Article II</td>
<td>34</td>
<td>20</td>
</tr>
<tr>
<td>To carry a congressional-executive agreement</td>
<td>269</td>
<td>60</td>
</tr>
<tr>
<td>To defeat a congressional-executive agreement</td>
<td>51</td>
<td>20</td>
</tr>
</tbody>
</table>

In contrast to the president’s minimum coalition of 140 million people representing majorities in both houses of Congress, his opposition need persuade only those citizens represented by a majority of either house. The most efficient way to do so is to persuade the 52 senators from the 26 least populous states, which contain a total of roughly 50 million people. The ratio of the citizens in the president’s minimum winning coalition to the number of citizens in the opposition’s minimum blocking coalition is thus almost three to one.

Table 1 summarizes the differences between pathways as well as between conceptions of the relevant audience as the members of Congress directly or instead the members of Congress indirectly through their constituents.

The president may face an uphill fight in every possible direction, but those hills are not equally steep in every direction. Table 2 shows the ratio of the relevant units necessary for the president to prevail to the relevant units necessary for the president’s opponents to prevail. A larger ratio is a steeper slope for the president to surmount.

The situation is complex. No ratio is the same. More important, no dimension of the problem (whether treaty approval pathway or the model of politics) contains both of the two most favorable ratios of the four. Neither treaty approval pathway dominates the other under both models of politics, and neither model of politics dominates the other political model under both treaty approval pathways. The president’s lightest burden occurs under the Article II procedure when senators may ignore their constituencies. His heaviest burden occurs under the congressional-executive pathway when the members of Congress must vote as their constituencies wish. This range of burdens is significant: the president’s heaviest burden is more than two-and-a-half times that of his lightest burden \((5.3/2.0 = 2.65)\).

One may summarize this section as follows. If the preferences of legislators are fixed, and if history and party affiliation are any guide, then the president will find it easier to obtain a majority of both houses of Congress than a two-thirds majority of the Senate. When the members of Congress vote according only to the effort expended by others in persuading them or their constituencies, however, the picture is more complex. If the president faces a situation in which personally persuading the members themselves is the
TABLE 2
RATIO OF CARRY TO DEFEAT UNDER PRERATIFICATION PATHWAY

<table>
<thead>
<tr>
<th></th>
<th>Personal-Politics Model</th>
<th>Representative-Politics Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article II</td>
<td>2.0</td>
<td>4.5</td>
</tr>
<tr>
<td>Congressional-executive</td>
<td>5.3</td>
<td>3.0</td>
</tr>
</tbody>
</table>

only relevant factor, then he should choose the Article II pathway. If he instead faces a situation in which persuading the members’ constituencies will be determinative, then the congressional-executive agreement is his better choice.

These various situations obviously describe stylized rather than realistic circumstances. Presumably the actual chance of success for any treaty along any pathway depends both on the a priori views of the members of Congress and on the efforts expended to lobby them and to reach their constituencies. Note, therefore, that the likelihood of success for a given treaty along a given pathway is in general likely to be much more difficult to predict.

C. Changes to the Text?

The analysis thus far has for the most part discussed the choice of preratification pathway as if the president negotiates a treaty that the legislature then either approves entirely or rejects utterly. There is, however, a range of intermediate possibilities in which the legislature modifies the text of the treaty and only then approves it. This possibility is yet another reason for the president to prefer the executive agreement to pathways that require legislative approval. If the president bypasses the legislature, then there is not only no need for a vote but also no possibility of facing a difficult choice between ratifying a modified text or withholding ratification entirely.

Legislative Reservations. With a congressional-executive agreement or an Article II treaty, the relevant resolution comes to the floor of the relevant chamber(s) and is typically subject to amendment just like any other bill or resolution. The legislature may then condition its approval of an agreement upon certain conditions set forth in the approved resolution. Amendments that respect congressional support for international agreements are in the aggregate generally known as “reservations, understandings, and declarations” (RUDs).26 These procedures effectively allow the relevant chamber(s)

26 For a treatment of RUDs that includes discussion of both their historical and contemporary uses, as well as their role in both domestic U.S. law and international law, see Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. Pa. L. Rev. 399 (2000). For a detailed quantitative analysis of RUDs that estimates that roughly 15 percent of all Article II treaties involve RUDs, see Kevin C. Kennedy, Conditional Approval of Treaties by the U.S. Senate, 19 Loy. L.A. Int'l & Comp. L. J. 89 (1996) (studying 1,286 Article II treaties involving 195 treaties with one or more RUDs).
of Congress to modify the text of the treaty: Congress implicitly, or sometimes explicitly, requires the president to restate these RUDs in his letter of ratification. If the president chooses to ratify the agreement, then the matter passes out of the domestic realm for the moment as other nations potentially party to the agreement must decide whether to accept the U.S. RUDs, react to them with similar reservations of their own, or insist upon renegotiating the treaty before being bound by any text on the issue at hand.

As between congressional-executive agreements and the Article II pathway, the analysis of amendments is much the same as the analysis of the approval vote—except that in the case of amendments, it is the president who benefits from the inertia of the status quo. Amendments of a congressional-executive agreement require the president’s opponents to garner a simple majority in both chambers, while amendments to an Article II treaty require the president’s opponents to obtain a two-thirds majority in the Senate (only). The same ratios applicable to the president in the analysis of the likelihood of obtaining legislative approval for the treaty now face the president’s opposition with respect to any textual modifications to that treaty.

The possibility that the relevant chamber(s) will attach RUDs to its approval thus in some sense narrows the differences between the two pathways that involve legislative participation. Where the president’s structural difficulties in obtaining approval are great, then so too will be the barriers to any efforts by his opponents to attach RUDs. If the president is going to get anything, he will probably get exactly the text that he negotiated with other nations. Where the president’s difficulties in obtaining approval are less, then the path of legislative RUDs is easier as well. A pattern of agreements approved but modified by the legislature becomes likely along these pathways. Plainly, this is another factor for the president to consider. A president who brings an agreement to the legislature that is delicately balanced from an international point of view, for example, may wish to do so along a pathway that trades off some likelihood of some approved text for greater textual stability.

The availability of RUDs also reflects a situation reminiscent of ordinary legislation: the president must either accept the modified text in its entirety (by ratifying) or “veto” the legislative action—and thus the treaty—in its entirety (by refusing to ratify). The all-or-nothing structure of this situation can influence the outcome. As in any all-or-nothing veto, a rational, fore-sighted presenter (here, the well-informed Senate or the well-informed Congress) will not mold the document so much to its own liking that it prompts a veto from the other actor (here, the president)—unless of course the legislature prefers the status quo (veto) outcome to any treaty text acceptable to the president. Likewise, the veto-holding president will seek to inform the legislature (credibly) that some outcomes acceptable to the legislature will be “vetoed” (that is, ratification will not occur) and that those outcomes
should be avoided by the legislature so long as the latter favors any outcome also acceptable to the president over the status quo.\textsuperscript{27}

A presidential failure to ratify an agreement approved by the legislature is rare, although such a possibility may not be far from the minds of the president and Congress.\textsuperscript{28} More frequently, the other potential parties to the treaty will assert that their original consent is no longer binding in light of the changes made to the text by the legislature (and transmitted by the president in his letter of ratification).\textsuperscript{29} The possibility that such renegotiations will fail to produce agreement from the foreign nation should allow the president to argue credibly against the most provocative RUDs (assuming, as always, that the legislature prefers a less radically modified treaty over the status quo).

\section*{D. A Trend toward Limiting Reservations}

Two developments, one international and one domestic, became increasingly prominent in the last quarter of the twentieth century: treaties that contained “no-reservations” clauses and U.S. statutes that gave the president “fast-track” authority. Both developments reduce significantly the legislature's ability to modify the text that the president presents to it.

A no-reservations clause is straightforward: a treaty states that it is not subject to any reservations by any nation ratifying the agreement. Such clauses exist in a number of environmental treaties\textsuperscript{30} and in the agreement constituting the WTO.\textsuperscript{31} Obviously, such a clause hinders any efforts by

\textsuperscript{27} See Kenneth A. Shepsle & Mark S. Bonchek, Analyzing Politics: Rationality, Behavior, and Institutions 147–49 (1997).

\textsuperscript{28} President Taft did refuse to ratify arbitration treaties with Great Britain and with France after the Senate attached what he considered to be excessive reservations to senatorial consent. See Restatement (3d) of Foreign Relations Law, § 303, Reporter's note 3 (1986). President Wilson asserted an all-or-nothing approach to Senate approval of the Treaty of Versailles; some believe that an amended version of that treaty could have made it through the Senate, in which case Wilson would then have been confronted with a stark choice.

\textsuperscript{29} For discussion of the history of ratification and reservations, see Bradley & Goldsmith, supra note 26, at 406–7, 430–32.


\textsuperscript{31} The overarching scheme of the WTO is that any member is bound to the entirety of the core sub treaties but may pick and choose from among certain peripheral sub treaties. Compare Agreement Establishing the World Trade Organization, Article II, ¶ 2 (“The agreements and associated legal instruments included in Annexes 1, 2, and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.”), with id. ¶ 3 (allowing nations to select among “Plurilateral Trade Agreements”). See also Article XVI, ¶ 5 (“No reservations may be made in respect of any provisions of this Agreement.”).
Congress to enter RUDs affecting the text of the treaty on the international plane (although there may still be ways for Congress to shape the domestic impact of such a treaty). A no-reservations clause may well benefit the president if the treaty as a whole is closer to his preferred outcome than to the outcome desired by the relevant legislative actor(s) (assuming, as ever, that the legislature prefers the treaty presented to it over the status quo). Furthermore, the fact that ordinarily only government personnel from the executive branch represent the United States in international negotiations presumably gives the president a better chance of embodying his branch's preferred policy choices in the treaty—including the presence of a no-reservation clause—than does the legislative branch.

The domestic parallel to the no-reservations clause is a congressional decision not to allow RUDs. Congress most prominently effects such restraint by giving the president "fast-track authority." In such legislation, Congress specifies certain negotiating objectives for the United States and authorizes the president to conduct trade negotiations on a particular topic, for example, free trade among Canada, Mexico, and the United States. Congress requires the president to include one or more legislators on the U.S. negotiating team. The president must notify Congress a given amount of time in advance of his signing the treaty (implicitly accompanied by a discussion of the treaty's terms), as well as notify the legislature another given amount of time before he presents the treaty to Congress. Both chambers of Congress then have a limited time to bring the treaty to a simple-majority approval vote and may not modify or supplement the treaty text.

Between 1974 and 1994, the president had nearly continuous fast-track authority with respect to at least one ongoing set of trade negotiations, including the Tokyo round of the GATT, the Uruguay round that created the WTO, the U.S. Free Trade Agreement, and NAFTA. Congress approved all four of these agreements and has yet to disapprove any fast-track agreement. Since 1994, however, the president has lacked fast-track authority (redubbed "trade promotion authority" by the current Bush administration) of any sort.

This procedure is sometimes viewed purely as self-paternalism by a Congress that fears it will diminish the benefits of a free-trade treaty by larding the approving measure with favors to special interests. The fact that Congress is to be given a seat at the international negotiating table, however, means that Congress may well benefit from affirmative exercises of its power and not just from tying the hands of special treatment. In the absence of the authorizing fast-track statute, it is unlikely that Congress can demand such

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32 See Bradley & Goldsmith, supra note 26, at 439–56.
a place on the negotiating team. (Indeed, one wonders if even the statutorily authorized presence of the Congress might violate the separation of powers between the president and the Congress. Apparently there has been no constitutional challenge to the practice, however.) If the presence of one or more members of Congress on the negotiating team moves the treaty text closer to the legislature’s optimum—that is, if the members of Congress are effective negotiators—then the legislature may gain from this procedure, even though ordinarily the executive’s greater ability to choose the text of a treaty would give the executive a substantial advantage if the approval process involves an up-or-down vote. Does the legislature gain more by moving the treaty text toward the legislative optimum through its increased negotiating influence than it will lose by keeping its promise of an up-or-down vote at the approval stage? One might infer from the unwillingness of Congress since 1994 to renew fast-track authority that the answer is “no,” but of course the calculation of net benefits is a complex one, and the alternative explanations—partisanship, diminishing marginal benefits from trade liberalization, or a desire to wait and see how much NAFTA and the WTO infringe on U.S. sovereignty, among others—are many.

IV. EXPLAINING THE CORRESPONDENCE OF TREATY ISSUE AREA WITH TREATY APPROVAL PROCEDURE

There are certain relatively strong correlations between the subject matter of a treaty and the treaty approval procedure typically employed by the president. Since the end of World War II, this general correspondence of approval procedures with issue area has consistently been part of presidential behavior, regardless of personality or party. For significant agreements that concern national security, such as arms control treaties or alliance treaties, the president tends to submit the treaty to the Senate for consideration under Article II. The same is true for international agreements that concern the environment or human rights. With significant trade agreements, in contrast, the president is likely to submit the treaty to Congress as a whole for approval as a congressional-executive agreement. For the settlement of international claims against the United States and for bilateral investment treaties, as well as for a wide variety of less significant agreements on topics comprising the full breadth of foreign relations, the president styles the treaties as executive agreements. As discussed in more detail below, the courts and the Congress have left these presidential characterizations essentially unchallenged—despite the lack of clear authority in favor of the president and despite the significant stakes.

One may draw at least two inferences from this robust correspondence of agreements with approval types. First, the president does not appear to make

34 See Yoo, Laws as Treaties? supra note 7, at 798–813.
individualized calculations about the likelihood of success in obtaining various types of approval. Across the years and the shifts in relative power and controlling parties in the presidency and the legislature, the president could surely have maximized his chances of obtaining the necessary legislative approval (or of obtaining success by bypassing the legislature) by fine-tuning his choice of treaty approval procedure according to the political landscape of the time on that issue. As with the general question of why the president sometimes forgoes the executive agreement route despite the quiescence of the other branches on the issue of the choice and the risks of seeking legislative approval, one must look beyond the issue of approval to explain presidential behavior.

Second, as argued immediately below in some detail, the need for the president to signal a durable, credible commitment by the United States as a whole can largely explain this distribution of agreement types across treaty approval pathways. Where the need to signal deep and durable political commitment is most prominent, the president chooses the Article II procedure (that form of approval that reflects the most durable consensus). Where the most pressing need is to signal the viability of implementing legislation, the president chooses the congressional-executive agreement (the pathway that most nearly mimics the pathway that implementing legislation needs to take). When the need to signal political support is relatively small and the president’s ability to effect the treaty’s obligations without congressional assistance is relatively large, the president chooses the executive agreement (the pathway that bypasses the legislature entirely).

A. Trade, Arms Control, and Claims Settlements

Arms control agreements that promise specific reductions in nuclear weapons have virtually always taken the Article II preratification pathway. President Nixon treated the SALT I Interim Accord as a congressional-executive agreement, but he treated the contemporaneously negotiated ABM Treaty as an Article II treaty, as President Carter did with SALT II, President Reagan with the Intermediate-Range Nuclear Forces Agreement, President Bush with Strategic Arms Reduction Treaty (START) I, and President Clinton with START II. As to more broadly multilateral treaties that restrict nuclear weapons technology, President Kennedy sent the Limited Test Ban Treaty to the Senate for its advice and consent, as did President Johnson with the Nuclear Non-proliferation Treaty\textsuperscript{35} and the agreement banning nuclear weapons and other weapons of mass destruction in outer space, President Bush with the Threshold Test Ban Treaty (negotiated decades before), and President Clinton with the Comprehensive Test Ban Treaty (to which, as mentioned above, the

\textsuperscript{35} President Nixon was in office when the Senate finally gave its advice and consent to the treaty.
Senate refused in a floor vote to give its advice and consent). As to other weapons of mass destruction, President Clinton submitted the Chemical Weapons Convention to the Senate, as President Nixon did with the Biological Weapons Convention. President Bush did the same with the Conventional Forces in Europe Agreement. Agreements that simply require notification of activities or an upgrading of interstate communications links, in contrast, are typically treated as executive agreements.36

Trade and multilateral financial agreements, in contrast, are usually styled as congressional-executive agreements. This was true, soon after World War II, for the international agreements constituting the World Bank and the International Monetary Fund. It was true for the agreements that simultaneously created the World Trade Organization and set forth myriad new substantive obligations. A simple-majority approval of both houses of Congress was likewise the preratification pathway for the treaty reflecting the Tokyo round of the GATT, for the U.S.-Israel Free Trade Agreement, for the Canada-U.S. Free Trade Agreement, and for the North American Free Trade Agreement. Indeed, as mentioned above, these latter agreements all involved the subset of congressional-executive procedures known as "fast-track authority." A similar pathway is contemplated for any expansions to NAFTA, such as a Free Trade Agreement for the Americas.

With claims settlements, in contrast to arms control and trade agreements, the president typically characterizes the treaty as an executive agreement. (Here the president’s authority is even surer than in most cases, since the Supreme Court has turned away several challenges to the preratification pathway chosen for claims settlements.)37

What might account for a rational president’s systematic allocation of arms control agreements, trade agreements, and claims settlement agreements to the preratification pathways of the Article II procedure, congressional-executive agreements, and executive agreements, respectively? The answer offered here is that the president chooses the Article II pathway when a signal of durable U.S. commitment is paramount, that he characterizes a treaty as a congressional-executive agreement when a signal of reliable and rapid implementation is paramount, and that he considers an international accord to be an executive agreement when the need to signal durable commitment and reliable implementation is minimal.38

37 See cases cited in note 46 infra.
38 John Yoo offers an alternative approach. Employing a historical approach leavened by constitutional textualism, he concludes that the appropriate line between congressional-executive agreements and Article II treaties runs along issues where “Congress already possesses plenary authority, such as international trade and finance.” Yoo, Laws as Treaties? supra note 7, at 821. Where Congress and the president share authority, the Article II treaty is the appropriate preratification pathway. Id. As to executive agreements, Yoo treats the issue only in a brief footnote: “Other areas within the President’s Article II powers may be handled by
Arms control agreements, of course, involve military forces. The president’s role as commander-in-chief and the circumstances of modern warfare (especially strategic nuclear deterrence) mean that the use of military force is the core of the modern president’s powers. Congress, by way of contrasting example, has not made use of its constitutional power to declare war in more than 50 years, nor has it ever pressed the president with respect to the issues supposedly raised by the War Powers Act. Furthermore, arms control agreements, involving as they typically do a reduction in actual or planned military forces, generally do not have large budgetary implications and so generally need not involve Congress’s power of the purse. Taken together, these factors strongly suggest that the need for implementing legislation for arms control agreements is minimal.

The need to signal broader political support for arms control agreements, in contrast, is significant. During the Cold War, arms control agreements between the United States and the Soviet Union were seen as plainly the most important efforts at explicit international cooperation between the superpowers. Public and elite attitudes toward arms control negotiations and the resulting agreements were a crucial barometer of Cold War tension. In addition, one must imagine that those in a plainly authoritarian and generally gerontocratic Kremlin saw the United States as politically unpredictable, perhaps even flighty, and that they would thus require an especially reliable show of U.S. commitment.

Given this combination of circumstances, a rational president would see a great need to signal the depth of U.S. commitment to the arms control process in general and to the resulting treaties in particular. The Article II procedure, with its requirement for a two-thirds majority and its dampened shifts with political winds owing to senators’ 6-year terms, is the best method for signaling such depth of support. The ever-growing complexity and slowly lengthening time horizons of arms control agreements has preserved the need for signaling a broad and durable commitment by the United States, even as the budgetary implications of such agreements have grown somewhat with

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a sole executive agreement [called in this article an executive agreement], such as international claims settlements.” Id. at 831 n.312. It is arguably misleading to say that Congress has plenary authority in areas “such as” international trade and finance, when Congress in fact makes congressional-executive agreements almost exclusively in international trade and finance. If one is to ground the judgment of what constitutes Congress’s “plenary authority” upon the enumerations in Section 8 of Article I (as with the power “[t]o regulate commerce with foreign nations”), then congressional-executive agreements should also be the only permissible pre-ratification pathway in such enumerated areas as postal conventions, copyright treaties, and offenses against the law of nations (such as war crimes). These agreements take different pathways, however. There may be difficulties running in the other direction as well. Claims agreements may have domestic budgetary impacts or international financial implications but are the subject of executive agreements involving no congressional participation at all. Finally, while Yoo’s line drawing works relatively well with respect to defense-oriented treaties—owing to the enumeration in Article II of the commander-in-chief power—it is difficult to find any Article II enumeration that gives the president any authority over treaties on human rights or the environment.
the establishment of well-staffed verification organizations and with the need
to expend funds on the destruction of nuclear weapons.

Trade liberalization agreements, and related agreements in international
finance, are a different matter. While arms control agreements especially
affect the uniformed military and a handful of arms manufacturers, trade
agreements impinge upon the interests of a wide range of manufacturers,
service providers, labor unions, and consumers. Export-oriented enterprises
may have a very different view of such an agreement from import-oriented
enterprises; businesses focused on domestic markets are likely to have their
own perspective as well. The plethora of oxen potentially gored is likely to
make for a complex and fragile bargain, especially since many of the interests
at issue will be well funded and politically vocal.

In such a situation, the most pressing preratification concern that the pre-
sident will need to assuage is that the negotiated agreement will fall apart
when Congress must actually convert the international agreement into a set
of domestic measures that lower particular U.S. tariffs, relax particular non-
tariff barriers to imports into the United States, and cut back on various
implicit or explicit subsidies to U.S. companies. Those who seek a signal
from the United States on the viability and stability of a trade agreement
therefore seem likely to worry more about the relatively short-term prospects
of congressional implementing legislation that reflects the agreement than
about broader or deeper political support for the cooperative endeavor. Indeed,
it is presumably no coincidence that the fast-track procedure both effectively
merges legislative approval with implementing legislation and that Congress
has granted fast-track authority only with respect to trade agreements. Not
only the president but also Congress has seemed fearful that, absent such a
procedure, there will be no way for the United States to send a sufficiently
credible signal about the likelihood that implementing legislation will follow
the same shape as the bargain struck in the international agreement. Congress
thus is willing to engage in the self-paternalism (and presumed loss of bar-
gaining power) inherent in granting fast-track authority in order to persuade
foreign nations to make the international bargain at all.

The treatment of arms control agreements and of trade liberalization and
international financial treaties is thus consistent with a signaling theory. The
depth and relative permanence implied in the signal of success with the
Article II procedure, and the likelihood of conforming implementing legis-
lation signaled by success with a congressional-executive agreement, show
a broad conformity with behavior.

For treaties that settle international claims, however, the executive agree-
ment is much the favored pathway. Is this distinction also consistent with a
signaling theory? International agreements that settle large classes of foreign
claims do seem distinct from trade agreements and arms control treaties.
While most international agreements involve ongoing relationships and ex-
ecutory promises, a claims settlement is typically executed in full within a
short time of its ratification. Foreclosed claims are foreclosed immediately. Disbursements tend to occur with relative rapidity and, once they occur, are difficult to undo given the impermeability of foreign borders to foreign judgments that is implicit or explicit in such claims settlement agreements. The need to signal long-term commitments is therefore absent with respect to claims agreements. The need for implementing legislation is often minimal, given that the foreclosing of claims (as opposed to their granting) typically requires little governmental funding. In addition, those claims that are paid out often come from a self-generating fund of frozen assets, attached property, and the like. In such a situation, the president can safely take advantage of the flexibility and fidelity of the executive agreement despite its lack of any preratification legislative participation.

B. Basing Agreements and Investment Treaties

The correspondence of arms control agreements, trade agreements, and claims agreements with particular preratification pathways is thus consistent with a signaling model. These three categories of agreements do not exhaust the topics of treaties, however. What of the other categories of agreement? For present purposes, one may identify treaties in five additional categories: foreign bases, investment, alliances, human rights, and the environment. The first two categories are typically executive agreements, while the last three categories typically take the Article II preratification pathway.

The categories of treaties typically styled by the president as an executive agreement display a strong consistency with the predictions of the signaling model. Decisions on foreign basing typically involve only the executive's disposition of military forces. (These agreements sometimes have budgetary implications, however, especially when the bases treated in the agreement are not yet significant deployment sites for U.S. military personnel. In this latter situation, the president has in fact sometimes sought congressional approval.) Investment treaties likewise have a low public profile and minimal budgetary implications, and the economic policies at issue are frequently more technical than those that require much congressional participation.

C. Alliances, the Environment, and Human Rights

The three sorts of agreements that typically take the Article II pathway are less plainly consistent with the signaling model. If one views alliances like the North Atlantic Treaty Organization (NATO) as promises to undertake coordinated political-military activity rather than as particularized pledges about military procurements and overall budgets, however, then the correlation of alliances and Article II treaties is sensible. The important thing in entering into an alliance—at least a peacetime alliance—is the ability to

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believe that one’s alliance partners are in fact militarily and politically committed to the endeavor. In fact, NATO has done rather poorly at coordinating military procurement policies or in equalizing the shares of national incomes that its members allocated to alliance/national defense. It was not, in other words, an effective international budgetary agreement—an undertaking that would require close cooperation from both houses of Congress. As a political endeavor with coordinated military planning, however, NATO has been (and still is) highly effective. The typical employment of the Article II pathway for alliance treaties (and treaties expanding membership in that alliance, as occurred recently with NATO) is thus consistent with signaling theory without a great deal of added explanation.

The persistent treatment of environmental treaties under the Article II procedure is not so readily harmonized with the simple signaling model. A set of treaties such as that governing the production of ozone-depleting substances must reach into the private sector if its strictures are to be obeyed (at least in a nation where, as in the United States, ozone production is in the hands of private industry). Regulation of industry is not at the core of the president’s powers and typically occurs only after a congressional grant of authority, however general. The Kyoto Protocol’s strictures would almost surely require the U.S. government to undertake widespread regulation of energy production and transportation—areas currently regulated, but areas that would need to be regulated in new ways and with unusual breadth. In addition, the multiple interests potentially challenged by implementation of the Kyoto Protocol—oil companies, automobile manufacturers, and power plants—are hardly impoverished newcomers at lobbying Congress. Yet despite the implication of these factors that only a congressional-executive agreement could convince other nations and domestic constituencies of the likelihood that Congress would actually undertake these requisite law makings, no one appears to have imagined that the Kyoto Protocol would take any other preratification pathway than the Article II procedure. The Biodiversity Convention involves a similar structure, though one somewhat more concentrated in the interests (chiefly pharmaceutical and biotech companies) affected by its provisions; this convention too is seen as a potential Article II treaty rather than as a congressional-executive agreement or an executive agreement.

A broader look at environmental treaties yields a number of factors that

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41 One of the rare instances in which the Supreme Court has ruled against the president when he asserted the exercise of his powers as commander-in-chief, in fact, involved President Truman’s attempt to take control of steel mills in the United States when labor unrest threatened their continuous operation. The president’s assertion that doing so was a valid extension of his powers as commander-in-chief did not persuade the Court. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
go some way toward reducing the apparent inconsistency of the preratification pathway of environmental treaties with the choices open to a rational president. The first notable environmental treaty, the International Convention on the Regulation of Whaling (ICRW) ratified not long after World War II, was initially an effort by and for whalers to attempt to manage cetacean stocks to their long-term advantage. Congressional implementation was not especially necessary, though a sense of long-term commitment by the United States to the endeavor may have been—conditions that favor the rational employment of the Article II pathway. The next important environmental treaty, the Convention on International Trade in Endangered Species ratified in the early 1970s, involved the executive-administered nitty-gritty of customs inspections and export licenses rather than more sweeping regulation of the production processes of large industries.

Furthermore, the Montreal Protocol's strict (and ever stricter) limits on the production of ozone-depleting substances came to the legislature in a treaty only after Congress had already enacted a ban on the domestic production of chlorofluorocarbons. Similarly, the transformation of the ICRW from a pro-whaling agreement into a pro-whale agreement (via a number of textual amendments) occurred only after Congress had already banned whaling by U.S. citizens and the importation into the United States of whale products. In these situations, the Senate took up the relevant agreements as Article II treaties only after the Congress as a whole had effectively already passed "implementing" legislation. Conversely, while the Kyoto Protocol's obligations would likely require a drastic restructuring of the U.S. economy, no concrete obligation actually comes due until 2012. Those obligations seem very unlikely to be met in any case, even by a committed U.S. government.42 Viewed in this light, the Kyoto Protocol seems no more an expression of concrete obligations than did the antecedent Framework Convention on Climate Change. A long-term political commitment to the process would then be all that one might hope for from ratification, and so treating these agreements as Article II treaties is not as inconsistent with the simple signaling model as one might first imagine. Still, there remains a discernible gap in the fit between environmental treaties and the signaling theory.

Human rights treaties are the final broad category of agreements to consider in terms of the president's rational choice of preratification pathways. As with environmental treaties, there is a facial inconsistency between the characteristics of the category of agreements and the choice of an Article II procedure as the preratification pathway. The individualized interactions that constitute the subject matter of human rights treaties would seem to require detailed legislative action (and executive administration) if a nation is to meet

its obligations under the wide variety of extant human rights agreements. The president has nonetheless submitted these agreements only to the Senate for its advice and consent, not to the Congress as a whole. As with environmental treaties, the president appears irrational to treat the agreements in question as Article II treaties when he presumably needs to signal the willingness of the United States to enact far-reaching legislation instead.

As with environmental agreements, however, there is less to the U.S. response to most human rights treaties than first meets the eye. First, the budgetary implications of such treaties are small. Perhaps more persuasively, though, is the fact that the Senate serves as a highly effective barrier to any real human rights commitments by the United States. The Senate has repeatedly made plain, through RUDs and other devices, that the agreements in question imply no need whatsoever to change U.S. practices. Those agreements that plainly require a change languish in committee. At least against the backdrop of the long-standing response of the Senate to this category of agreement that the president presents to it again and again for advice and consent, the best one can hope for is a general signal of political support for human rights agreements. In this light, the president's submission of these agreements as Article II treaties rather than as congressional-executive agreements is less odd than it might otherwise seem. Still, as with environmental treaties, the harmonization of practice with the signaling theory requires some special pleading.

V. PRESIDENTIAL FORBEARANCE

That Congress and the courts give the president discretion to choose a treaty approval pathway has so far been assumed. This section argues the point.

As discussed above, the rational president concerned only with achieving a treaty configuration as close to his own optimum as possible should always prefer the executive agreement to the Article II treaty procedure or the congressional-executive agreement. Without the need for the president to woo the legislature, he will have no worries about approval votes, and the text of the treaty that the president ratifies can be exactly the text that the president negotiated. Nonetheless, as discussed near the outset of this article, the executive agreement is not the only treaty approval form employed by the president. The president's choice of these other preratification pathways leads on some occasions to a failure to obtain legislative approval, to great delays in obtaining approval, or to significant changes in the effective text of the treaty. There is, therefore, a genuine price to be paid by a president who, instead of characterizing every treaty as an executive agreement, submits some agreements to the Senate under Article II or to the Congress for consideration as a congressional-executive agreement. Why, then, does the president forbear the exclusive use of the executive agreement? This section
considers but rejects the explanation that direct external limitations on the 
president—constitutional constraints, the intervention of the courts, and con-
gressional opposition—are the cause of this forbearance.

A. Constitutional Constraints on Presidential Choice?

One potential explanation for the president’s persistence in seeking pre-
ratification approval from the legislature is that the Constitution requires it. 
A governmental actor who flies in the face of plain text in the Constitution 
may well pay a political price even in the absence of a court order—and 
any court order will be all the more persuasive for its constitutional 
plausibility.

The Constitution is a poor explanation for the president’s varied selections 
among the three preratification pathways, however, largely because the Con-
istitution provides only one such pathway. In allocating the “making” of 
treaties to the president—with the advice and consent of the Senate—Section 
2 of Article II provides the only mention of “treaties” in the Constitution. 
Sections 10 and 11 of Article I seem to touch upon a similar phenomenon 
in setting forth limits on the new States: “No State shall enter into any Treaty, 
Alliance, or Confederation [nor], without consent of Congress, . . . enter 
into any Agreement or Compact with . . . a foreign power.” One joint read-
ing of these clauses is that the treaty-alliance-confederation phrasing em-
phasizes that states may not enter into any international agreement that by 
its description implies that the several states have independent sovereignty, 
while the agreement-compact phrasing covers agreements that acknowledge 
a state’s subsovereign status but still involve a foreign nation. On this reading, 
the first clause prohibits what under the new Constitution is logically im-
possible though it had been a practice under the Articles of Confederation, 
while the second clause assures that those international agreements that in-
volve one of the several states have the consent of Congress. In any case, 
neither clause mentions the president at all. Since no one is arguing that the 
president is exceeding his constitutional authority by participating in the 
treaty-making process, these clauses from Article I cannot bear directly on 
the current inquiry.

The final mention of international agreements in the Constitution is in its 
final article: “This 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, shall be the supreme Law 
of the Land.” In mentioning both the laws of the United States and treaties, 
the drafters of this article imply that statutory law and treaty law result from 
different processes. The congressional-executive agreement resembles leg-
islation in its basic voting rules—a majority of each house of Congress—but 
the absence of a veto override mechanism and the fact that the president 
may unilaterally invalidate the congressional action clearly distinguish the
congressional-executive agreement from the constitutionally prescribed pathway for statutory law. The congressional-executive agreement is neither Article I legislation nor Article II advice and consent. No other, hybrid form of law making is described elsewhere in the Constitution.

One might also note that, whatever number of preratification pathways that one may infer from various textual entail readings, the Constitution gives the president nary a clue as to how to choose among those pathways. One may rest a bit of weight upon Article II’s grant to the president of “the executive power” to give the president some authority for executive agreements, but that is a vague and slender reed—and does nothing to create a textual foundation for the congressional-executive agreement.

B. Constraints from the Courts?

It is not beyond the interpretive powers of the federal courts to draw from ambiguous or nonexistent constitutional language some doctrinal restraint on one branch of government or another. The constitutional cloudiness discussed above is therefore not a definitive barrier to the courts’ imposition upon the president of some constraints in his choice of preratification pathway.

Nonetheless, in the particular context of treaty approval procedures, at least, the argument that the courts constrain the president also lacks much power. The courts, for example, have never reversed a presidential decision to characterize a treaty as an executive agreement. Indeed, they have upheld such decisions not only when the president’s action arguably impinged on a proper separation of powers by usurping congressional power to participate in the treaty approval process but also when the president’s actions, by terminating ongoing litigation, arguably impinged on the independence of the federal judiciary. Efforts to characterize the congressional-executive agreement as unconstitutional in light of the Treaty Clause, while provoking a lively academic debate, have likewise failed to persuade the courts. An effort by a small group of senators to challenge the president’s unilateral power to terminate a treaty approved under the Treaty Clause bore similarly

43 In fact, the Supreme Court has interpreted Congress’s use of the word “treaty” to include executive agreements employed by the president to create exceptions to a congressional statute. Weinberger v. Rossi, 456 U.S. 25 (1982).


45 See the cases and customary behavior discussed at Phillip R. Trimble & Alexander W. Koff, All Fall Down: The Treaty Power in the Clinton Administration, 16 Berkeley J. Int’l L. 55, 60 (1998); see also B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) (holding that the statutory use of “treaty” included the agreement in question: “If not technically a treaty requiring ratification [after senatorial advice and consent], nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President.”).
fruitless litigation. A direct challenge to the constitutionality of the approval procedure for NAFTA fell far short as well.

Often these failures occur because the relevant courts invoke the political-question doctrine or another threshold concern, rather than because the court reaches the merits and rules against the party challenging the president’s choice of treaty approval procedure. The courts’ willingness to call these disputes a political question, and thereby remain out of the fray, conflicts with any hypothesis that the courts always seek to expand the scope of their jurisdiction. The courts do not merely refrain from advancing their own authority but also retreat from the effort even to define the limits of that authority or to serve as a referee between Congress and the president. Regardless of whether the grounds of the decision are procedural or substantive, however, the implicit rule is that the president’s position prevails.

C. Congressional Constraints on Presidential Choice?

Yet another possibility to explain presidential forbearance from characterizing all treaties as executive agreements is that it is Congress itself that constrains the president. Certainly a unified Congress could wreak havoc even upon a president who complies generally with the Constitution. Congress may stop the flow of appropriations and, in doing so, may specify such a cessation in as much detail as it wishes. As it did recently with respect to the Kyoto Protocol, Congress may pass legislation that prevents an administrative agency from moving to behave in accordance with an international agreement. Congress could as a body assert in the courts that the president’s actions violate the Constitution. Given sufficient rancor, the houses of Congress may even combine to impeach the president and remove him from office.

In this particular arena, however, Congress has proved a paper tiger. In terms of litigation, Congress has spawned no set of plaintiffs more representative of the body as a whole than a handful of senators who (unsuccesfully) challenged the president’s unilateral authority to terminate a treaty and some 50 representatives who (unsuccessfully) challenged the president’s ability to conduct the Gulf War without a congressional declaration of war. Despite the hollow roar of the War Powers Act and occasional growls con-

47 Made in the USA Foundation v. United States, 242 F.3d 1300 (11th Cir. 2001) (question of whether NAFTA’s treatment as a congressional-executive agreement was unconstitutional is a nonjusticiable political question), cert. denied, 70 U.S.L.W. 3359 (November 26, 2001).
48 Goldwater, supra note 46 (various opinions in majority invoking political-question doctrine and ripeness concerns); Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (recognition of governments is a matter for political branches, not the judiciary).
cerning appropriations, Congress has never attempted to deny the president funding for military actions. Its acquiescence to presidential superiority in this area (where Congress is expressly granted the power to declare war, after all) apparently carries over into similar passivity with respect to any efforts to force the president to use one preratification pathway instead of another. Despite the fact that the president’s freedom of choice with respect to executive agreements diminishes congressional power, the Congress has not even seriously challenged this presidential discretion since an unsuccessful effort—in the form of the so-called Bricker Amendment—by some (not a majority) of members of the Senate to assert that the president may not use executive agreements as a substitute for Article II treaties. An institution that appears not even to attempt a defense of its turf is far from the stereotypical governmental actor, but Congress appears to be such an institution with respect to presidential choice of preratification pathway.\(^\text{50}\)

The president’s ability to freely choose a preratification pathway may also benefit from a divide-and-conquer strategy. The Senate is the only congressional actor under the Article II procedure set out plainly in the Constitution. When the president chooses an executive agreement rather than an Article II treaty, he plainly reduces congressional prominence. When he chooses a congressional-executive agreement instead of an Article II procedure, however, he simultaneously reduces the Senate’s power (by allowing a simple-majority vote in the Senate to constitute senatorial approval) and increases the House’s power (by giving it a role in the approval procedure at all). A self-interested House of Representatives, therefore, might accept some diminution in total congressional influence if it were to increase its own relative influence.

VI. Conclusion

Over time, some individuals move from plying the highly theoretical waters of rational choice to more eclectic and pragmatic approaches.\(^\text{51}\) Analysis of

\(^{50}\) For a rare argument that the Senate is both practically and constitutionally entitled to constrain the president’s preratification pathways, see Michael J. Glennon, The Constitutional Power of the United States Senate to Condition Its Consent to Treaties, 67 Chi.-Kent. L. Rev. 533 (1991). For an argument that the Clinton administration unwisely acknowledged congressional assertions concerning the presidential choice of preratification pathways in several different international agreements, see Trimble & Koff, supra note 45.

\(^{51}\) Compare Richard A. Posner, The Economics of Justice (1981) (advancing wealth maximization as the sole legitimate criterion of social success and applying theoretical economic analysis to a wide variety of nonmarket behaviors), with Richard A. Posner, Overcoming Law (1995) (arguing for pragmatic, empirically grounded approach). Compare also Robert O. Keohane, After Hegemony (1984) (advancing a theory, consistent with materialist international relations theory of neo-Realism, that nation-states are rational, unitary, self-interested actors interested in minimizing transactions costs through international institutions), with Ideas and Foreign Policy: Beliefs, Institutions, and Political Change (Robert O. Keohane & Judith Goldstein eds. 1993) (ideas are important and states are not always materialist), and Judith Goldstein et al. (including Robert O. Keohane), Introduction: Legalization and World Politics, 54 Int'l
the interaction among the branches of the federal government with respect to international agreements may eventually benefit from a similar adjustment in course—and not just for proponents of rational choice but also for those employing narrow theoretical frameworks informed only by textualism, or historicism, or the search for constitutional moments, or an effort to read into scanty precedent and Delphic constitutional provisions only one's own political predilections. The lesson of the president's choice of a preratification treaty pathway may prove to be nothing more or less complex than a tutorial in politics, with all the loose ends and occasional idiocies apparent in the art of the possible as painted by highly imperfect mortals. If one steps back a bit from the frays of the executive and legislature (and from the unwillingness of the judiciary to enter the fight), there is a certain rough functionalism to the domestic political process surrounding the ratification and implementation of international agreements. The executive negotiates international agreements. With important agreements, he is likely to involve Congress explicitly in the preratification and postratification stages. The magnitude and form of interaction vary from case to case. In foreign policy generally, the Congress and the courts have been willing to cede most of the decision making to the president, and the process at issue here is no exception. The president must, however, negotiate and ratify in the shadow of other branches that have quite substantial powers at their disposal. Rumblings from Congress fail to produce formal change or challenge, but that may stem in part from presidential willingness to respond informally to congressional concerns. The balance is malleable rather than delicate.

In fact, the form of interaction in political reality may not vary quite as much as proponents of various explanatory frameworks might hope. Some estimate that the prevalence of congressional-executive agreements (broadly defined) approaches 90 percent. The mine run, and some of the richest ores and poorest tailings, thus reflects the usual joint endeavor between the president and Congress—with some idiosyncratic variations in process and outcome, as one might imagine in any political process of long standing authored by so many hands over so many years. One might then be particularly moved to ask whether the issues that revolve around domestic political actors and

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32 See Trimble & Koff, supra note 45, at 55–58 (describing various “unfortunate concessions” made by the president after congressional complaints concerning the choice of preratification pathway); see also Weiss, supra note 36, at 1556 n.99 (describing presidential hesitation, in light of congressional concerns, over the proper preratification pathway of the Treaty on the Final Settlement with Respect to Germany).

international agreements involve something of a theoretical tempest in a constitutional teapot. As occasionally happens, political decision makers appear to be capable of doing their jobs without definitively resolving the correspondence between the Constitution and their actions, and even without their express or implicit adherence to any particular theory advanced by academics.