Rejoinder

Treaty Interpretation and the False Sirens of Delegation

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INTRODUCTION

In an earlier Essay published in this Review, Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation ("Politics as Law"), I examined the principles that govern the interpretation of treaties. The issue had last received intense academic and political attention in the 1980s, when President Ronald Reagan sought to interpret the Anti-Ballistic Missile Treaty ("ABM Treaty") to allow the development of a space-based defense against nuclear missiles. Politics as Law argued that the separation of powers requires that the public lawmaking system treat statutes and treaties differently, and it maintained that the Constitution endows the President with broad powers over treaty interpretation. Politics as Law turned to materials from the Framing to show that the treaty power was understood by the Constitution's ratifiers to be an executive power and that early practice (particularly President Washington's Neutrality Proclamation) demonstrated the executive branch's control over interpretation. Finally, Politics as Law applied this approach to the current controversy over the ABM Treaty and national missile defense and concluded that the President's authority over treaties...
provided him with several options for deploying a national missile defense.\(^5\)

In the course of this analysis, *Politics as Law* observed that the current debate over statutory interpretation could shed light upon these issues. Over five pages or so, the Essay suggested that, regardless of whether one agreed with a “textualist” or a “dynamic” theory of reading statutes, the considerations behind both approaches supported executive control over treaty interpretation.\(^6\) I then dropped this footnote:

As far as I can tell, only one author has attempted to explore in any detail the relationship between treaties and the recent debates over statutory interpretation.\(^7\) Professor Van Alstine argues that no commonalities exist between domestic canons of statutory interpretation and treaties because of the special nature of treaties, especially in the private international commercial area. He argues that such treaties “delegate” to the federal courts the law-making power to fill in gaps in treaties, and that the courts should perform this task in harmony with the courts of other nations. Professor Van Alstine’s account, however, suffers from his failure to identify any constitutional authorization for such an enormous transfer of power from the treaty makers to the courts, one that would arguably violate the Constitution if undertaken domestically. Professor Van Alstine’s approach also attempts to read into the Constitution treaty interpretation theories developed at the international level, but without demonstrating any domestic legal authorization for such a move.\(^8\)

In response to this footnote, Professor Van Alstine has attempted to redress his most obvious difficulty: his notion that the Constitution permits the transfer of interpretive authority over certain treaties from the executive branch to the judiciary.\(^9\) Professor Van Alstine’s interesting Response Essay provides me with a welcome opportunity to consider in more depth the role of the courts in filling in gaps in treaties. Upon further reflection, I think my original instincts were right. In the following pages, I will explain why Professor Van Alstine’s argument that treaties ought to receive the same treatment as statutes is unconvincing and, indeed, why it does violence to the separation of powers and the proper allocation of the foreign affairs power.

Several significant problems pervade Professor Van Alstine’s approach to treaty interpretation. It transplants the most expansive theories of

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5. *Id.* at 901-15.
6. *Id.* at 877-82.
8. Yoo, *Politics as Law*, supra note 1, at 879 n.85 (citations omitted).
the federal judiciary's role in making law into the treaty context, and it fails to recognize the President's paramount role in foreign affairs. As I have argued elsewhere, however, the separation of powers and federalism require a clear distinction between treaties and statutes, and Professor Van Alstine provides no compelling reason, rooted in the text, structure, or history of the Constitution, for erasing that textual barrier.

Although he does not mention it in his Response Essay, Professor Van Alstine's argument for a "delegation" of interpretive power is only the prelude to an even broader expansion of the judicial role. In his earlier article, Professor Van Alstine claimed that such delegation would "empower[] domestic courts to participate in the fashioning of solutions on an international level" when treaties are silent on a question. Rather than look to "domestic legal norms" in interpreting treaties, American courts would participate in a grand, transnational community of interpreters in which American judges would apparently owe greater loyalty to a treaty regime than to their domestic legal systems. As Professor Van Alstine put it, "[i]nterpretation is a social process [in which] effective unification of the law on an international level will require cooperation among the formally independent national courts." Thus, Professor Van Alstine really argues in favor of a dual delegation: first from the executive branch to the American courts and then from the American courts to some vague, international community of interpreters who are required to defer to one another. As I will explain, this second delegation runs into its own constitutional difficulties, ones which Professor Van Alstine makes no effort to confront.

This Essay will not merely rehash the points from Politics as Law, although a certain amount of overlap is inevitable. Rather, it will focus upon several new points involving the judicial role in treaty interpretation that were helpfully raised by Professor Van Alstine. Part I examines Professor Van Alstine's specific responses to the arguments developed in Politics as Law. This Part examines why treaties should not receive the same treatment as statutes for purposes of the domestic constitutional system. Part II evaluates Professor Van Alstine's approach to constitutional interpretation with respect to the separation of powers, placing special emphasis on the textual and structural vesting of the foreign affairs power

10. See id. at 1280-86.
12. Van Alstine, supra note 7, at 694.
13. Id. at 693-94, 701, 732-33.
14. Id. at 732.
in the executive branch. It concludes that the proposed delegation of authority to interpret treaties to the judiciary runs counter to the original understanding and violates modern Article III jurisprudence. Finally, Part III discusses whether broad theories of federal-common-law making justify a similarly expansive role for judicial treaty making. It concludes that this approach distorts both the text and structure of the Constitution. This distortion is compounded by Professor Van Alstine’s notion that a treaty can delegate to the federal courts the power to transfer treaty-interpretation authority to foreign or international courts.

I

VAN ALSTINE’S RESPONSE TO POLITICS AS LAW

A. Revisiting Politics as Law: Constitutional Foundations for Interpretation of Treaties by the Executive

Politics as Law used the issues surrounding treaty interpretation as the lens through which to understand the application of the separation of powers to treaties. For the most part, scholarly writing about this question has addressed the scope of the Senate’s constitutional role in consenting to treaties. 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.” Some have read this provision as giving the Senate an equal role in treaty making, or at least one more active than its practice today, in which the President usually presents a fully negotiated agreement to a Senate that often defers. Many of the most interesting questions involving treaties, however, go beyond this debate, which is characterized by long-settled positions and is the subject of much partisan wrangling. Thus, in my other work, I have explored the manner in which the separation of powers applies to other treaty questions, such as the delegation of lawmaking authority, non-self-execution, and interchangeability with statutes. These issues are increasingly important as treaties assume a more central role in the regulation of domestic affairs.

16. See, e.g., Michael J. Glennon, Constitutional Diplomacy 123-63 (1990); Harold H. Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair 40-45 (1990); Arthur Bestor, Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined, 55 Wash. L. Rev. 1, 117-20 (1979) (arguing that the Senate’s advice and consent power was intended to give it an active role in setting foreign policy).
18. See generally Yoo, New Sovereignty, supra note 15.
20. See generally Yoo, Laws as Treaties, supra note 11.
With this in mind, *Politics as Law* sought to create a framework for understanding treaty-interpretation issues. It first argued that analysis of the interpretation power ought to begin with the constitutional text. Unlike the authority to enact legislation, the treaty power as a whole is located in Article II of the Constitution, which indicates that it ought to be regarded as an exclusively executive power. Although the Senate plays a role in providing its advice and consent, there are several reasons that this exception to the President’s general power over treaties should be read narrowly. First, the location of the treaty power in Article II suggests that treaties are not legislative in nature. The treaty power is an executive power, as it was under the British constitution of the eighteenth century. Just as Article I describes Congress’s powers and Article III those of the federal judiciary, Article II focuses solely on the powers and functioning of the executive branch. Inclusion of the treaty power in Article II indicates that it belongs to the President. Second, Article II, Section 2 enumerates executive powers that have been divided and shared with Congress (such as the power to declare war and the commander-in-chief power) or the Senate (as with the treaty and appointment powers). The Senate’s participation, however, does not transform the treaty power into a quasi-legislative power so much as it represents the dilution of the unitary nature of the executive branch, just as the inclusion of the presidential veto over legislation does not undermine the fundamentally legislative nature of the Article I, Section 8 powers. Third, Article II’s Vesting Clause establishes a rule of construction that any unenumerated executive power, such as that over treaty interpretation, must be given to the President. Article II begins with a general grant of power that requires that all of the federal executive power vest in the President, in contrast to the Vesting Clause of Article I, in which only legislative powers “herein granted” are given to Congress (thus limiting the legislature to only those powers specifically enumerated).

*Politics as Law* then demonstrated that a functional approach to treaty interpretation led to the same result. First, it argued that the nature of international relations, especially in the modern world, has led to the centralization of the power over foreign affairs in the President. He remains the constitutional actor best able to gather information, develop policies, and monitor responses in a fast-moving, dangerous environment.

24. Id.
27. See Yoo, *Politics as Law*, supra note 1, at 870-73.
28. Id.
Alexander Hamilton put it, "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number . . . ." Second, Politics as Law showed that the President’s monopoly over foreign affairs is mirrored in the process of treaty making, in which the President controls the choice of subjects and partners, the course of negotiations, and the decision of whether to make the agreement even after the Senate has consented. Neither the Congress nor the Senate can force the President to make a treaty (in contrast to legislation, the President effectively wields an absolute veto over treaties), and the President controls the power over termination. It would make little sense, I argued, to read the treaty-interpretation power at odds with these other, albeit unenumerated, aspects of the treaty power. Third, Politics of Law concluded that treaty interpretation has to rest with the President due to his management of foreign policy and his constitutional control over the interpretation of international law on behalf of the United States. The President must constantly interpret international law in the course of conducting our day-to-day foreign affairs. Even if treaties contain gaps in meaning, presidential treaty interpretation performs a function akin to that of the federal courts in creating specialized federal common law, without the attendant legitimacy problems.

Politics as Law concluded its textual and structural analysis by seeking to glean some lessons from the recent scholarship on statutory interpretation. I argued that those who favored either textualist or dynamic approaches to statutory interpretation would agree that the President ought to enjoy the power of treaty interpretation. Textualists, who criticize the use of legislative history by courts, would give no weight to any senatorial readings of a text but instead would favor interpretations based purely on the text that survived Article II, Section 2’s supermajority process. Those who promote dynamic theories of interpretation advocate a more creative role for judges in bringing policy considerations to bear in reading statutes. In the foreign affairs setting, these dynamic theorists would look to the

30. See Yoo, Politics as Law, supra note 1, at 873-77; see also Louis Henkin, Foreign Affairs and the United States Constitution 184 (2d ed. 1996) (suggesting that the President can choose not to make a treaty even after the Senate has given its advice and consent).
32. Yoo, Politics as Law, supra note 1, at 874-75.
33. Id. at 875-76.
34. Id. at 908.
35. Id. at 878-82 (citing William N. Eskridge Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321 (1990); John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673 (1997)).
36. Yoo, Politics as Laws, supra note 1, at 879-81.
President, rather than the courts, to play the role of a dynamic interpreter, since in foreign affairs the President plays the primary role in applying laws to facts and setting policies.

I sought to further support this analysis by looking to the Framers’ original understanding of treaty interpretation. According to Politics as Law’s analysis of the relevant historical materials, the Constitution’s ratifiers would have understood the treaty power to be executive in nature, based on the traditional placement of the power with Anglo-American chief executives. I also showed that the transfer of the treaty power from the Senate, where it had become lodged in earlier drafts of the Constitution, to the Article II process we have today, signified a desire to reduce the role of the Senate in favor of the nationally elected President.

In reviewing this history, I thought that scholars had overlooked one particularly telling event: President George Washington’s Neutrality Proclamation. In 1793, President Washington issued a proclamation that the United States would remain neutral in the conflict between revolutionary France and the other European powers. In so doing, President Washington interpreted the Franco-American Treaty of Alliance of 1778, which contained a mutual defense provision, as not requiring American entry into the war on France’s behalf. Washington’s cabinet, which was composed of several leading members of the Framing generation, such as Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, never disputed that the power to interpret the treaty rested with the President alone, that neither the Senate nor the House needed to be consulted, and that the Continental Congress’s understanding of the treaty had no relevance.

In defending the Neutrality Proclamation, Alexander Hamilton made textual and structural arguments similar to those in Politics as Law: the treaty power was executive, and any unenumerated powers related to it should be inferred to vest in the President. In criticizing the proclamation, James Madison attacked Hamilton’s broad theory of executive power—in a rather unconvincing fashion, according to historians—but Madison did not attack Hamilton’s claim that interpreting treaties was the responsibility of the President.

37. Id. at 882-88.
38. Id. at 888-94.
39. Id. at 895-901.
40. Id. at 899.
43. See James Madison, Helvidius No. 2, reprinted in 15 Papers of James Madison 80 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., 1985). Instead, Madison believed that the President’s power to interpret treaties could not be read so as to preclude Congress’s power to declare war, which he believed President Washington’s proclamation had done. Id.
Politics as Law concluded by applying its analysis to the current debate over the application of the ABM Treaty to the testing, development, and deployment of a national missile defense.\textsuperscript{44} The collapse of the Soviet Union had raised the possibility that the ABM Treaty was no longer in force due to the disappearance of one of the two state parties to the agreement.\textsuperscript{45} I argued that the Clinton administration was able to enter into agreements with four successor states to the U.S.S.R. without submitting them to the Senate for advice and consent because of the executive's control over treaty interpretation.\textsuperscript{46} Just as President Washington could interpret the 1778 Treaty of Alliance as not requiring the United States to enter into the European wars, so too could President Clinton interpret the ABM Treaty as applying to Russia, Belarus, Kazakhstan, and Ukraine even after the disappearance of the Soviet Union. This power, however, could just as easily be used to interpret the ABM Treaty as not precluding the testing and deployment of a defense system designed to stop small-scale missile launches by rogue states or terrorists, but not a full-scale strike by Russia. Indeed, I argued, such an outcome was one of many different ways in which the President could enter into a variety of formal or informal arrangements with the Russians to allow national missile defense. Only some of these options, such as a treaty amendment or a congressional-executive agreement, would require legislative participation. Many others would not, such as an informal coordination of policies, a sole executive agreement, treaty interpretation, treaty suspension, or treaty termination. The House and the Senate, however, would have available their usual tools of oversight, legislation, and appropriations to support or contest the President's policy on national missile defense without needing a formal role in treaty interpretation, suspension, or even termination. The legislature can influence treaty matters through the normal working of politics rather than through an overly legalized process requiring the Senate's advice and consent or legislative interpretation of treaties.

B. False Categories: The Problem of Classifying Self-Executing Treaties as "Legislative"

In an earlier article, Professor Van Alstine had advanced the notion that federal courts could and should engage in lawmakers in certain subjects regulated by treaties.\textsuperscript{47} He argued that features of the Convention on the International Sale of Goods ("CISG") had explicitly "delegated" power to the federal courts to unilaterally create new norms of private law in the

\textsuperscript{44.} Yoo, Politics as Law, supra note 1, at 901-14.
\textsuperscript{45.} Id. at 904.
\textsuperscript{46.} Id. at 902-08.
\textsuperscript{47.} See Van Alstine, supra note 7, at 692-93.
area of commercial contracts. Naturally, this expansive vision of the role of American courts conflicts with the executive branch’s traditional authority over treaty interpretation as part of its constitutional power over foreign affairs.

Professor Van Alstine admirably admits that his CISG article had reached too quickly for the grail by failing to develop any constitutional theory granting the federal courts such remarkable power. In his response to Politics as Law, he tries to remedy this defect. He supports his earlier claim by arguing that there are really two types of treaties. The first, which takes the form of contracts between sovereign nations, generally regulate matters of international politics and therefore do not create individual rights. In regard to these agreements, such as the ABM Treaty, Professor Van Alstine acknowledges that “the treaty may indeed ‘address[] itself to the political, not the judicial department.’” In this respect, Professor Van Alstine appears to agree with the reasoning and conclusions of Politics as Law, at least with regard to the ABM Treaty, and indeed, probably to most other treaties.

The second category, however, is where Professor Van Alstine and I part ways. According to Professor Van Alstine, this second type of treaty establishes individual rights that automatically give rise to a federal cause of action. For this category of agreements, Article III courts have the constitutional power to impose their own interpretations in the course of adjudicating disputes involving treaty terms. He derives this rule from both textual and doctrinal sources. As a textual matter, he argues, the Supremacy Clause makes treaties the laws of the land, capable of judicial enforcement on a par with the Constitution and statutes, while Article III extends the federal judicial power to cases arising under the Constitution, the laws of the United States, and treaties. Thus, just as the federal courts have the constitutional authority to “say what the law is” in regard to lawsuits involving constitutional and statutory provisions, they also must have the equal authority to pronounce—as a final matter—on the meaning of treaties. Professor Van Alstine declares that “[t]he inclusion within the

48. Id. at 756-57. See also Van Alstine, supra note 9, at 1291 & nn. 180-86.
49. Van Alstine, supra note 9, at 1267.
50. Id. at 1269-71.
51. Id. at 1271 (quoting Foster v. Neilson, 27 U.S. 253, 314 (1829)).
52. Id.
53. Id. at 1271-74.
54. U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).
56. Van Alstine, supra note 9, at 1271.
judicial power in Article III thus placed treaties on an equal footing with Article I laws.\textsuperscript{57}

As a doctrinal matter, Professor Van Alstine seeks support from the theory of self-executing treaties. This doctrine, which I have criticized elsewhere,\textsuperscript{58} asserts that treaties that purport to create individual rights are capable of direct judicial enforcement, even without implementing legislation in areas of Congress’s exclusive Article I authority.\textsuperscript{59} Self-executing treaties allow the courts to interpret treaties directly without interference from the executive or legislative branches.\textsuperscript{60} According to Professor Van Alstine, this is especially true for treaties that completely lack the characteristics of a sovereign-to-sovereign bargain.\textsuperscript{61} Some treaties apparently “impose no substantive obligations on the United States in its international conduct as a sovereign entity [but rather] their subject is purely the private relations between private actors involved in defined commercial law transactions.”\textsuperscript{62} He contends that such “legislative treaties” are identical to Article I legislation and should be treated as such by the federal courts.\textsuperscript{63}

II
A CRITIQUE OF VAN ALSTINE’S CONSTITUTIONAL DEFENSE OF JUDICIAL INTERPRETATION OF TREATIES

Professor Van Alstine’s approach suffers from several flaws. His theory’s overarching problem is its effort to transform his preferred treaties into superstatutes that would receive exalted treatment from the American public lawmaking system. The defects of Professor Van Alstine’s theory here are twofold. It would distort the Constitution’s structural limitations on the legislative power, and it would encourage an unwarranted expansion of judicial authority into foreign affairs. This Part will explain the general textual and structural defects in Professor Van Alstine’s theory and will focus, in particular, on the question of treaty termination. It will then show the problems with Professor Van Alstine’s approach to federal jurisdiction and the role of the federal courts.

\textsuperscript{57} Id. at 1270.
\textsuperscript{58} See generally Yoo, Globalism, supra note 19.
\textsuperscript{59} See generally id. (criticizing Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”, 99 COLUM. L. REV. 2095 (1999); Carlos M. Vázquez, Laughing at Treaties, 99 COLUM. L. REV. 2154 (1999)).
\textsuperscript{60} Foster v. Neilson, 27 U.S. 253, 314 (1828).
\textsuperscript{61} Van Alstine, supra note 9, at 1279-80.
\textsuperscript{62} Id. at 1279. Of course, if treaties have such features, it is worth asking why they are treaties at all, since there seems to be no reason to use an agreement with another nation to achieve the desired result. Indeed, such agreements raise the concern that they are not really treaties but, rather, efforts to enact domestic legislation without undergoing the statutory process and without being subject to the limits on Congress’s enumerated powers.
\textsuperscript{63} Id. at 1280.
A. The Structural and Textual Implications of Treaty Delegation of Interpretive Power

Professor Van Alstine's central problem is his effort to transform an executive power into a legislative one. Article II, Section 1 of the Constitution provides that the executive power of the United States is vested in a single, unitary executive branch headed by the President. Article II then enumerates powers, such as the treaty and appointments powers, in which the unitary nature of the executive branch has been diluted by the inclusion of the Senate. Nonetheless, the Senate's participation does not change the treaty power into a legislative power, just as its role in appointments does not transform the nomination and confirmation of officers of the United States into a legislative authority. The Framers clearly understood the difference between the legislative power, which was seen as the authority to make rules governing the private conduct of citizens, and the executive power, which was seen as the power to execute the laws and employ the nation's strength in its foreign affairs. They embodied this understanding in the clear allocations of power between Articles I and II. In defining the line between the executive and legislative powers, the Supreme Court and prominent scholars, such as Professor Henry Monaghan, have defined the executive power by its very inability to make laws. Reading the treaty power as establishing just another species of legislative power, as Professor Van Alstine would have it, would directly violate this understanding of the separation of powers.

Second, Professor Van Alstine's efforts to use the treaty power to enact broad rules of domestic, private conduct would undermine the Constitution's careful definition of and restrictions on the legislative power. The nature and scope of the federal legislative power was one of the most contested issues during the Constitution's ratification. Its limitation to the subjects enumerated in Article I, Section 8, and the recognition that federalism and the separation of powers would hem in its use, were crucial compromises that allowed the ratification process to go forward. As the Supreme Court has observed, "[t]he choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those

64. See U.S. CONST. art. II, § 1.
67. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); Henry P. Monaghan, The Protective Power of the Presidency, 93 COLUM. L. REV. 1 (1993).
hard choices were consciously made by men who had lived under a form of
government that permitted arbitrary governmental acts to go unchecked. 70
Professor Van Alstine would evade the careful limitations on the legisla-
tive power by allowing the executive branch, via the treaty power, to regu-
late areas under Congress’s Article I control.

This result should prove unacceptable even to most international law
scholars, who generally have articulated similarly broad theories about the
treaty power. 71 If the treaty power can give rise to some sort of alternate
legislative power, then it should be able to exercise any element of
Congress’s Article I powers. As James Madison argued during the Jay
Treaty debates, “if the Treaty-power alone could perform any one act for
which the authority of Congress is required by the Constitution, it may
perform every act for which the authority of that part of the Government is
required.” 72 There is no difference, at least as a matter of constitutional text
or structure, between using treaties to regulate international commerce,
impone taxes, or enact criminal laws. Nonetheless, international law au-
thorities generally acknowledge that treaties in these areas cannot take ef-
fica in domestic law without congressional implementation. Even the
Restatement (Third) of the Foreign Relations Law of the United States
(“Restatement (Third)”) maintains that treaties cannot exert direct effect
within the United States if legislation is “constitutionally required.” 73
Professor Louis Henkin, widely regarded as the dean of the American in-
ternational law community, joins the Restatement (Third) in the view that
treaties cannot punish criminal conduct, raise taxes, appropriate money, or
declare war. 74 All of these actions, however, fall exclusively in the domain
reserved by Article I to Congress. Professor Van Alstine apparently be-
lieves that treaties may exercise any and all of Congress’s Article I powers,
which include imposing taxes, spending, declaring war, and raising the
military. The sheer absurdity of this juxtaposition highlights the distortions
in the constitutional text and structure created by Professor Van Alstine’s
view.

Third, Professor Van Alstine’s theory would directly undermine the
delicate structure of the Constitution by creating a virtually limitless legis-
lative power. Leading international law commentators believe that a treaty
can be made on any subject, so long as it is “an agreement between two or

71. See, e.g., Henkin, supra note 30, at 202-03; David M. Golove, Treaty-Making and the
72. James Madison, Jay’s Treaty (Mar. 10, 1796), reprinted in 16 Papers of James Madison
73. Restatement (Third) of the Foreign Relations Law of the United States § 111(4)
(1986) [hereinafter Restatement (Third)].
74. Henkin, supra note 30, at 203; see also Restatement (Third), supra note 73, at § 111
cmt. i & reporter’s note 6.
more states or international organizations that is intended to be legally binding and is governed by international law... They further believe that treaties are not generally subject to the separation of powers. Thus, under this view, treaties may delegate powers to international organizations where statutes could not, they can allow nonfederal officials to exercise federal executive power, and they can transfer the power to decide cases to international dispute resolution systems. If undertaken by statutes, such actions would raise constitutional difficulties under various structural protections for the separation of powers, such as the nondelegation doctrine, the Appointments Clause, and Article III's vesting of the federal judicial power in the federal courts. It seems, under Professor Van Alstine's view, that these restrictions on Congress's Article I powers disappear where treaties are concerned. If treaties also may exercise direct domestic legislative authority, as Professor Van Alstine claims, then treaties would have the benefit of exercising all of the power due to Congress in Article I but would be free from any of the separation of powers restrictions that usually apply.

This constitutional loophole grows larger in the area of federalism. In Missouri v. Holland, the Supreme Court suggested that federalism does not apply to the treatymakers in the same way that it applies to Congress. According to Justice Holmes, the treaty power was not to be limited in the same manner as Congress's Article I, Section 8 powers, because treaties concerned "a national interest of very nearly the first magnitude," the power over which had to be vested somewhere in the national government. Although a vigorous debate questions whether Missouri v. Holland was correctly decided, most international law scholars agree that the President and Senate can use treaties to make national policy on any subject regardless of the Tenth Amendment or the limited enumeration of federal powers.

75. See, e.g., RESTATEMENT (THIRD), supra note 73, at § 301(a).
76. See, e.g., HENKIN, supra note 30, at 194-96.
79. Id. at 435.
in Article I, Section 8.\textsuperscript{81} Professor Gerald Neuman, for example, argues that even if, as the Supreme Court has held in \textit{City of Boerne v. Flores},\textsuperscript{82} the Religious Freedom Restoration Act violated the federalism limits on Congress's enumerated powers, the national government could achieve the same legislative result by relying upon the treaty power instead.\textsuperscript{83} When combined with such thinking, Professor Van Alstine's proposition that treaties can exercise the same force as statutes would, if accepted, create a new species of legislative power wholly free of the Constitution's federalism limitations. It is difficult to imagine a theory that would be more at odds with the Constitution's most basic textual and structural principles.

Fourth, Professor Van Alstine's elevation of the Treaty Clause into a sort of superlegislative power would severely distort the Constitution's allocation of the foreign affairs power. Most commentators and authorities recognize that the Constitution centralizes the foreign affairs power in the executive branch.\textsuperscript{84} Under \textit{United States v. Curtiss-Wright Export Corp.},\textsuperscript{85} as well as by long-standing executive and legislative practice reaching back to the very beginnings of the Republic,\textsuperscript{86} the President is constitutionally responsible for the conduct of foreign policy.\textsuperscript{87} As the sole organ of the nation in its foreign relations, the President is responsible for establishing policy goals, conducting diplomatic relations and negotiations, communicating with other nations, and making agreements. Article II, Section 2 declares that the President makes treaties, subject to the advice and consent of two-thirds of the Senate. Despite the Senate's role in providing advice and consent, the President's role in the treaty context is clearly dominant. The President, not the Senate, chooses to initiate the treaty process, and the President can still refuse to make a treaty even after the Senate has approved it.\textsuperscript{88} Professor Van Alstine's effort, however, to transform treaties into something more akin to legislation threatens to oust the President from this constitutionally dominant position and effectively negates the President's absolute veto over foreign policy.

\begin{itemize}
  \item \textsuperscript{81} See, e.g., \textit{Henkin}, supra note 30, at 191.
  \item \textsuperscript{82} 521 U.S. 507 (1997).
  \item \textsuperscript{83} Gerald L. Neuman, \textit{The Global Dimensions of RFRA}, 14 CONST. COMMENT. 33, 46-49 (1997).
  \item \textsuperscript{84} See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, \textit{The Executive Power over Foreign Affairs}, 111 YALE L.J. 231 (2001).
  \item \textsuperscript{85} 299 U.S. 304 (1936).
  \item \textsuperscript{86} See, e.g., Letter from Thomas Jefferson to Edmond Charles Genet (Nov. 22, 1793), in 27 \textit{PAPERS OF THOMAS JEFFERSON} 414 (John Catanzariti et al. eds., 1997) (stating that the President is the "only channel of communication" between United States and foreign nations); John Marshall, Speech Before House of Representatives, in 10 \textit{ANNALS OF CONG.} 613 (1800) (arguing that the President is the "sole organ" of the nation in its communications with foreign nations).
  \item \textsuperscript{87} See generally Prakash & Ramsey, \textit{supra} note 84.
  \item \textsuperscript{88} \textit{Henkin}, \textit{supra} note 30, at 184.
\end{itemize}
B. The Executive's Power over Foreign Affairs and the Termination of Treaties

A prime illustration of the severe difficulties besetting Professor Van Alstine's view can be found in his discussion of the termination of treaties. Statutes require the consent of both houses of Congress and the President, or two-thirds of Congress without the President, before they can be repealed. This requirement makes a certain amount of sense as a formal matter, as the same process to make a law should be used in order to repeal it. Thus, statutes can only be repealed by subsequent statutes, and constitutional provisions can be nullified only by the ratification of a contrary, later-in-time constitutional amendment (as with the Eleventh, Thirteenth, Fourteenth, and Fifteenth Amendments). If Professor Van Alstine is to remain consistent in his claim that, for constitutional purposes, lawmaking by treaty should be treated just like lawmaking by statute, then treaties should logically face similar requirements for termination. Accordingly, treaties having the force of statutes should only be terminable by the agreement of the President with two-thirds of the Senate or, perhaps, by the enactment of a repealing statute. If the President cannot repeal ordinary laws by himself, then he cannot terminate treaties by himself; indeed, such action would fall afoul of the President's duty to take care that the laws are faithfully executed.

Despite this attractive symmetry, Professor Van Alstine's theory leads to the inevitable conclusion that presidents cannot terminate treaties, a position that has been flatly rejected by almost all of the commentators, courts, and government entities that have addressed the issue. Even though the constitutional text does not specifically address the issue, the President has long been understood to enjoy the power to terminate treaties unilaterally. Just as the President retains the power to remove executive branch officials, even though he shares the appointments power with the Senate, he also has the power to terminate treaties. Both are the result of the textual vesting of all unenumerated executive powers in the President. This appears to have been the understanding of the Framing generation,

89. See Van Alstine, supra note 9, at 1271 n.57.
90. See Goldwater v. Carter, 617 F.2d 697, 708-09 (D.C. Cir. 1979), vacated, 444 U.S. 996 (1979); RESTATEMENT (THIRD), supra note 73, at § 339; HENKIN, supra note 30, at 214; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 164-65 (1st ed. 1978) ("[T]he President... has exclusive responsibility for... terminating treaties or executive agreements....").
91. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (reviewing the great debate over removal in the first Congress). Although the Supreme Court in Morrison v. Olson, 487 U.S. 654 (1988), allowed Congress to condition the exercise of the President's removal power in narrow circumstances, it did not disturb the understanding that the removal power was wholly executive in nature. Id. at 686-93.
92. During the events that gave rise to President Washington's issuance of the 1793 Neutrality Proclamation, Treasury Secretary Alexander Hamilton argued that the President had the constitutional authority to suspend (or, in modern terms, terminate) the 1778 Treaty of Alliance with France. Yoo,
and it has also received the support of historical practice. Although the United States has terminated treaties on relatively few occasions in its history, presidents have done so unilaterally at least half the time. Chief executives such as Presidents Lincoln, Franklin Roosevelt, Carter, and Reagan have all terminated treaties on their own. Indeed, President Bush's December 2001 declaration of the United States' withdrawal from the ABM Treaty without congressional or senatorial consent once again displays the executive branch's power over treaty termination. Because the federal courts have refused to adjudicate the merits of any dispute between the President and Senate concerning termination, termination remains "as a practical matter," in the words of the Congressional Research Service, a power in the hands of the President.

Vesting termination power in the President makes sense as a textual, structural, and functional matter. The constitutional text does not explicitly give the power to terminate to Congress or the judiciary; therefore, according to Article II's Vesting Clause, this unenumerated executive power must

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Politics as Law, supra note 1, at 895-901 (describing debates within Washington's cabinet). No one in the cabinet disagreed.

93. *See* DAVID G. ADLER, THE CONSTITUTION AND THE TERMINATION OF TREATIES 161 (1986). Of the approximately eighteen times that the United States had terminated treaties through the 1980s, the President acted alone nine times, seven terminations were by congressional directive, and two were by Senate command. *Id.*


95. President Roosevelt appears to have terminated at least five treaties unilaterally, although there is some dispute concerning whether some of these instances were accompanied by legislative authorization. *See* Memorandum for the Secretary of State from Herbert J. Hansel, Legal Adviser, President's Power to Give Notice of Termination of U.S.-ROC Mutual Defense Treaty (Dec. 15, 1978), in COMM. ON FOREIGN RELATIONS, UNITED STATES SENATE, 95th Cong., TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER 395, 412-18 (Comm. Print 1978). With regard to at least one treaty, the 1911 Commercial Treaty with Japan, however, President Roosevelt clearly terminated unilaterally and declared that he could do so independently. *Id.* at 417.


be vested in the chief executive. Further, the President alone decides whether to initiate the treaty process, the President alone signs the agreement, the President alone can decide not to submit even a signed agreement to the Senate, and the President alone can choose not to make an agreement after the Senate has given its advice and consent.101

Even after [the President] has obtained the consent of the Senate it is for him to decide whether to ratify a treaty and put it into effect. Senatorial confirmation of a treaty concededly does not obligate the President to go forward with a treaty if he concludes that it is not in the public interest to do so.102

Reserving to the President a unilateral power to terminate treaties maintains the harmony of the President's general authority over treaties and the unity of the executive power.

Professor Van Alstine's view, by contrast, not only does violence to this text and structure but also disrupts the Constitution's vesting of the foreign affairs power in the President. Article II's granting of the unenumerated federal executive powers to the President, in combination with his enumerated powers as commander in chief, maker of treaties, and receiver and appointer of ambassadors, makes clear that the President is the sole organ of the nation in its foreign affairs. From the very beginnings of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct of foreign relations. As Secretary of State Thomas Jefferson observed during the first Washington administration, "[t]he constitution has divided the powers of government into three branches [and] has declared that 'the executive powers shall be vested in the president,' submitting only special articles of it to a negative by the senate."103 Due to this structure, Jefferson continued, "[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly."104 In defending President Washington's authority to issue the Neutrality Proclamation of 1793, Alexander Hamilton came to the same conclusion regarding the President's foreign affairs powers. According to Hamilton, Article II "ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that

101. See Yoo, Laws as Treaties, supra note 11, at 813 (citing Henkin, supra note 30, at 184).
102. Goldwater v. Carter, 617 F.2d 697, 705 (D.C. Cir. 1979); see also Henkin, supra note 30, at 184.
104. Id.
Hamilton further contended that the President was "[t]he constitutional organ of intercourse between the UStates [sic] & foreign Nations . . . ." As future Chief Justice John Marshall famously declared a few years later: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations . . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation . . . ."

The President must retain the power to terminate treaties in order to give full effect to the Constitution's broader grant of the foreign affairs power in the executive branch. The President must have the ability to terminate international agreements when they conflict with the national interest or the executive's foreign-policy goals, and he must at least be able to threaten to withdraw from treaties in order to procure better deals in international negotiations. Professor Van Alstine would divest the President of the flexibility needed to manage the nation's foreign affairs in order to transform treaties into a superior form of domestic lawmakers.

C. Problems with Automatic Judicial Enforcement of Treaties

Professor Van Alstine's theory further suffers from a simplistic view of Article III and the nature of federal jurisdiction. According to Professor Van Alstine, a treaty that appears to be intended to create individual rights, or even one that regulates only private relations between private parties, automatically triggers a cause of action in federal courts due to Article III, Section 2's grant of jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." Just as federal constitutional and statutory provisions directly support "arising under" jurisdiction, the reasoning goes, so too must federal treaties, which are mentioned in the same clause of Article III.

Constitutional and statutory provisions, however, do not themselves benefit from such sweeping judicial enforcement. Professor Van Alstine's argument fails because courts have refused to adopt the same blanket rule of self-execution for constitutional and statutory provisions that he urges for treaties. In the statutory context, for example, federal courts generally have refused to recognize a claim, even when brought by an injured

105. ALEXANDER HAMILTON, PACIFICUS No. 1 (1793), reprinted in 15 PAPERS OF ALEXANDER HAMILTON, supra note 41, at 33, 39.
106. ALEXANDER HAMILTON, PACIFICUS No. 7 (1793), reprinted in 15 PAPERS OF ALEXANDER HAMILTON, supra note 41, at 135.
107. 10 ANNALS OF CONG. 613-14 (1800).
110. See Van Alstine, supra note 9, at 1270.
plaintiff, unless the statute clearly grants a private cause of action.111 Although the Supreme Court once had adopted a generous approach toward the implication of private rights of action,112 it has more recently adopted a narrower approach requiring that Congress clearly state an intent to create a cause of action in either the statutory text or the legislative history.113 As a result of the Supreme Court's current approach, numerous federal statutory provisions cannot be enforced in court. Administrative law recognizes that the executive branch, rather than the judiciary, will enforce certain federal policies embodied in statutes.114

Foreign affairs, with its demands for swift, unitary executive action on behalf of the nation, makes automatic judicial enforcement of statutory provisions in that area even more unlikely and inappropriate. In *Tel-Oren v. Libyan Arab Republic,*115 for example, the D.C. Circuit refused to hear a claim, brought under the Alien Tort Statute,116 by the survivors of a terrorist attack in Israel. Concurring, Judge Bork reasoned that courts should not infer a cause of action because the separation of powers required courts to defer to the executive and legislative branches in foreign affairs.117 Refusing to enforce a cause of action avoided judicial interference with the foreign affairs functions of the political branches and prevented judicial decision of issues that were unfit for judicial resolution.118 Taking "into account the concerns that are inherent in and peculiar to the field of international relations," Judge Bork concluded that the political branches’ monopolization of foreign affairs constituted a "special factor[] counseling hesitation in the absence of affirmative action by Congress."119 Judge Bork’s concurrence demonstrates that foreign affairs concerns provide special reason to question the notion that every species of federal law must be automatically enforced by the federal courts. These concerns have led to reduced judicial involvement in several foreign affairs areas, as expressed in the political question doctrine,120 the act-of-state doctrine,121 the

115. 726 F.2d 774 (D.C. Cir. 1984).
117. *Tel-Oren,* 726 F.2d at 801 (Bork, J., concurring).
118. Id. at 802-03.
120. Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000) (holding that the constitutionality of presidential initiation of hostilities in Kosovo was nonjusticiable).
reluctance to engage in dormant foreign affairs preemption, and the presumption against extraterritoriality.

Professor Van Alstine, however, would reject these doctrines and exempt treaties from this settled approach to federal jurisdiction. His view would effectively elevate treaties to a preferred position above statutes and even constitutional provisions by requiring their automatic judicial enforcement. His mistake in equating Article III’s inclusion of treaties with automatic judicial enforcement becomes even clearer when compared with the non-self-executing nature of some constitutional provisions. According to Professor Van Alstine’s logic, for example, the mention of the Constitution in the Supremacy Clause and in Article III, Section 2 should require that federal courts hear any and all cases based on a constitutional claim. Yet, this one-dimensional idea has been rejected from the very beginning of the Republic. In a well-known example, the Madisonian compromise over Article III itself left to Congress the decision whether to create the lower federal courts and how to define their jurisdiction. Congress could have refused to create any lower federal courts at all and relied instead upon the state courts to initially hear federal claims. In the Judiciary Act of 1789, the first Congress did not provide for federal jurisdiction over all Article III cases and controversies. Until 1875, Congress did not authorize general federal question jurisdiction, and the diversity jurisdiction statute still does not vest the lower courts with the full reach possible under Article III, Section 2. These examples clearly show that the Constitution leaves certain decisions concerning the enforcement of federal law, even those expressed in core constitutional provisions, to the discretion of the political branches. Neither Professor Van Alstine nor others who have taken similar positions have explained why treaties must

124. See Van Alstine, supra note 9, at 1275 (“When a treaty addresses itself to the courts, therefore, Article III requires that they apply it just as they would a statute or any other form of judicially enforceable law.”).
126. See Hart & Wechsler, supra note 111, at 7-9.
benefit from automatic federal judicial enforcement when even some provisions of our fundamental charter of government do not.\textsuperscript{130}

\textbf{D. The Political Question Doctrine and Foreign Policy}

The political question doctrine further demonstrates that deeper structural concerns—namely, the Constitution’s allocation of the foreign affairs power primarily to the President—will preclude judicial enforcement of treaties. The political question doctrine bars federal courts from hearing cases and controversies if the courts might intrude into matters committed to the other branches, reach determinations unsuited for judicial resolution, or make policy pronouncements that might embarrass the other branches of government.\textsuperscript{131} In its most recent case in this area, \textit{Nixon v. United States},\textsuperscript{132} the Supreme Court refused to adjudicate a claim by a federal judge that his impeachment violated the Constitution. Writing for the Court, Chief Justice Rehnquist found the case to be nonjusticiable because the Constitution had delegated sole authority over impeachments to Congress, because the text of the impeachment clauses were insufficiently precise to lend themselves to judicial review, and because an ultimate remedy was lacking and fashioning relief was difficult.\textsuperscript{133} Although substantial debate surrounds the scope and merit of the political question doctrine,\textsuperscript{134} there can be no doubt that the federal courts have relied upon the doctrine to refuse to hear claims arising under the Constitution.\textsuperscript{135} Even if the courts were to treat the Constitution, statutes, and treaties in the same manner, as Professor Van Alstine claims they should, judicial enforcement of treaty provisions would not be automatic.

The principles motivating the political question doctrine indicate that foreign affairs cases, in particular, should receive less judicial scrutiny than cases involving purely domestic affairs. The Constitution fully commits foreign affairs to the political branches, and it is a subject in which the courts are particularly incompetent. As Justice Jackson wrote, “[s]uch decisions are wholly confided by our Constitution to the political

\textsuperscript{130} This does not address, however, state obligations to obey treaties. See Margaret Thomas, Comment, "Rogue States" Within American Borders: Remediying State Noncompliance with the International Covenant on Civil and Political Rights, 90 Calif. L. Rev. 165, 194-97 (2002).
\textsuperscript{132} 506 U.S. 224 (1993).
\textsuperscript{133} Id. at 230-37.
departments of the government, Executive and Legislative. They are
delicate, complex and involve large amounts of prophecy. He observed,
with regard to foreign affairs cases, that "[t]hey are decisions of a kind for
which the Judiciary has neither aptitude, facilities nor responsibility." Although
criticized by international law scholars, the courts have continued
to obey the doctrine in foreign affairs. In a recent example, the D.C.
Circuit refused to adjudicate a challenge to President Clinton’s use of force
during the conflict in Kosovo in the absence of a declaration of war or
other congressional authorization. Campbell v. Clinton followed the
federal courts’ approach to earlier conflicts, such as the Persian Gulf War, in
which they had found similar challenges nonjusticiable. Judicial reluctance
to enter the fray comports with historical practice, as the Supreme
Court has never agreed to reach the merits of any challenge to presidential
war-making authority abroad. As a matter of constitutional structure, as
Judge Silberman’s concurrence in Campbell makes clear, the Constitution
unambiguously vests the war power wholly in the political branches
through the President’s commander-in-chief power and Congress’s power
to declare war. This allocation of war-making authority to the political
branches divests the federal judiciary of any jurisdiction in that area.

Judicial reluctance to intervene in foreign affairs cases is not limited
to war powers. Rather, the Supreme Court’s recognition that foreign affairs
demand judicial deference to the political branches extends to the very
treaty questions that Professor Van Alstine believes are fit for judicial
resolution. In Goldwater v. Carter, for example, a four-Justice plurality
agreed that the issue of whether the President could terminate treaties

137. Id.
138. See, e.g., Thomas M. Franck, Political Questions/Judicial Answers (1992); Henkin, supra note 134.
142. See Sterling v. Constantin, 287 U.S. 378, 399 (1932); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) (concluding that the decision of whether a state of belligerency exists belongs to the President); Campbell, 203 F.3d at 26-27 (Silberman, J., concurring) (The Court in The Prize Cases "made clear that it would not dispute the President on measures necessary to repel foreign aggression."). To be sure, the Court has addressed the question of how far the commander in chief’s power extends domestically. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-88 (1952) (holding that the President’s constitutional powers do not extend to issuing seizure orders for private business property). Youngstown, however, did not review President Truman’s authority to initiate and wage the Korean War without formal congressional authorization. Id.
without the consent of the Senate presented a nonjusticiable political question.\textsuperscript{144} Then—Justice Rehnquist’s plurality opinion emphasized that the political question doctrine was particularly appropriate because of the case’s international dimension: “I think that the justifications for concluding that the question here is political in nature are even more compelling than in [the Guarantee Clause context] because it involves foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government . . . .”\textsuperscript{145} Decisions concerning whether and how to fulfill the nation’s international obligations are better made, from a structural perspective, by the President and Congress rather than by the judiciary. While the political branches can marshal society’s resources swiftly and effectively to respond to prospective threats, the judiciary’s limitation to deciding cases or controversies curtails its ability to play a meaningful role in foreign affairs.

In this respect, Justice Rehnquist’s concurrence echoed Justice Brennan’s articulation of the political question doctrine’s application in foreign affairs. As Justice Brennan wrote in \textit{Baker v. Carr}, “[n]ot only does resolution of [foreign affairs] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views.”\textsuperscript{146} In earlier cases, according to the Court, these reasons had led it to apply the political question doctrine to avoid reviewing foreign affairs decisions of the political branches.\textsuperscript{147} Just as Justice Jackson observed in \textit{Chicago & S. Air Lines},\textsuperscript{148} \textit{Baker v. Carr} noted that courts should not involve themselves in foreign affairs because of their lack of ability. Moreover, \textit{Baker} recognized the importance of the structural superiority of the other branches to handle foreign affairs and their plenary power over that area.\textsuperscript{149} Justice Brennan’s views here echoed Justice Sutherland’s opinion for the Court in \textit{United States v. Curtiss-Wright}. “Not only,” Justice Sutherland wrote, “is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited.”\textsuperscript{150} Because foreign affairs took place “[i]n the previous note.

\begin{footnotes}
\item[144.] Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (plurality opinion of Rehnquist, J.).
\item[145.] \textit{Id.} at 1003-04.
\item[147.] \textit{See}, e.g., \textit{Chicago & S. Air Lines Inc. v. Waterman S.S. Corp.} 333 U.S. 103, 111 (1948) (holding that the nature of “executive decisions as to foreign policy is political, not judicial”); \textit{Oetjen v. Cent. Leather Co.}, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”).
\item[148.] \textit{See supra} note 136 and accompanying text.
\item[149.] \textit{Baker}, 369 U.S. at 211-12.
\end{footnotes}
this vast external realm, with its important, complicated, delicate and manifold problems," Justice Sutherland concluded, the courts ought to defer to the President. In raising political question concerns in *Goldwater v. Carter*, Justice Rehnquist also relied on this language to urge deference to the political branches.

The political question doctrine thus seeks to preserve the prerogatives of the President and Congress in foreign affairs and to prevent the judiciary from interfering in matters over which it has little competence. Professor Van Alstine would upset this system to give some treaties, which he seems to admit add little value to American foreign policy goals, the attributes of statutes. This would put the courts into the role of regularly rendering decisions that might impact our international relations, a result that the Constitution is structured to avoid. Professor Van Alstine’s theory would elevate treaties above the status of statutes and even constitutional provisions by demanding that the federal courts automatically enforce them in cases brought by individuals. This disruption in the constitutional structure and theories of federal jurisdiction demonstrates why the notion of two separate types of treaties, one that would be subject to the normal workings of the separation of powers in foreign affairs, and another that would have the same status as domestic statutes, is unworkable.

### III

**Expanding the Federal Common Law to Include Treaty Interpretation**

These problems with Professor Van Alstine’s effort to create a species of supertreaty only serve as a prelude to more serious constitutional problems with his broader theory of interpretation. As *Politics as Law* suggested, Professor Van Alstine assumed that the Constitution permitted the transfer of interpretive authority from the executive branch to the courts despite the severe difficulties this presented for the constitutional text and structure. In his Response Essay, Professor Van Alstine has given this claim more content. He argues that in making certain statutelike treaties, the treatymakers have delegated to the federal courts the power to make new law with regard to that treaty. In Part III.A, I will explain why his new reliance upon doctrines of federal common law cannot justify a transfer of constitutional authority from one branch to another. Further, in his earlier work, Professor Van Alstine argued that federal courts should form some sort of relationship with a broader international community of national courts to bring global uniformity to the interpretation of certain treaties.

151. *Id.*


Part III.B will critique this notion as inconsistent with basic constitutional principles regulating the exercise and delegation of federal power.

A. Van Alstine’s Reliance on Federal Common Law

Professor Van Alstine argues with regard to his category of statutelike treaties that federal courts have the final constitutional authority to construe treaties.154 He contends that in this capacity, the courts may directly contradict executive-branch interpretations and establish purely substantive norms that go beyond the mere interpretation of ambiguous treaty provisions.155 He believes that such expansive federal judicial lawmaking draws support from the idea of the federal common law. Relying upon cases such as *Erie R.R. Co. v. Tompkins*,156 which famously rejected the idea of a general federal common law, Professor Van Alstine claims that “[l]ike administrative agencies, however, federal courts may obtain the authority to develop the law through a delegation from Congress.”157 To further bolster this striking claim of judicial treaty-making power, he turns to *Textile Workers Union v. Lincoln Mills*,158 in which the Supreme Court identified a broad judicial power to shape substantive federal common law out of what appeared to be merely a grant of jurisdiction to the federal courts.159 For this reason, *Lincoln Mills* frequently appears when a broad policy-making role for the federal judiciary is advanced.160

*Lincoln Mills* does not, however, lend such easy assistance to Professor Van Alstine’s effort to carve out a broad new role for the federal courts in treaty making. *Lincoln Mills* is often cited and discussed, usually by legal academics, precisely because it is such an extraordinary case.161 *Lincoln Mills*’s troubling approval of judicial common-law-making authority comes close to the wholesale delegation of Congress’s legislative authority to the courts that *Erie* sought to prevent. *Erie*, however, made clear that the federal courts do not enjoy the power to make general federal

155. *Id.*
156. 304 U.S. 64 (1938).
158. 353 U.S. 448 (1957).
159. Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1994), had provided for federal jurisdiction over contract disputes between employers and labor organizations, without providing any substantive federal contract norms for courts to apply. *Lincoln Mills*, 353 U.S. at 449-50. Justice Douglas, writing for the Court, concluded that the substantive law that would apply would be federal law, and that it was “not uncommon for federal courts to fashion federal law where federal rights are concerned.” *Id.* at 457.
common law.\textsuperscript{162} Only Congress can make federal law by enacting legislation that undergoes both bicameralism and presentment.\textsuperscript{163} These hurdles promote both the separation of powers, by ensuring that it is the legislature and not the executive or the judiciary that makes federal law, and federalism, by making national law with the power of preemption difficult to enact. The ease with which judicial decisions avoid these procedural obstacles highlights the tension between federal-common-law making and the Constitution's structural limitations on the enactment of legislation. Thus, the broad judicial lawmaking authority sketched out in \textit{Lincoln Mills} has remained limited, in order to maintain the Constitution's structural checks on federal power.\textsuperscript{164}

Following \textit{Erie}'s rejection of a general federal common law, courts have recognized the existence of a specialized federal common law that fills in the gaps left by statutes.\textsuperscript{165} Such federal common law occurs only in the limited, narrow circumstances called for by specific constitutional or statutory provisions, not in the broad manner suggested by Professor Van Alstine. Indeed, the Supreme Court recently has turned away from the broad, undefined \textit{Lincoln Mills} approach in favor of relying upon state-law norms to fill in statutory gaps.\textsuperscript{166} As the Court observed in \textit{O'Melveny & Myers v. FDIC}, "[n]or would we adopt a court-made rule to supplement a federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law."\textsuperscript{167} Thus, it should come as no surprise that in the only case that Professor Van Alstine can identify where the Supreme Court has confronted this issue, \textit{Zicherman v. Korean Air Lines, Co.},\textsuperscript{168} the Court rejected the option of developing a federal-common-law rule to fill a gap in a treaty, even though it would have been quite easy for the Court to do so.

\textsuperscript{162} Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
\textsuperscript{164} According to the editors of the \textit{HART & WECHSLER} casebook on federal courts, \textit{Lincoln Mills} is one of only "three celebrated instances in which the federal courts' law-making power is based at least substantially on a jurisdictional grant." \textit{HART & WECHSLER}, supra note 111, at 789. The other two are admiralty jurisdiction and interstate disputes, which are thought to derive directly from the Constitution itself. \textit{See id.} at 789-90. Even the federal courts' role in admiralty has come under serious academic criticism. \textit{See Ernest A. Young, Preemption at Sea}, 67 GEO. WASH. L. REV. 273 (1999).
\textsuperscript{167} \textit{O'Melveny}, 512 U.S. at 85.
\textsuperscript{168} 516 U.S. 217 (1996).
In other words, the Supreme Court has never countenanced the type of *Lincoln Mills* lawmaking that Professor Van Alstine would transplant into the treaty context.

*Lincoln Mills* cannot support a new theory of judicial treaty making for at least two reasons. First, as noted earlier, the very existence of the specialized federal common law is in sharp tension with the procedural checks on Congress's lawmaking powers. Such judicial lawmaking draws its justification only from the need of courts, in the course of deciding cases or controversies, to interpret ambiguous legislative terms or fill in narrow, unanticipated statutory gaps. In the treaty context, however, the tension between judicial lawmaking and the Constitution's procedural checks reaches a breaking point. It is not merely bicameralism and presentment that are evaded by judicial lawmaking, but also the higher two-thirds requirement of senatorial approval (the same as for constitutional amendments) and the President's enhanced role in treaty initiation and ratification. The Framers imposed these supermajoritarian procedures to make it difficult for the nation to enter into treaties.\(^{169}\) Allowing courts to engage freely in treaty making sends them on an even greater end-run around the Constitution's checks on the creation of federal law than does judicial lawmaking in the statutory context.

Second, creation of federal common law takes place in the context of enacted statutory law, where Congress clearly intends that the courts will interpret ambiguous phrases or fill in statutory gaps. Federal common law relies upon Congress's ability to delegate rulemaking authority to other branches of government. The Supreme Court certainly has approved the delegation of such authority to administrative agencies located in the executive branch, within certain loose limits.\(^{170}\) As the Court observed in *Yakus v. United States*,

> [t]he Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make . . . detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.\(^{171}\)

Although the Court recently has made clear that delegation has its limits,\(^{172}\) Congress continues to enjoy broad discretion to delegate rulemaking authority to the executive branch.\(^{173}\)

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169. See generally Yoo, Globalism, supra note 19.


Professor Van Alstine’s argument, however, turns on the assumption that Congress also enjoys equally sweeping power to delegate rulemaking power to the federal judiciary. He claims that if Congress can delegate such power to the judiciary by statute, then the treatymakers must similarly be able to delegate it by treaty. However, the underlying assumption is flawed. Delegation of rulemaking power by Congress to the judiciary differs from delegation to the executive in several crucial respects. First, unlike the executive branch, the judiciary cannot claim to be democratically accountable. Second, the judiciary does not possess technocratic expertise in specific regulatory areas, at least not in the way contemplated by *Chevron* v. *NRDC* Since Congress’s delegation power is not what Professor Van Alstine presumes it to be, the analogy between Congress and the treatymakers fails.

Regardless of whether such broad statutory delegation to the judiciary is constitutionally appropriate, Professor Van Alstine makes a fundamental error when he equates delegations by statute to delegations by treaty. As its placement in Article II suggests, and as I have argued above, the treaty power is an executive power and was widely understood as such during the Framing period. Professor Van Alstine cannot demonstrate that an executive power has ever been delegated outside the executive branch. Perhaps the closest he could come would be *Morrison v. Olson*, in which the Court upheld the exercise of prosecutorial power by an independent counsel who could be removed only for cause. Yet, even in that case, the Court emphasized that the independent counsel continued to be an executive-branch official responsible to the Attorney General and the President. As far as I know, there is no example where any branch has successfully delegated part of the executive power to another branch of government and, certainly, no example where such power was delegated to the judicial branch. Delegations, when they occur, run in only one direction, from Congress to either the executive branch or, in limited circumstances, to the courts.

There are several good reasons why no such delegation could occur in the treaty context. First, a textual reading of Article II clearly indicates that an executive power to interpret treaties could not be delegated. Article II’s Vesting Clause makes clear that all of the executive power is vested in the

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174. Van Alstine, supra note 9, at 1286-94.


177. *See also* Yoo, *Globalism*, supra note 19, at 1982-2091.


179. *Id.* at 691-92.
President. The President could no more delegate his treaty power outside the executive branch than he could delegate his power to negotiate treaties to Congress or his power as commander in chief to the courts. The Appointments Clause specifically provides for the delegation of appointment authority for "inferior Officers" to "the Courts of Law, or in the Heads of Departments." According to the canon of expressio unius, this explicit creation of a separate procedural method for the exercise of the appointments power indicates that no such delegation is permissible with any other executive power. This conclusion seems especially compelling in regard to the Treaty Clause, which sits directly adjacent to the Appointments Clause in Article II, Section 2. If the Framers had wanted to allow for the delegation of any part of the treaty power, they certainly knew how to provide for it.

Further, the notion of delegating executive power to one of the other branches directly conflicts with the Framers' very purpose in structuring the executive branch as they did. The Constitution clearly secures all federal executive power in the President to ensure unity in purpose and effectiveness in action. One of the chief benefits of a unitary executive was that the President would bring these characteristics to the execution of federal law. By vesting the implementation of federal law in the President, the Framers would make the administration of law vigorous, expert, and politically accountable. This would appear even more important to the nation in the foreign affairs context than in the domestic. The centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch. Allowing the courts and the lawmakers to disrupt this essential unity would undermine the Framers' design in unifying the executive power in the Presidency.

B. Transnational Treaty Interpretation

Professor Van Alstine's disregard of these separation-of-power principles hints at a deeper structural problem with his general approach to treaty interpretation. His earlier article on treaty interpretation articulated an even more ambitious role for the federal courts than one that relied merely on Lincoln Mills and the notion of federal treaty making. Rather

182. Cf. Yoo, Laws as Treaties, supra note 11, at 789-90 (analogizing between Appointments and Treaty Clauses in Article II).
than simply engaging in federal lawmaking, the federal courts were to invent "general legal standards to govern disparate cultural and legal traditions" as part of "an international law unification effort." 184 Focusing wholly on the U.N. Sales Convention, Professor Van Alstine argued that federal courts should liberate themselves from the normal rules that govern the interpretation of treaties or statutes in favor of "harmony among the interpretive approaches of the domestic courts in the various member states that are charged with resolving disputes within their scope." 185 Such "cooperation among domestic courts on an international level" would produce "'autonomous' interpretation free from the influence of national legal concepts and terminology, and even from the domestic interpretive techniques themselves." 186 The millennial result would be nothing less than "the development of a truly transnational, substantively independent body of law." 187 Liberation theory, it seems, has found an unexpected but welcome home in the world of international sales law.

One could view in two ways the methodology that federal courts ought to employ when performing this role. Professor Van Alstine could be making the rather modest claim that federal courts ought to examine the relevant decisions of other jurisdictions when interpreting treaties. 188 In this respect, foreign judicial decisions would recommend themselves based on the worthiness of their logic and reasoning, rather than on any hierarchy of authority. In recent years, some Justices of the Supreme Court have even taken to citing the work of the high courts of other jurisdictions. 189 While admitting that European decisions interpret different constitutions, for example, Justice Breyer believes that "their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . ." 190 Putting aside the question of whether it makes sense in a constitutional context, a comparative approach would represent no great expansion in the way we think about interpretation. It would bear some similarity to the manner in which state courts look to the decisions of their sister states in developing the common law, the way in which federal circuit courts take account of the decisions of their sister circuits, or the approach employed by studies in comparative law.

Given the ambitiousness of Professor Van Alstine's rhetoric, 191 however, an international community of autonomous interpreters seems

184. Van Alstine, supra note 7, at 693-94.
185. Id. at 701.
186. Id. at 732-33 (footnotes omitted).
187. Id. at 731.
188. See, e.g., id. at 732.
190. Id. at 977.
191. Van Alstine, supra note 7, at 731-32. Professor Van Alstine stated:
unlikely to subsist merely on the persuasive reasoning of coordinate jurisdictions. Instead, in order to guarantee the international harmony he prizes, Professor Van Alstine must envision that U.S. federal courts would defer to prior decisions by the courts of other national jurisdictions on the same question. American courts would have to accept foreign decisions due to their precedential force, according to some theory of legal hierarchy. Professor Van Alstine resorts to *Lincoln Mills* to clear ample room for the federal courts to engage in unprecedented deference to the decisions of foreign and international legal institutions.

A judicial role of this kind raises significant problems of constitutional text and structure. Professor Van Alstine’s theory of treaty interpretation would subject the private conduct of American citizens, in a relatively unfiltered form, to the regulatory decisions of foreign or international institutions. The Constitution, however, makes no implicit or explicit provision for the transfer of federal power to entities outside of the American governmental system. As I have argued elsewhere, this principle of the conservation of federal power is embodied primarily in the Appointments Clause. While much writing on this clause has focused on the balance of power between the President and Senate in the appointment of federal judges, its purpose as a mechanism to conserve federal power has not received as much notice. In its recent decisions, the Supreme Court has rediscovered the Appointments Clause’s broader purpose in restricting the exercise of federal power only to those officials who undergo appointment through the processes set out in the Clause. This restriction has the fundamental effect of rendering the use of federal power accountable to the people’s elected representatives. Reserving the exercise of federal power only to federal appointees prevents the delegation of the authority to interpret U.S. law to international or foreign courts.

In *Buckley v. Valeo*, the Supreme Court recognized that the Appointments Clause performed an important separation of powers role in preventing any one branch of government from arrogating to itself the power to control the selection of federal officers. In striking down

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192. *Yoo, New Sovereignty, supra note 15, at 96-105.*
the congressional appointment of members of the Federal Election Commission ("FEC"), the Court held that FEC members had to be nominated by the President and confirmed by the Senate, or be appointed directly by the President, a department head, or the courts, if they were to implement federal law.\textsuperscript{196} According to the Court, the Framers intended for the Appointments Clause specifically to prevent Congress from both enacting federal law and controlling its execution.\textsuperscript{197} The per curiam opinion observed that the clause responded to the Framers' fears "that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."\textsuperscript{198}

In two recent cases, \textit{Edmond v. United States}\textsuperscript{199} and \textit{Printz v. United States},\textsuperscript{200} the Supreme Court reaffirmed Buckley's basic idea that the Appointments Clause serves the goal of preventing Congress from transferring control over the execution of federal law to officers outside the control of the executive branch. In \textit{Edmond}, the Court observed again that the Appointments Clause "is among the significant structural safeguards of the constitutional scheme."\textsuperscript{201} In \textit{Printz}, the Court held that Congress could not delegate the power to enforce the Brady Act to state officials because such delegation would leave federal law enforcement without "meaningful Presidential control" and would undermine the effectiveness of a unitary executive.\textsuperscript{202} "That unity would be shattered," according to the Court, "and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."\textsuperscript{203} \textit{Printz} made clear that the Appointments Clause would be offended not only if Congress sought to transfer federal law enforcement to officers of its own selection, but also if it attempted to delegate that power to officials outside the executive branch and the federal government.

\textit{Printz} points to the second concern animating the Appointments Clause: the general scope and execution of national power. By requiring that all those who exercise federal authority become officers of the United States, appointed pursuant to Article II, Section 2, the Constitution ensures that the federal government cannot blur the lines of accountability between the people and their officials. As Chief Justice Rehnquist wrote for the Court in \textit{Ryder v. United States}: "The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is

\begin{itemize}
  \item \textsuperscript{196} \textit{Id.} at 127-28.
  \item \textsuperscript{197} \textit{Id.} at 129.
  \item \textsuperscript{198} \textit{Id.}
  \item \textsuperscript{199} 520 U.S. 651, 659 (1997).
  \item \textsuperscript{200} 521 U.S. 898, 922-23 (1997).
  \item \textsuperscript{201} \textit{Edmond}, 520 U.S. at 659.
  \item \textsuperscript{202} \textit{Printz}, 521 U.S. at 922.
  \item \textsuperscript{203} \textit{Id.} at 923.
\end{itemize}
more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.' 204 Ryder reinforces the link that Buckley v. Valeo first made clear between the Appointments Clause and the exercise of federal power. In rejecting the idea that Congress could appoint individuals who would not be officers of the United States but could still exercise federal power, the Ryder Court observed: "We think [that the Appointments Clause's] fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Clause]." 205 Individuals appointed by Congress, therefore, did not qualify as officers of the United States and could only perform duties which do not involve enforcement of federal law.

The Supreme Court's general Appointments Clause analysis can be captured in three steps. First, the Court asks whether the authority in question involves the administration or enforcement of public law. If so, then the Court asks whether the individual who enforces it "exercises significant authority pursuant to the laws of the United States . . ." 206 If these first two questions are satisfied, then the official in question must be an officer of the United States appointed to office pursuant to the Appointments Clause. No federal power can be enforced by anyone who is not an officer of the United States. In reading the Appointments Clause so broadly, the Court seeks to fulfill the Framers' efforts to guarantee that the people could hold those who administered the laws responsible for their actions. The Court observed in Freytag v. Commissioner, another Appointments Clause case, that "[t]he Framers understood . . . that by limiting the appointments power, they could ensure that those who wielded it were accountable to political force and the will of the people." 207 A centralized appointments process prevents the federal government from concealing or confusing the lines of governmental authority, and as a result, allows the electorate to hold its officials accountable.

In addition to providing the basis for a centralized appointments process, two other elements of the constitutional structure support the Appointments Clause’s careful husbanding of federal power. First, Article II’s creation of a unitary executive demands that all officials who execute federal law must be subject to the direction and control of the President. Regardless of whether one follows a formalist or functionalist theory of the separation of powers, transferring federal power wholly outside the

206. Id. at 126.
207. Freytag, 501 U.S. at 884; see also Yoo, New Sovereignty, supra note 15, at 105-11 (reviewing drafting and ratification history of the Appointments Clause).
executive branch would violate the vesting of all executive power in the
President and undermine accountability in government.\textsuperscript{208} Members of the
electorate could not hold accountable officials who stand completely out-
side the structure of American government. Second, the nondelegation doc-
trine places limits on the ability of the government to transfer power. As
the Court has recently clarified, the nondelegation doctrine prohibits
Congress from delegating rulemaking authority to another branch unless it
has stated intelligible standards to guide administrative discretion.\textsuperscript{209} Dele-
gating lawmaking power totally outside the federal government would pre-
vent the courts, Congress, and the public from monitoring whether the
delegated authority was being exercised consistent with legislative stan-
dards.

Professor Van Alstine’s defense of the delegation of the power to in-
terpret federal law to foreign courts contravenes these structural principles.
There can be little doubt that if American courts were bound to follow for-
eign judicial decisions, they would be conceding substantial federal author-
ity. This authority would be akin to, or even greater than, the deference that
federal agencies enjoy under \textit{Chevron v. NRDC} for their interpretation of
ambiguous statutory law.\textsuperscript{210} Indeed, if this were not the case, and if
Professor Van Alstine were claiming that no hierarchical rule required fed-
eral courts to follow foreign judicial decisions, then his approach would
merely be an argument that American courts simply pay more attention to
foreign decisions for their persuasive effect. For Professor Van Alstine’s
autonomous community of interpreters to truly build a unified, workable,
and harmonious system of international treaty law, there must be some rule
that requires American courts to give precedential effect—identical at a
minimum to the type that applies within a common law system—to earlier
decisions of another jurisdiction. Granting foreign courts such authority

\textsuperscript{208} Functionalism asserts that Congress enjoys substantial flexibility in arranging the order of
government, so long as it does not prevent any branch from fulfilling its core constitutional duties. See,
\textit{e.g.}, \textit{Mistretta v. United States}, 488 U.S. 361 (1989) (upholding creation of U.S. Sentencing
Commission); \textit{Morrison v. Olson}, 487 U.S. 654, 691-92 (1988) (allowing independent counsel to be
insulated by “good cause” removal requirement from direct presidential control); Lawrence Lessig &
functionalism); Peter L. Strauss, \textit{The Place of Agencies in Government: Separation of Powers and the
Fourth Branch}, 84 \textit{COLUM. L. REV.} 573 (1984) (same). Formalists argue that each exercise of federal
power can be categorized and allocated to one of the three branches of government, and that generally
the President must have the unrestricted authority to control the execution of federal law. See \textit{Bowsher
budget reductions); \textit{INS v. Chadha}, 462 U.S. 919 (1983) (invalidating legislative veto); Calabresi &
(same).

\textsuperscript{209} See, \textit{e.g.}, \textit{Whitman v. Am. Trucking Ass’n}, 531 U.S. 457 (2001); \textit{Clinton v. New York City},

would vest them with an important measure of federal power, one that affects the private rights and duties of American citizens. This, however, would also vest foreign courts with sufficient federal authority to bring them within the rule of *Buckley v. Valeo* and its progeny.

Following *Buckley*, under the Appointments Clause, anyone who possesses the power to interpret and execute federal law must be an officer of the United States. Foreign judges, though, do not undergo presidential nomination or senatorial consent, even as they exercise significant federal power by dictating the interpretation of a federal treaty. They would not be responsible to the American political system, nor would they have to adapt their exercises of interpretive authority to federal constitutional or statutory principles. Indeed, the traditional methods that would come into play to correct an undesired interpretation of the law—appellate review or legislative overrule—would prove unavailable.

As the federal judicial system would be required to follow Professor Van Alstine's rule of deference to foreign judicatures, even the Supreme Court would be forced to defer to foreign treaty interpretations. Further, Congress apparently could not enact a normal statutory override to correct unwanted interpretations; only a treaty amendment would do. Not only would an amendment have to garner the higher supermajority approval needed for treaties, but it would also have to receive the approval of our treaty partners, which would be many in number for the type of multilateral treaties Professor Van Alstine has in mind. To be sure, Professor Van Alstine might argue that Congress could pass a statute, under the last-in-time rule, which would supersed the interpretation of a treaty, but this action would actually amount to a domestic repudiation of a treaty commitment, rather than an amendment of the treaty itself. It would substitute American unilateralism for the international uniformity and harmony that Professor Van Alstine seeks.

The difficulty in changing the interpretation of a treaty only underscores the constitutional problems with Professor Van Alstine's approach. His theory seeks to effect a double delegation: first, the transfer of treaty-making authority to the federal courts, and second, the transfer of this function to foreign and international courts. Both delegations raise serious constitutional difficulties. The first would represent an unwarranted expansion in the role of the federal judiciary in the making of federal law. The second would evade the Constitution's strict centralization of the implementation and interpretation of federal law in officers of the United States who are accountable to the electorate. While Professor Van Alstine's approach may

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211. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (The Chinese Exclusion Case) (holding that a later-in-time statute supersedes a contrary treaty provision); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson, 112 U.S. 580, 599 (1884) (The Head Money Cases) (same); *Henkin, supra* note 30, at 209-11 (same).
lead to better policy making concerning private commercial treaties, this prospective benefit cannot justify a rearrangement of the separation of powers and the allocation of the foreign powers called for by the Constitution.

CONCLUSION

*Politics as Law* has had the good fortune to outlive its subject. It began by discussing whether the political consensus in favor of a national missile defense could survive the terms of the ABM Treaty. It argued that the President could deploy a system by exercising any number of treaty powers, ranging from termination to interpretation. As the latter had received limited scholarly attention, *Politics as Law* examined how the separation of powers applied in the treaty-interpretation context. Traditional methods for interpreting the Constitution, such as focusing on its text, structure, and history, made clear that the power to interpret treaties vested in the President alone. Thus, I concluded, if the President wanted to deploy a national missile defense, he could unilaterally interpret the ABM Treaty as not prohibiting a limited system designed to destroy a limited number of missiles launched by rogue states.

Although President Bush mooted the issue by terminating the ABM Treaty on December 13, 2001,212 Professor Van Alstine’s response demonstrates that the debate lives on. He argues that certain classes of treaties, such as those governing private commercial transactions, create individual rights and that their interpretation therefore lies within the province of the federal judiciary. In short, his response equates treaties to statutes and attributes to them all the rights and privileges that pertain to domestic legislation. As his discussion of private commercial law treaties shows, Professor Van Alstine would further allow this interpretive authority to flow from U.S. courts to foreign and international courts, all in the name of international harmonization. Professor Van Alstine seeks nothing less than the mother of all delegations.

As I have argued here, that vision of treaty interpretation suffers from serious flaws. Equating treaties with statutes does violence to the separation of powers and federalism, the Constitution’s two fundamental structural limitations on the authority of government. It would allow the treaty-makers to escape the Constitution’s careful limitations on Congress’s powers, and it would represent a serious invasion of the President’s constitutional authority in foreign affairs. The shortcomings of his approach are amply demonstrated by its need to divest the President of his unilateral treaty-termination authority, which (as the lack of criticism of President Bush’s termination of the ABM Treaty shows) is widely accepted. His

justification of a plenary judicial treaty interpretation on the basis of the delegation doctrine similarly fails for textual and structural reasons. The Constitution simply has never been read to permit the delegation of an executive power to another branch of government. Finally, Professor Van Alstine’s theory supporting the transfer of interpretive authority outside the American government has no basis whatsoever in the Constitution. Indeed, such delegation would violate the basic constitutional structures that regulate the exercise of power by the federal government.

Despite the disappearance of the ABM Treaty, this debate is anything but academic. At the time of this writing, one of the most heated international legal issues involves the legal status of detainees captured in the war against the al Qaeda terrorist network and the Taliban forces that harbored it. Under common article 2 of the Third Geneva Convention of 1949 ("Convention"), if state parties engage in an international armed conflict, members of their armed forces taken in combat are accorded prisoner of war ("POW") status. Certain volunteer and militia forces associated with a state party are similarly entitled to POW status, so long as they fulfill four basic conditions: they are under responsible command, they wear a recognizable insignia, they bear their arms openly, and they obey the laws of war. If entitled to POW status, al Qaeda and Taliban prisoners would enjoy the same conditions and rights as members of regular armed forces in a conventional state-to-state war, including specified standards for detention and recreation as well as the right to be released at the end of the conflict.

As this Essay and Politics as Law make clear, however, the President has the constitutional authority to interpret the Convention to find that al Qaeda and Taliban members are not entitled to POW status. On February 7, 2002, the White House announced that President Bush had exercised precisely this authority while also deciding as a policy matter to treat the detainees in a manner consistent with the Convention. The President’s reasoning could run thus. First, the al Qaeda terrorist organization is not a nation state, and therefore it could not and did not sign the Convention. Since, under article 2 of the Convention, the Convention applies only to international armed conflicts between state parties to the agreement, it simply does not govern the treatment of al Qaeda prisoners. Second, even if the Taliban militia were the regular armed forces or militia of Afghanistan, they did not fulfill the four basic conditions for POW status.

214. Id. art. 4A(2)(a)-(d), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.
216. See supra note 213.
enumerated above. The latter reading would be based in part on the facts available to the President concerning the manner in which the Taliban organized itself and conducted itself on the battlefield.

It seems clear that the political system accepts that President Bush enjoyed the power to interpret the Geneva Convention in this manner. This acceptance is suggested by the fact that, as far as I could tell, no members of Congress took to the House or Senate floor, or held committee hearings, to question the President’s authority to make this decision on behalf of the United States. This Essay and *Politics as Law* provide a theory rooted in the text, structure, and history of the Constitution by which the President could exercise this unilateral power. Professor Van Alstine’s approach, however, would yield a far more confusing and undesirable result. It is clear that the Convention, by its text, purports to establish rights for individual POWs. Professor Van Alstine, therefore, would find that federal courts could adjudicate the legal status of enemy prisoners and potentially issue decisions that conflicted with the President’s interpretation and interfered with his ongoing conduct of the war against terrorism. He might even countenance deference to international organizations, such as the International Committee on the Red Cross, which has interpreted the Geneva Convention differently than the President. Following Professor Van Alstine’s approach, a federal court could determine al Qaeda and Taliban prisoners to be POWs, even though doing so would interfere with decisions made by the President, as commander in chief, regarding the manner in which to detain prisoners captured on the battlefield, the resources to devote to their detention, the amount of security to assign, and even whether to release still-dangerous prisoners once the fighting in Afghanistan has ended. The Supreme Court long ago recognized that such matters should rest solely in the discretion of the President, as it has found that U.S. courts have no jurisdiction over the detention of enemy aliens held outside the United States.

This Essay has demonstrated the severe constitutional problems with an approach to treaty interpretation that would force the federal courts to interfere with the executive branch’s primacy in foreign affairs. The current controversy over the Geneva Convention illustrates the reasons why, as *Politics as Law* demonstrated, the Constitution vests such authority in the President. It is the President who must interpret treaties as part of the day-to-day conduct of foreign affairs and as part of his constitutional responsibility to fulfill the nation’s international obligations while also protecting its security. An effort to transform treaties into statutes, to delegate the power of their interpretation to the federal courts, and then to require deference to foreign and international organizations, only threatens to

interfere with the President’s ability to perform his core functions in foreign affairs. I hope that *Politics as Law* will continue to live on in its explanation of the dangers of pursuing a legalistic approach to international politics, an approach which, unfortunately, Professor Van Alstine’s response typifies.