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Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining

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*Rational Treaties:  
Article II, Congressional-Executive Agreements, and International Bargaining*

John Yoo

In April 2010, President Barack Obama of the United States and President Dimitry Medvedev of Russia signed a new arms control agreement. “New START” will cut the strategic nuclear arms stockpiles of the two nations by 30 percent, limit the number of weapon launchers, and link the development of offensive and defensive missile systems. President Obama must submit the agreement, the first arms reduction pact between the two countries since the Moscow Treaty of 2002, to the Senate for its approval before he can ratify it. As the treaty moved through the Senate in the summer of 2010, the Obama administration could count on 59 votes from its own party, but was unsure whether it could reach the two-thirds required by Article II, Section 2 of the Constitution for advice and consent.

But according to many commentators and the apparent scholarly consensus, President Obama could have chosen an easier route to approval. Past Presidents have bypassed the advice-and-consent process of the Treaty Clause and sent some international agreements to both houses of Congress for approval as simple statutes, known as congressional-executive agreements. The North American Free Trade Agreement and the World Trade Organization agreement are the most recent, prominent examples. According to the *Restatement (Third) of United States Foreign Relations Law*: “the prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”<sup>1</sup> In his classic work, *Foreign Affairs and the United States Constitution*, Louis Henkin observed that “it is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty.”<sup>2</sup>

These opinions attempt to catch up to, rather than radically change, constitutional practice. Since the end of World War II, congressional-executive agreements have become a vital tool of American foreign policy. They have surpassed treaties in terms of frequency. Since the end of World War II, the United States has entered a period of rapid agreement-making, entering into as many as 450 a year from less than 50 per year in the years before World War II.<sup>3</sup> According to the Congressional Research Service, non-treaties are responsible. Congressional-executive agreements, for example, accounted for

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· Professor of Law, Berkeley Law School, University of California at Berkeley. I am grateful for comments received at a 2010 conference on rational choice theory and constitutional design held at the University of Chicago Law School. I thank Matthew DalSanto for his excellent research assistance.

<sup>1</sup> Restatement (Third) of the Foreign Relations Law of the United States 303 cmt. e (1987).

<sup>2</sup> Louis Henkin, *Foreign Affairs and the United States Constitution* 217 (2d ed. 1996).

<sup>3</sup> Senate Comm. On Foreign Relations, *Treaties and Other International Agreements: The Role of the United States Senate* 39 (2001).

88.3 percent of all international agreements between 1946 and 1972.<sup>4</sup> From 1939-1989, the nation entered into 11,698 international agreements that did not take the Article II treaty form, and only 702 that did.<sup>5</sup> Oona Hathaway reports that from 1980-2000 the United States made 2744 congressional-executive agreements and only 375 treaties.<sup>6</sup> Congressional-executive agreements are not just numerous, but important. They include subjects of great importance to the American national interest, such as the NAFTA and WTO agreements, which regulate the roughly one-quarter of U.S. GDP related to imports or exports.<sup>7</sup>

Constitutional law, however, has struggled to find a place for non-treaty treaties. Ever since their accelerated use began, congressional-executive agreements have confronted serious doubts about their legitimacy. The constitutional text explicitly provides only one way for the federal government to reach international agreements: the President negotiates the agreement, two-thirds of the Senate gives its advice and consent, and the President ratifies. Critics of modern practice make the simple and straightforward claim that Article II's Treaty Clause remains exclusive. Defenders of congressional-executive agreements have engaged in linguistic acrobatics to avoid this result, claimed that "constitutional moments" have silently amended the Constitution, or looked to simple majoritarianism for support. Others have attempted to find boundaries between treaties and congressional-executive agreements rooted in the constitutional structure, but which preserve a place for both. The Supreme Court has never take up the legality of congressional-executive agreements, though the lower courts have never rejected them.

This paper takes a different approach, one focused on function rather than legitimacy. Rather than renew the argument over the legitimacy of different forms of constitutional interpretation, it examines the instrumental value of the various forms of international agreement under the Constitution. It asks what advantages and disadvantages flow from the choice of instruments. It suggests that both types of agreements produce information that address bargaining difficulties produced by asymmetry. This arises because of the steps involved in the approval and ratification process. Treaties, however, provide more credible information, *ex ante*, because of the greater political capital required for their approval.

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<sup>4</sup> Cong. Research Serv., 95<sup>th</sup> Cong., *International Agreements: An Analysis of Executive Regulations and Practices* 22 (1977).

<sup>5</sup> Senate Comm. On Foreign Relations, *Treaties and Other International Agreements: The Role of the United States Senate* (2001).

<sup>6</sup> Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *Yale L.J.* 1236, 1258-60 (2008).

<sup>7</sup> See U.S. Department of Commerce, Bureau of Economic Research, *National Income and Product Accounts Table, Table 1.8.6. Command-Basis Real Gross Domestic Product and Gross National Product, Chained Dollars*, <http://bea.gov/national/nipaweb/TableView.asp?SelectedTable=46&FirstYear=2002&LastYear=2004&Freq=Qtr> (US GDP 2004 IV quarter of \$12.410 trillion; imports of \$1.979 trillion; exports of \$1.252 trillion).

A sharp difference between treaties and congressional-executive agreements lies in enforcement. The two types of international agreements provide different ways of reducing failure to cooperate due to the lack of an international institution capable of compelling the parties to obey the agreement or awarding damages for violations. Treaties, for example, provide more *ex ante* signals of commitment, because more political capital is required to obtain two-thirds of the Senate to agree than majorities of each House. Congressional-executive agreements, however, provide stronger *ex post* guarantees, due to the more difficult path for termination of a statute. The latter may lead to more stable, long-term cooperation than the former, even though this would not be the initial intuition based on the voting requirements.

Treaties and congressional-executive agreements, therefore, have different trade-offs that make one or the other better suited for different types of pacts. Treaties convey more credible information about the expected value of a good or territory, but less of a signal of *ex post* commitment. Congressional-executive agreements strike the opposite balance: less information, but greater commitment. An instrumental approach does not find the non-exclusivity of the Treaty Clause to be a constitutional defect. In fact, understanding the Constitution in this light sees the different options for making international agreements as valuable. It allows the United States to send different amounts of information and signals of commitment to other nations depending on its own intentions and the specific context of the agreement. It would be a mistake, for instrumental reasons, to limit the federal government only to treaties or to congressional-executive agreements because of concerns about the best reading of the constitutional text or notions of democratic legitimacy.

Part I of this paper begins the analysis by describing the existing scholarly literature on the question of “interchangeability,” in other words the use of treaties or statutes to make international agreements. Part II introduces a rational choice model for the resolution of international disputes, which understands international agreements as a means to avoid wasteful conflict but beset by informational asymmetry and commitment problems. Part III applies this model to the question of interchangeability, and shows the effect of the treaty versus statute choice on obstacles to settling disagreements between states. It ends by discussing comparing arms control and international trade agreements to illustrate the trade-offs between treaties and congressional-executive agreements.

### *I. The Struggle over Instruments*

Making international agreements presents one of the great tensions between practice and the constitutional text and structure. Congressional-executive agreements have become an important tool of American foreign relations, but their legitimacy has remained consistently in doubt since their first consistent use in the New Deal period. Their main defect is the absence of any explicit authorization in the constitutional text for any form of international agreement other than a treaty, made by the President with the advice and consent of two-thirds of the Senate. It is difficult to maintain that the President and mere majorities of the House and Senate can use Article I of the

Constitution for the exact same formal act described in Article II. This has led to every more shaky justifications for the replacement of the Article II treaty process with Article I statutes.

Debate over the claim of interchangeability of instruments has focused on its legitimacy. There appear to have been non-treaty international agreements as early as 1792, when Congress authorized the Postmaster General to reach mail exchange agreements with other countries.<sup>8</sup> Despite this early precedent, congressional-executive agreements remained rare for much of the nation's history. From 1789-1839, for example, the nation entered into sixty treaties and only twenty-seven other international agreements. From 1839-1889, the numbers remained similarly low for both forms of agreements. In fact, the numbers of treaties made has kept fairly stable throughout the nation's history, with a slight uptick in the period after World War I and only rising near 50 treaties in a single year toward the end of the 1990s.<sup>9</sup> Congressional-executive agreements, however, surged: in the late 1930s from no more than two dozen a year to more than 150 a year in the 1940s, to peaks of 300 per year in the 1950s, topping out at 400 a year by the 1970s and 1980s, followed by a decline to between 200-300 a year in the 1990s.<sup>10</sup> To this day, the number of congressional-executive agreements per year year appears to be about an order of magnitude greater than for treaties.<sup>11</sup>

Criticism and defense of this practice soon followed. One of the first critics was Edwin Borchard, who argued in 1944 that the Constitution set out only one method for making international agreements in Article II of the Constitution.<sup>12</sup> Article II, Section 2 of the Constitution states that 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."<sup>13</sup> Borchard was right, at least with regard to the federal government. The Constitution does not describe any other way for the President or Congress to make any other agreements with other nations. Article I, Section 8, which lists Congress's powers, describes the subject matters for regulation, but not their form. Article VI describes the Supremacy Clause effects of treaties, while Article III includes them in the cases or controversies subject to federal court jurisdiction, but neither mentions other international agreements. Borchard made a straightforward *exclusio unius* argument: the inclusion of treaties alone implied the exclusion of all other forms of international agreement.

Borchard's argument for treaty exclusivity met with criticism from Myres McDougal and Asher Lans. Other scholars, such as Wallace McClure, Edward Corwin, and Quincy Wright had noted the rise of congressional-executive agreements and

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<sup>8</sup> Act of Feb. 20, 1792, ch. 7, sect. 26, 1 Stat. 232, 239.

<sup>9</sup> Treaties and Other International Agreements (2001), *supra* note , at 39.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Edwin Borchard, Treaties and Executive Agreements – A Reply, 54 Yale L.J. 616 (1945). For agreement with Borchard, see Raoul Berger, The Presidential Monopoly of Foreign Relations, 71 Mich. L. Rev. 1 (1972).

<sup>13</sup> U.S. Const. Art. 2, Section 2.

supported the easier path toward international cooperation that they presented. But they had not launched a sustained defense of the legitimacy of congressional-executive agreements based on the constitutional text and structure.<sup>14</sup> McDougal and Lans filled that omission. They properly observed that the Constitution showed knowledge of more than just treaties. Article I, Section 10, for example, declares: “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.”<sup>15</sup> The Constitution distinguished between these other forms of cooperation and the treaty, and it was clear when it wanted to prohibit the former. Therefore, McDougal and Lans reasoned, the Constitution did not deprive the federal government of the power to make “agreements” or “compacts,” which might also find support in the Necessary and Proper Clause as an implementation of a free-standing congressional power. These agreements, they argued, could take the form of statutes or even unilateral presidential orders.

Later supporters of congressional-executive agreements went beyond McDougal’s and Lans’ textual arguments to register instrumental advantages for the Article I path. Giving the Senate an out-sized role in the making of international agreements no longer made sense, as the sectional concerns present at the time of the Framing had disappeared. The growth in the Senate’s size reduced its ability to act with secrecy and speed, as the Framers had hoped, and the Senate never became the co-equal partner in foreign affairs that some had predicted. Allowing one-third of the states to block international agreements allowed a minority to pursue an isolationist foreign policy, with some times disastrous results (as with the failure to join the League of Nations). Congressional-executive agreements would advance a more democratic form of foreign policymaking that would better serve the national interest. “One way of rendering treaty making more democratic without constitutional amendment,” Louis Henkin wrote, “might be to have agreements made by the President if authorized or approved by both houses of Congress.”<sup>16</sup> This would serve “the cause of greater democracy.”<sup>17</sup>

There matters stood until consideration of the NAFTA and WTO agreements. Laurence Tribe revived the Borchard position to attack the constitutionality of the Article I path for international agreements, based on a more nuanced reading of the constitutional text and structure.<sup>18</sup> Tribe argued that the constitutional text and structure do not permit the invention of an alternative form of treaty-making. Drawing from Supreme Court decisions such as *INS v. Chadha*,<sup>19</sup> striking down the legislative veto, and *New York v.*

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<sup>14</sup> Wallace McClure, *International Executive Agreements: Democratic Procedure Under the Constitution of the United States* (1941); Edward S. Corwin, *The Constitution and World Organization* (1944); Quincy Wright, *The United States and International Agreements*, 38 *Am. J. Int’l L.* 341 (1944).

<sup>15</sup> U.S. Const. art. I, sec. 10.

<sup>16</sup> Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* 60 (1990).

<sup>17</sup> *Id.*

<sup>18</sup> Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 1221 (1995).

<sup>19</sup> 462 U.S. 919 (1983).

*United States*,<sup>20</sup> prohibiting the commandeering of state legislatures, Tribe argued that the Necessary and Proper Clause could not make up for a lacuna in the text. He further compared the Treaty Clause to the adjacent Appointments Clause to show that Article II clearly provides for alternate forms of government action, when the Framers wanted them. Lastly, Tribe claimed that the Article I method conceivably allowed Congress to enter the nation into an international agreement over a presidential veto, a result forbidden by Article II's vesting of the final power to make a treaty with the executive. Tribe concluded that adoption of the NAFTA and WTO agreements as statutes violated the Constitution.

Bruce Ackerman and David Golove came to Article I's defense.<sup>21</sup> They portrayed the use of congressional-executive agreements as a non-textual amendment to the Constitution. For them, the very fact that the constitutional text lacks an alternative form for treaty-making shows that practice has changed the Constitution's meaning. They argued that as the end of World War II neared, a popular movement to increase the United States' participation in international institutions led to an attack on the Senate's anti-democratic check on treaty-making. The transformative 1944 presidential election validated the Roosevelt's plans to replace the supermajority requirement for treaties with a majoritarian process, and became part of the New Deal's broader transfer of power from the states to the federal government. Adoption of the United Nations Charter as a treaty, and the International Monetary Fund and World Bank agreements through Article I, led to a new constitutional settlement enshrining interchangeability as part of a living Constitution.

Other scholars have attempted to find some kind of middle ground that preserves a place for both treaties and congressional-executive agreements. I argued elsewhere that the Constitution reserves Article II treaties for significant military and political agreements because they involve the coordination of the President's executive powers in foreign affairs with legislative action.<sup>22</sup> Under this view, congressional-executive agreements remain appropriate for pacts involving international commercial and financial affairs, where Congress's powers under Article I, Section 8 give it control. On the other hand, matters resting outside Article I, Section 8 would still require international regulation by treaty. Peter Spiro sought a dividing line between treaties and congressional-executive agreements in practice, which he argued could dictate constitutional meaning in the same way that judicial opinions might.<sup>23</sup>

More recently, Oona Hathaway and Rosalind Dixon, separately, have extended the transformative approach. Hathaway argues that no subject matter distinctions remain

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<sup>20</sup> 505 U.S. 144 (1992).

<sup>21</sup> Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799 (1995).

<sup>22</sup> John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 Mich. L. Rev. 757 (2001).

<sup>23</sup> Peter Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 Tex. L. Rev. 961 (2001).

any longer between treaties and congressional-executive agreements. According to Hathaway, the empirical data shows that congressional-executive agreements have been used for every subject on which international agreements have been made.<sup>24</sup> Eliminating treaties and relying only on congressional-executive agreements would provide for a more democratic form of lawmaking, reject the obsolete concerns that originally gave the Senate such a outsized role in treaty-making, and produce more reliable American commitments. Although Dixon disagrees with Ackerman's theory of constitutional change, she argues that the Treaty Clause creates high constitutional error costs because changes in population have made it even harder to ratify a treaty than the Framers intended.<sup>25</sup> In interchangeability, Dixon writes, "Congress has in fact succeeded in using ordinary legislative means to update constitutional meaning (i.e., the supermajority voting rule found in Article II)."<sup>26</sup> For Ackerman and Golove, Hathaway, and Dixon, President Woodrow Wilson could have re-submitted the Treaty of Versailles, after its rejection by the Senate in 1919 by one vote, for approval by a simple majority of both houses of Congress.

These scholarly accounts suffer from various flaws. The exclusivity position of Borchard and Tribe, for example, cannot account for the long historical pedigree of congressional-executive agreements nor the huge burst in their use in the last half-century. It gives no recognition to Congress's Article I, Section 8 powers, which leads to an overly broad reading of the scope of the Treaty Clause. McDougal and Lans' claim infers too much from the negative restrictions on the states. When Article I, Section 10 denied a power to the states, but the Framers wanted to give the federal government that same power, they did not leave it to a negative inference – they vested Congress with the authority explicitly. Thus, Article I, Section 10 prohibits states from granting letters of marque and reprisal, while Article I, Section 8 grants that power to the states.

McDougal and Lans' successors suffer from even more serious problems. Ackerman and Golove's account has the same faults that afflict Ackerman's general theory of constitutional change outside the Article V amending process. Even worse, Ackerman and Golove's claims that 1944 represented a "constitutional moment" for interchangeability cannot find support even in Ackerman's theory of non-textual constitutional change. The political history of the period reflects little popular concern in the 1944 elections over the constitutional methods making of international agreements.<sup>27</sup> Henkin's and Hathaway's separate claims for greater democracy in treaty-making encounters the same problems as the original defenses of McClure, Corwin, and Wright. If the Constitution should be purged of all "non-democratic" impurities, then treaties should not be the only provision to go. Their argument should equally apply to the Senate, the Electoral College, judicial review, and even aspects of the House of Representatives. Favoring simple majoritarianism ignores the higher lawmaking

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<sup>24</sup> Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *Yale L.J.* 1236 (2008).

<sup>25</sup> Rosalind Dixon, *Updating Constitutional Rules*, 2010 *S. Ct. Rev.* 319, 328-30.

<sup>26</sup> *Id.* at 331.

<sup>27</sup> See Yoo, *Laws as Treaties*, *supra* note , at 779-88.



procedures used to make the Constitution, which established certain supermajority and non-democratic procedures to ensure more deliberative decisionmaking that better reflected the popular will.

One common feature shared by most of these efforts is their criticism of multiple methods for making international agreements. Borchard and Tribe believe that Article II, Section 2 sets forth the exclusive method to make treaties. If the Constitution does not explicitly allow for congressional-executive agreements, there are no alternatives. Henkin, Ackerman and Golove, and more recently Hathaway, argue that congressional-executive agreements should supplant treaties because of their better democratic pedigree. Whether because of unusual theories of constitutional change or desires to reduce counter-majoritarian features of the government, they see no reason for the use of the Article II sequence any longer. To them, the treaty-making process is a relic of the nation's unhappy past, where southern concerns over slavery led to the Senate's exaggerated role. The debate has this absolutist feature because it soon became entangled in broader arguments over the legitimate method for interpreting the Constitution and how it allows for change.

Despite these academic theories, practice shows little sign of falling on either the treaty exclusivity side or the majoritarian side. The national government continues to use congressional-executive agreements, perhaps even as freely as Hathaway and Dixon claim. Nevertheless, the United States still reserves the Article II process for some of the most significant national security issues. In the last decade, for example, the Bush administration submitted the Treaty of Moscow, which drastically cut American and Russian nuclear warhead arsenals, to the Senate as a treaty. The Obama administration has done the same with New START.

Instead of renewing the debate for or against the legitimacy of these decisions, this paper asks instead about the consequences. It seeks to understand the trade-offs of choosing one instrument over the other, and does that by reversing the direction of the analysis. All of the earlier work attacks the question of interchangeability within the context of familiar theories of constitutional interpretation, and then asks about the implications for making agreements on the international stage. This paper begins with the international system to study its effects on domestic constitutional structure. Nations locked in a dispute will have difficulties in reaching peaceful agreements. The choice of treaties or congressional-executive agreements can overcome different aspects of these obstacles. The interaction of the international system and the domestic system can find the solution for the interchangeability debate that has eluded constitutional scholars.

## *II. Treaties as the Settlement of International Crises*

Because the conventional constitutional accounts remain unsatisfying, a more revealing approach may lie in a consequentialist account of the making of international agreements. We can understand international agreements as a means for solving crises between nations. A classic example is a peace treaty that ends a war, such as the Treaty of Paris of 1783 that ended the Revolutionary War between the United States and Great

Britain. Treaties also can include agreements that head off possible conflict, such as the agreement between the United States and Great Britain to demarcate the border between the Oregon territory and Canada. They might also resolve struggles between nations over land, with one side accepting payment in exchange for foreswearing its claim to a territory. Examples are the Louisiana Purchase, which transferred France's north American possessions to the United States for \$20 million, the Adams-Onis treaty, which recognized American possession of Florida in exchange for a few million dollars, and Seward's Folly, as it was known, in which Russia sold Alaska to the United States for another few million dollars. Agreements might also involve reciprocal treatment for the free flow of commerce and travel, such as NAFTA, which will create surpluses and losses that will be shared between the nations. Or they may limit wasteful competition that allows nations to save resources or limit the destructiveness of war, such as arms control agreements.

This paper begins with a standard bargaining model drawn from political science to understand these agreements. It will accept their simplification of international politics by assuming that two nations in a crisis can choose between war and peace. In general, our model assumes that war arises because of a failure of the nations to reach a settlement of their dispute, which can be in their interests – beyond the benefit of winning the dispute – because it avoids the deadweight losses of war. This model treats international conflicts much in the way that others, such as Cooter and Rubinfeld, model litigation as a choice between settlement and trial, in which the parties have an interest in limiting the deadweight losses of litigation costs by avoiding trial.<sup>28</sup> It also works in the same direction as scholars, such as Posner and Goldsmith and Guzman, who have applied rational choice theory to international law.<sup>29</sup> It is different than these approaches, however, in linking international law and domestic law, and in moving away from the broader debate over compliance with customary international law toward a more spartan model of international relations. In this respect, this paper follows in the path charted by Robert Putnam that scholars of international relations look for general equilibrium theories that account for the interaction of international and domestic politics.<sup>30</sup>

There is an important difference between the applications of the bargaining model to litigation and to international relations. Inability to reach settlement of domestic legal claims usually depends on informational asymmetries and imbalances in financial resources to conduct litigation. Once a plaintiff and defendant settle, enforcement of the

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<sup>28</sup> See, e.g., Robert Cooter & Daniel Rubinfeld, *An Economic Model of Legal Discovery*, 23 *J. Leg. Stud.* 453 (1994); Robert Cooter & Daniel Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 *J. Econ. Lit.* 1067 (1989); Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 *J. Leg. Stud.* 225 (1982).

<sup>29</sup> See, e.g., Eric Posner, *The Limits of Global Legalism* (2009); Andrew Guzman, *How International Law Works: A Rational Choice Theory* (2008); Jack Goldsmith & Eric Posner, *The Limits of International Law* (2005).

<sup>30</sup> Cf. Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *Int'l Org.* 427, 430 (1988).

agreement usually is not a difficult question, as the parties fall within the personal jurisdiction of the court, which has available institutional resources to carry out its orders. If a defendant, for example, refuses to pay the damages called for by an agreement approved by the court, a judge may levy fines or even hold the defendant in contempt of court, which can result in jail.

In international relations, by contrast, asymmetries in information and resources are only part of the obstacles to a settlement. Even if the parties have complete information, they still might not reach an agreement due to an international environment characterized by weak institutions. There are no effective supranational organizations that can coerce parties to obey treaties, at least nothing like a domestic court. Without enforcement, nations still may not enter into agreements that would avoid a wasteful conflict, especially if the agreement involves issues that may shift the balance of power in the future.

Much of the international relations literature focuses on why nations go to war. This part builds on that analysis, but turns it toward ways that a domestic constitutional system can help find a stable peace. In particular, it will build on efforts to explain the “democratic peace” – the empirical correlation that democracies in the period since 1814 do not fight wars against each other – within the framework of international conflict as bargaining failure. Political scientists have sought to explain why democracies do not war with each other by looking to features of their domestic political structures. Democracies might not go to war with each other because their relatively transparent political systems may facilitate negotiations. An overlooked area in this vein may be domestic constitutional arrangements. Since weak to non-existent enforcement by effective international institutions remain a stumbling block, nations that can commit more deeply to keeping international agreements may have an advantage in world affairs.

#### *A. Conflict as Bargaining Failure*

As Thomas Schelling observed, “conflict situations are essentially bargaining situations.”<sup>31</sup> Nations will have disputes because of competing interests. A nation may wish to gain a good like territory or population or trading rights. Or it may wish to stop harm, such as pollution, population migration, or international crime and terrorism. Another nation may want to acquire the same territory for itself, or it may want the harm to continue because it is a negative externality of conduct that benefits it.

Nations acting rationally should generally reach a settlement of their conflicting goals. It is in their interests to divide the benefits of a good through negotiation rather than to escalate their dispute into a conflict. A conflict will cause deadweight losses – such as the lives and treasure lost in war – or require the nations to spend resources on arms and security that it might otherwise allocate to more productive uses. War, in other words, reduces the size of the pie that two nations in a dispute can divide; they should reach a Pareto-superior settlement that will leave each nation better off than if they go to war.

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<sup>31</sup> Thomas Schelling, *The Strategy of Conflict* 5 (1960).

War is, as Robert Powell puts it, an “inefficiency puzzle.”<sup>32</sup> This insight has given rise to a bargaining theory approach to conflict, which has become a leading approach to the study of crisis, escalation, and war in political science.<sup>33</sup>

Since Schelling’s insight, this flourishing literature has formalized the causes of war. The model works this way. Imagine that the United States (USA) and China (CHN) have a dispute for control over a territory. The USA currently controls the territory, and CHN wishes to gain a share of it. CHN makes a demand accompanied by a threat. The USA can decide to resist or accede to CHN’s demand. If the USA decides to transfer the share of the territory to CHN, the game ends. If the USA resists, then CHN must decide whether to go to war. Iterations of counter-offers and counter-responses can occur between CHN’s first demand and the USA’s final response, but at the end the USA must choose between war or transfer, and CHN must decide whether to go to war if the USA resists.

War may produce a victory that brings part of the disputed territory, or even all of it. But the outcome of war is uncertain. Making the right decision whether to resist or accede will depend on the probability of the outcome of conflict between the armed forces of the USA and CHN. If the expected gain of going to war exceeds the expected costs, CHN should go to war in response to a USA rejection of its offer. If the expected costs exceed the expected gain, CHN should not go to war. On the flip side, if the USA’s expected cost of war exceeds its expected benefit, the USA should agree to CHN’s demand. If the opposite holds true, the USA should resist CHN’s demand and its threats.

These expected benefits and costs will be a function of probability of victory, the value of the territory, and the anticipated destruction of war. We can express them in a simple formula. The expected value of war to CHN will be:

$$W(\text{CHN}) = P(\text{CHN}) \times V(\text{CHN}) - C(\text{CHN})$$

Where  $W(\text{CHN})$  means the expected value of war to China;  $P(\text{CHN})$  means the probability that CHN would prevail in war;  $V(\text{CHN})$  means the value of the territory to CHN, and  $C(\text{CHN})$  means the cost of war.  $P(\text{CHN})$  times  $V(\text{CHN})$  is the expected benefit of gaining the territory.

Similarly, the expected value of war to the USA will be:

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<sup>32</sup> Robert Powell, War as a Commitment Problem, 60 *Int’l Org.* 169, 169 (2006). See also Robert Powell, The Inefficient Use of Power: Costly Conflict with Complete Information, 98 *Am. Pol. Sci. Rev.* 231 (2004).

<sup>33</sup> See, e.g., David A. Lake, Two Cheers for Bargaining Theory: Assessing Rationalist Explanations of the Iraq War, 35 *Int’l Security* 7, 7-8 (2010); Dan Reiter, Exploring the Bargaining Model of War, 1 *Perspectives on Pol.* 27 (2003). Robert Powell, In the Shadow of Power: States and Strategies in International Politics (1999); James Fearon, Rationalist Explanations for War, 49 *Int’l Org.* 379 (1995).

$$W(\text{USA}) = P(\text{USA}) \times V(\text{USA}) - C(\text{USA}).$$

Where  $W(\text{USA})$  means the expected value of war to the United States;  $P(\text{USA})$  means the probability that the United States would prevail in war;  $V(\text{USA})$  means the value of the territory to the United States; and  $C(\text{USA})$  means the cost of war to the United States

A further point is worth making on  $P$ . With  $P(\text{CHN})$ , the probability that China would prevail in war is the primary uncertainty. This will be a function of more than just economic resources. It will include the size and configuration of the Chinese armed forces, which depends on spending, but also factors such as organizations, leadership, experience, and technology. It is also relative, as it depends on how Chinese forces are likely to fare against the armed forces of the United States, rather than another country. Because of this relationship,  $P(\text{CHN}) + P(\text{USA}) = 1$ . In other words, if China were certain it would prevail in war, the probability would be 1, so with the outcome of war uncertain,  $P(\text{CHN})$  must be a fraction of 1. The probability that the United States would prevail must be the remainder.

A similar relationship does not necessarily obtain for the other variables in the equation. The value of the territory to China may not be the same as the value to the United States. It might have the same estimated value in resources, although one side may have better technology or organizations to exploit them. But it also might have more cultural or defense importance for one side than another – possessing Taiwan, for example, will have great value to China because of the latter's desire to unify historical Chinese territory under its control. The cost of war may also differ between the contending nations. One nation may suffer less level of loss at certain probabilities of winning, due to different investments and effectiveness of the armed forces, value of lives between the nations, and strategic and tactical disparities. Due to more productive investments in its armed forces, for example, the United States may suffer less losses by going to war than China, but the higher per capita GDP in the United States might also mean that each life lost in a conflict is more valuable too.

War should not erupt under conditions of perfect information. Suppose that China wishes territory within the control of the United States. If  $W(\text{CHN}) < 0$ , this means that the expected value of a Chinese victory (the probability of victory times the value of the territory) is less than the expected cost of war. The United States should reject China's offer and China will back down; no war will result. If  $W(\text{CHN}) > 0$ , this means that the  $P(\text{CHN}) * V(\text{CHN})$  – the expected value of Chinese victory – is greater than the expected cost of war. The United States knows that China will go to war if the demand is rejected. The United States should reach a negotiated settlement, unless China's valuation of the territory is so great relative to the US's that any settlement would require the US to give China so much in concessions that the US would be better off going to war. A similar situation arises when the US's valuation is so great relative to China's. However, when the valuations of the two countries are almost equivalent, both countries can be made strictly better off by negotiating an agreement as opposed to going to war.

Under certain conditions, we can predict the range of potential outcomes of negotiations. Assume that the value of the territory is roughly the same for both China and the United States. In other words,  $V(\text{CHN}) = V(\text{USA})$ , because perhaps the territory's main value lies in its physical resources. If we assume, for purposes of this example, that China's probability of winning is 67 percent and the U.S. probability is 33 percent, then the value of any settlement to China,  $S(\text{CHN})$ , must make it better off than it would have expected to be from going to war,  $S(\text{CHN}) > W(\text{CHN}) = 67\% \times V - C(\text{CHN})$ . And similarly the value of any settlement to the US,  $S(\text{US})$ , must make it better off than it would have been had it gone to war,  $S(\text{US}) > W(\text{US}) = 33\% \times V - C(\text{US})$ . By making use of the fact that in a zero-sum game, such as this one,  $S(\text{CHN}) + S(\text{US}) = V$ , it can easily be shown that

$$67\% \times V - C(\text{CHN}) < S(\text{CHN}) < 67\% \times V + C(\text{US}), \text{ and} \\ 33\% \times V - C(\text{US}) < S(\text{US}) < 33\% \times V + C(\text{CHN}).$$

While the value of the settlement to each country must exceed its expected benefit from going to war, it also must *not* exceed its expected benefit of the territory plus the other country's deadweight loss from war. If the latter condition does not hold, then a country would have captured more than the entire deadweight loss the other country was trying to avoid by negotiating a settlement. Thus, the other country would be made worse off by the settlement than if it had gone to war. Both countries should accept a negotiated settlement along these lines, because they will avoid incurring the deadweight costs of the conflict itself.

### *B. Incomplete Information and Settlement*

Incomplete information can prevent the United States and China from reaching a settlement, even if both nations act rationally as sketched out in Part II.A. With imperfect information, the United States cannot accurately estimate China's expected gains from war,  $W(\text{CHN})$ , and the same for China and  $W(\text{USA})$ . Even if both the United States and China have a fair sense of the value of the territory to the other, they will have a difficult time estimating the other's probability of victory. Some factors that influence  $P(\text{CHN})$  and  $P(\text{USA})$  could prove observable by monitoring public budgets, following military exercises, national technical means of surveillance such as satellites, and espionage. Through these means, China and the United States could estimate the size an opponent's armed forces, the spending devoted to defense, the nature of weapon systems, and military performance on certain terrains. But other factors will lie within the private information of each country, such as military capabilities, strategies and tactics, unit morale and effectiveness, and the willingness of the national population and leadership to devote resources and take losses in a drawn-out conflict.

Not only will this information be private, but nations may have an incentive to manipulate public knowledge. They may wish to hide their strengths in order to achieve tactical surprise. China, for example, concealed its movement of large forces into North Korea as General MacArthur's forces approached the Yalu River in 1951 in order to win a significant victory. Or nations might want to exaggerate their strength in order to bluff

in negotiations. Germany hid its military weakness as it succeeded in annexing Czechoslovakia in 1938 and invading Poland without any military response by Great Britain or France. Different estimates about the probability of success in war, therefore, can arise even without introducing irrationality, such as an emotional over-estimate of the valor of a nation's troops, or bounded rationality due to the overwhelming complexity of predicting the outcome of armed conflict.

War can result because of asymmetric information on the probability of winning a conflict. If China underestimates  $P(\text{USA})$ , for example, it will assume that  $W(\text{USA})$  is lower than it actually is. This will lead it to demand more of the disputed territory than it should, and it will expect the United States to concede at a lower level of threat than it will. Ultimately, China's misreading of  $P(\text{USA})$  will increase the lower end of the range of offers that China will accept. This will increase the chances of war, because the United States will be willing to go to war when its expected gain from war exceeds the costs and it cannot reach an agreement with China that will allow it to avoid the costs of war. Another effect of asymmetric information, mentioned above, is that nations may bluff. If  $W(\text{CHN})$  is uncertain, for example, due to private information of  $P(\text{CHN})$ , the United States does not know whether China's demand genuinely reflects the distribution of existing power and cannot decide on firm information whether to concede or go to war. China could be exaggerating its probability of victory to get better terms, and the United States could be doing the same in response.

Political science scholars have explored whether domestic factors can help overcome the bargaining problems created by asymmetric information. Rational choice studies have suggested that the factual correlation that democracies do not fight wars with each other may be due to the advantages that democracies enjoy over non-democracies in revealing private information credibly. Several statistical studies have shown that democracies since 1814 do not wage war against each other, but that they fight autocracies regularly and win a high percentage of those conflicts, and that they suffer lower casualties and fight for shorter periods than autocracies.<sup>34</sup> One set of scholars explain this phenomenon by claiming that democracies place institutional constraints on war, because of viable opposition parties that will take power in the event of defeat and the unwillingness of the population to take high casualties. We will not take up those theories here.

More usefully here, a second set of scholars argues that the democratic peace may arise because democracies can better solve asymmetric information problems in international bargaining. States can reach settlements if they can reveal private information about their probabilities of winning, but they must do so credibly. The possibility of bluffing and the absence of strong governmental institutions make this

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<sup>34</sup> Dan Reiter & Allen Stam, *Democracies at War* (2002); David Lake, *Powerful Pacifists: Democratic States and War*, 86 *Am. Pol. Sci. Rev.* 24 (1992); Scott Bennett & Allan Stam, *The Declining Advantages of Democracy: A Combined Model of War Outcomes and Duration*, 42 *J. Conf. Res.* 344 (1998); Scott Bennett & Allan Stam, *The Duration of Interstate Wars: 1812-1985*, 90 *Am. Pol. Sci. Rev.* 239 (1996).

difficult. Economists have shown that, even in such circumstances, negotiators can act credibly through the use of costly signals.<sup>35</sup> By revealing information in a way that generates significant costs, nations can separate themselves from those who would bluff. If the P(USA) is high, it could take steps during its crisis with China that have greater costs – such as large-scale military deployments – than those taken by a nation whose probability of winning was lower.

Democracies here may have greater facility in sending costly signals. This is due to the concept of audience costs.<sup>36</sup> Audience costs refers to the domestic costs incurred by a governing regime when it suffers a setback in foreign affairs. The simple idea is that a state has two groups, the governing regime and its supporters, and the opposition. If the ruling party makes a threat to use force and backs down, it will suffer domestic political costs, both among its own supporters and the opposition party. This dynamic is not unique to democracies, but in systems with competitive, representative elections, the audience costs will be significantly higher. Audience costs can appear in a democracy in several ways. First, public threats to use force in the event of a crisis will create high audience costs if a leader backs down. Second, opposition parties will demand more information about a crisis and the nation's strategies, which will generally be aired publicly. Third, a democracy might separate the foreign affairs power into executive and legislative branches, in which case the former may need to cooperate with the latter to undertake any military steps to follow through on a threat. And obviously, a setback in conflict or settlement will undermine the regime in the next elections.

Understood in these ways, however, audience costs may also offer a means for democracies to better signal their private information. If the American President makes public declarations of military measures to be taken in the event that China escalates during a crisis – along the lines of President John F. Kennedy's threats in the event that Soviet missiles were not removed during the Cuban Missile Crisis – he will suffer high domestic political costs for not following through. To justify the case for war, the President will disclose to the electorate information about the nature of the threat, the likelihood of winning, and why the war advances the national interest. If the President seeks funds or authorization from Congress, he will disclose even more information about the likelihood and outcome of a conflict, and any legislative approval will provide even more signals about national resolve and willingness to bear casualties and costs in a conflict. Democracies, however, will balance the gains from credible signaling against the costs in delaying action and giving up tactical surprise, which may prove more valuable against autocracies or terrorist groups.

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<sup>35</sup> See, e.g., Eric Posner, *Law and Social Norms* (2000).

<sup>36</sup> See, e.g., James Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 *Am. Pol. Sci. Rev.* 577 (1994); Kenneth Schultz, *Domestic Opposition and Signaling in International Crises*, 92 *Am. Pol. Sci. Rev.* 829 (1998); Kenneth Schultz, *Do Democratic Institutions Constrain or Inform?: Contrasting Two Institutional Perspectives on Democracy and War*, 53 *Int'l Org.* 233 (1999); Branislav Slantchev, *Politicians, the Media, and Domestic Audience Costs*, 50 *Int'l Stud. Q.* 445 (2006).



The nature of the signals may affect whether the crisis leads to conflict or settlement. Costly signals in the context of international bargaining may take two forms.<sup>37</sup> An American President who promises war unless China withdraws, as President George H.W. Bush response to Iraq's 1990 invasion of Kuwait, in effect "ties his hands." This is a credible signal because the President will suffer *ex post* audience costs if he does not follow through on the threat. An American President can send a second type of signal by mobilizing the armed forces or, less immediately, engaging in an arms build up or constructing certain types of weapon systems. This type of signal is a sunk cost. It generates costs *ex ante*, unlike tying hands, because it requires the expenditure of resources before the final decision on war or settlement. But it does not bear *ex post* audience costs if a threat remains unrealized. Interestingly, tying hands signals arguably increase the chances of war, because it increases future costs if the United States does not engage in a conflict even if  $W(\text{CHN})$  and  $W(\text{USA})$  remain unchanged. Sunk costs do not have this effect because they do not alter the future values of either war or settlement; once the money is spent, it is spent.

Part III will examine how different domestic constitutional arrangements affect the types of signals sent during international disputes. As I have argued elsewhere, an American President can send credible signals by involving Congress in his decision to go to war, that these signals can be of the tying hands or sunk cost variety, and that the advantage of sending signals must be balanced against the nature of the opponent. What has gone relatively unexamined in the literature is the other choice, the one of settlement. Different paths toward the making of international agreements may send different types of signals. These may enhance the credibility of the signal, they may generate different audience costs, and they too may be of the tying hands or sunk costs kind. But before we discuss the value of signals in overcoming international disputes, we must still address a second, greater obstacle.

### *C. Conflict as a Commitment Problem*

The preceding part described the information problems that cause war because nations hold private information about their probability of winning and they cannot credibly communicate it to the other side. But a second perhaps more difficult problem, still remains even with perfect information. Nations may be unable to commit to obeying any settlement because there is no supranational government that can meaningfully force them to follow through on their commitment. Along another dimension, incentives may arise after the agreement that will urge one of the parties to renege on its commitment. Conceived in this way, the commitment problem may be particularly acute in situations of rapidly changing shifts in the distribution of power.<sup>38</sup> These problems may prevent, in

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<sup>37</sup> James Fearon, *Signalin Foreign Policy Interests*, 41 *J. Conflict Res.* 68 (1997); Branislav Slantchev, *Military Coercion in Interstate Crises*, 99 *Am. Pol. Sci. Rev.* 533 (2005).

<sup>38</sup> Powell, *War as a Commitment Problem*, *supra* note , at 171-72.

our hypothetical, China and the United States from reaching an agreement even when perfect information exists and they have available the means to send credible signals.

One way to understand the difficulty of the commitment problem is to see the limitations of the account of war as a result of asymmetric information. Examples of civil wars or prolonged fighting highlight the drawbacks. Under the information explanation, such wars result from the failure of each side to communicate credibly to the other its true military capabilities and political resolve, leading to a bargaining failure. But with civil wars, after a few years if not immediately, the parties to a contest should gain ample information on the resources, organization, and tactics of the other.<sup>39</sup> Yet, they continue to fight on without reaching a settlement of their differences.<sup>40</sup> This insight might also apply to crises that develop into wars of long duration. By 1940-41, Great Britain and Germany had been at war for a year and Germany had decided to launch the aerial Battle of Britain as a prelude to invasion. Germany could have sought a separate peace in the West that left Britain alone. War did not continue, it seems, because of German misunderstanding of British resolve and resources, or vice versa. Complete information did not end the fighting. In fact, one could argue that the more the British learned about Hitler, the more they decided that they would fight him.<sup>41</sup>

Recent political science work argues that the real culprit to such bargaining failures is not asymmetric information, but commitment problems.<sup>42</sup> With complete information, states can identify a range of bargains that they will both prefer to war. In fact, as the cost of fighting increases, the range of bargains will broaden because both will benefit more by avoiding expensive war. States cannot reach these agreements because of inability to keep the commitment, rather than failure to identify the Pareto-optimal settlement. Work on commitment has identified similar problems areas other than international relations, such as coups and civil wars, transitions to democracy, government spending, and independent agencies.

Commitment problems will be especially pronounced when the distribution of power between actors changes rapidly. If China and the United States, for example, are trying to reach an agreement over the division of a territory, they are using their power to lock in a certain flow of future benefits. As discussed in Part II.B, that division will mirror the balance of power between China and the United States. But if China, for example, is rapidly increasing its military power because of explosive economic growth, it will have a strong incentive to renege on the deal and use its better position to seek a greater share of the territory. This may occur even though a share of the pie will be destroyed because of war itself. The agreement might even accentuate this dynamic by

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<sup>39</sup> *Id.* at 173.

<sup>40</sup> See James Fearon, *Why Do Some Civil Wars Last So Much Longer than Others?*, 43 *J. Peace Res.* 275 (2004).

<sup>41</sup> Powell, 60 *Int'l Org.* at 176.

<sup>42</sup> See Fearon, 41 *J. Peace Res.* at \_\_\_; Powell, *Inefficient Use of Power*, *supra* note , at 231; Branislav Slantchev, *The Power to Hurt: Costly Conflict with Completely Informed States*, 97 *Am. Pol. Sci. Rev.* 123 (2003).

sending resource flows to China that will allow it to accelerate its economic growth and accompanying military expansion. Or the agreement may require the United States to expend so many resources to maintain the status quo in the future that it would rather fight now than spend later. Knowing this, the United States will not trust China to keep any commitment it makes in the present, and may instead seek war now to lock in its share of resources, rather than face a steeper balance of forces in the future.<sup>43</sup> This explains why international agreements are unlikely to solve situations of first-strike preemptive attack and preventive war, because the attacker has a significant advantage in military resources in the present that will significantly erode in the future.

Domestic political arrangements may help overcome these commitment problems, just as they did with asymmetric information. Political scientists have not yet extended the commitment analysis to include audience costs, but we can see where it might lead. If a democracy has a ruling party and an opposition party, it might be able to make a more credible commitment by giving a veto over any future effort to renege to the opposition party. It could try to commit itself by requiring the expenditure of high levels of political capital to break the agreement in the future. Or it might devote resources to compliance that would be lost in the event of withdrawal, something like the giving of a hostage as part of a peace treaty in the ancient world. Part III will now return to the debate over treaty-making under the American Constitution to analyze the way that the choice of instruments bears on the problems of commitment and asymmetric information.

### *III. International Agreements and the U.S. Constitution*

We now use the tools of Part II to approach the puzzles described in Part I. As with political science studies of why nations choose war, we will examine why nations cannot make peace. For simplicity, we will assume that two nations have a dispute over which they can choose war or peace. Peace can occur because a nation backs down and the status quo remains intact or because the parties reach a settlement of their differences that allocates the resources or territory more in line with the balance of power between them. We will leave to another day examination of multilateral agreements that extend beyond individualized disputes.

Part II's model identifies two ways that negotiations can fail, despite the presence of Pareto-optimal bargains and the avoidance of the deadweight loss of war. The first is asymmetric information; the second is commitment. Choosing a treaty or the congressional-executive route to make an international agreement may bear on both of these problems. John Setear has observed that using the Article II treaty process can send a costly signal of commitment because it requires more political capital to win the higher majority for approval.<sup>44</sup> Lisa Martin makes a similar point with regard to treaties versus

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<sup>43</sup> Powell, 60 Int'l Org. at 181.

<sup>44</sup> John Setear, *The President's Rational Choice of a Treaty's Prer ratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. Leg. Stud. S28 (2002).

sole executive agreements.<sup>45</sup> This point actually confuses the asymmetric information and commitment issues. Treaties and congressional-executive agreements have different trade-offs on these issues due to the timing of important steps in their approval process, the level of political support required, their means of implementation, and the process for withdrawal. Different paths for termination of an international agreement, in particular, would have important bearing on the commitment problem.

Hathaway, by contrast, observes that congressional-executive agreements provide more durable commitments than treaties, which enhances the democratic nature of using Article I to make international agreements.<sup>46</sup> It is unclear why democratic theory should want to make it difficult for a nation to renege on its international agreements. In fact, a purely majoritarian system might prefer termination of treaties solely by the President, who is the only federal official, along with the Vice President, elected by the nation as a whole. Nevertheless, the focus on the democratic legitimacy of termination is besides the point. Hathaway elides the two different types of problems in making international agreements – credibly revealing private information and the threat of renegeing. It is important to understand that both variables are present in international disputes, and the choice of instruments has different trade-offs for their resolution.

It is important to underscore a point that frames the following discussion. While the scholarship to date has debated the legitimacy of treaties versus congressional-executive agreements, this paper does not view legitimacy as the critical question. Whether treaties are the sole means of making international agreements because of the constitutional text and structure, or democracy demands congressional-executive agreements, will not settle the debate over interchangeability. The political branches continue to use both forms, and the courts show little desire to overturn practice. Scholarly debate over the legitimacy of the use of the congressional-executive agreement to approve NAFTA seemed to have little affect on Congress or the executive branch. Nor have recent claims for full interchangeability convinced the President to seek approval of certain types of agreements, such as the rejected Comprehensive Test Ban Treaty or the new START, through Article I rather than the Article II process.

Instead, of legitimacy, this paper takes up the consequences of choosing between treaties and congressional-executive agreements. From Part II, we can begin by observing that multiple forms of international agreements are not a problem, but a solution to the problem of bargaining between nations. Different types of agreements allow the United States to send varying amounts of information and to choose between levels of commitment. This should make it easier for the United States to overcome the problems of asymmetric information and lack of enforcement that beset negotiations in an international system that lacks strong institutions.

#### A. Choice of Instruments as Informational Signals

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<sup>45</sup> Lisa Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 *Pres. Stud. Q.* 440 (2005).

<sup>46</sup> Hathaway, *supra* note , at 1316-38.

As demonstrated in Part II, one of the chief obstacles to the settlement of an international dispute is asymmetric information. Parties to a dispute have private information about their own probability of prevailing in a conflict, and this has a direct bearing on its expected benefit or cost from any conflict. Without that information, the other party cannot determine the range for an appropriate bargain. This problem is compounded by the possibility that the other nation might exaggerate its capabilities so as to successfully bluff its way to a more advantageous deal.

Consider how the choice of instruments might affect this dynamic. In the context of the decision whether to go to war, I have argued elsewhere that a U.S. President could seek congressional support for a conflict as a way to send a credible signal of the nation's private information concerning its ability to prevail in a conflict.<sup>47</sup> Placed in the simple hypothetical in Part II, this would make the U.S.'s expected benefit of a war:

$$W(\text{USA}) - AC(\text{USA}) = P(\text{USA}) * V(\text{USA}) - C(\text{USA}) - AC(\text{USA})$$

Here,  $AC(\text{USA})$  refers to audience costs. In the political science literature, scholars think of audience costs as the political price that the President will incur by going public with a threat against another nation that he does not fulfill. Here, we can think of  $AC(\text{USA})$  as the political cost of seeking the approval of another branch of government for support. Assuming that the costs of a conflict remain the same regardless of the signal, as well as the value of the territory to the United States, the expensive signal reveals information to China about the value of  $P(\text{USA})$ , the probability of winning a conflict.

Audience costs play a similar role in reaching international agreements. If the agreement, in our hypothetical, is a way to avoid war, then audience costs can again reveal  $P(\text{USA})$ . In fact, it might do this in a more direct way because of the difference between making a threat before a conflict and of approving either a treaty or a congressional-executive agreement afterwards. When the United States makes an international agreement, the President first negotiates and signs the treaty or congressional-executive agreement and then submits it to the Senate (if the former) or to Congress (if the latter). The agreement does not take effect until after legislative approval, followed by presidential ratification. The other party, here China, can also decide to reject the agreement as it waits to see the results of the approval process in the Senate or Congress.

In the course of legislative approval, the executive branch usually reveals information to the Senate or Congress in public to convince it to approve. The Senate Foreign Relations Committee, for example, will hold public hearings where executive branch officials will testify under oath about the benefits of international cooperation to the national interest. One inevitable question is whether the United States would be better off if the Senate did not ratify the agreement. The executive branch would have to explain what  $W(\text{USA})$  would be if the dispute escalates into war. If the value of the

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<sup>47</sup> Nzelibe & Yoo, *supra* note , at .

territory remain constant, the public testimony would reveal the executive branch's estimate of its probability of winning and the cost of the war. Misrepresenting this information to the Senate would have costs, including sanctions against the executive branch officials, difficulties for the President in the approval of future agreements, and disruption of foreign policy in the subject matter of the treaty. Executive branch testimony and Senate consideration provides important private information that can be seen as part of the negotiating process itself, since it occurs after the President has signed the treaty, but before it is approved and ratified.

This should provide a powerful help to reaching an agreement. Consider our hypothetical from Part II. Suppose that the United States and China reach a tentative agreement on allocating the territory in dispute. As Part II showed, this division will depend upon  $P$  and the deadweight loss of war,  $C$ . If China has a 50 percent chance of winning a conflict, it should get something around half of the territory plus or minus the deadweight losses of war to the US and China. The exact outcome of the settlement negotiations would depend on variables not included in our model. When the Senate considers the proposed treaty, members of the Foreign Relations Committee will ask whether the President should have gotten a better deal. In order to justify the negotiated division, the executive branch will have to reveal to the Senate its probability of winning and its estimates of the cost of war. If the revealed information does not match up with China's understanding of  $P(\text{USA})$  and  $C(\text{USA})$ , it can refuse to ratify the agreement. If the President were to say, for example, that the agreement is a great deal for the United States, because  $P(\text{USA})$  was really only 40 percent, China will not ratify the agreement and may well choose war instead because it will have a 60 percent chance of winning the whole territory.

Up to this point, there is no difference between the Article II treaty process and the Article I statutory method. The choice of instruments will not affect the type of information communicated about the probability of winning, but the strength of its credibility beyond the political costs that a President would suffer for misrepresenting information to Congress. Taking the Article II route requires the President to convince two-thirds of the Senate to agree to the treaty. A blocking coalition of 34 Senators need represent the population of only the smallest one-third of states by population. This could be as small as 7.4 percent of the population (the amount of the nation's population contained by the 17 smallest states), or 22.7 million out of the U.S. population of 307 million in 2009.<sup>48</sup> By contrast, the minority needed to block legislation in the Senate can be as small as 16 percent of the population (the population of the 25 smallest states).

The Article I route, by contrast, requires simple majorities of both the House and Senate. To get through the House, the President need only convince the representatives

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<sup>48</sup> Wyoming, the smallest state by population, has 544,270 people; Utah, the 17<sup>th</sup> smallest state, has 2.7 million inhabitants. See U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009 (NST-EST2009-01). <http://www.census.gov/popest/states/NST-ann-est.html>.

51 percent of the majority of the population. To get through the Senate, the President must only persuade 51 Senators, instead of 67 as with an Article II treaty. This assumes that a simple majority of the Senate does not actually represent 51 percent of the population. It might. But if the 25 smallest states vote together, enactment of a statute requires the other 25 to cooperate – 84 percent of the population. In fact, to take account of Senate rules, a minority opposed to a congressional-executive agreement would need the votes of only the smallest 20 states, which represents about 10 percent of the population – enough votes to sustain a filibuster that would prevent the bill from coming to a vote. Nevertheless, the President will consume more political capital to convince the representatives of 93 percent of the population, via a treaty, rather than the representatives of 84 percent of the population, via a statute.

In the terminology of our earlier equation, choosing the treaty process over the congressional-executive route will increase audience costs. That increase will be equivalent to the additional political capital needed to win the votes of 9 percent of the population (the difference between 84 percent of the population for a statute and 93 percent of the population for a treaty). It may be the case that this is not a great amount, but the marginal difference allows the United States to increase the cost, and hence the credibility, of its signal. Treaties will provide a more credible means for the United States to reveal private information to its negotiating partner than the enactment of a statute.

In fact, it seems that the United States might be willing to incur audience costs up to the expected benefit of war itself and even beyond if it expected to get an agreement that it values much more than going to war. To see why this is so, think about how the government would make a determination about whether to continue incurring audience costs or whether to stop and either settle or go to war. On the margin the government would incur an additional unit of audience costs up until the marginal benefit of doing so equals the marginal cost. The marginal benefit is the increase in potential settlement value if the parties agree to settle and the marginal cost is the additional unit of AC. As more information is revealed through audience costs, China will refine its beliefs about P and C. However, at some point the release of additional information will cease to be rational because the cost from an additional unit of AC will exceed the increase in settlement value to the United States due to the large quantity of already available data. If the potential settlement value is much greater than the expected benefit of war, the US may determine it is rational to increase audience costs beyond even the expected benefit of war if it believes that China is likely to settle once it has all of the relevant information on P and C.

A watching adversary will see that the President's political efforts to win legislative approval make it less likely that the United States is bluffing. The more expensive are the audience costs, the less likely that the President has misrepresented the probability of American victory in a conflict. The different paths to the approval of an international agreement allow the United States to send varying signals about private information. While the international relations literature does not further distinguish audience costs, we can identify two types of information communicated through the

advice and consent process. The first is simply the costs of the political effort to secure Senate or congressional approval. A President will expend political capital to build a majority or supermajority to approve the agreement, just as the executive will incur costs to convince Congress to pass its domestic legislative program. Presidents may take away time and resources away from other priorities, offer legislators favors for their votes, and risk public support to push an international agreement forward. These costs would not be much different, if at all, from the costs that Presidents incur to convince Congress to enact their legislative agenda. Political audience costs send a costly signal, but the nature of the signal itself is not important, only the cost.

A second dimension of the signal is the substance of the information communicated during the advice and consent process. Presidents will need to explain to the Senate the reasons why a treaty is in the national interest. The Senate Foreign Relations Committee will hold hearings in which administration witnesses will respond, under oath, to questions about the agreement. This will reveal in public more information about the United States' expected benefit from the agreement, which will give the other party more information on the value of the asset and the probability of victory in the event of a conflict. Senators, for example, might demand that the administration explain why a treaty does not give away the store, as it were, but instead carries non-obvious advantages for the United States. This signal is even more credible if the Senate is controlled by the opposite political party from the President's, which will be more demanding and harder to convince.

We might think of the costs of the signal versus its content as the difference between the quantity and quality. The former involves the amount of resources expended by the executive branch to get a treaty through the Senate. The latter involves the information communicated as part of that process. A bargaining state, however, might discount both as a bluff. China, for example, might suspect that the President and Senate are colluding to inflate the political costs of advice and consent to a treaty settling its dispute with the United States. The only reason why China might believe the audience costs is if it is confident in the reliability of the Constitution's division of the treaty-making authority between the President and the Senate and the institutional independence of each. Or, the other party might take the division of the treaty-making power so seriously as to doubt whether it has won an equitable division of the bargaining surplus if the President wins a supermajority in the legislature. China, for example, may believe that it negotiated a good deal for itself only if the President can convince a bare majority of Congress to agree. If two-thirds of the Senate, however, readily approve a treaty, China might believe that it has given up too much to the United States – much in the same way that a car buyer might believe he or she has paid too much if a dealer agrees right away to the first offer.

The Constitution addresses the first concern, bargaining theory the second. The more the Constitution truly organizes and limits power horizontally within the federal government, the more credible will be audience costs. If formal constitutional rules, for example, bear little resemblance to actual political practice – as occurred in communist countries during the Cold War – the other nation may not take seriously any apparent



political exertions to win approval of a treaty. Conversely, the more that the political branches obey the Constitution, even incurring inconvenient political costs to obey its separation of powers, the more the other nation will believe a costly signal. The second problem can be thought of as a transaction cost. Bargaining theory predicts that the two parties to an international dispute should reach an agreement that avoids the deadweight costs of war, should they be able to overcome the problems of asymmetric information and commitment failure. It does not necessarily predict, however, that the two parties will divide the surplus precisely in line with their relative power. Nonetheless, if two nations receive information that the division is not in line with their relative power, they will seek to re-negotiate the agreement until they come close. At that point, the Senate may approve the agreement anyway, because it knows that the treaty will allow the United States to avoid the costs of war and that it cannot improve its position any further.

These differences in the nature of signals might provide a partial explanation for the use of treaties for major agreements involving political alliances like NATO or arms control agreements like new START or the ABM treaty, and the use of congressional-executive agreements for economic matters like the IMF, Bretton Woods, NAFTA, and the WTO. The former address matters dear to a nation's security from attack, and as such will involve capabilities that a nation will usually keep secret, such as military forces and deployments, readiness and spending, and types of weapons. To reach agreement, for example, the parties to an arms control agreement must make credible disclosures about the size and shape of their arsenals.

With other types of agreements, the need to reveal private information may prove less pressing. Economic agreements may suffer less from problems of asymmetric information. Nations will already have disclosed publicly a great deal of information about their economies for reasons unrelated to the international agreement. The United States, for example, regularly reports for domestic reasons a whole host of statistics on economic growth, employment, industrial activity, and labor and capital deployment. It requires companies to release a great deal of information in order to ensure the smooth functioning of its markets. Private economic analysts have their own incentives to determine the effects of a trade agreement on different industry segments. A government will possess less private information about the future effects of an international economic agreement, and so it will have less need to send a costly signal to reveal it.

There is one more feature of the communication of information worth mention. Part II distinguished between informational signals that "tied hands" and those that were sunk costs. The former cost relatively little but increased instability, while the latter were costly but improved stability because once spent they were lost. Viewed on this axis, treaties seem to fall more along the lines of a tying hands signal, while congressional-executive agreements evoke more of a sunk cost. Treaties promise that the United States will live up to certain commitments, but they still require further implementing steps, such as the passage of legislation or the destruction of weapons, that will take place in the future. Congressional-executive agreements, by contrast, combine the international agreement and the implementing legislation in one package. The statute adopting WTO and NAFTA both approved the agreements and made changes to domestic tariff and trade

laws necessary to comply with their terms. This may mean that while Article II treaties reveal more private information, they also raise the political stakes for the President because of the need to follow through on promises made both to the foreign treaty partner and before domestic political audiences. Because Article I congressional-executive agreements combine the making of the international agreement with its domestic implementation, its enactment represents something more akin to the sunk cost of political capital.

## B. Choice of Instruments and Commitment

The choice of instruments may have far more to do with the second obstacle to making international agreements. Even if nations have successfully revealed private information and identified their bargaining range, they will still have difficulty in making credible commitments to keeping their agreement. Unlike the domestic contracting setting, there is no supranational government that can compel nations to keep their promises. This had led to some formal work on the causes of war to conclude that states might fight even if they have complete information, compounding the inefficiency puzzle of war.<sup>49</sup> Commitment problems will be especially pronounced in situations with rapid changes in the balance of powers between the two states, or where the division of the good itself will cause or accelerate shifts in the distribution of power.

The choice of instruments can play some role providing what the international system lacks. We might even say that the Framers were aware of the problem, though they would not have thought of it in modern terms. One of the chief problems with the Articles of Confederation was the inability of the Continental Congress to ensure compliance with the 1783 Treaty that ended the Revolutionary War.<sup>50</sup> Congress itself had no power to legislate, tax, or spend, and instead had to rely on the states to carry out its requests. It could only ask the states politely to obey the 1783 Treaty. States refused. Several, for example, refused to honor pre-revolutionary war debts between Americans borrowers and British lenders. This caused Britain to refuse, as required under the treaty, to turn over territories and strategic forts along the northwestern frontiers.<sup>51</sup> Congress could not compel states to lower trade barriers to live up to proposed trade agreements.<sup>52</sup> The Framers realized that the national government's failure to enforce existing treaties would discourage other states from making agreements with the United States in the future. Failure to live up to past commitments would make it difficult to convince other nations, in an international system characterized by anarchy, to believe any promises.

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<sup>49</sup> See, e.g., Powell, 60 Int'l Org. at 194-95.

<sup>50</sup> The story of the problem in enforcing treaties during the "Critical Period" between the Revolution and the Constitution is told in John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 2013-24 (1999).

<sup>51</sup> See, e.g., Federalist 15, at 91 (Jacob E. Cooke ed. 1961) (Alexander Hamilton).

<sup>52</sup> See Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 52-95 (1973).

Alexander Hamilton, writing as Publius in the *Federalist Papers*, put the problem clearly. “The treaties of the United States, under the present constitution, are liable to the infractions of thirteen different Legislatures, and as many different courts of final jurisdiction, acting under the authority of those Legislatures.”<sup>53</sup> Ensuring that the United States lived up to its international promises was challenging, to say the least. “The faith, the reputation, the peace of the whole union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.” Nations would have no credible belief that the United States could commit. “Is it possible that foreign nations can either respect or confide in such a government?”<sup>54</sup>

Domestic constitutional arrangements, some Framers realized, might help overcome these commitment problems. This, in fact, was one of the Framers’ explanations for the two-thirds requirement for the approval of treaties by the Senate. Responding to Anti-Federalists critical of the inclusion of treaties in the Supremacy Clause, John Jay responded as Publius: “These gentlemen would do well to reflect that a treaty is only another name for a bargain.” Jay continued: “it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.”<sup>55</sup> Jay thought the commitment problem so serious that he suggested in *Federalist 64* that the United States neither could withdraw from a treaty without the permission of the other state nor terminate one by a simple act of Congress. Jay appeared to believe that terminating a treaty would require both the President’s decision and approval by two-thirds of the Senate.

Reading the Constitution in this manner would have allowed the national government to use its internal separation of powers to send credible signals of commitment. In the context of war, political scientists have pointed to public declarations by a President of ultimatums or demands as credible signals, due to the domestic political costs if the President does not follow through. Here, the audience costs go beyond mere threats and the attendant gains for the opposition. If the President could not terminate a treaty – under the rules of the domestic Constitution – without the approval of two-thirds of the Senate, the use of the Article II process would be a powerful signal of commitment. In this case, Article II’s supermajority requirements would work in the nation’s favor. Only 7.4 percent of the population could prevent any effort by the United States to renege on its international promises. While the two-thirds termination requirement could not permanently guarantee a commitment to an agreement, it would significantly raise the political price for a President intent on reneging.

Constitutional practice, however, did not develop in the direction that Jay predicted. Within a decade of *Federalist 64*, the United States terminated its first treaty. The United States withdrew from the 1778 Treaty of Alliance with France both unilaterally and by statute, ruining both of Jay’s commitment devices. The death knell

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<sup>53</sup> *Federalist 22*, at 144 (Jacob E. Cooke ed. 1961) (Alexander Hamilton)

<sup>54</sup> *Id.*

<sup>55</sup> *Federalist 64*, at 437 (Jacob E. Cooke ed. 1961) (John Jay).

for the French treaty even occurred as early as the beginning of President Washington's second term. Under attack by nations seeking to restore the Bourbon monarchy, the French called on the United States to provide military assistance in 1792-93. President Washington, however, decided instead to interpret the 1778 Treaty as allowing the nation to remain neutral in the fighting. He did not consult Congress or the Senate or seek its approval. Congress eventually terminated the treaty, at President Adams' request, and began a naval war with France in 1798.

A credible signal might still be available if congressional consent to termination continued as a constitutional requirement. Under current population figures, 16 percent of the population – the smallest 25 states – could still block an effort to terminate a treaty in the Senate, if not the House. But by the time of Abraham Lincoln, Presidents had unilaterally withdrawn the nation from treaties without the consent of either the Senate or Congress. Today, the United States terminates treaties sometimes by congressional act, but more often by sole presidential decision. President George W. Bush, for example, terminated the Anti-Ballistic Missile Treaty in 2002 without seeking congressional approval. As with the 1778 Treaty with France, presidential interpretation of the ABM Treaty had already set the stage for the termination. Beginning in 1984, Presidents from Reagan through Clinton interpreted the agreement to allow the United States to research and develop ABM missile systems for eventual deployment on the West Coast. While the Presidents needed congressional cooperation to fund the development of ABM technology, they never sought congressional approval for their reading of the treaty.

While members of Congress have opposed this practice at various times, the courts have refused to intervene. The constitutional question of presidential treaty termination did not reach the courts until the United States withdrew from the mutual defense treaty with Taiwan in 1979. In *Goldwater v. Carter*, the U.S. Court of Appeals for the D.C. Circuit upheld the termination as part of the President's executive power in foreign affairs.<sup>56</sup> Comparing the issue to the President's power to remove executive branch officials without congressional consent, the court found that the two-thirds Senate approval requirement was a narrow exception from the President's constitutional authority and that it did not extend further to the power to end agreements. The Supreme Court could not agree on a majority opinion.<sup>57</sup> Four Justices found that the case presented a non-justiciable political question, Justice Powell found the case unripe because Congress as an institution had not taken any steps to thwart the President, and Justice Brennan reached the merits and agreed with the D.C. Circuit. The Court's refusal to intervene allowed President Carter's unilateral termination of the mutual defense treaty to take effect.

Article II treaties, therefore, may send a relatively credible signal about the reliability of private information. But they send a less credible signal about the United States' future commitment to keeping its promise to another nation. If the Constitution required the President and Congress to agree to the withdrawal from an international

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<sup>56</sup> *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979).

<sup>57</sup> *Goldwater v. Carter*, 444 U.S. 996 (1979).

agreement, the political costs of renegeing on the promise would be higher, which would send a costly signal of commitment. Commitment does not come from international enforcement of promises, but from raising the domestic costs for a President to implement his foreign policy. A requirement of congressional or Senate consent would require the President to expend political capital and take public positions that would hurt his standing with the electorate if unfulfilled. In the political science models discussed in Part II, the Constitution could have raised the audience costs for any treaty termination, thereby allowing a credible signal of commitment to be sent. But terminating a treaty does not require the President to receive the consent of another coordinate branch of government. By allowing unilateral presidential termination of treaties, constitutional practice has reduced their utility as a credible signal of commitment.

Treaty termination, however, is not wholly costless. The domestic cost realized by the President will come from the political process, rather than from the constitutional allocation of powers. This may be high initially, but may well drop off in the future. Criticism of a President's decision to unilaterally terminate a treaty will likely come most directly from the Senators who gave their advise and consent. But as time passes, the holders of Senate seats may change and the new officeholders may have little to no attachment to treaties approved by their predecessors. Any political opposition to presidential termination will have more to do with the specific policies governed by the treaty than any strong desire to keep commitments made by past Senates. These costs will be even less if the same political party controls both the Presidency and holds a majority in Congress, which would give the latter more political incentive to leave a termination unchallenged.

Congressional-executive agreements, by contrast, may present the opposite trade-off on signaling information versus commitment. Adopting an international agreement by the Article I statutory route sends a less credible signal about the reliability of revealed information because of the lower number of votes required for approval. But because of differences in terminating procedures, congressional-executive agreements may send a stronger signal than Article II treaties about commitment. Unlike treaties, congressional-executive agreements require legislative approval before termination because of their different constitutional pathways.

To see why this is so, it is important to recall the constitutional difference between treaties and congressional-executive agreements. Treaties are executive acts – hence the location of the advice and consent clause in Article II alongside the similar provision for the appointment of executive branch officers. The location of the treaty power in Article II was an important piece of evidence for the courts in *Goldwater v. Carter* in agreeing that the President could terminate treaties and that the courts had no authority to review the decision. The constitutional argument for presidential termination of treaties mimics the argument for presidential removal of subordinate officers. While the Senate must consent to the appointment of major officers of the government, the Constitution remains silent about their removal. The Constitution has been understood to grant removal to the President, except in certain circumstances, because the Senate's consent is a specific exception to what would have been a general executive power to

both appoint and remove unilaterally. Similarly, the Constitution is silent about treaty termination, but the lower courts have read it as remaining with the President because the Senate's advice and consent role is a specific exception to a general executive authority to make or terminate treaties.

Congressional-executive agreements, by contrast, are statutes. They are passed using the same process as other laws enacted within Congress's Article I, Section 8 powers. They combine the approval of the international agreement with the necessary domestic implementing legislation. As with removal or treaties, the Constitution only sets out the process for the affirmative enactment of a statute. Article I does not explicitly address the negative act of terminating the law. Unlike removal or treaties, however, the Constitution has not been understood to allow for alternate methods for reversing an earlier statute. If Congress or the President want to terminate a federal law, they must enact a second law overriding the first. There might be one exception for judicial review, but a court's "striking down" of a federal law might amount to no more than judicial refusal to enforce a law, rather than the actual removal of the law from the U.S. Code. But generally, statutes must be reversed by later-in-time statutes.

Hence, a President who wishes to withdraw from a congressional-executive agreement must convince a majority of Congress to consent. And here again, the supermajority nature of enactment works against breaking the international commitment. The President needs not only 51 percent of the House, but 51 Senators. If the 25 smallest states oppose terminating the congressional-executive agreement, the President may need to persuade Senators who represent as much as 84 percent of the population to consent. And if we take into account the Senate filibuster rule, the President may even need to win over Senators who represent as much as 90 percent of the nation's population. Not quite the 93 percent needed for two-thirds of the Senate, but a high political cost nonetheless.

The difference in treaty and statutory termination allow the United States to send varying signals of credibility about its commitment to keep an international promise. Treaties will send a lesser signal of commitment than congressional-executive agreements because of the President's power to unilaterally terminate the former. His main domestic cost will arise from opposition political parties and interest groups that support the policies in the treaty. A President would suffer those same costs in terminating a congressional-executive agreement, but he must go to the greater effort of assembling majorities in both the House and Senate. These audience costs could be significant, especially if opposition aligns along differences in state geography or population. The additional political resources required to terminate a statute provides a credible signal, at the time of the signing of the international agreement, of commitment.

This trade-off between treaties and congressional-executive agreements may help explain some consistencies in U.S. practice. Some, such as Ackerman and Golove, insist that the instruments should be fully interchangeable, and others, such as Hathaway, argue that they already are. These scholars claim that congressional-executive agreements are easier to ratify and more justified as a matter of democratic theory. Nevertheless, the United States has continued to use treaties for significant political agreements, such as the

Treaty of Versailles, U.N. Charter, NATO, and the settlement of the Cold War in Europe. It still chooses the Article II treaty form for arms control pacts, such as the ABM Treaty, SALT, the INF and START agreements, the chemical weapons convention, the Comprehensive Test Ban Treaty, and now the proposed START. If full interchangeability were correct, Presidents should always use the Article I route, even for political and arms control agreements. In fact, if interchangeability were correct, a President could take a treaty rejected by the Senate (such as the Treaty of Versailles or the Comprehensive Test Ban Treaty), and turn around and re-submit it for simple majority approval as a statute. This appears to have never happened.

Supporters of interchangeability might claim that Presidents still choose treaties because the Senate demands it. Senators who are concerned about maintaining their institution's prerogatives could threaten to block any international agreements that come through Article I, rather than Article II. The smallest states should have the greatest interest in preserving the Senate's constitutional place. They demanded the creation of the Senate as the price of the Constitution's creation and ensured that the Senate would have a veto over any form of federal lawmaking.<sup>58</sup> It would require the 25 smallest states, which today represent 16 percent of the population, to band together to block all congressional-executive agreements, so that a mere 7 percent of the population through the one-third smallest states can block any future treaty. Ackerman and Golove, however, claim that the Senate gave up any effort to play defense in the wake of World War II, when it allowed the IMF and Bretton Woods through as congressional-executive agreements, rather than treaties. Nor did any defenders of the Senate's prerogatives appear when NAFTA -- perhaps the last international agreement to spur widespread public debate (Vice President Gore publicly debated 1992 presidential candidate Ross Perot on national radio and television over NAFTA's merits) -- went through Congress by simple majorities.

The interchangeability puzzle is not really about why congressional-executive agreements have not fully replace treaties. It is about why the United States continues to use Article II treaties, and in fact reserves them for some of the most important international agreements. Normative justifications rooted in democratic legitimacy or constitutional interpretation cannot provide an answer. Instead, the consequences of the choice of instrument hint at the solution. Treaties strike a particular trade-off: they can reveal significant private information in a credible manner, but with a lower signal of commitment. Congressional-executive agreements reveal private information less credibly, but they send a more costly signal of ex post commitment. This may make treaties particularly effective for security-related agreements such as arms control or military alliances. In these areas, information asymmetries may prove to be the more difficult obstacle to cooperation. A nation will start out with less access to public information about the other side's military capabilities and resources, particularly its probability of prevailing in any conflict (our P variable). It will have serious concerns about bluffing, particularly if they might conceal possibly rapid shifts in the balance of

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<sup>58</sup> See, e.g., Bradford A. Clark, Putting the Safeguards Back into the Political Safeguards of Federalism, 80 Tex. L. Rev. 327 (2001).

power. A mistaken decision might result in the dearest consequences: military defeat, reduced territory, and loss of lives and resources (a high V variable).

In these circumstances, choosing the Article II process can help overcome the serious credibility issues in revealing private information. At the same time, credibility of commitment may not be as important. Nations may want to have an easier escape hatch for treaties that involve vital national interests. With arms control, for example, the United States may want to reveal to the Soviet Union that its anti-ballistic missile program is fairly primitive and easily dismantled. But it may also want to reserve the ability to pull out of the treaty fairly quickly, in the future, because of a change in circumstances. That change may have little to do with the Soviet Union and more to do with a threat from another nation, such as North Korea, which might develop an intercontinental ballistic missile capability and nuclear weapons that could be deterred by a small-scale ABM system. The United States, in fact, might expect the Soviet Union to terminate quickly too, should its vital national interests come under threat. Arms control treaties explicitly recognize this fact by making provision for unilateral withdrawal under such conditions. Article XV of the ABM Treaty for example, set out that “[e]ach Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests.”<sup>59</sup>

Congressional-executive agreements, by contrast, would prove better suited for situations where the United States has less need to reveal private information and more to show a credible commitment. Economic agreements could well fall into these category. As argued earlier, there may be little private information that needs to be revealed to reach an agreement. Commitment, however, may prove the more difficult challenge. Trade agreements will encourage investments, such as in manufacturing plants or distribution and retail facilities, to take advantage of reduced tariffs and other trade barriers. Private actors, however, will have some reluctance to invest if they are unsure about the long-term commitment of the United States to the agreement. Making it more difficult for the President to terminate a trade agreement will increase confidence that the United States will comply with its obligations.

This explanation of the congressional-executive agreement draws on the same intuition as rational choice explanations for the separation of powers. Some political scientists have argued that the separation of powers may have emerged in seventeenth and eighteenth century England because of the need of monarchs to commit not to expropriate the property of the upper classes.<sup>60</sup> Without that commitment, the Crown would have difficulty convincing investors to lend it the money needed for foreign wars and domestic expenses. A parallel account describes judicial independence as a valuable commitment device for governments that want to encourage private and foreign

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<sup>59</sup> ABM Treaty, *supra* note , at art. XV.

<sup>60</sup> Douglass North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 *J. Econ. Hist.* 803 (1989).



investment in their economies. Judicial review vests an independent body with the power to block an effort to nationalize investments. Congressional-executive agreements, similarly, allow 51 percent of the House or a blocking minority in the Senate to exercise a form of review over the President's decision to terminate an international pact.

A related point is worth making on the choice of instruments. If it is true that congressional-executive agreements and treaties provide the United States with two tools that carry different trade-offs for the resolution of international disputes, two instruments remain missing. Treaties reveal information more credibly, while congressional-executive agreements provide a surer guarantee against renegeing. The nation ought to have a means of making an international agreement with lower levels of credible information transmission and commitment than either of these choices, and it should have one with greater facility at both. This would give the United States a full range of instruments, with a variety of costs and benefits to overcome information asymmetry or enforcement difficulties.

It may come as a surprise that while practice has provided for one, it has precluded the other. Sole executive agreements, which are outside the scope of this paper, emerged alongside the congressional-executive agreement in the New Deal and post-WWII period as another means of reaching international agreements. A sole executive agreement is made and terminated by the President alone, without the approval or implementation by Congress.<sup>61</sup> Like congressional-executive agreements, their constitutional place has rested uneasily. They can be understood not just as a President's promise to use his singular constitutional powers to follow a promised policy, but as a less credible signal of revealing information that has the same commitment value as a treaty.

What is missing is an instrument that combines a highly costly signal about the credibility of information and a credible promise not to renege on the agreement in the future. On this point, perhaps a treaty exclusivist view may have had it right. There is no strong reason to read the Constitution to require that two-thirds of the Senate has to approve the termination of a treaty, though it would mirror the formal symmetry for the making and ending of statutes. In fact, when compared to the adjacent Appointments Clause, the natural reading would be that the termination of a treaty, like the removal of an officer, falls within the President's executive power. This result coheres with the overall practice and, I would argue, the original constitutional design, in vesting the President with control over foreign policy. Nevertheless, this reading of the Constitution has removed from the nation's tool chest an instrument that could send the most credible signals on information and commitment, and hence lead to the most durable international agreements.

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<sup>61</sup> See, e.g., Bradford Clark, *Domestic Sole Executive Agreements*, 93 Va. L. Rev. 1573 (2007); Michael Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 133 (1998).

Non-self-execution of treaties, however, may have provided a level of commitment that moves toward filling this gap. No constitutional procedure currently approximates the informative and costly signal transmitted by a two-thirds requirement for both making and terminating a treaty. The only constitutional process that comes close is the two-thirds of the Congress and three-quarters of the states required to make or eliminate a constitutional amendment, which is somewhat more difficult. Non-self-execution, however, requires that certain treaties not take effect domestically without implementing legislation.<sup>62</sup> Like congressional-executive agreements, scholars dispute how broad the doctrine reaches – some argue that it only includes treaties that promise future action, while others believe it includes treaties that regulate matters resting within Congress's Article I, Section 8 powers.<sup>63</sup> Regardless of the breadth of the doctrine, most agree that the Senate can condition its approval of a treaty with a requirement that it not take effect without further implementing legislation.<sup>64</sup>

This provides the political branches with an instrument that comes close to filling the gap created by the executive's unilateral termination of treaties. Non-self-executing treaties still require two-thirds of the Senate for approval, which preserves the advantage over congressional-executive agreements for overcoming situations of asymmetric information. At the same time, non-self-executing treaties require Congress to enact regular legislation to live up to the terms of the international obligation. As a formal matter, terminating the treaty will not undo the accompanying implementing statute unless Congress enacts a repealing law. This signals commitment at the same level of intensity as a congressional-executive agreement and greater than for a normal treaty. Non-self-execution has come in for harsh criticism from many international law scholars, despite the Supreme Court's long and continuing application of the doctrine. Ironically, these scholars criticize non-self-execution for making American compliance with international obligations suspect, while missing its advantages in overcoming bargaining obstacles to making agreements in the first place.

Treaties may have one last instrumental advantage over congressional-executive agreements. It derives from Thomas Schelling's insight that a rational actor, under certain circumstances, might want to act irrationally so as to gain an advantage in conflict resolution. "[T]he power of a negotiator often rests on a manifest inability to make concessions and to meet demands."<sup>65</sup> Schelling further observed that an executive negotiating a settlement with another nation would have more credibility in establishing a

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<sup>62</sup> *Medellin v. Texas*, 552 U.S. 491, 505 (2008).

<sup>63</sup> For different perspectives on non-self-execution, see John Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 *Colum. L. Rev.* 2218, 2233-57 (1999); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 *Colum. L. Rev.* 2095 (1999) Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 *Colum. L. Rev.* 1082 (1992).

<sup>64</sup> This stems from Chief Justice John Marshall's early recognition of non-self-execution in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

<sup>65</sup> Schelling, *supra* note , at 19.

firm position if it is evident that he must seek approval from the legislature which will only accept a certain range of options.<sup>66</sup> This intuitively makes sense. If the President can only agree to treaty terms that two-thirds of the Senate will accept, the United States has self-committed to a limited range of outcomes. As a device, it is similar to Cortez's decision to burn his ships as a signal that he would not accept retreat as an option.

Scholars since have developed this conjecture into a theory. They conclude that a bargaining advantage will accrue to a nation that must seek, after an agreement is reached, subsequent ratification by the legislature.<sup>67</sup> Even though the domestic constraints narrow the executive's negotiating flexibility, they send a credible signal that the President can only agree to certain options and not others. Some of this work has shown that the higher the domestic ratification constraints on the executive, the more that a nation will receive in bargaining advantage over a nation that has no similar constraint.<sup>68</sup> If both sides have high constraints, then neither obtains a bargaining advantage.

Schelling's theory illustrates one way that treaties may prove superior to congressional-executive agreements in communicating credibility, but credibility of a different sort than discussed earlier. Obtaining a two-thirds majority of the Senate is one of the most difficult procedural hurdles for federal action in the Constitution. It sends a costly signal to another nation that the United States can only accept a certain range of international agreements. Its use gives the United States an advantage in negotiating with a country that has no domestic constitutional ratification requirements, or at least negates any advantage that a similar democracy might have enjoyed. Of course, congressional-executive agreements would provide some of the same benefits, but treaties allow the United States to ratchet the constraints even higher. Following an approach that would only use congressional-executive agreements would force the nation to give up the potential bargaining advantages from having a choice of instruments.

### *Conclusions*

This paper has explained the functional trade-offs between various forms of international agreements under the Constitution. It shows that, putting aside the arguments rooted in constitutional legitimacy, a choice of instruments can provide advantages to American foreign policymaking. It adopts a model that understands the primary obstacles to rational agreements between two states as asymmetric information and signaling commitment. Using a treaty or a congressional-executive agreement allows the United States to reveal different levels of private information or to signal varying levels of commitment in the course of reaching a bargain with another country.

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<sup>66</sup> Id. at 27-28.

<sup>67</sup> See, e.g., Helen Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* 68 (1997); Ahmer Tarar, *International Bargaining with Two-Sided Domestic Constraints*, 45 *J. Conflict Resolution* 320 (2001).

<sup>68</sup> Tarar, *supra* note , at 329-30.

It is possible that the President and Congress could achieve the same ends by specifying a different level of approval in a congressional-executive agreement itself. If, for example, the political branches wanted to reveal more private information, on a par with a treaty, they could specify that a congressional-executive agreement must receive 60 percent, 67 percent, or even 75 percent approval in both houses. There are no examples of Congress attempting something like this. Such a mechanism might also raise questions about whether a current Congress can bind a future Congress. If a Congress were to enact a congressional-executive agreement by a simple majority, and delete the higher vote requirement, it would have met the requirements to become federal law. The U.S.'s bargaining partner might also question the reliability of ad hoc vote requirements in congressional-executive agreements that do not originate from the Constitution itself. Adhering to the Constitution's vote requirements for statutes and treaties may provide stronger indications about the reliability of the signals sent by the United States.

These ideas reinforce the value of understanding the process of making of international agreements in instrumental terms. The contest over whether treaties or statutes are the only valid form of reaching international agreements has had little to no impact upon the political or judicial branches of the government. The United States continues to use both methods to make its international commitments. This paper proceeds from the assumption that a useful, but little exploited, approach is to judge the consequences of the different approaches. More attention to the costs and benefits of treaties and congressional-executive agreements not just allows us to better understand their use. It also helps identify the advantages to American foreign policy of the choice of instruments.