



Executive Agreements+

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ABSTRACT

Did President Obama act constitutionally in joining the Paris Climate Change Agreement without seeking the approval of the Senate or Congress? According to the conventional, tripartite paradigm for analyzing the president's treaty-making power, this question is conceptualized as an issue of the president's independent constitutional power. Since the Paris Agreement was not approved by the Senate as an Article II treaty or by Congress as a congressional-executive agreement, then it must be a sole executive agreement.

This Article challenges the conventional, tripartite paradigm as both conceptually inadequate and historically inaccurate, and proposes a fourth category of international agreement, which it christens "executive agreements+" (EA+). EA+ are neither congressional-executive agreements nor sole executive agreements; they fall somewhere in between. They are supported, but not specifically authorized, by congressional action. This Article argues that EA+ have a long, heretofore undiscovered pedigree. It then explores the Obama administration's deployment of the concept, applies it to the Paris Agreement, and argues that the Paris Agreement is best understood as an EA+ rather than as a sole executive agreement.

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I. INTRODUCTION

Was President Obama's acceptance of the Paris Climate Change Agreement (Paris Agreement)¹ without seeking the approval of the Senate or Congress constitutional? The answer to this question will likely be as consequential for Obama's foreign policy legacy as the fate of the Affordable Care Act was for his domestic legacy. Since the prospects were virtually nil that the Senate would approve the Paris Agreement by a two-thirds majority, the only way for the United States to join was for the president to do so on his own.

Questions concerning the president's treaty-making power have usually been conceptualized as an issue of independent constitutional power. According to the prevailing paradigm, international

1. Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, WHITEHOUSE.GOV (Sept. 3, 2016), <https://www.whitehouse.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement> [<https://perma.cc/PD6H-SXNJ>] (archived Oct. 15, 2016).

agreements fall into one of three categories: (1) Article II treaties, which receive the advice and consent of the Senate; (2) congressional-executive agreements, which are approved by Congress; and (3) sole executive agreements, which rest on the president's independent foreign affairs authority.² According to this paradigm, since the Paris Agreement was not approved by the Senate or Congress, then it must be a sole executive agreement. So, the question is: Did joining the Paris Agreement fall within the president's independent powers under the Constitution? Under this standard analysis, the answer is arguably no. Many question U.S. adoption of the accord on that basis.³

This Article argues that this conventional paradigm—and the resulting way of framing the debate over presidential acceptance of the Paris Agreement—is inadequate both conceptually and historically. Many international agreements are neither sole executive agreements nor congressional-executive agreements; they fall somewhere in between. They are supported but not specifically authorized by congressional action. We call them executive agreements+ (EA+). President Obama's acceptance of the Paris Agreement was as an EA+ rather than as a sole executive agreement.

Although EA+ have a long, heretofore undiscovered pedigree, the Obama administration is the first to self-consciously deploy the concept. It has adopted several important international agreements in the absence of *ex ante* or *ex post* congressional authorization, respecting issues beyond independent presidential authority. These agreements thus qualify as neither congressional-executive agreements nor sole executive agreements under the conventional typology. The administration has acknowledged as much. The president has not argued that Congress directly authorized these agreements or that the absence of such authorization is immaterial. Rather, the executive branch has asserted that the agreements are consistent with, and

2. See *infra* Part II.

3. See, e.g., John Bolton & John Yoo, *Paris Climate Conference: Without Congress' Support, Obama's Dealmaking Powers are Limited*, L.A. TIMES (Dec. 1, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-boltonyoo-paris-climate-deal-not-binding-20151201-story.html> [<https://perma.cc/F2DR-EQCR>] (archived Sept. 18, 2016); Steven Groves, *Will the Senate Let Obama Bypass It on Paris Climate Deal?*, WASH. TIMES (Oct. 19, 2015) <http://www.washingtontimes.com/news/2015/oct/19/steven-groves-will-the-senate-let-obama-bypass-it/> [<https://perma.cc/MLM4-WB45>] (archived Sept. 18, 2016) (explaining Obama's plan to adopt climate agreement as an "egregious case" and asking "why not keep the executive train rolling unchecked?"); Karoun Demirjian & Steven Mufson, *Trick or Treaty? The Legal Question Hanging over the Paris Climate Change Conference*, WASH. POST (Nov. 30, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/11/30/trick-or-treaty-the-legal-question-hanging-over-the-paris-climate-change-conference/> [<https://perma.cc/T8Q9-2AH4>] (archived Sept. 19, 2018) (noting opposition to accord being adopted without Senate approval); see also S. Con. Res. 25, 114th Cong. (2015) (resolution introduced but not enacted expressing the sense of the Senate that Paris Agreement be submitted to Senate for its advice and consent).

complement, related congressional activity and that this relationship to existing law suffices to establish constitutional legitimacy.⁴ This new practice requires at least a new category, and perhaps a new vocabulary, for analyzing agreements that lack clear congressional approval.

In the face of political polarization and institutional gridlock, EA+ are likely to become increasingly prominent in the spectrum of instrument choice. The Obama administration's use of them is part of its broadly aggressive deployment of executive power.⁵ The Article II treaty route is now effectively a non-starter, as demonstrated by the Senate's failure to consent to ratification of the Convention on the Rights of Persons with Disabilities.⁶ *Ex post* congressional-executive agreements are no more viable, at least outside the trade context,⁷ as divided government becomes the norm. While the executive branch has been pressing the boundaries of sole executive agreement-making, as demonstrated by strategic framework and status-of-forces agreements

4. Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 732–34 (2013). Jack Goldsmith has recently highlighted the Obama Administration's executive agreement practice as implicating "singular innovations." Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L.J. 1, 2 (2016).

5. See, e.g., Jack Goldsmith, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME (Sept. 11, 2014), <http://time.com/3326689/obama-isis-war-powers-bush/> [https://perma.cc/BGL5-BMSN] (archived Sept. 19, 2016); David Cole, *Obama's Unauthorized War*, N.Y. REV. BOOKS BLOG (Sept. 11, 2014, 12:00 AM), <http://www.nybooks.com/daily/2014/09/11/obama-isis-unauthorized-war/> [https://perma.cc/2ZZF-84EK] (archived Sept. 19, 2016); Peter H. Schuck, *Why Congress Can Impeach Obama*, N.Y. TIMES (Nov. 21, 2014), http://www.nytimes.com/2014/11/22/opinion/the-impeachment-of-obama-on-immigration-may-be-legal-but-its-wrong.html?partner=rssnyt&emc=rss&smid=tw-nytopinion&_r=0 [https://perma.cc/3DAM-LAYJ] (archived Sept. 19, 2016) (arguing that immigration executive action gives rise to a "plausible case" for impeachment); see also Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html> [https://perma.cc/Y4ZF-JNVD] (archived Sept. 19, 2016).

6. Ramsey Cox & Julian Pecquet, *Senate Rejects United Nations Treaty for Disabled Rights in a 61-38 Vote*, THE HILL (Dec. 4, 2012), <http://thehill.com/policy/international/270831-senate-rejects-un-treaty-for-disabled-rights-in-vote> [https://perma.cc/RX25-6G2U] (archived Sept. 19, 2016); Jon Kyl et al., *The War of Law: How New International Law Undermines Democratic Sovereignty*, FOREIGN AFFAIRS (July/Aug. 2013), <https://www.foreignaffairs.com/articles/united-states/2013-06-11/war-law> [https://perma.cc/6M6M-A35K] (archived Sept. 19, 2016) (justifying Senate opposition to Disabilities Convention and other international accords).

7. See Jonathan Weisman, *Trade Accord, Once Blocked, Nears Passage*, N.Y. TIMES (June 23, 2015), <http://www.nytimes.com/2015/06/24/us/politics/senate-vote-on-trade-bill.html> [https://perma.cc/L276-WVTH] (archived Sept. 19, 2016); Stewart Patrick, *More Treaty Gridlock: Another Impact of GOP Senate Takeover*, COUNCIL ON FOREIGN REL.: THE INTERNATIONALIST (Nov. 10, 2014), <http://blogs.cfr.org/patrick/2014/11/10/more-treaty-gridlock-another-impact-of-gop-senate-takeover> [https://perma.cc/76DY-S3G7] (archived Sept. 19, 2016) ("With the exception of trade agreements . . . don't look for any movement on treaties.").

with Iraq and Afghanistan,⁸ most contexts will not sustain claims of independent presidential authority, consistent with historical practice.

This Article proceeds in four parts. Part II suggests a new typology of international agreements, distinguishing between two broad categories of agreements—those that enjoy clear legislative authorization (in any form) and those that do not.⁹ Agreements enjoying express authorization include Article II treaties and congressional-executive agreements that Congress has either formally authorized *ex ante* or approved *ex post*. Those without express authorization include sole executive agreements and EA+.

Part III reexamines the history of treaty-making in the United States, arguing that only a small, well-defined subset of international agreements were undertaken without at least some underpinning in existing law. In other words, so-called sole executive agreements, which rest entirely on the asserted “independent” or “inherent” authority of the president, represent only a fraction of the spectrum of executive agreements concluded without clear legislative approval. EA+ represent the larger category.

Part IV describes three case studies of Obama administration practice employing EA+. The case studies involve the Anti-Counterfeiting Trade Agreement,¹⁰ the Minamata Convention on Mercury,¹¹ and a series of inter-governmental agreements relating to tax offshoring.¹² On the one hand, none of these agreements enjoyed express congressional authorization or Senate approval. On the other hand, none could be tethered to historically-legitimized independent presidential authority. Unable to follow conventional constitutional scripts, the administration justified the agreements on the basis that they were consistent with and complemented existing law. This Part argues that a similar rationale supports presidential acceptance of the Paris Agreement.

Part V considers this activity jurisprudentially. EA+ fit comfortably within the *Youngstown* framework. Justice Jackson’s

8. Greg Bruno, *U.S. Security Agreements and Iraq*, COUNCIL ON FOREIGN REL. (Dec. 23, 2008), <http://www.cfr.org/iraq/us-security-agreements-iraq/p16448> [<https://perma.cc/HF7V-FEU7>] (archived Sept. 19, 2016).

9. Cf. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009) (grouping sole executive agreements and *ex ante* congressional-executive agreements together on basis that both are unilaterally created).

10. Anti-Counterfeiting Trade Agreement (Oct. 1, 2011), http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf [<https://perma.cc/BQ2S-K5TV>] (archived Sept. 19, 2016).

11. Minamata Convention on Mercury (Oct. 10, 2013), http://www.mercuryconvention.org/Portals/11/documents/Booklets/Minamata%20Convention%20on%20Mercury_booklet_English.pdf [<https://perma.cc/2J2M-LQXB>] (archived Sept. 19, 2016).

12. See Foreign Account Tax Compliance Act (FATCA), 26 U.S.C. §§ 1471–74 (2010).

famous concurrence in *Youngstown*¹³ set out a tripartite, relational categorization for measuring the constitutionality of presidential actions. The approach measures presidential action against implied congressional authorities and political imponderables. The *Youngstown* framework has represented a dominant heuristic for assessing the constitutionality of presidential action in recent decades,¹⁴ and the Obama administration has played the *Youngstown* card in defending recent treaty action.¹⁵

It is important to scrutinize the Obama administration's practice regarding EA+ in its nascency. In the foreign affairs context, practice has historically played a crucial function in setting constitutional norms.¹⁶ Although the president has joined several agreements on an EA+ theory, the practice is not yet constitutionally entrenched. Future episodes could snuff out EA+ before they become a standard component of the president's foreign relations toolbox.

Given the improbability of congressional fortitude, judicial nullification appears to be the greater threat to EA+. In recent years, the courts have shed their historical reticence to engage the merits in foreign relations-related disputes.¹⁷ They have also shown increasing willingness to buck presidential power in the area, often on formalist grounds.¹⁸ Litigants may be tempted to challenge EA+ on

13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

14. See, e.g., *Medellín v. Texas*, 552 U.S. 491 (2008); *Hamdan v. Rumsfeld* 548 U.S. 557 (2006); see also Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1951–1958 (2015); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1283–1287 (1988).

15. Koh, *supra* note 4, at 732–34.

16. See, e.g., Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59 (2014); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1099–1101 (2013); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412–14 (2012); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 1015 (2001). See also *infra* notes 177–79 and associated text (citing earlier explications of use of historical practice in determination of constitutional norms).

17. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (addressing merits of a challenge to the president's power to issue passports and recognize foreign states); *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (dismissing government's assertion of political question doctrine in same dispute); see also *Bond v. United States*, 134 S. Ct. 2077 (2014) (considering merits challenge to criminal prosecution founded on the Treaty Power); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (challenge to application of Alien Tort Statute); Sitaraman & Wuerth, *supra* note 14 (arguing that normalization of foreign relations law includes increased willingness of courts to address disputes in the area).

18. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Medellín*, 552 U.S. at 491; Harlan Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 386–87 (2015).

constitutional grounds, especially if future administrations go beyond the Obama precedents.¹⁹

Even if the courts duck the question, EA+ warrant close examination. To the extent that the president takes vague expressions of legislative policy and turns them into international agreements, accountability concerns necessarily enter the mix.²⁰ This is perhaps especially the case in the face of congressional gridlock.²¹ Presidential assertions of a legislative nexus for international agreement-making will be difficult to cabin and refute through affirmative congressional action. But a strong case can be made for EA+. Congressional gridlock supplies a clear justification as well as motivation.²² Many international problems, such as climate change, cannot be addressed without multilateral action, so there will be continuing pressure for international agreements.²³ Suppressing EA+ in the courts or otherwise will likely drive this agreement-making underground. The United States increasingly engages international regimes through less formal, lower profile mechanisms, which raise transparency as well as accountability concerns.²⁴ EA+ have the virtue, at least, of institutional visibility. Congress can adjust future legislation to anticipate presidential agreement-making that is inconsistent with its legislative intent.

Although EA+ to date have been limited to agreements that do not purport to change U.S. law, they create binding and potentially consequential international obligations. As international agreement-making extends to the full range of governance, the potential scope of the practice is broad. The flexibility afforded by EA+ make them a necessary feature in a world where governments institutionalize cooperation on all fronts. To the extent EA+ trigger accountability concerns, they are addressed by the self-limiting aspects of the form.

19. A challenge to the tax intergovernmental agreements was recently rejected by a federal district court on standing grounds. See *infra* note 200.

20. See generally Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1308–12 (2008).

21. See, e.g., Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 496 (2012); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 330–31 (2011).

22. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 61–89 (2014) (positing theory of “constitutional countermeasures” in which one branch can pursue otherwise unconstitutional action in the face of another branch’s constitutional obstruction).

23. See generally SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING (2003); TODD SANDLER, GLOBAL CHALLENGES: AN APPROACH TO ENVIRONMENTAL, POLITICAL, AND ECONOMIC PROBLEMS (1997).

24. Kal Raustiala, *Form and Substance in International Agreements*, 49 AM. J. INT’L L. 581 (2005); Jean Galbraith & David T. Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735 (2014); David Kaye, *Stealth Multilateralism*, FOREIGN AFF. (Sept./Oct. 2013), <https://www.foreignaffairs.com/articles/united-states/2013-08-12/stealth-multilateralism> [<https://perma.cc/3VPB-GE8M>] (archived Sept. 19, 2016).

EA+ are a natural adaptation of historical practice to contemporary conditions.

II. CATEGORIZING AGREEMENTS

Alone among major constitutional democracies, the United States employs an array of domestic procedures to conclude international agreements. The Constitution itself sets out only a single route to join agreements: through two-thirds Senate consent to ratify treaties under Article II. Constitutional practice, however, has legitimized several alternative mechanisms by which the United States may consent to international obligations. Choice among them has provoked major scholarly debate in recent decades, as the Article II route presents a formidable barrier to treaty-making.²⁵

An increasingly reified domestic typology of international agreements now includes so-called congressional-executive agreements and sole executive agreements as constitutionally legitimate alternatives to Article II treaties, at least in some contexts.²⁶ Like Article II treaties, congressional-executive agreements enjoy legislative approval in some form either before or after the president negotiates an international undertaking.²⁷ They have become the dominant mode for U.S. participation in international trade regimes, among others. Sole executive agreements, by contrast, are agreements undertaken by the president without any legislative approval by the Senate or Congress. In the standard account, they are enabled as departures from the baseline of legislative authorization only when an agreement implicates the president's independent foreign affairs

25. See, e.g., John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1 (2011) [hereinafter Yoo, *Rational Treaties*]; Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 11 (2003); John C. Yoo, *Law as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2000) [hereinafter Yoo, *Law as Treaties?*]; G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999); Joel R. Paul, *The Geopolitical Constitution, Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671 (1998); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N. CAR. L. REV. 133, 190 (1998); Detlev F. Vagts, *International Agreements, the Senate and the Constitution*, 36 COLUM. J. TRANSNAT'L L. 143 (1997); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); Hathaway, *supra* note 20; Spiro, *supra* note 16; Hathaway, *supra* note 9. See generally Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247 (2012).

26. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (AM. LAW INST. 1987); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 284–85 (2d ed. 1997).

27. Hathaway, *supra* note 20.

power.²⁸ Scholars have addressed congressional-executive and sole executive agreements as discontinuous for both descriptive and normative purposes: agreements fall into either one category or the other, and the categories have different justifications.²⁹

But this tripartite classification is incomplete as a matter of both theory and practice. Senate consent, congressional authorization, and independent presidential authority, seen as discrete alternatives, are not the only possible bases for concluding an international agreement. A treaty can also rest on a combination of these different authorities, for example, the president's constitutional authority in combination with legislative and/or treaty activity. We call this fourth category of international agreements, "executive agreements+." EA+ differ from congressional-executive agreements in that they lack clear congressional approval, either *ex ante* or *ex post*. They differ from sole executive agreements in that they do not rest solely on the president's independent constitutional authority; they have a legislative or treaty basis as well, hence the "plus."

A. Agreements with Legislative Authorization: Article II Treaties and Congressional-Executive Agreements

The Constitution provides 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."³⁰ Although this is the only constitutionally specified procedure for entering into international agreements, Article II treaties have comprised only a small fraction of U.S. international agreements in the post-World War II era, and their numbers have further dwindled during the Obama administration.³¹ The "vast majority" of all international agreements

28. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581–82 (2007).

29. Hathaway, for example, focuses almost exclusively on congressional-executive agreements, and sees them as quite distinct from sole executive agreements. See Hathaway, *supra* note 20; see also Tribe, *supra* note 25 (approving constitutionality of sole executive agreements while rejecting that of congressional-executive agreements); Yoo, *Law as Treaties?*, *supra* note 25, at 765 (arguing that the two forms are "analytically distinct").

30. U.S. CONST. art. II, § 2, cl. 2.

31. Jeffrey S. Peake, *The Obama Administration's Use of Executive Agreements: Business as Usual or Presidential Unilateralism?*, 2–3 (2014), <http://ssrn.com/abstract=2445535> [https://perma.cc/ED9U-NTHW] (archived Sept. 19, 2016). Peake estimates that only 6 percent of the international agreements the United States joined between 1949 and 2012 were concluded as Article II treaties. That percentage has gone down to 2 percent during the Obama Administration. See *id.*; see also Goldsmith, *supra* note 4, at 10 (Obama administration success rate for submitted treaties is 27 percent, compared to 88 percent for President George W. Bush; the 112th Congress consented to only two treaties, an all-time low).

to which the United States is a party were adopted as congressional-executive agreements.³²

Congressional-executive agreements come in three flavors:

- *Ex ante* congressional-executive agreements enjoy congressional authorization in advance of their negotiation by the president.³³
- A variant finds *ex ante* authorization in a treaty that has received Senate approval (sometimes denominated as treaty-executive agreements).³⁴
- *Ex post* congressional-executive agreements receive congressional approval after the president has negotiated them—the sequencing resembles the Article II process except that they are approved by bicameral majority rather than by Senate supermajority.

Congressional-executive agreements enjoy plausible support in the constitutional text.³⁵ First, Article II does not state that its treaty-making procedure is exclusive. Second, Article I, Section 10, implies that not all international agreements constitute “treaties,” since states are precluded from entering into “treaties” with other countries, but are allowed to enter into “agreements” and “compacts” with congressional approval.³⁶ Since Article II, by its terms, applies only to “treaties,” it leaves open the procedure for approving other types of

32. Hathaway, *supra* note 20, at 1240; Hathaway, *supra* note 9. Hathaway estimates that 80 percent of all agreements are concluded as *ex ante* congressional-executive agreements. *Id.* at 145. According to her count, between 1980 and 2000, more than 3000 *ex ante* congressional-executive agreements were concluded, as compared to 375 treaties, *id.* at 150, although since the President often does not specify the legal basis for joining an executive agreement, whether the basis is *ex ante* congressional authorization or independent presidential power is often unclear, making classification impossible. (Thanks to David Sloss for this point.) A recent Congressional Research Service study estimates that over 18,500 executive agreements have been concluded since 1789, as compared to 1,100 Article II treaties. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 5 (Feb. 18, 2015).

33. Hathaway, *supra* note 20, at 1255. For example, the Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-840, § 101, 68 Stat. 454, 455, provides that the president may “negotiate and carry out agreements with friendly nations or organizations of friendly nations.”

34. *Cf.* CONG. RESEARCH SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 5, 86 (2001) (classifying treaty-executive agreements separately from congressional-executive agreements).

35. See Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 205, 217–22 (1945).

36. For a discussion of these terms, see Ramsey, *supra* note 25, at 162–73.

international agreements.³⁷ Third, the extensive powers granted by the Constitution to Congress provide bases for treaty-making that are additional to the Article II procedure.³⁸ For example, the district court in *Made in the USA Foundation v. United States* found that the Foreign Commerce Clause gives Congress authority to approve international trade agreements.³⁹

Regardless of the strength of these textual arguments,⁴⁰ historical practice and case law have firmly established the constitutionality of congressional-executive agreements.⁴¹ The North American Free Trade Agreement (NAFTA) provoked a major scholarly debate on *ex post* congressional-executive agreements.⁴² Subsequent use of *ex post* congressional-executive agreements for U.S. accession to the World Trade Organization Uruguay Round Agreements and a slew of bilateral free trade agreements have confirmed their constitutionality, at least with respect to some classes of agreements.⁴³ *Ex ante* congressional-executive agreements have, until recently, attracted little attention, notwithstanding their numerosity. Professor Oona

37. See Tribe, *supra* note 25; HENKIN, *supra* note 26, 295–97; CURTIS BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 80 (2013).

38. Yoo, *Law as Treaties?*, *supra* note 25, at 822 (asserting foreign commerce power validates use of congressional-executive agreements relating to international economic affairs).

39. *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999). Although the Eleventh Circuit Court of Appeals held that the case presented a non-justiciable political question and, accordingly, vacated the district court opinion, it described the opinion as “remarkably learned and thorough,” and viewed Congress’s foreign commerce power as an “added factor” in finding a political question. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302, 1319 (11th Cir. 2001). See also *Star-Kist Foods, Inc. v. United States*, 169 F. Supp. 268, 287–88 (Cust. Ct. 1958), *aff’d* 257 F.2d 472 (C.C.P.A. 1959) (Mollison, J., concurring) (Congress may authorize the president to conclude trade agreements pursuant to its foreign commerce power); *Advising the President of the U.S., the Attorney Gen. and Other Exec. Officers of the Fed. Gov’t in Relation to Their Official Duties*, 18 Op. O.L.C. 232, 237, 239–40 (1994) (“[T]he Constitution on its face permits foreign commerce to be regulated either through the Treaty Clause or through the Foreign Commerce Clause. Nothing in the Constitution privileges the Treaty Clause as the ‘sole’ or ‘exclusive’ means of regulating [foreign commerce].”).

40. Tribe argues that the constitutional text precludes the use of congressional-executive agreements. Tribe, *supra* note 25, at 1268–76. *But see* Spiro, *supra* note 16, at 973–81.

41. CONG. RESEARCH SERV., *supra* note 34, at 77–85; see also Spiro, *supra* note 16, at 993–1003.

42. Compare Ackerman & Golove, *supra* note 25 (arguing that adoption of NAFTA as a congressional-executive agreement was constitutional) with Tribe, *supra* note 25 (arguing that NAFTA is unconstitutional). See also Spiro, *supra* note 16 (validating use of congressional-executive agreements in some contexts); Yoo, *Law as Treaties?*, *supra* note 25 (same).

43. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14; United-States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77 (2003); United-States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286 (2004).

Hathaway has recently questioned their use on the grounds that advance congressional authorization delegates power too broadly, attenuating actual congressional control.⁴⁴ Nevertheless, the constitutional legitimacy of *ex ante* congressional-executive agreements appears better established than the *ex post* variety, with examples dating back to the founding era.⁴⁵ In *Field v. Clark*⁴⁶ and *B. Altman & Co. v. United States*,⁴⁷ the Supreme Court upheld congressional-executive agreements of the *ex ante* variety.⁴⁸ Congressional authorization is the defining feature of both *ex ante* and *ex post* congressional-executive agreements, eliminating the objection of unchecked presidential power and putting them within Category 1 of Justice Jackson's *Youngstown* framework, where presidential authority is at its zenith.⁴⁹

B. Agreements Lacking Express Congressional Authorization: Sole Executive Agreements

In contrast to congressional-executive agreements, sole executive agreements lack clear congressional authorization, either *ex ante* or *ex post*. According to the conventional account, sole executive agreements are constitutionally legitimate in a narrow band of contexts implicating "independent" presidential power.⁵⁰ Where an international

44. Hathaway, *supra* note 9, at 165–67.

45. See Act of Aug. 4, 1790, ch. 43, § 2, 1 Stat. 139 (1790). Congress authorized the president to enter into agreements to borrow money to pay off Revolutionary War debts through the 1790 Act, and it authorized the Postmaster General to enter into agreements with foreign postmasters regarding delivery and receipt of mail in 1792, Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 239 (1792). See generally CONG. RESEARCH SERV., *supra* note 34, at 78.

46. 143 U.S. 649 (1892).

47. 224 U.S. 583 (1912); see also *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999).

48. See, e.g., Francis B. Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 757–58 (1939); HENKIN, *supra* note 26, at 217. Ackerman and Golove offer a revisionist history in which the *Field* and *Altman* decisions do not supply a square validation of executive agreements *ex ante*, see Ackerman & Golove, *supra* note 25 at 829–32, but that view does not appear to have undermined the consensus position that such agreements are constitutional. See generally David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499 (2012); cf. White, *supra* note 25, at 15–21 (tying rise of executive agreements to decision in *Field v. Clark*).

49. See, e.g., Ramsey, *supra* note 25, at 142.

50. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303(2) (AM. LAW INST. 1987) (“[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”); Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345 (1955); Clark, *supra* note 28, at 1581–82 (presidents have used sole executive agreements “solely as a means of exercising their independent statutory or constitutional powers”); Wuerth, *supra* note 25; Hathaway, *supra* note 9, at 211 (“Such agreements rest entirely on the President’s sole constitutional powers and are limited by the bounds of that authority.”). But see Ramsey,

agreement is concluded pursuant to an independent presidential power, no congressional authorization is required. This account has a clear constitutional logic. International treaty-making was manifestly intended to be a shared power by the Constitution's framers.⁵¹ Sole executive agreements mark a departure from that baseline. Hence, their admissibility depends on identifying an authority that is constitutionally allocated to the president. That condition cabins the departure from the baseline.

But this conventional account is theoretically incomplete for two reasons. First, it assumes a neatly compartmentalized system in which Congress either authorizes an agreement or is silent, and the president, when joining an agreement, does so by placing it in one box or another. Second, it assumes a fixed quantum of independent presidential power in the absence of congressional approval. Both of these assumptions over-simplify a more complex reality. Congressional approval and silence are not the only possibilities; there are many shades of gray in between. Moreover, along the continuum between approval and silence, the president's authority is not fixed: it varies depending on the level of legislative support.⁵² Agreements falling within this gray zone are neither congressional-executive agreements, since they lack congressional authorization or approval, nor sole executive agreements, since they do not rely exclusively on the president's independent constitutional authority. Instead, they have legislative underpinnings.

EA+ can be understood if one views Justice Jackson's *Youngstown* framework, not in terms of a tripartite categorization between cases of congressional approval (Category 1), ambiguity (Category 2), and disapproval (Category 3), which Jackson himself recognized was over-simplified,⁵³ but rather in terms of a spectrum "running from explicit congressional authorization to explicit congressional prohibition," as Justice Rehnquist suggested in *Dames & Moore v. Regan*.⁵⁴ Like most sole executive agreements, which fall within the president's independent but not exclusive authority,⁵⁵ EA+ fall within Category 2.

supra note 25, at 217 (many sole executive agreements lack basis in powers textually allocated in the Constitution to the president).

51. U.S. CONST., art. 2, § 2; *see also* Lee B. Ackerman, *Executive Agreements, the Treaty-Making Clause, and Strict Constructionism*, 8 LOY. L.A. L. REV. 587, 595 (1975).

52. *Youngstown*, 343 U.S. at 635 (1952) (Jackson, J., concurring) ("[P]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

53. *Id.*

54. *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

55. In only a few instances have courts found sole executive agreement to be inconsistent with congressional acts, placing them within Category 3 rather than 2. *See, e.g., United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd* on other grounds, 348 U.S. 296 (1955) (refusing to enforce trade agreement with Canada on grounds that it was inconsistent with Agricultural Act of 1948).

But EA+ and sole executive agreements occupy different parts of the Category 2 spectrum, where EA+ are closer to Category 1. Indeed, at the extreme, EA+ blend into implied *ex ante* congressional-executive agreements, which are authorized by Congress. Their validity “hinges on a consideration of all the circumstances which might shed light on the views of the Legislative branch toward such action, including ‘congressional inertia, indifference, or quiescence.’”⁵⁶ Sole executive agreements, by contrast, occupy the other end of the Category 2 spectrum, in what Jackson called the “twilight zone,”⁵⁷ where there is no obvious manifestation of congressional support or acquiescence.

III. REVISITING THE HISTORY OF EXECUTIVE AGREEMENTS

The conventional tripartite categorization of international agreements is not only conceptually inadequate, it is also historically misleading. Agreements often do not fit neatly into one box or another; they are underpinned by both congressional support and independent presidential powers. The president, when joining an agreement, need not indicate the legal basis for doing so or choose between alternative legal theories. So classifying an agreement as either an implied congressional-executive agreement or as a sole executive agreement requires scholarly guesswork and may not always be possible.

Although the Obama administration was the first to distinguish a fourth category of agreements lying between sole executive agreements and *ex ante* congressional-executive agreements, a reexamination of the historical record reveals many agreements that arguably fall within this category. On the one hand, only a fraction of the agreements usually categorized as sole executive agreements rested exclusively on the president’s independent constitutional powers—most had some basis in related legislative activity.⁵⁸ On the other hand, some agreements classified as *ex ante* congressional-executive agreements rest on statutory language that does not specifically authorize agreement-making.⁵⁹ Both sets of agreements are properly classified as EA+.

This Part will not attempt a comprehensive history of all EA+ that have been miscategorized as sole executive agreements or implied *ex ante* congressional-executive agreements; instead, the analysis is confined to a few notable examples.

The Litvinov Agreements. Executed as an exchange of diplomatic notes, the Litvinov Agreements loom large in historical accounts of sole

56. *Dames & Moore*, 453 U.S. at 668–69 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

57. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

58. See *supra* notes 60–115 and accompanying text.

59. See *supra* notes 116–22 and accompanying text.

executive agreements.⁶⁰ This is attributable to their validation in two decisions of the U.S. Supreme Court that are easily the highest profile judicial considerations of what have been conventionally denominated as sole executive agreements.⁶¹ Not only did the Court sustain the president's authority, the agreements were found to trump conflicting state law.⁶² The Court rejected the constitutional challenge based on the agreements' form. Decided in the wake of the Court's decision in *Curtiss-Wright* (the foundation of expansive twentieth century presidential powers),⁶³ the *Belmont* and *Pink* decisions validated the agreements as part of the president's "authority to speak as the sole organ" of the national government in its external relations.⁶⁴ *Pink* framed the agreements as pursuant to the "modest implied power of the President" to recognize foreign governments.⁶⁵

This exclusive power to recognize foreign governments has supplied the conventional wisdom regarding the constitutionality of the Litvinov Agreements.⁶⁶ But the legality of the Litvinov Agreements was over-determined. The government also defended them as implicating the settlement of international claims,⁶⁷ the leading historical use of sole executive agreements.⁶⁸ Moreover, the Litvinov Agreements enjoyed substantial congressional support.⁶⁹ Congress

60. *Exchange of Communications Between the President of the United States and the President of the All Union Central Executive Committee*, 28 AM. J. INT'L L. 1, 1–11 (Supp. 1934) (reproducing the text of the Litvinov Agreements). See White, *supra* note 25, at 96.

61. *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942).

62. *Belmont*, 301 U.S. at 331–32; *Pink*, 315 U.S. at 230–31.

63. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). For critical assessments, see generally HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION* 93–94 (1990); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

64. See, e.g., *Curtiss-Wright*, 299 U.S. at 320; *Belmont*, 301 U.S. at 334; *Pink*, 315 U.S. at 229.

65. *Pink*, 315 U.S. at 229.

66. See *id.* at 229–30; see also Carlos M. Vazquez, *The Abiding Exceptionalism of Foreign Relations Doctrine*, 128 HARV. L. REV. FORUM 305, 312–313 (2015); HENKIN, *supra* note 26, at 220; Paul, *supra* note 25, at 742; Yoo, *Law as Treaties?*, *supra* note 25, at 765 n.22. This power was recently confirmed in the *Zivotofsky* case. See generally *Zivotofsky*, 135 S. Ct. at 2076 (confirming the exclusive power to recognize foreign governments).

67. See Brief for the United States at 8–11, *United States v. Belmont*, 301 U.S. 324 (1937) (No. 532). The decisions can also be explained as an application of the act of state doctrine, which (through the vehicle of federal common law) vindicates foreign law relative to conflicting law of U.S. states. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); Clark, *supra* note 28, at 1637–52.

68. Wuerth, *supra* note 25, at 1.

69. See, e.g., DONALD G. BISHOP, *THE ROOSEVELT-LITVINOV AGREEMENTS: THE AMERICAN VIEW* 4 n.7 (1965) (noting congressional resolutions supporting recognition); *New Senate Tends to a Soviet Treaty*, N.Y. TIMES, Jan. 10, 1933 (reporting "strong feeling for recognition" in Congress at beginning of Roosevelt Administration). Congress had

confirmed President Roosevelt's nomination of an ambassador to the Soviet regime⁷⁰ and approved the mechanism for resolving the outstanding property issues adopted in the agreements.⁷¹ In other words, though the agreements lacked express congressional authorization, the president's action was consonant with related congressional activity.

Destroyers for Bases Agreement. The same can be said of one of the most controversial executive agreements ever adopted: the 1940 Destroyers for Bases Agreement between the United States and Britain.⁷² Although often described as a prime example of executive overreach,⁷³ Robert Jackson's opinion as Attorney General defending the agreement did not rely exclusively on the president's independent constitutional powers.⁷⁴ Jackson argued that Congress had provided "ample statutory authority" to support the transfers of property provided for by the agreement, even if it had not approved the agreement itself.⁷⁵ Congressional leaders indicated privately to President Roosevelt that, while Congress would not formally approve the agreement, they would not raise any objections.⁷⁶ So President Roosevelt at least had congressional acquiescence, if not authorization, for the deal.⁷⁷

Armistices. Armistices undertaken as agreements with other sovereigns without express congressional authorization include the Peace Protocol of 1898 (ceasing hostilities with Spain), and armistices concluded with the Central Powers in 1918 (during World War I) and with Italy in 1943 (during World War II).⁷⁸ In the era of formally

earlier agitated in favor of recognition in the face of resistance by the Hoover administration. *See Washington Firm in Russian Stand*, N.Y. TIMES, Apr. 24, 1932.

70. Only one senator openly opposed the nomination, which came less than two months after the recognition agreement. *See Bullitt Confirmed as Envoy to Soviet*, N.Y. TIMES, Jan. 12, 1934.

71. *See* BISHOP, *supra* note 69, at ch. 5.

72. Agreement Respecting Naval and Air Bases (Hull-Lothian Agreement), U.S.-Gr. Brit., Sept. 2, 1940, 54 Stat. 2405. *See, e.g.*, William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers for Bases Deal*, 52 AM. J. LEGAL HIST. 1 (2012).

73. *See* Ackerman & Golove, *supra* note 25, at 856 n.251 (characterizing Destroyers for Bases Agreement as "among the most controversial executive agreements ever concluded" and noting "even in the 1970s, Senators Church and Fulbright were attacking the deal as a usurpation of the Senate's constitutional prerogative").

74. Robert H. Jackson, *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 OP. ATT'Y GEN. 484, 488 (1940).

75. *Id.*

76. GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS 40 (2009).

77. *See* Ramsey, *supra* note 25, at 237 n.406. (offering an additional argument for the constitutionality of the Destroyers for Bases Agreement, namely, that it did not create any ongoing obligations for the United States).

78. Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 673-75 (1944); *see also* Wienczyslaw J. Wagner, *Treaties and Executive*

declared wars, the agreements were intended as temporary, their terms to be superseded by formal peace treaties. Nonetheless, armistice terms were consequential insofar as they set the stage for final arrangements.⁷⁹

Armistices are situated in the conventional account as enabled by the president's independent power as commander-in-chief.⁸⁰ Among the agreements categorized as sole executive agreements, armistices are perhaps the best fit. It is not clear that Congress could prohibit the president from entering into an armistice or reverse one that has been executed. In other words, this may reflect not just an independent, but an exclusive presidential power.

That said, the power to undertake an armistice could also be framed as incidental to an authorization to use force. When Congress declares war, it implicitly authorizes the president to determine the circumstances under which to end the use of force, pending the negotiation of peace terms subject to congressional approval.⁸¹ In this way, the armistice power is contingent on the initial authorization of war; a president cannot enter into an armistice without predicate support from Congress for the hostilities that the armistice will end.⁸² That is consistent with historical practice; presidents entered into armistices to suspend hostilities only in declared wars, a practice of which Congress would be aware in its initial authorization.⁸³ To the extent that armistices were meant to be superseded by treaties of peace, they also resembled *modi vivendi* and other agreements of a temporary character,⁸⁴ an accepted nineteenth century component of executive agreement practice.⁸⁵

Agreements: Historical Development and Constitutional Interpretation, 4 CATH. U. L. REV. 95, 101 (1954).

79. Borchard, *supra* note 78, at 673–74; Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 619 n.11 (1945) [hereinafter Borchard, *Treaties and Executive Agreements*].

80. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. g. (1987); Mathews, *supra* note 50, at 353–54; Don Wallace, Jr., *The President's Exclusive Foreign Affairs Powers over Foreign Aid: Part I*, 1970 DUKE L.J. 293, 298 n.33 (1970).

81. *Cf. Hamdi*, 542 U.S. at 507 (finding detention of enemy combatants to be implicit in Authorization for the Use of Military Force).

82. As a formal matter, armistices can only be undertaken between belligerent states, *i.e.*, those in a state of war.

83. That is, through historical practice, Congress would have understood that a declaration of war would enable the president to execute an armistice in his discretion.

84. See David A. Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States*, 35 ILL. L. REV. 365, 388 (1940) (noting that, as a formal matter, armistices provide for the temporary suspension of hostilities).

85. Borchard, *supra* note 78, at 673–74; BRADLEY, *supra* note 37, at 92.

Status-of-Forces Agreements. The United States is a party to more than one hundred status-of-forces agreements (SOFAs).⁸⁶ SOFAs vary considerably, so their constitutional basis also varies, depending on their contents. Only one was adopted as a treaty;⁸⁷ the rest have usually been classified either as *ex ante* congressional-executive agreements (authorized by statute or treaty)⁸⁸ or, more commonly, as sole executive agreements.⁸⁹

As with armistices, commentators have justified SOFAs as sole executive agreements on the basis of the Commander-in-Chief Clause.⁹⁰ But SOFAs are not invariably undertaken on presidential

86. INTERNATIONAL SECURITY ADVISORY BOARD, REPORT ON STATUS OF FORCES AGREEMENTS 1, 12 (2015), <http://www.state.gov/documents/organization/236456.pdf> [<https://perma.cc/67UT-T9E2>] (archived Sept. 19, 2016); R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2012).

87. MASON, *supra* note 86, at 1. The NATO SOFA is a multilateral agreement among twenty-six NATO members, and received the advice and consent of the Senate. NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67, signed June 19, 1951.

88. Mason classifies seven SOFAs as based on a pre-existing treaty, those with Japan, Korea, Australia Korea, Guatemala, Haiti, and Honduras. MASON, *supra* note 86, at 18–19, 24 tbl.3.

89. *Id.* at 1. Mason lists forty-eight SOFAs that were not in support of some specified activity or exercise and were not based on underlying treaty or legislative action. *Id.* at CRS-27-29. However, most of these agreements involve the status of U.S. forces only temporarily present in foreign states, governing minor activity only. Only one (Djibouti) appears to involve a permanent U.S. facility.

90. *Id.*; BRADLEY, *supra* note 37, at 90. Presidents Bush and Obama claimed the power to enter into SOFAs with Iraq and Afghanistan on this basis. In the end, although these agreements contained provisions relating to the status of forces, they were denominated more broadly as “security agreements.” See T.I.A.S. Exchange of Notes Sept. 26 and Dec. 12, 2002 and May 28, 2003, entered into force May 28, 2003; AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF IRAQ ON THE WITHDRAWAL OF UNITED STATES FORCES FROM IRAQ AND THE ORGANIZATION OF THEIR ACTIVITIES DURING THEIR TEMPORARY PRESENCE IN IRAQ (Nov. 17, 2008), <http://www.state.gov/documents/organization/122074.pdf> [<https://perma.cc/NJ9Y-WLRC>] (archived Sept. 27, 2016). See, e.g., *Negotiation [sic] a Long-Term Relationship with Iraq: Hearing on U.S.-Iraq Long-Term Security Agreement Before the S. Foreign Relations Committee*, 110th Cong. (2008) (statement of Hon. David Satterfield, Senior Advisor to the Secretary of State and Coordinator for Iraq) (citing the president’s authorities as commander-in-chief as basis for concluding 2008 Iraq Agreements). See also Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 469 n.90 (2011) (calling SOFA designation “inappropriate”). The agreements generated opposition in Congress. In 2011, a bill was introduced in the House expressing the sense of Congress that the president should negotiate a SOFA with Afghanistan and submit it to the Senate as an Article II treaty. United States-Afghanistan Status of Forces Agreement (SOFA) Act of 2011, H.R. 651, 112th Cong. (2011). The bill received seventy co-sponsors, but was not acted upon. See, e.g., Bruce Ackerman & Oona Hathaway, *Bush’s Final Illusion*, SLATE (Oct. 21, 2008), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/10/bushs_final_illusion.html [<https://perma.cc/4XJW-MQ3P>] (archived Sept. 27, 2016) (asserting unconstitutionality of the Iraq SOFA agreement). On the constitutional aspects of these agreements as “security arrangements”, see MICHAEL JOHN GARCIA ET

authority alone; a number of SOFAs are based on existing treaties or congressional activity that supports the development of SOFAs. For example, the Korea SOFA⁹¹ was adopted on the basis of Article IV of the 1953 Mutual Defense Treaty, which granted the United States the right to dispose of U.S. forces in Korea “as determined by mutual agreement.”⁹² Similarly, the Haiti SOFA⁹³ cited the Inter-American Treaty on Reciprocal Assistance by way of authorization.⁹⁴ It appears that Congress can legislate with respect to the status of U.S. forces abroad.⁹⁵ This puts into question whether the president’s authority to enter into these agreements can be located in the Commander-in-Chief Clause,⁹⁶ which would put SOFAs beyond congressional reach.

Claims Settlement. Since the early days of the Republic, the settlement of claims has comprised the most important use of sole executive agreements in terms of both number and significance.⁹⁷ The earliest claims agreements involved the Wilmington Packet in 1799.⁹⁸ This practice was most recently validated in 2003 by the Supreme Court in *American Insurance Association v. Garamendi*.⁹⁹

And yet claims settlement is an imperfect fit, at best, for the “independent powers” theory of sole executive agreements.¹⁰⁰ In contrast to agreements founded on the recognition or commander-in-chief powers, claims settlements cannot be paired with a discrete constitutional allocation of presidential authority outside of the agreement-making context. Some commentators have sourced a

AL., CONG. RES. SERV. RL34362, CONGRESSIONAL OVERSIGHT AND RELATED ISSUES CONCERNING THE PROSPECTIVE SECURITY AGREEMENT BETWEEN THE UNITED STATES AND IRAQ, (2008).

91. Facilities and Areas of the Status of United States Armed Forces in Korea, U.S.-S. Kor., July 9, 1966, 17 U.S.T. 1677, T.I.A.S. 6127.

92. Mutual Defense Treaty, U.S.-S. Kor, Oct. 1, 1953, 5 U.S.T. 2368, T.I.A.S. 3097.

93. Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti, U.S.-Haiti, May 10, 1995, 2271 U.N.T.S. 235.

94. American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. 1838.

95. See Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PENN. L. REV. 903, 921 (1959).

96. U.S. CONST. art. II, § 2.

97. Hathaway, *supra* note 9, at 171 n.90.

98. Settlement of the Case of the Schooner “Wilmington Packet,” U.S.-Neth., Dec. 12, 1799, reprinted in TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1075 (Hunter Miller, ed., 1937).

99. 539 U.S. 396 (2003) (nullifying state law regarding Holocaust-era insurance claims in the face of executive agreement with Germany and other executive branch activity).

100. Goldsmith and Lessig acknowledge this when they uphold claims settlement agreements based on “a long historical pedigree” rather than on the president’s express constitutional powers. See Jack Goldsmith & Lawrence Lessig, *Anti-Counterfeiting Agreement Raises Concerns*, WASH. POST (March 26, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html> [https://perma.cc/6XZS-QUR3] (archived Sept. 19, 2016).

presidential power to enter into claims settlements without specific congressional authorization in the president's power to engage in diplomatic relations¹⁰¹ and (more non-specifically) the president's foreign affairs power.¹⁰² But those justifications prove too much, as they could justify almost any use of sole executive agreements.¹⁰³

Whatever presidential power is implicated, moreover, is not exclusive. The settlement of international claims involves the regulation of foreign commerce, over which Congress has express constitutional power. Congress has legislated with respect to implementation of claims settlements executed by the president. In at least one instance, Congress required the renegotiation of a claims settlement agreement, thus demonstrating its institutional primacy on the question.¹⁰⁴ A president cannot constitutionally defy congressional direction in the claims settlement context on the grounds that Congress is trespassing on an exclusive presidential power.

The better theory of claims settlements is that they represent EA+. That is (in effect) the approach taken in *Dames & Moore v. Regan*, in which the Supreme Court upheld the 1981 Algiers Accord between the United States and Iran (executed by President Carter to end the Embassy Hostage crisis).¹⁰⁵ Applying the tripartite approach from Justice Jackson's *Youngstown* concurrence, Justice Rehnquist considered Congress's historical posture towards claims settlement agreements generally, and with respect to the Iran agreement in particular. Rehnquist highlighted the "history of congressional acquiescence" respecting claims settlements and more recent post-World War II affirmative legislation evidencing congressional acceptance of the practice.¹⁰⁶ With respect to the Algiers Accord itself, the Court refused to recognize a plenary presidential power to settle claims and acknowledged the lack of congressional authorization.

101. See, e.g., *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951) ("The continued mutual amity between the nation and other powers depends on the satisfactory compromise of mutual claims.").

102. See, e.g., *Pink*, 315 U.S. at 229 (citations omitted) (internal quotation marks omitted) ("Power to remove such obstacles to full recognition as settlement of claims of our nationals certainly is a modest implied power of the President who is the sole organ of the federal government in the field of international relations.").

103. Cf. *Medellin* 552 U.S. at 491 (stating that president's authority to settle international claims by executive agreement is "narrow and strictly limited").

104. Trade Act of 1974, Pub. L. No. 93-618, §408, 88 Stat. 2064 (Jan. 3, 1975) (Gravel Amendment, blocking lump settlement between United States and Czechoslovakia); see also *Dames & Moore*, 453 U.S. at 688 n.13 (discussing Gravel Amendment); Richard B. Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Lump Sum Agreement*, 69 AM. J. INT'L L. 837 (1975).

105. Declaration of the Government of the Democratic and Popular Republic of Algeria, U.S.-Iran, Jan. 19, 1981, 20 I.L.M. 224.

106. *Dames & Moore*, 453 U.S. at 675-89. Rehnquist further reasons, "[T]he relevant Senate Committee has stated that the establishment of the [claims tribunal under the agreement] is 'of vital importance to the United States.'" *Id.* at 688.

Instead, in upholding the agreement, it relied on the enactment by Congress of “closely related” legislation, which evinced “legislative intent to accord the president broad discretion.”¹⁰⁷ The decision highlighted the contingencies of the Iran episode,¹⁰⁸ but its logic would work to validate presidential claims settlement agreements except where Congress expressed its disapproval and the case was within *Youngstown* Category 3.¹⁰⁹

The *Dames & Moore/Youngstown* approach best explains the legality of most executive agreements entered into by the president without express legislative approval. Sole executive agreements are typically rationalized in an *ad hoc* manner, by identifying categories of agreements where historical practice has constitutionalized presidential action. Executive agreements falling within the recognized categories are permissible, others are not. But these categories cannot be coherently explained on the conventional “independent power” basis.¹¹⁰ Instead, the key strand among these agreements has been the fact of related congressional action that underpins the agreement, if not authorizes it. Once that is understood, the categorical constraints on the use of sole executive agreements established through historical practice become permeable, and may include potentially any agreement with legislative underpinnings.

Environmental Agreements. Although most international environmental agreements have been concluded as Article II treaties, several were accepted by the president acting alone, without Senate or congressional approval, either *ex ante* or *ex post*. These include the 1979 Long-Range Transboundary Air Pollution Convention (LRTAP),¹¹¹ the 1991 U.S.-Canada Air Quality Agreement (AQA),¹¹² the 1993 North American Agreement on Environmental

107. *Id.* at 678.

108. *Id.* at 672, 675–78 (drawing also on the IEEPA and Hostage Acts).

109. In fact, that was the posture assumed by the Court in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

110. See White, *supra* note 25, at 18 (noting that emergence of broad executive agreement practice in the early twentieth century “lacked an overriding constitutional rationale”).

111. Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217.

112. Canada-United States: Air Quality Agreement, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676.

Cooperation (the so-called NAFTA Environmental Side Agreement),¹¹³ and the 1999 Gothenburg Protocol to LRTAP.¹¹⁴

These agreements have been ignored by foreign affairs scholars and were uncontested by other actors, but they are perhaps the clearest examples of EA+ prior to the Obama administration. Since the president's independent constitutional powers do not plausibly encompass environmental regulation, these agreements do not qualify as sole executive agreements; nor did they receive any clear legislative approval. Instead, the key factor that allowed the president to accept them was that they mirrored existing U.S. law. Indeed, in the case of the AQA, the agreement directly incorporated the standards that Congress had recently enacted domestically in the 1990 Clean Air Act Amendments.¹¹⁵ Acceptance of the agreements by the president did not entail any legislative changes; it simply reflected internationally what Congress had already decided to do domestically. No specification of presidential authority was required to enter into these agreements (and none was ever given). But the only basis for understanding these agreements on a constitutional basis is as EA+.

Implied Ex Ante Congressional-Executive Agreements. At the extreme, the category of EA+ merges into that of implied *ex ante* congressional-executive agreements.¹¹⁶ Commentators have tended to put a huge range of agreements in the *ex ante* congressional-executive agreement basket.¹¹⁷ When Congress clearly authorizes the president to enter into international agreements, the categorization is appropriate. For example, the Omnibus Trade and Competitiveness Act of 1988 provides that "the President may enter into an agreement with any country that has a positive trade balance with the United States under which that country would purchase United States agricultural commodities or products for use in agreed-upon development activities in developing countries."¹¹⁸

113. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 13, 1993, 32 I.L.M. 1480. Although Congress expressly approved the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (making it an *ex post* congressional-executive agreement), as well as U.S. participation in the Commission on Environmental Cooperation, 19 U.S.C.A. § 3472 (West, Westlaw through Pub. L. No. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113)), it never authorized the side agreement itself.

114. Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication, and Ground-Level Ozone, Nov. 30, 1999, 2319 U.N.T.S. 81.

115. Clean Air Act, Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401 to 7671q).

116. See John H. Knox, *The United States, Environmental Agreements, and the Political Question Doctrine*, 40 N.C. J. INT'L L. & COM. REG. 933, 943 (2015).

117. Hathaway, *supra* note 9, at 159-65 tbl.2.

118. Pub. L. No. 100-418, § 4203, 102 Stat. 1107, 1392 (codified at 7 U.S.C. § 5213). Similarly, 10 U.S.C. § 2350(a) provides, "The Secretary of Defense may enter into a memorandum of understanding (or other formal agreement) with one or more other

But, in some cases, the “authorizing” statute does not in fact authorize the president to engage in agreement-making. For example, Hathaway lists, as an authorizing statute, the International Anti-Corruption and Good Governance Act of 2000,¹¹⁹ which permits the president to “establish programs that combat corruption, improve transparency and accountability, and promote other forms of good governance.”¹²⁰ Similarly, the Anti-Drug Abuse Act language that putatively gives the president authority to enter into international agreements simply provides that “[t]he Secretary may by regulation authorize customs officers to exchange information and documents with foreign customs and law enforcement agencies if the Secretary reasonably believes the exchange of information is necessary.”¹²¹ In neither case does the statute mention, much less authorize, the conclusion of international agreements. To say that agreements negotiated on the basis of these very general statutory provisions were authorized *ex ante*, and to lump them together with agreements that receive clear approval from Congress,¹²² is to stretch the notion of delegation beyond any reasonable construction. Instead, agreements negotiated on the basis of these statutory provisions represent EA+.

IV. DISCOVERING EXECUTIVE AGREEMENTS+

The Obama administration has recently discovered the potentially expansive application of executive agreements on a *Youngstown*-type rationale. In at least three important contexts, the Obama administration has concluded agreements that do not fit neatly within the established tripartite categorization. They lack Senate or congressional approval, and hence do not qualify as Article II treaties or congressional-executive agreements. But the Obama administration did not justify them on the basis of some “independent” presidential power, or claim that they were undertaken as “sole” executive agreements. Rather, the Obama administration justified them as consistent with and furthering congressional policies. In this respect, the Obama administration, in effect, unveiled a new product, one with potentially expansive applications.

countries or organizations . . . for the purpose of conducting cooperative research and development projects on defense equipment and munitions.”

119. Microenterprise for Self-Reliance and International Anti-Corruption Act of 2000, Pub. L. No. 106-309, § 205(a), 114 Stat. 1078, 1092 (codified as amended at 22 U.S.C. § 2152c).

120. Hathaway, *supra* note 9, at 165.

121. Pub. L. No. 99-570, § 3127, 100 Stat. 3207, 3207–89 (codified as amended at 19 U.S.C. § 1628).

122. See Hathaway, *supra* note 9, at 155–56 (accepting that these statutes “delegate” or “grant” unilateral power to the president to enter into international agreements).

A. Anti-Counterfeiting Trade Agreement

An early articulation of the Obama administration's self-consciously expansive approach to executive agreements came in the context of the Anti-Counterfeiting Trade Agreement (ACTA),¹²³ described by commentators as "the most important intellectual property agreement concluded in more than a decade."¹²⁴ The ACTA seeks to strengthen international standards for the enforcement of intellectual property rights through requirements for higher penalties, stronger border enforcement, and broader injunctive relief.¹²⁵ Negotiated in secret by a small number of countries between 2008 and 2010, the ACTA is a stand-alone plurilateral agreement, separate from the World Trade Organization and the World Intellectual Property Organization.¹²⁶

Critics of the ACTA initially assumed that the president viewed it as a sole executive agreement.¹²⁷ But after significant pushback from Senator Wyden and legal academics, who argued both that regulation of intellectual property rights is a congressional rather than a presidential power and that the ACTA would affect U.S. law,¹²⁸ the

123. Anti-Counterfeiting Trade Agreement, *supra* note 10.

124. Oona A. Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, ASIL INSIGHTS (Aug, 24, 2011), <https://www.asil.org/insights/volume/15/issue/23/going-it-alone-anti-counterfeiting-trade-agreement-sole-executive> [<https://perma.cc/QLL7-KSF3>] (archived Sept. 19, 2016). See generally Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms through Executive Trade Agreements*, 35 YALE J. INT'L L. ONLINE 24 (2009).

125. Anti-Counterfeiting Trade Agreement, *supra* note 10, at E-1.

126. *Anti-Counterfeiting Trade Agreement*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/acta> (last visited Feb. 21, 2016) [<https://perma.cc/AA9G-2RDM>] (archived Sept. 27, 2016).

127. Letter from Senator Ron Wyden to President Barack Obama (Oct. 12, 2011) (on file with author) ("The USTR long asserts authority to enter ACTA as a sole executive agreement with no Congressional authorization or approval.") [hereinafter Weyden letter]; Letter from Seventy-Five Law Professors to President Barack Obama (Oct. 28, 2010), <http://wcl.american.edu/pijip/go/academics10282010> [<https://perma.cc/9S4U-LYET>] (archived Sept. 27, 2016) [hereinafter Seventy-Five Law Professors Letter] ("The use of a sole executive agreement for ACTA appears unconstitutional.")

128. Wyden argued that even if the ACTA is consistent with existing U.S. law, it could "work to restrain the U.S. from changing such rules and practices," and that "the executive branch lacks constitutional authority to enter into a binding international agreement covering issues delegated by the Constitution to Congress, absent congressional approval." Wyden letter, *supra* note 127; see also Seventy-Five Law Professors Letter, *supra* note 127] ("The use of a sole executive agreement for ACTA appears unconstitutional."). There is considerable dispute about whether the ACTA would, in fact, require changes to U.S. law. See Katz & Hinze, *supra* note 124, at 33. A study by the Congressional Research Service concluded that "[d]epending on how broadly or narrowly several passages from the ACTA draft are interpreted, it appears that certain provisions of federal intellectual property law could be regarded as inconsistent with ACTA." Memorandum from Brian T. Yeh, Legis. Attorney, Am. Law Div., Cong.

Obama administration clarified its position. In a letter to Senator Wyden, Harold Koh, then the State Department's legal adviser, defended the president's authority to accept the ACTA in the following terms:

The ACTA was negotiated in response to express Congressional calls for international cooperation to enhance enforcement of intellectual property rights. Congress has passed legislation explicitly calling for the Executive Branch to work with other countries to enhance enforcement of intellectual property rights The ACTA helps to answer that legislative call [and] . . . is part of a long line of trade agreements that were similarly concluded by successive Administrations.¹²⁹

Critics interpreted Koh's letter as claiming that the ACTA qualified as an *ex ante* congressional-executive agreement, authorized by the Prioritizing Resources and Organization for Intellectual Property Act (Pro-IP Act).¹³⁰ Although Koh did not say this explicitly, *ex ante* congressional authorization seemed to be his only available argument, since the administration was neither claiming independent constitutional authority to join the ACTA nor planning to submit it to Congress or the Senate for approval. Trapped within the tripartite typology of international agreements, what the ACTA critics failed to recognize was that Koh was suggesting a fourth option. He did not claim that the Pro-IP Act authorized the ACTA *ex ante*, but rather that it provided more general support for concluding the agreement. If Congress asks the president to work with other countries to establish effective international standards, and the standards that the president negotiates are consistent with existing U.S. law, the president is acting in alignment with Congress, rather than in opposition to it—that was Koh's point.

The ACTA was perhaps a poor choice, politically, to roll out a new theory of treaty acceptance. As Justice Marshall astutely understood, it is best to claim previously unrecognized authority in a context where

Research Serv., to Senator Ron Wyden (Oct. 29, 2010) (on file with author) [hereinafter Yeh Memorandum].

129. Letter from Harold Koh to Senator Ron Wyden (Mar. 6, 2012), in DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 95 (CarrieLyn D. Guymon ed., 2012). Koh cited to the Prioritizing Resources and Organization for Intellectual Property Act (Pro-IP Act), section 8113(a), which calls on the Executive branch to “work[] with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights.” *Id.* at 96.

130. See, e.g., Letter from Fifty-Three Law Professors to U.S. S. Comm. on Finance (May 16, 2012), <http://infojustice.org/wp-content/uploads/2012/05/Law-Professor-Letter-to-Senate-Finance-Committee-May-16-20122.pdf> [<https://perma.cc/Y63Z-WHJ6>] (archived Sept. 19, 2016) [hereinafter Fifty-Three Law Professors Letter]. According to critics, this justification failed, because the Pro-IP Act manifestly did not authorize the negotiation of the ACTA. Jack Goldsmith, *The Doubtful Constitutionality of ACTA as an Ex Ante Congressional-Executive Agreement*, LAWFARE (May 21, 2012, 1:03 PM), <https://www.lawfareblog.com/doubtful-constitutionality-acta-ex-ante-congressional-executive-agreement> [<https://perma.cc/R5L2-F9S8>] (archived Sept. 19, 2016).

opponents are unlikely to resist and there is little danger of losing.¹³¹ The ACTA was highly controversial for other reasons, so opposition was to be expected. Critics argued that the agreement was negotiated “behind a shroud of secrecy, with little opportunity for public input and with active participation by special interests who stand to gain from restrictive new international rules,”¹³² and that the administration’s claims that the ACTA did not affect U.S. law were dubious.¹³³ In that context, asserting unilateral presidential power to join the agreement simply added fuel to the fires. Although the administration never renounced its claim that it could accept the ACTA without Senate or congressional approval, it still has not exercised that authority: the United States has not joined the ACTA as a party. Thus, at the moment, the ACTA remains unperfected as an EA+, but the stage is set for it to emerge as a major precedent for the form.

B. *Minamata Convention on Mercury*

The administration’s acceptance in 2013 of the Minamata Convention on Mercury¹³⁴ (Minamata Convention) creates a stronger precedent for EA+. The Minamata Convention establishes a comprehensive regulatory regime addressing the production, use, and disposal of mercury. One commentator has described it as “the most ambitious multilateral environmental agreement to date.”¹³⁵

The contents of the Minamata Convention are highly substantive.¹³⁶ Nevertheless, President Obama did not submit the Convention either to the Senate for advice and consent to ratification or to Congress for approval as an *ex post* congressional-executive agreement. Instead, he went ahead and accepted the Minamata Convention on his own, making the United States the first contracting state. In its announcement, the State Department did not specify the

131. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 25 (Sanford Levinson ed., rev. 2d. ed. 1994) (describing *Marbury v. Madison* as a “masterwork of indirection, a brilliant example of Marshall’s capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents were looking in the other”).

132. Seventy-Five Law Professors Letter, *supra* note 127.

133. *See id.*; Yeh Memorandum, *supra* note 128.

134. Minamata Convention on Mercury, *supra* note 11.

135. Tseming Yang, *The Minamata Convention on Mercury and the Future of Multilateral Environmental Agreements*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10064, 10064 (2015).

136. Among other things, the Convention prohibits new mercury mining and calls for the phase-out of existing mining; strictly limits trade in mercury; limits the manufacture, import, and export of products containing mercury; limits the use of mercury in manufacturing processes; limits mercury emissions; regulates the use of mercury in small-scale and artisanal gold mining; requires parties to use best available techniques to limit emissions of mercury from new sources; and requires parties to manage mercury wastes in an environmentally sound manner. *See* Minamata Convention on Mercury, *supra* note 11.

legal basis for concluding the agreement. Instead, the announcement simply stated the following:

The Minamata Convention represents a global step forward to reduce exposure to mercury. The United States has already taken significant steps to reduce the amount of mercury we generate and release to the environment, and can implement Convention obligations under existing legislative and regulatory authority. The Minamata Convention complements domestic measures by addressing the transnational nature of the problem.¹³⁷

The opacity of the State Department announcement left commentators wondering how to classify the Minamata Convention—as a sole executive agreement, an *ex ante* congressional-executive agreement, or something else.¹³⁸ The agreement is best understood as an EA+. On the one hand, the announcement did not claim that U.S. acceptance of the Minamata Convention was based solely on the president’s independent foreign affairs powers; instead, it emphasized the agreement’s close relationship with existing law.¹³⁹ On the other hand, it did not claim that Congress authorized the agreement *ex ante*; instead, the agreement has a hybrid basis, involving the confluence of executive and congressional action. The executive exercised its international power to accept the agreement without clear congressional authorization, but, as in the ACTA case, the president’s international exercise of his agreement-making power complemented what Congress had done domestically by addressing the threat to the United States from the use of mercury globally.

C. Foreign Account Tax Compliance Act

In the wake of several high-profile tax-offshoring scandals, Congress imposed a robust foreign financial information reporting requirement on U.S. persons with the 2010 Foreign Account Tax

137. Press Release, U.S. Dept. of State, United States Joins Minamata Convention on Mercury (Nov. 6, 2013) (<http://www.state.gov/r/pa/prs/ps/2013/11/217295.htm>) [<https://perma.cc/RWD9-PDUA>] (archived Sept. 19, 2016).

138. Duncan Hollis, *Doesn't the U.S. Senate Care about Mercury?*, OPINIO JURIS (Nov. 12, 2013, 11:02 PM), <http://opiniojuris.org/2013/11/12/doesnt-u-s-senate-care-mercury> [<https://perma.cc/GV2P-BBZK>] (archived Sept. 19, 2016).

139. The State Department announcement did not specify the “existing legislative and regulatory authority,” U.S. Dept. of State, *supra* note 137, but relevant legislation includes, for example, Mercury Export Ban of 2008, 42 U.S.C.A. § 6939f (West, Westlaw through P.L. 114-49) (reducing the availability of elemental mercury in domestic and international markets); Mercury-Containing and Rechargeable Battery Management Act of 1996, Pub. L. No. 104-142, 110 Stat. 1329 (codified as amended in scattered sections of 42 U.S.C.) (phasing out the use of mercury in batteries); 42 U.S.C.A. § 7412 (West, Westlaw through Pub. L. No. 114-114 (excluding 114-92, 114-94, 114-95, 114-113)) (listing mercury as a hazardous air pollutant to be addressed by the Clean Air Act) [collectively, hereinafter Domestic Mercury Regulations].

Compliance Act (FATCA).¹⁴⁰ The regime uses foreign financial institutions (FFIs) as a leverage point, imposing a stiff 30 percent withholding tax on U.S. investment income from FFIs found noncompliant with the reporting requirements.¹⁴¹ But the requirements in many cases conflict with home country privacy laws.¹⁴² By way of overcoming those conflicts and streamlining the compliance process, the United States has entered into dozens of so-called inter-governmental agreements (IGAs).¹⁴³ These IGAs have emerged as a critical component of the extremely complex—and controversial—implementation process of FATCA, which finally went live in 2014.¹⁴⁴

As with the ACTA and Minamata Convention, however, the IGAs enjoy no express legislative approval. As part of a July 2013 letter to Treasury Secretary Jack Lew, deploring the IGAs on policy grounds, Representative Bill Posey noted the lack of authorization in FATCA for international agreements of any description: “Despite the absence of any specific legislative authorization, these IGAs are not being submitted to the Senate as treaties or treaty amendments for its advice and consent, nor . . . is any request being made to Congress for the statutory authority to implement” the IGAs.¹⁴⁵ A Treasury official replied with citations to a number of statutory and treaty provisions on which “the United States relies, among other things . . . to enter into

140. Foreign Account Tax Compliance Act (FATCA), 26 U.S.C. §§ 1471–1474 (2010).

141. *Id.* § 1471.

142. See generally Joshua D. Blank & Ruth Mason, *Exporting FATCA*, 142 TAX NOTES 1245 (2014).

143. For a list of IGAs, see *FATCA Resource Center*, U.S. DEPT OF THE TREASURY, <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last visited Feb. 21, 2016) [<https://perma.cc/B9GE-6YQD>] (archived Sept. 19, 2016) (listing more than 100 jurisdiction with which IGAs have been at least agreed in substance). See also Reuven S. Avi-Yonah & Gil Savir, *Find It and Tax It: From TIEAs to IGAs* (Univ. of Michigan Public Law Research Paper No. 443, Feb. 20, 2015), <http://ssrn.com/abstract=2567646> [<https://perma.cc/DVD2-8UP8>] (archived Sept. 19, 2016).

144. See, e.g., Stu Hagen, *An American Tax Nightmare*, N.Y. TIMES (May 13, 2015), http://www.nytimes.com/2015/05/14/opinion/an-american-tax-nightmare.html?_r=0 [<https://perma.cc/KJJ2-NY7B>] (archived Sept. 19, 2016); Coleen Graffy, *The Law That Makes U.S. Expats Toxic*, WALL ST. J. (Oct. 10, 2015), <http://www.wsj.com/articles/the-law-that-makes-u-s-expats-toxic-1444330827> [<https://perma.cc/8FLN-RYY7>] (archived Sept. 19, 2016); *FATCA's Flaws*, ECONOMIST (June 28, 2014), <http://www.economist.com/news/leaders/21605907-americas-new-law-tax-compliance-heavy-handed-inequitable-and-hypocritical-fatcas-flaws> [<https://perma.cc/U6RG-WPLD>] (archived Sept. 19, 2016).

145. Letter from Representative Bill Posey to Jack Lew, Sec'y of the Treasury (July 1, 2013) (http://www.repealfatca.com/downloads/Posey_letter_to_Sec_Lew_July_1,_2013.pdf) [<https://perma.cc/5JED-LW96>] (archived Sept. 19, 2016)).

and implement the IGAs,”¹⁴⁶ but Allison Christians has persuasively debunked the applicability of these asserted authorities to the IGAs.¹⁴⁷

It is somewhat puzzling that the administration has not characterized the FATCA IGAs as “tax information exchange agreements” (TIEAs).¹⁴⁸ These agreements, which provide for the exchange of tax-related information that might otherwise be subject to nondisclosure laws, themselves sit uncomfortably in the conventional three-category typology of international agreements. As part of the Caribbean Basin Initiative (CBI), Congress expressly authorized the execution of such agreements with CBI states.¹⁴⁹ In *Barquero v. United States*,¹⁵⁰ the Fifth Circuit considered the president’s constitutional authority to enter into TIEAs with non-CBI states. The court found implied authority for the non-CBI TIEAs in the form of subsequent legislation that would have had no effect in the absence of non-CBI agreements. The court read the provision to authorize TIEAs with all countries to avoid an “absurd” reading of the later legislation.¹⁵¹ In the alternative, the court found the non-CBI agreements to enjoy the “implicit approval” of Congress¹⁵² in a *Youngstown/Dames & Moore* analysis—in effect, as the kind of EA+ described here.

The TIEAs, whether with Caribbean or non-Caribbean states, were enabled as a statutory predicate for the designation of entities as tax-preferred “foreign sales corporations” (FSC).¹⁵³ This may explain why the Obama administration has not sought to apply the TIEA authority to the FATCA agreements. If it were to do so, the non-FSC-related purpose would remove the agreements a step further from express authority. But, as Christians describes, there appears to be no good argument that other authorities cited by the administration expressly authorize the IGAs.¹⁵⁴ Nor is there any tenable claim that

146. Letter from Alastair M. Fitzpayne, Assistant Sec’y for Leg. Affairs, I.R.S., to Representative Bill Posey (June 23, 2014) (<http://federaltaxcrimes.blogspot.com/2014/07/irs-letter-to-congressman-defending-its.html>) [<https://perma.cc/ST52-5BYQ>] (archived Sept. 19, 2016).

147. Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why It Matters)*, 69 TAX NOTES INT’L 656 (2013) [hereinafter Christians, *Dubious Legal Pedigree of IGAs*]; Allison Christians, *IRS claims statutory authority for FATCA agreements where no such authority exists*, TAX, SOC’Y & CULTURE (July 4, 2014, 9:34 PM), <http://taxpol.blogspot.com/2014/07/irs-claims-statutory-authority-for.html> [<https://perma.cc/9TGQ-7AT3>] (archived Sept. 19, 2016) [hereinafter Christians, *IRS claims statutory authority for FATCA agreements*].

148. On tax information exchange agreements, see XAVIER OBERSON, INTERNATIONAL EXCHANGE OF INFORMATION ON TAX MATTERS: TOWARDS GLOBAL TRANSPARENCY 56–65 (2015).

149. 19 U.S.C. § 2701–2707 (2015); 26 U.S.C. §274(h)(6)(C) (2015).

150. 18 F. 3d 1311 (5th Cir. 1994).

151. *Id.* at 1314.

152. *Id.* at 1315.

153. 19 U.S.C. § 2701–2707 (2015).

154. Christians, *Dubious Legal Pedigree of IGAs*, *supra* note 147.

the IGAs are validated by an independent presidential power, as is the case with sole executive agreements. The administration does not appear to claim that it can enter into the IGAs on its own authority, hence the need to claim statutory authorities for the agreements. In the last analysis, then, the Obama administration appears to be arguing that the IGAs further the purpose of FATCA and other tax-related authorities. As such, they appear constitutionally valid as EA+ or not at all.

Unlike the Minamata Convention and the ACTA, the administration may not have consciously pursued the FATCA IGAs as EA+, backing into the rationale rather than leading with it. Harold Koh did not showcase the IGAs in justifying the administration's agreement-making practice.¹⁵⁵ Negotiated and entered into by the Department of the Treasury, it is possible that the FATCA agreements were not cleared by State Department lawyers, in which case the question of constitutional authority may not have been vetted.¹⁵⁶ But the fact that the IGAs were not devised as EA+ does not detract from their utility as a case study. On the contrary, the fact that administration officials have been able to justify the IGAs as such afterwards highlights the potential capaciousness of the category.

D. *The Contours of Executive Agreements+*

The three episodes described above—the ACTA, the Minamata Convention, and FATCA—obviously have their *ad hoc* qualities, insofar as they are contingent on issue-specific congressional regimes. It appears, however, that they reflect a conscious effort to break out of existing categories.¹⁵⁷ In an October 2012 lecture, State Department Legal Adviser Harold Koh lamented the conventional tripartite typology as a “tidy framework that grossly oversimplifies reality.”¹⁵⁸ In

155. See Koh, *supra* note 4.

156. The Treasury Department may also have underestimated the backlash against the IGAs, which soften some compliance elements of the FATCA regime. The Treasury Department almost surely would not have anticipated the constitutional challenge against the IGAs, described *infra* note 200.

157. In addition to the Paris Agreement, described *infra* Section IV.E, the Obama administration appears to have contemplated undertaking an executive agreement+ in the context of nuclear negotiations with Iran. See David E. Sanger, *Obama Sees an Iran Deal That Could Avoid Congress*, N.Y. TIMES (Oct. 20, 2014), http://www.nytimes.com/2014/10/20/us/politics/obama-sees-an-iran-deal-that-could-avoid-congress-.html?_r=0 [https://perma.cc/XQ5T-K5DR] (archived Sept. 19, 2016); David Golove, *Presidential Authority to Conclude an Iran Nuclear Agreement—and the Senate's Self-Defeating Bill*, JUST SECURITY (Aug. 20, 2014, 9:41 AM), <https://www.justsecurity.org/14154/presidential-authority-conclude-iran-nuclear-agreement-and-senates-self-defeating-bill/> [https://perma.cc/C6R3-E8R8] (archived Sept. 19, 2016) (Iran nuclear deal could be justified on basis of Atomic Energy Act of 1954).

158. Koh, *supra* note 4, at 732.

Koh's assessment, the typology falsely holds that any agreement falling between the "three stools" of Article II treaties, congressional-executive agreements, and sole executive agreements "must mean the U.S. lacks any authority to enter the agreement!"¹⁵⁹—a view reflected by critics of the ACTA.¹⁶⁰ Koh posed an alternative approach "run[ning] along a spectrum of congressional approval," as per Justice Jackson's concurrence in *Youngstown* and Justice Rehnquist's majority opinion in *Dames & Moore*.¹⁶¹ He saw the ACTA as rooted in historical practice,¹⁶² thus framing the ACTA episode itself as a putative precedent.¹⁶³

As this historical discussion makes clear, EA+ have a pedigree in prior practice. The best descriptive explanation for many supposedly "sole" executive agreements is that they are bolstered by congressional action.¹⁶⁴ But the prior practice was also cabined by a categorical approach under which the use of sole executive agreements was limited to particular classes of agreements (even if there was no other universal rationale for why those classes were appropriate to the form). The Koh rationale eliminates these categorical constraints. Under the EA+ approach, presidents would be enabled to enter into agreements in furtherance of any congressionally-validated policy, at least where the agreements do not require a change in U.S. law. This approach could dramatically expand the subject areas addressed by international agreements adopted without express legislative approval.

But EA+ are not without limits. The Obama administration precedents suggest two requirements for their use. First, in contrast to sole executive agreements, EA+ must be capable of implementation on the basis of existing federal law. They cannot be used by the president to change an existing statute or extend the executive's domestic authority.¹⁶⁵ Second, EA+ are appropriate only as a complement to existing domestic measures, in order to address the transnational aspects of a problem. In the case of the Minamata Convention, for example, Congress had already comprehensively regulated mercury at the domestic level.¹⁶⁶ Thus the Minamata Convention did not impose

159. *Id.* at 732–33.

160. *See supra* notes 130–33 and accompanying text.

161. Koh, *supra* note 4, at 733.

162. *Id.* at 733 (terming the phenomenon a "quasi-constitutional custom").

163. Koh situated the approach as part of a broader landscape in which "traditional forms of international legal engagement do not convey the entire picture of our legal diplomacy." *Id.* at 746.

164. *See supra* Part III.

165. In this respect, EA+ satisfy one of the two limitations on the use of executive agreements that Ramsey argues was part of the original understanding of the Constitution, namely that they lack the force of domestic law. *See* Ramsey, *supra* note 25, at 136.

166. Domestic Mercury Regulations, *supra* note 139.

any additional requirements on the United States, it simply internationalized the regulation of mercury—an essential condition for U.S. law to achieve its purposes, given the transnational nature of the problem. Similarly one of the earliest examples of an environmental EA+—the 1991 U.S.-Canada Air Quality Agreement—directly incorporated the requirements of the recently enacted Clean Air Act Amendments and imposed them on the United States in exchange for action by Canada to address its emissions of SO₂ and NO_x.¹⁶⁷ In contrast, the use of EA+ would be problematic where transnational responses are not integral to the success of domestic efforts to address an issue. For example, it would have been questionable for the president to join the World Heritage Convention¹⁶⁸ as an EA+, based on existing domestic legislation protecting U.S. antiquities and national parks,¹⁶⁹ since, in most cases, protection of U.S. sites does not require complementary international action. Although protection of cultural and natural heritage is of common concern—hence the development of an international agreement—it does not usually have a direct transboundary element, in contrast to mercury or sulfur dioxide pollution.

These two conditions significantly constrain the use of EA+. The fact that Congress has legislated regarding a particular subject does not give the president *carte blanche* to conclude international agreements on that subject on the vague ground that the agreement serves the same general purposes as the legislation. The existence of environmental laws such as the Clean Air Act, for example, does not provide a basis for the president to join environmental agreements that make new policies for the United States or impose new standards. Instead, EA+ such as the Gothenburg Protocol, the U.S.-Canada Air Quality Agreement, and the Minamata Convention merely mirror at the international level what the United States has already decided to do domestically.

E. EA+ Go to Paris

President Obama's decision to join the Paris Agreement without seeking the approval of the Senate or Congress could prove to be an important—perhaps crucial—test of the EA+ theory. The president arguably has authority to accept the procedural aspects of the Paris

167. Canada-United States: Agreement on Air Quality, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676; see Jeffrey L. Roelofs, *United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems*, 26 CORNELL INT'L L.J. 421, 442 (1993).

168. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151.

169. See, e.g., American Antiquities Act of 1906, 16 USC § 431–33; National Park Service Organic Act, 54 USC §§ 100101 et seq.

Agreement as a sole executive agreement, based on his independent foreign affairs power to communicate with foreign governments.¹⁷⁰ But the substantive requirements of the agreement—including the obligation to pursue domestic mitigation measures¹⁷¹—require something more. They require that the president’s constitutional authority be bolstered by related legislative activity, making the agreement an EA+.

The Paris Agreement represents the latest installment of the UN climate change regime. The United States joined the first installment, the UN Framework Convention on Climate Change (UNFCCC),¹⁷² as an Article II treaty, with the consent of the Senate;¹⁷³ it signed but did not ratify the second installment, the Kyoto Protocol,¹⁷⁴ due to strong Senate opposition;¹⁷⁵ and it supported the third installment, the Copenhagen Accord,¹⁷⁶ as a political rather than a legal agreement, which was within the president’s foreign affairs power¹⁷⁷ (like the nuclear deal with Iran¹⁷⁸).

Unlike the Copenhagen Accord, the Paris Agreement is a legal agreement, which the United States must formally accept by means of

170. HENKIN, *supra* note 26, at 42 (“As ‘sole organ,’ the President determines . . . how, when, where and by whom the United States should make or receive communications and there is nothing to suggest that he is limited as to time, place, form, or forum.”).

171. Paris Agreement, art. 4.2, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/10/Add.1, at 21.

172. United Nations Framework Convention on Climate Change (UNFCCC), May 9, 1992, 1771 U.N.T.S. 107.

173. 138 CONG. REC. 1307, S17434-36 (1992) (announcing Senate approval of United Nations Framework Convention on Climate Change).

174. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, 2303 U.N.T.S. 148 [hereinafter Kyoto Protocol].

175. Prior to the Kyoto Protocol’s adoption, the Senate adopted the Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997), by a vote of 95-0, expressing its opposition to a treaty along the lines of the Kyoto Protocol, which included emission targets for developed but not developing countries.

176. Copenhagen Accord, Dec. 18–19, 2009, U.N. Doc. FCCC/CP/2009/11/Add.1.

177. Duncan Hollis & Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VA. J. INT’L L. 507 (2009).

178. The Joint Comprehensive Plan of Action (JCPOA) between Iran and China, France, Germany, the Russian Federation, the United Kingdom, and the United States was finalized on July 14, 2015 and provides for the lifting of economic sanctions against Iran in exchange for restrictions on Iran’s nuclear program. The State Department has stated that Joint Comprehensive Plan “reflects political commitments” and is not a treaty or an executive agreement. Letter from Julia Frifeld, Assistant Sec’y of State for Legislative Affairs, to Congressman Mike Pompeo (Nov. 19, 2015) (http://pompeo.house.gov/uploadedfiles/151124_-_reply_from_state_regarding_jcpoa.pdf) [<https://perma.cc/C32V-LKYK>] (archived Sept. 19, 2016)). President Obama accepted the JCPOA on behalf of the United States on October 18, 2015, after Congress failed to pass legislation blocking the deal. President Barack Obama, Statement on the Adoption of the Joint Comprehensive Plan of Action, (Oct. 18, 2015) (<https://www.whitehouse.gov/the-press-office/2015/10/18/statement-president-adoption-joint-comprehensive-plan-action>) [<https://perma.cc/9AGL-UUEH>] (archived Sept. 19, 2016)).

ratification, accession, acceptance, or approval, in order to become legally bound.¹⁷⁹ The president's authority to join the agreement on behalf of the United States rests on three elements:

First, the core obligations in the Paris Agreement are procedural in nature. Unlike the Kyoto Protocol, the Paris Agreement does not establish legally binding emission reduction targets. Instead, it establishes procedural obligations on parties to formulate, communicate, and periodically update "nationally-determined contributions" (NDCs) to limit their emissions, to report on their progress in implementing and achieving their NDCs, and to undergo international review.¹⁸⁰ Since submitting reports and participating in international review are within the president's core foreign affairs power to communicate with other governments,¹⁸¹ it is a comparatively small step to say that the president may enter into international agreements providing for such communications. Of course, some might object that even though a president has the power to communicate with foreign countries, this does not mean he or she has the power to bind future presidents to do so. On this rationale, some have argued that a sole executive agreement binds only the president who entered into it.¹⁸² But this purported limitation on sole executive agreements has never received widespread support and is inconsistent with opinions such as *Dames & Moore*, which recognize sole executive agreements as part of the supreme law of the land.¹⁸³ Moreover, this objection to presidential acceptance of the Paris Agreement is particularly inapposite, since the agreement expressly allows parties to withdraw by giving one year's notice,¹⁸⁴ thereby allowing future presidents to withdraw from obligations that they do not wish to fulfill.

Second, the president's decision to join the Paris Agreement finds significant support in the Senate's prior approval of the UNFCCC. The Paris Agreement largely elaborates obligations contained in the UNFCCC, including obligations to formulate, implement, report on, and regularly update national programs to limit emissions and facilitate adaptation,¹⁸⁵ and to provide financial assistance to

179. Daniel Bodansky, *Legal Character of the Paris Agreement*, 25 REV. EUR. CMTY. & INT'L ENVTL. L. 142 (2016).

180. Paris Agreement, *supra* note 171, art. 4.2, 13.7

181. *See supra* note 170 and accompanying text.

182. *See, e.g.*, HUGH EVANDER WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 438 (1936); Hathaway, *supra* note 9, at 173. The argument has been made in the context of the recent nuclear agreement with Iran. *See, e.g.*, Bruce Ackerman & David Golove, *Can the Next President Repudiate Obama's Iran Agreement?*, THE ATLANTIC (Sept. 10, 2015), <http://www.theatlantic.com/politics/archive/2015/09/can-the-next-president-repudiate-obamas-iran-agreement/404587/> [https://perma.cc/M942-6RKN] (archived Sept. 19, 2016).

183. GARCIA, *supra* note 32, at 84.

184. Paris Agreement, *supra* note 171, art. 28.

185. UNFCCC, *supra* note 172, art. 4.1(b), 12(b).

developing countries.¹⁸⁶ Indeed, the financial obligation in the Paris Agreement specifically states that it is in “continuation of . . . existing obligations under the Convention,” rather than a new obligation.¹⁸⁷ The UNFCCC did not specifically authorize the president to enter into future agreements, so the Paris Agreement is not an *ex ante* congressional-executive agreement. Instead, the Senate’s approval of the UNFCCC provides more general support for the Paris Agreement, making it an EA+.

Third, the Paris Agreement, like the Minamata Convention, is consistent with and can be implemented on the basis of existing legal and regulatory authorities; furthermore, it complements existing law by addressing the transnational nature of the climate change problem. Congress expressed its support for international cooperation to address the climate change problem in the Global Climate Protection Act of 1987, which notes that “the global nature of the [climate change] problem will require vigorous efforts to achieve international cooperation,” that “international cooperation will be greatly enhanced by United States leadership,” and that U.S. policy should seek to “work towards multilateral agreements.”¹⁸⁸

V. THE FUTURE OF EA+

The recent shift in practice towards EA+ could prove a major development on the choice-of-form question. The Obama administration’s approach lays the foundation for the entrenchment of EA+ as a constitutionally legitimate form for joining international agreements. But the courts could get in the way as they grow more confident and formalistic in their approach to foreign affairs disputes. That would be an unfortunate development. Although EA+ pose accountability concerns, reversing the practice on constitutional grounds would have the unintended consequence of driving agreement-making practice underground. Assuming EA+ avoid judicial nullification and that their numbers increase, Congress will be equipped to change its behavior to further cabin their use. On balance, EA+ are a welcome new feature of the foreign relations landscape.

A. *The Emerging Constitutional Stature of EA+*

Much of the constitutional law of foreign relations has developed through practice outside the courts. This is a necessary consequence of

186. *Id.* art. 4.3.

187. Paris Agreement, *supra* note 171, art. 9.1.

188. Global Climate Protection Act of 1987, Pub. L. No. 100-204, title XI, 101 Stat. 1407 (1987), amended by Pub. L. No. 103-199, title VI, sec. 603(1), 107 Stat. 2327 (West, Westlaw through Pub. L. No. 114-49).

the modern judicial tendency to evade engaging the merits of foreign affairs disputes.¹⁸⁹ The notion of constitutional custom (under that or some other moniker) has been long noted¹⁹⁰ and is enjoying a revival of interest among scholars.¹⁹¹ In broad outline, the history-as-law proposition holds that practice is capable of establishing constitutional norms with respect to separation-of-powers questions.

One of us has elsewhere attempted to systemize the process by which practice gives rise to norms through the accretion of “constitutional increments.”¹⁹² This model evaluates the precedential value of discrete episodes using the metrics of acceptance, contestedness, age, and pedigree. The acceptance factor includes acquiescence and looks not just to governmental actors but also to social movements, editorialists, and academics as constitutional actors, taking account of opposition framed in constitutional (as opposed to policy) terms. The more contested an episode, the more weight it will have on the constitutional scales (assuming acceptance). On the theory that contestedness focuses institutional attention and provokes the application of institutional capital, the resolution of a highly contested episode will loom larger than a less contested one. The age factor inversely correlates the age of an episode to its precedential weight on the theory that the older an episode, the less likely it is to reflect current constitutional understandings. Finally, pedigree looks to repetition and longevity with continuity up to or close to the present day.

With these metrics, one can estimate the constitutional significance of the Obama administration cases. The FATCA inter-governmental agreements episode is ongoing; its constitutional weight hangs in the balance (leaving aside the possibility of judicial consideration). The ACTA case has been highly contested but also remains inconclusive, at least for as long as the executive branch refrains from final ratification. The Minamata Convention measures relatively low on the scale of contestedness: U.S. acceptance of the

189. See *infra* notes 197–201.

190. See, e.g., *Youngstown*, 343 U.S. 579 at 610 (1952) (Frankfurter, J., concurring) (“a systematic, unbroken executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’); *Myers v. United States*, 272 U.S. 52 (1926) (upholding presidential power to remove officers, on basis of long established practice); EDWIN CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 41 (1944) (“[T]he most beneficial type of constitutional change is that which issues gradually from, and so has been thoroughly tested by, successful practice.”); QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 365 (1922) (“[P]ractice is the best evidence of what Constitutions are.”). The importance of custom as the fount of constitutionalism dates back at least to Edmund Burke. See EDMUND BURKE, *REFLECTIONS ON THE FRENCH REVOLUTION* (1790); ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 11–25 (1975) (expounding on Burke).

191. See, e.g., Bradley & Morrison, *supra* note 16.

192. Spiro, *supra* note 16.

agreement occurred during the government shutdown in fall 2013, received little attention¹⁹³ and occasioned no discussion, much less objection, in Congress.¹⁹⁴ It is thus of limited precedential value, although its obvious role as a model for U.S. acceptance of a new climate change agreement makes the lack of protest more significant.¹⁹⁵

In the wake of these episodes, the constitutional legitimacy of EA+ remains provisional. Much will depend on the extent to which the Obama administration and its successor attempt to build on this early practice, and the extent to which other actors fall into line. As a constitutional norm, EA+ have at least candidate status.

B. *Judicial Nullification?*

The above analysis applies in the absence of court decisions relating to a norm grounded in historical precedent. Although judicial action can be factored into the increments analysis, it tends to have a heavy footprint.¹⁹⁶ A finding that they are unconstitutional would be likely, although not certain, to snuff out EA+ in this provisional phase.

Until very recently, the prospects for a merits ruling in such a case would have been slim. The courts routinely and categorically employed a litany of jurisdictional barriers to defeat consideration of constitutional questions in the context of foreign relations.¹⁹⁷ Prominent among them has been the political question doctrine. “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,” intoned the Supreme Court in its 1918 decision in *Oetjen v. Central Leather Co.*, “and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”¹⁹⁸ *Baker v. Carr* featured foreign relations as a context in which questions will often “uniquely demand single-voiced statement of the Government's views.”¹⁹⁹ Other

193. A search of Google News found only seven stories about the Mercury Convention between November 6, 2013, when the president signed the convention, and November 13, 2013.

194. A search of the *Congressional Record* uncovered no comment in Congress on the president's action.

195. Low-profile episodes can sow the seeds for durable constitutional innovation. The roots of *ex post* congressional-executive agreements are found in an obscure 1923 U.S.-U.K. agreement regarding war debts. See Ackerman & Golove, *supra* note 25, at 840.

196. See Spiro, *supra* note 16.

197. See Koh, *supra* note 4, at 146–48.

198. 246 U.S. 297, 302 (1918).

199. 369 U.S. 186, 211 (1962).

jurisdictional doctrines that have defeated foreign relations-related constitutional challenges include standing²⁰⁰ and ripeness.²⁰¹

Even if a litigant were able to overcome all of these jurisdictional barriers, the prospects for a decision on the merits striking down executive action would have been slimmer still. When the courts reached the merits, they almost always affirmed government power over private rights and executive branch decision-making over separation of powers claims.²⁰² This tendency was rooted in the ur-case of presidential power over foreign relations—the Supreme Court’s decision in *Curtiss-Wright*.²⁰³ Justice Sutherland’s opinion set forth a broad, nearly categorical justification for exceptional executive authority over foreign affairs on textual, originalist, historical, and structural grounds.²⁰⁴ Although the decision has supplied a perennial whipping post for those seeking to rein in the so-called imperial presidency,²⁰⁵ it has continued to be the starting point for the (mostly successful) executive branch defense of foreign relations decision making that would otherwise run afoul of constitutional limitations.²⁰⁶

200. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 25 (D.C. Cir. 2000); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982). A recent challenge to the FATCA was rejected by a district court on standing grounds. *Crawford et al. v U.S. Dep’t of Treasury*, No. 3:2015-cv-00250, 2015 WL 5697552 (S.D. Ohio Apr. 27, 2016). Among plaintiffs’ claims was an argument that the FATCA IGAs constitute treaties requiring Article II Senate consent. Plaintiffs in the case were represented by Jim Bopp, the conservative-cause lawyer who brought the suit that gave rise to the Supreme Court’s epochal decision in *Citizens United*. See, e.g., James Bennet, *The New Price of American Politics*, THE ATLANTIC (Oct. 2012), <http://www.theatlantic.com/magazine/archive/2012/10/the/309086/> [<https://perma.cc/YTV2-E2U9>] (archived Sept. 19, 2016) (calling Bopp the “intellectual architect” of the *Citizens United* litigation). Bopp has expressed an intention to appeal the district court’s decision. The ruling was based in part on the fact that none of the plaintiffs had been subject to FATCA penalties. Since the government has only recently initiated enforcement of the legislation, that objection could presumably be overcome by future plaintiffs. Similarly, a lawsuit challenging the Iran nuclear deal was dismissed by a Florida district court for lack of standing, on the ground that the plaintiff had not alleged concrete and particularized injuries. *Klayman v. President et al.*, No. 15-81023-CIV-MARRA (S.D. Fla. Sept. 10, 2015).

201. See, e.g., *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

202. See, e.g., *Koh*, *supra* note 4.

203. *Curtiss-Wright*, 299 U.S. at 304.

204. *Id.*

205. See, e.g., ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY 103 (1973) (“The mood thus registered by [the *Curtiss-Wright* Court], thereafter strengthened by thirty years of world crisis and confirmed by a succession of Congresses, encouraged a series of Presidents in the conviction that there were few, if any, limits to executive initiative in the making of foreign policy.”).

206. KOH, *supra* note 63, at 94 (“Among government attorneys, Justice Sutherland’s lavish description of the president’s powers is so often quoted that it has come to be known as the “Curtiss-Wright, so I’m right” cite’—a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief.”). For a recent example, see the Solicitor General’s brief in the *Zivotofsky* litigation, which cites the case at multiple junctures. See Brief for the Respondent at 9, 10, 18, 19, 23, 24, 53, 54, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 13-628).

For the most part, the posture of the courts has been consistent with Sutherland's worldview. Through the end of the twentieth century, there were few episodes in which the courts rebuffed executive branch action relating to foreign affairs.

The one major exception was the Supreme Court's decision in *Youngstown*, which nullified President Truman's seizure of steel mills during the Korean War. But *Youngstown* took less institutional fortitude on the Court's part than meets the contemporary eye. In his executive order effecting the seizure, President Truman asserted that a work stoppage "would immediately jeopardize and imperil our national defense . . . and would add to the continuing danger of our soldiers."²⁰⁷ But the justification lacked credibility, obvious even to the non-expert judicial eye. "By the time the case reached the Supreme Court," writes one commentator, "there simply was not a sense by citizens that the nation was seriously at risk. Fighting in Korea had come to a lull during truce talks."²⁰⁸ As a result, "the Court felt, reflecting the public consensus, that it could reassert the ordinary limits on presidential power, and that is why it did so." One might even take the view (pushed, somewhat infamously, by John Yoo during his tenure in the Bush administration's Justice Department) that *Youngstown* was a case about labor law, not national security.²⁰⁹

Youngstown might have proved a mere footnote if not for Justice Jackson's concurrence, one of the most celebrated opinions in Supreme Court history.²¹⁰ Jackson's opinion supplied a jurisprudential counterpoint to Justice Sutherland's conception of presidential authority in *Curtiss-Wright*, if not in the courts, then in the law reviews.²¹¹ The tripartite framing, in which congressional postures

207. See *Youngstown* 343 U.S. at 590–91 (1952) (appending Truman executive order).

208. Ken Gormley, *President Truman and the Steel Seizure Case*, 41 DUQ. L. REV. 667, 676 (2003) ("Onlookers in the United States that summer were more concerned with a baseball season dominated by the New York Yankees and the Brooklyn Dodgers, than war overseas.").

209. *Id.* at 676; JOHN YOO, WAR BY OTHER MEANS 184 (2006) (justifying omission of *Youngstown* from memos relating to post-9/11 authorities on grounds that case concerned Congress's "exclusive power to make law concerning labor disputes" and had "no application to the President's conduct of foreign affairs and national security").

210. See David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 156 (2002) (finding *Youngstown* a case "assured of immortality in the annals of constitutional jurisprudence"); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 217 (2002) (arguing that *Youngstown* is one of the most important cases of all time and comparing the case's influence to that of *Marbury v. Madison*); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 753 (1986) (describing *Youngstown* as a "very important constitutional case").

211. See Paulsen, *supra* note 210, at 224 (noting Justice Black's ponderous textualist opinion for the Court, which, by contrast, has been largely forgotten).

orient (if not determine) the level of constitutional scrutiny, supplied a banner behind which to marshal advocates of congressional power.²¹²

Those aspirations may now be realized. Recent years have seen a shift away from judicial reticence in the realm of foreign affairs law. The Roberts Court has decided a series of high-profile cases relating to foreign affairs. In *Zivotofsky v. Clinton*, it spurned the political question doctrine in a case involving passport and recognition authorities.²¹³ Issues implicating foreign relations no longer seem out of judicial bounds. After decades of professing a lack of institutional competence, the Court appears to be normalizing its approach to foreign affairs law.²¹⁴

Nor have these merits decisions been characterized by the rubber-stamping of executive action. The Court pushed back on the Bush administration's counter-terror detention practices. In *Hamdan v. Rumsfeld*, *Youngstown* supplied the hammer for striking down the post-9/11 military commissions, somewhat implausibly situating the tribunals in Justice Jackson's Category 3 as inconsistent with Congress's will.²¹⁵ When Congress in effect reversed that decision,²¹⁶ the Court deployed constitutional habeas to keep the courts in the loop.²¹⁷ Beyond the terror context—distinguishable, perhaps, as an area of especially depleted executive branch credibility²¹⁸—in *Medellín v. Texas*, the Supreme Court rejected President Bush's attempt to impose a clear treaty obligation on the states.²¹⁹ Here again, the *Youngstown* framework carried the day over Sutherlandian assertions of presidential supremacy in foreign relations.²²⁰

Harlan Cohen sees a formalist tendency in these rulings.²²¹ That bodes poorly for the judicial reception of the theory of EA+, which has

212. See, e.g., KOH, *supra* note 63, at 107–13; David Cole, *Youngstown v. Curtiss-Wright*, 99 YALE L.J. 2063 (1999).

213. *Zivotofsky*, 132 S. Ct. at 1421.

214. See Sitaraman & Wuerth, *supra* note 14; see also Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029 (2015).

215. *Hamdan*, 548 U.S. at 638.

216. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C.).

217. *Boumediene*, 553 U.S. at 723 (holding that because the procedures provided by the Detainee Treatment Act are not adequate substitutes for the habeas writ, Military Commission Act of 2006 is an “unconstitutional suspension” of that writ).

218. See, e.g., John O. McGinnis, *Executive Power in the War on Terror*, POLICY REV. (Dec. 2007), <http://www.hoover.org/research/executive-power-war-terror> [https://perma.cc/PRE8-U4ZQ] (archived Sept. 19, 2016) (noting how the Bush Administration's legal analysis undermined its credibility before the Court: “[T]he general credibility of executive branch positions will hugely influence the actual degree of deference the Court applies.”).

219. See *Medellín*, 552 U.S. at 491.

220. *Id.* at 524–29 (discussing the president's action in light of the tripartite *Youngstown* framework).

221. See Cohen, *supra* note 18.

no grounding in constitutional text. In *Medellín*, the Roberts Court hinted at narrowing the conventional conception of sole executive agreements,²²² pointing in the opposite direction of where the theory of EA+ would need the Court to go. The seeming novelty of EA+ would (as a matter of atmospherics at least) make them more vulnerable to judicial attack.²²³ *Medellín*, finally, made short shrift of assertions of implied legislative authorities, rejecting the president's claim that various congressional actions implicitly validated the imposition of treaty obligations on state courts.²²⁴ Although it did not directly address constitutional constraints on executive agreements, *Medellín* cast a decidedly skeptical eye on broad conceptions of the executive foreign affairs power.

In other words, a judicial takedown of EA+ is not beyond the range of possibilities. In a FATCA-related case,²²⁵ for example, the Court could rebuff the executive without seeming to upset the apple cart of foreign relations by rejecting a long-established practice. Moreover, the FATCA agreements do not go to core relations with other sovereigns. The kind of risks that scared the courts away from foreign relations cases in the past are negligible in this case. The tax context would help give the case the look and feel of an ordinary domestic matter. The fact that striking down the FATCA agreements would disrupt the implementation of an important regulatory regime would not distinguish the case categorically: courts are used to causing administrative headaches; they are not used to causing major diplomatic disputes. A FATCA case would fall comfortably in the former category, and the conservative wing of the Supreme Court might see the case as a safe one in which to rap the administration on the knuckles for executive overreach.

Perhaps the greatest concern in rejecting EA+ would be the risk of spillover for congressional-executive agreements both *ex ante* and *ex*

222. *Medellín*, 552 U.S. at 531 (“[C]laims-settlement cases involve a narrow set of circumstances.”).

223. *See id.* at 532 (highlighting lack of historical precedent for presidential imposition of treaty obligation on state courts).

224. This aspect of the opinion is all the more striking to the extent President Bush was acting against type in attempting to impose the treaty obligation on state courts. Bush was generally resistant to international law during his presidency. *See, e.g.*, Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & POL'Y 57 (2009). That should have added credibility to the administration's characterization of the case as implicating important foreign policy interests, insofar as Bush would have otherwise been unlikely to make the move, especially in a context also involving federalism values. *Cf.* Cass R. Sunstein, *Breaking Up Echo*, N.Y. TIMES (Sept. 17, 2012), <http://www.nytimes.com/2012/09/18/opinion/balanced-news-reports-may-only-inflame.html> [<https://perma.cc/VSF8-YKQ5>] (archived Sept. 19, 2016) (noting phenomenon of “surprising validators”).

225. *See supra* note 200.

post, which are an important foreign relations tool.²²⁶ But it is doubtful that the Supreme Court has grown so bold, for instance, as to nullify U.S. participation in NAFTA and the World Trade Organization. That argues against straight-up, formalist reasoning, and any effort to try to squeeze agreement-making back into the Article II box. There are tenable grounds on which to strike down EA+, while insulating the established approaches of congressional-executive and sole executive agreements.

C. Assessing EA+

Would judicial nullification be justified constitutionally? And, from a normative standpoint, are EA+ a positive or a negative development? They raise accountability concerns, which cannot be dismissed on the basis that EA+ simply reflect existing law or can be over-turned by Congress. True, the primary motivation of EA+ may be to promote reciprocal actions by other countries in order to address problems that the United States is already addressing domestically rather than to change U.S. policy.²²⁷ And, true, Congress is still free to change the law, even if that would violate an EA+.²²⁸ But even when an international agreement exactly mirrors U.S. law, it is not epiphenomenal. The incorporation of a domestic standard into a treaty makes legislative amendment more difficult—politically, if not legally. Indeed, for some advocates, the domestic lock-in effect of EA+ is one of their primary benefits. According to pre-commitment theory, the prevention of domestic backsliding can be an important rationale for international lawmaking.²²⁹ But, for critics of EA+, it represents an illegitimate end run, aimed at tying Congress's hands, and is arguably undemocratic.²³⁰

This Article also does not claim that EA+ enjoy the implicit support or approval of Congress. Yes, EA+ must be consistent with, and complement, what Congress has done domestically. But the

226. See *supra* Section II.A. Jack Goldsmith usefully highlights the role of the courts in *The Contributions of the Obama Administration to the Practice and Theory of International Law*, *supra* note 4, at 17–18.

227. The Minamata Convention, discussed *supra* Section IV.B, provides a good example.

228. For purposes of domestic law, Congress is able to trump the effect of international agreements, regardless of form, under the last-in-time rule. See generally Julian Ku, *Treaties as Law: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

229. See generally Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055 (2003) (exploring the use of precommitment theory to examine how states and organizations restrict their future conduct through treaties and other international legal undertakings).

230. Cf. Hathaway, *supra* note 9 (criticizing *ex ante* congressional-executive agreements as anti-democratic).

adoption of domestic measures by Congress does not imply that Congress supports the conclusion of an international agreement.²³¹ In enacting domestic legislation on, say, mercury, Congress presumably did not consider, much less authorize, the negotiation of an international agreement like the Minamata Convention. Moreover, the fact that Congress does not overturn an EA+ does not necessarily reflect acquiescence; it may simply reflect gridlock. So it would be disingenuous to claim that the president, in concluding an EA+, has Congress's support or even acquiescence.

Instead, the argument for EA+ is narrower, and consists of four points: First, the conclusion of an EA+ has legal effects only on the international plane, not domestically.²³² Although the president's authority to legislate domestically is questionable, he undoubtedly can do so internationally—for example, by engaging in state practice that contributes to the creation of customary international law.²³³

Second, although the president legislates when he concludes an EA+, he does so in a limited way, by reflecting domestic law internationally. In concluding an EA+, the president engages in a lesser legislative act than, say, President Truman's proclamation claiming the U.S. continental shelf.²³⁴ The innovation beyond existing law is small, hence the need for justification is correspondingly less.

Third, a key feature of EA+ is that they must not only be consistent with, and capable of implementation on the basis of existing law, but also be complementary to existing law by addressing the transnational aspects of a problem. Consider the problem of mercury pollution. Congress has deemed mercury to be a threat and has adopted comprehensive domestic regulations.²³⁵ But, given the persistence of mercury, its global transport, and its tendency to bioaccumulate, these domestic regulations are incapable of solving the

231. The recent experience with the Disabilities Convention illustrates the point: although the treaty tracked the Americans with Disabilities Act (among other laws) and would not have required changes in U.S. law, the convention failed to secure Senate consent. See Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37, 40 (2007) ("The domestic laws and policies of the U.S. are clearly stronger and represent meaningful substantive objectives when compared to the newly drafted UN Convention."). Cf. Goldsmith, *supra* note 4, at 13 (asserting that Iran nuclear deal and Paris Agreement based on delegated authority that "Congress had no idea would lead to such international cooperation").

232. Cf. Ramsey, *supra* note 25, at 138, 218–31 (arguing that, according to original understanding, executive agreements lacked domestic legal effect).

233. See generally HENKIN, *supra* note 26, at 43 (the president "speaks the part of the United States in the subtle process by which customary international law is formed").

234. See Exec. Order No. 9633, 10 Fed. Reg. 12,305 (Sept. 28, 1945), *revoked by* Exec. Order No. 10,426, 18 Fed. Reg. 405 (Jan. 16, 1953).

235. See, e.g., Domestic Mercury Regulations, *supra* note 139.

problem. Instead, international action is needed.²³⁶ In concluding the Minamata Convention, the president leveraged what Congress had already done domestically in order to address the global component of the problem.

Fourth, although EA+ pose accountability concerns, they serve a necessary function in the face of inter-branch gridlock. If EA+ did not exist, they might need to be invented.²³⁷ In the two decades prior to the president's decision to join the Minamata Convention, the United States was successful in joining only a single multilateral environmental agreement, the 1994 Desertification Convention.²³⁸ Without the option of EA+, the United States may have no practical way of addressing the transboundary aspects of environmental problems. Moreover, a successful effort to disallow EA+, just as they are seeing the light of day, could have the effect of driving agreement-making activity underground again, in the form of soft law instruments.²³⁹ Of course, EA+ are subject to the same criticisms that Hathaway levels against *ex ante* congressional-executive agreements: they lack the broad political support characteristic of Article II treaties and *ex post* congressional-executive agreements, and therefore may be less durable and effective.²⁴⁰ But, in practice, the choice is usually not between an EA+ and an agreement approved by the Senate or Congress, but between an EA+ and no agreement at all.

VI. CONCLUSION

Few understandings of foreign relations law are as deeply entrenched as the conventional tripartite typology of international agreements under the U.S. Constitution. For constitutional purposes, international agreements have been slotted as either treaties, congressional-executive agreements, or sole executive agreements. Treaties and congressional-executive agreements enjoy express congressional approval, distinguished by the mode in which approval is delivered; sole executive agreements do not. Unlike so many other foreign relations law doctrines,²⁴¹ however, the tripartite division has

236. See Minamata Convention on Mercury, *supra* note 11, preamble, para. 1. (“Recognizing that mercury is a chemical of global concern owing to its long-range atmospheric transport, its persistence in the environment once anthropogenically introduced, its ability to bioaccumulate in ecosystems and its significant negative effects on human health and the environment . . .”).

237. See generally, Pozen, *supra* note 22.

238. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994, 1954 U.N.T.S. 3.

239. See generally Galbraith & Zaring, *supra* note 24.

240. Hathaway, *supra* note 9, at 146–47, 155–67, 212–15.

241. Ever since Curtis Bradley and Jack Goldsmith's objection to the putative assimilation of customary international law into federal common law in 1997, foreign

never been interrogated. This Article establishes a fourth category, EA+, which are bolstered, but not specifically authorized by legislative activity. Although recent efforts on the part of the Obama administration have foregrounded this new category, many accords previously labeled as sole executive agreements, and some congressional-executive agreements, are more appropriately denominated as EA+. In that respect, this Article contributes an important revision of our understanding of the constitutional terms on which the United States has engaged the world.

Historically, EA+ have been limited to particular substantive spheres, the settlement of claims prominent among them. The Obama administration has moved to eliminate any such substantive limitations, so that EA+ could be pursued with respect to any type of global accord that is consistent with and complements existing law. The administration has justified agreements relating to anti-counterfeiting, mercury regulation, and offshore tax regulation on this basis. Unable to point to express congressional authorization, the administration has argued that these agreements have legislative underpinnings.

These agreements have laid the groundwork for U.S. acceptance of the Paris Agreement on climate change. Although the agreement could conceivably be justified as a sole executive agreement as traditionally understood, it is on firmer ground as an EA+. This Article thus provides theoretical and historical support for the Obama administration's argument that it need not secure congressional approval for the climate change agreement. The stakes could hardly be higher.

Beyond Paris, EA+ pose accountability concerns, letting out a long leash for executive branch agreement-making. But Congress is equipped to cabin the practice should it so choose, especially with respect to legislation enacted after EA+ become an accepted executive branch capacity. In a world in which almost all issues are global issues, broad use of EA+ may be a necessity. As it has in the past, the Constitution should adapt to the challenges of its time.

relations law has been in a state of intensive reconsideration. See Sitaraman & Wuerth, *supra* note 14, at 1919–21; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 836 (1997).