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The Case for Replacing Article II Treaties With Ex Post Congressional-Executive Agreements

By Oona A. Hathaway

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Oona A. Hathaway*

I. Introduction

In the fall of 2007, Senate hearings finally commenced on the United Nations Convention on the Law of the Sea, a treaty that has been languishing in the Senate since 1994, when Bill Clinton was still a fresh face in the White House. Submitted to the Senate under the Treaty Clause of the Constitution,¹ the treaty must gain the consent of two-thirds of the Senate in order to become law for the United States—a hurdle it has been unable to clear for over a decade because of a small but determined opposition. Meanwhile, free trade agreements between the United States and Peru, Colombia, and Panama are also up for approval. But these agreements are proceeding not through the Treaty Clause but as “congressional-executive agreements,” subject to approval by a majority of both houses of Congress. Signed in 2006, one has already been approved by Congress.

As these examples show, the process for making binding international agreements in the United States today proceeds along two separate but parallel tracks: one that excludes the House of Representatives and another that includes it, one that requires a supermajority vote in the Senate and another that does not, one that is expressly laid out in the Constitution and one that is not.²

Of the two methods for making international law in the United States, the Treaty Clause—which requires a two-thirds vote in the Senate and bypasses the House of Representatives—is the better known; it is principally used to conclude agreements on human rights, taxation, environment, arms control, and extradition. But an increasingly common path is the congressional-executive agreement, approved by Congress through the enactment of ordinary legislation passed by both houses and signed into law by the President.

This Issue Brief argues that nearly everything that is done through the Treaty Clause can and should be done through ex post congressional-executive agreements.³ It begins by laying

* Professor of Law, University of California, Berkeley, School of Law. This Issue Brief is adapted from Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236 (2008).

¹ U.S. CONST. art. II, § 2.

² The only mention of international agreements other than treaties in the Constitution appears in Article I, Section 10, which forbids the states to “enter into any treaty, alliance, or confederation,” but simply requires that they first obtain the consent of Congress before entering into “any agreement or compact with another State, or with a foreign power.” U.S. CONST. art. I, § 10.

³ “Ex post” congressional-executive agreements are approved by both houses of Congress after they are negotiated by the President. By contrast, “ex ante” congressional executive agreements are approved by Congress through legislation enacted in advance. Only the first is advocated in this issue brief. Indeed, the latter raises its own

out the clear benefits of ex post congressional-executive agreements over Article II treaties. First and foremost, international law made through ex post-congressional-executive agreements enjoys greater legitimacy and stronger democratic credentials. But there are also practical benefits: congressional-executive agreements, I argue, are not only less likely to be held hostage by a small minority than are Article II treaties; they also generally create more reliable commitments, both because they are more likely to be enforced and because they can be more difficult for a single branch of government to unilaterally undo.

The current system of international lawmaking in the United States already takes advantage of these benefits in some areas. But these advantages are forfeited in others. In those areas most dominated by the Treaty Clause—human rights chief among them—agreements are much more vulnerable to being held hostage by a small number of extreme political actors, are more difficult to implement, and are easier for the president to unilaterally undo. It is therefore in those areas that the more frequent use of congressional-executive agreements would bring the greatest benefits.⁴

The Issue Brief concludes with a discussion of how this transformation of international lawmaking in the United States could be brought about. It shows that making this proposed change does not require legislation or a constitutional amendment. It rather requires only a commitment by the President to do things differently, and the willingness of Congress to cooperate.

II. The Case for (Almost) Abandoning the Treaty Clause

A. Stronger Democratic Legitimacy

The Treaty Clause’s voting structure gives rise to real concerns about the democratic legitimacy of international law in the United States. By now it seems normal that the Treaty Clause excludes the House of Representatives from the process. That exclusion was originally justified by a need for secrecy and a desire to have the Senate function as a council of advisors in the treaty-making process. Yet these rationales were almost immediately undermined by actual practice. By the end of George Washington’s presidency, “advice and consent” had been reduced to “consent” alone. Hence the Article II process specifying exclusion of the House—the body of Congress designed to be most representative of the population (with membership based on population, not territory) and most responsive to popular control (with two-year, rather than

constitutional issues, which are explored in more detail in Oona A. Hathaway, *Imbalance of Power: The Growth of Presidential Power Over International Lawmaking in the United States* (unpublished manuscript).

⁴ To be clear, this is not an argument for *complete* interchangeability of the two instruments as a matter of law. There are certain acts to which the treaty power does not extend and hence where legislation passed by both Houses of Congress and signed by the President is required to create a binding and enforceable commitment (discussed at greater length in Hathaway, *supra* note *). At the same time, there is a much smaller set of cases in which treaties will continue to be required. In the vast majority of cases in which either instrument can be used—where, that is, treaties and congressional executive agreements are legally interchangeable—there are strong reasons for preferring a congressional-executive agreement even if a treaty might traditionally have been used.

six-year, terms)—is based largely on a set of assumptions that are no longer correct, if indeed they ever were.

The ex post congressional-executive agreement, which requires approval by a majority in both Houses, has greater democratic legitimacy than the Article II treaty as a result. Democratic theorist Robert Dahl, comparing the treaty power and congressional-executive agreements, wrote: “an executive agreement combined with a joint resolution of Congress is much the superior alternative. Surely majority action by both Houses is more ‘democratic’—in the sense that majority rule is an essential element of democratic procedure.”⁵

The exclusion of the House is particularly problematic when set in comparative context. The United States, Mexico, and Tajikistan are the only countries in the world that provide for less involvement by a part of the legislature in treaty-making than in domestic lawmaking (by excluding the House in the United States) *and* make the results of this process automatically part of domestic law in more than a few confined areas of law. This gives rise to the possibility that Presidents could game the system, using the international lawmaking process as an end-run around the House.

But even if this possibility is discounted (and admittedly it is only likely to arise in rare circumstances), the broader implications of the United States’ comparatively restrictive process are both substantial and too often neglected. Critics of international law frequently contend that international law is undemocratic, basing much of their complaints on the odd, exclusionary process by which the United States conducts treaties. The assumption behind the complaint is apparently that the U.S. process, so weakly democratic, is also the international norm. The U.S. process is indeed weakly democratic, but it is far from the norm. If the democratic problem with international law is that the American international lawmaking process excludes the House, that is a problem easily remedied—by including the House.

The exclusion of the House from a significant body of international lawmaking is particularly problematic in the modern era, when international law and domestic law are increasingly intertwined and overlapping. International law today does not simply deal in matters of diplomatic relations and border disputes. Modern international law is about everything from education to tax policy to torture. In this era, the exclusion of the House from participation in international lawmaking is increasingly dissonant.

The same lawmaking process that sets too low a bar (or, more accurately, no bar) in the House sets an excessively high bar in the Senate. The two-thirds rule imposed by Article II is among the highest imposed in the Constitution—used only for such matters as impeachment, override of presidential veto, amending the Constitution, and removal of the President from office for inability to discharge the powers and duties of his office.⁶ There are some who celebrate this high hurdle, arguing that a treaty commitment should be subjected to the increased

⁵ Robert A. Dahl, *Congress and Foreign Policy* 24 (Yale Institute of Int’l Studies, Working Paper No. 1949).

⁶ See U.S. CONST. art. I, §§ 3, 7; *id.* art. V; *id.* amend. XXV.

scrutiny and heightened level of consensus that comes with a supermajority voting requirement. Yet there are substantial, and frequently unacknowledged, costs to this exceptionally high requirement.

The supermajority requirement imposed by the Treaty Clause means that treaties that enjoy the support of a strong majority of the population and its political representatives may still not receive approval. This is all the more true because the Senate is extremely malapportioned—far more so today than was the true at the Founding, or even a century ago.⁷ Senators representing only about 8% of the country’s population can halt a treaty.⁸

Achieving support of a two-thirds majority also requires playing to the polarized extremes of modern American politics. Consider, by way of illustration, the difference in ideological positions of the fifty-first vote in the Senate versus the sixty-seventh. If we array the senators in the 109th Congress from most liberal to most conservative according to a widely used measure of ideological position, we see that in the 109th Congress the sixty-seventh senator was just over twice as conservative as the fifty-first senator.⁹ In the reverse dimension, the sixty-seventh senator was also just over twice as liberal as the fifty-first. In other words, the supermajority requirement means treaties must gain the support of senators that are twice as conservative or liberal as the so-called median voter in the Senate.

The presence of the filibuster in the Senate does narrow the gap between the treaty process and congressional-executive agreements. When legislation may be filibustered, the requirement for passage increases to sixty senators—reducing the gap to the two-thirds (or sixty-

⁷ See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 16-43 (1999) (discussing Senate apportionment).

⁸ Calculated by adding the populations of the eighteen least populous states and dividing by the total U.S. population. U.S. Census Bureau, www.census.gov (last visited Mar. 28, 2008) (author’s calculations). In 1788 it would have taken states accounting for at least 14% of the country’s population to do the same. EDWARD S. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 48-49 (1944) (“[W]hereas in 1788 a ‘recalcitrant one-third plus one man of the Senate’ could not have been recruited from States containing less than one-seventh of the population, an equally lethal combination can today be compounded out of Senators representing less than one-thirteenth thereof.”). The Senate is now among the most malapportioned legislative bodies in the world. See ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 46-54 (2001); see also SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 25-78 (2006).

⁹ Royce Carroll et al., *Dw-Nominate Scores with Bootstrapped Standard Errors* (Aug. 15, 2007), <http://www.voteview.com/dwnomin.htm>. The DW-NOMINATE scores provide a number between -1 (liberal) to 1 (conservative). For more on the data, see KEITH T. POOLE & HOWARD ROSENTHAL, *IDEOLOGY & CONGRESS* (2d ed. 2007). The dataset shows that arrayed from liberal to conservative, the fifty-first vote is Senator Coleman of Minnesota, with a .217 nominate score. The sixtieth vote (which is what would be required to overcome a filibuster) is Senator Talent (.343), and the sixty-seventh vote is Senator Hagel (.433). Arrayed in the opposite direction (from conservative to liberal), the fifty-first vote is Senator Specter (.103), the sixtieth is Senator Pryor (-.264), and the sixty-seventh is Senator Robert Byrd (-.324). Carroll et al., *supra*. In both cases, I treat Senator Corzine and Senator Lautenberg as a single vote, for Lautenberg replaced Corzine when he resigned to become Governor of New Jersey. Both are at the far liberal end of the spectrum. This is not to suggest that votes on international agreements will line up on ideological grounds, but simply to illustrate the point that a more extreme minority is able to prevent agreements that must receive the support of sixty-seven senators.

seven votes) requirement of the Treaty Clause. There are some instances where a revised process has been put in place for congressional-executive agreements—for example, the “fast track” process—that explicitly precludes filibusters in the Senate. But for the most part, these agreements are subject to the super-majority requirement imposed by the filibuster, as is the majority of legislation more generally.

The use of the filibuster has expanded substantially since the rise of congressional-executive agreements. Once reserved almost exclusively for the defense of core regional interests—and then almost exclusively for Southern defense of Jim Crow—the filibuster is now used frequently on controversial legislation even when regional interests are not at stake. Far more a tool of partisan warfare than it once was, the filibuster is now a routine part of Senate lawmaking, making congressional-executive agreements less distinct from Article II treaties than they once were.

Nonetheless, the filibuster carries with it political risks: it requires mounting a public opposition to proposals that frequently have clear majority support. Moreover, even with the filibuster, the Article II process sets the bar substantially higher. In a polarized body of one hundred Senators, seven votes are hardly a trivial additional hurdle. Add to this the extreme malapportionment of the Senate, and it becomes clear that congressional-executive agreements are less likely to be held up by political actors representing a small minority of voters than are agreements subject to the Article II process.

B. A Less Cumbersome and Politically Vulnerable Process

It is clear that an extraordinary level of consensus is required to conclude an Article II treaty. This might at first appear harmless, but it is not. Treaties can be halted by those far outside of the mainstream—and can be held hostage even in the face of broad popular support. It is no coincidence, then, that the Treaty Clause has been regarded by some as “an almost insuperable obstacle to entrance by the United States into an international organization. . . .”¹⁰ John Hay, who as Secretary of State helped negotiate the Treaty of Paris of 1898 ending the Spanish-American War, later said, “A treaty entering the Senate . . . is like a bull going into the arena: no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive.”¹¹ Hay’s prediction was overwrought, but his essential argument—that obtaining the Senate’s advice and consent can be exceptionally difficult—was correct.

Some scholars deny that the two-thirds requirement in the Senate imposes any significant hindrance to international agreements. They cite the fact that few treaties have been rejected by the Senate.¹² It is true that relatively few treaties have been defeated in the Senate. And yet this fact alone does not support the contention that the Treaty Clause does not impose an obstacle to

¹⁰ CORWIN, *supra* note 8, at 32.

¹¹ 2 WILLIAM ROSCOE THAYER, *THE LIFE AND LETTERS OF JOHN HAY* 393 (Houghton Mifflin Co. 1915) (1908).

¹² In total, the Senate has rejected twenty-one treaties submitted to it by the President. In twelve of these, the treaties received majority support from the Senate. *I See* U.S. Senate, Art & History, *Treaties, Rejected Treaties*, <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#5> (last visited Jan. 29, 2008).

agreements, even those that enjoy wide popular support. Under Senate Rules, there is no procedure by which a President can call a vote on a resolution of ratification. Hence a treaty can remain before the Senate indefinitely if the Senate chooses not to act. There are, at present, forty-eight treaties pending before the Senate.¹³

The high hurdle to obtaining advice and consent in the Senate also has a less visible cost. As Congressman Kefauver put it in a debate in 1945 over a constitutional amendment to change the Treaty Clause, “The damage done by the two-thirds rule cannot be measured solely by the treaties which secured a majority vote of the Senate but failed because of the lack of two-thirds. The fear that treaties are very likely to be rejected prevents desirable treaties from being conceived.”¹⁴ It is impossible to measure this “damage,” for it is impossible to know which agreements would have been brought to the Senate, much less “conceived” in the first place, but for the difficulties imposed by the Treaty Clause. Yet it is reasonable to infer that the numbers are not insignificant. Imagine how foolish it would be to say that the presidential veto is not a hurdle because only a miniscule share of legislation is subject to a veto; or that congressional incumbents are not advantaged in electoral contests—it is simply that no good challengers run against them. Strategic actors look ahead, and when they see an insurmountable hurdle, they are not likely to continue on their present path.

This is not to say that obtaining approval of two-thirds of the Senate is always harder than obtaining the approval of a majority of both houses of Congress. If the House and Senate are extremely far apart ideologically—unlikely, but possible—then agreements with majority support in one body may face tough sledding in the other. Moreover, while congressional committees wield relatively limited power in the Senate, with its relatively open debate process, they nonetheless maintain substantial agenda-setting power. Depending on which senators sit on the various committees within the Senate, the committee structure might be more amenable to treaties than to equivalent agreements submitted as congressional-executive agreements. Under the Senate rules, for example, all Article II treaties proceed through the Senate Foreign Relations Committee. When the committee is led and populated by a majority of Senators who are generally favorable to treaties, as it is today, that can be an asset. However, there have been points in U.S. history when the Committee was a decided impediment. It is probably not coincidental, for example, that the years in which Senator Jesse Helms, a declared foe of international law, was chair, the Committee saw few treaties approved by the Senate.

Congressional-executive agreements, by contrast, generally proceed through the relevant subject matter committees in the Senate. It is possible, though there is no evidence to suggest, that these committees might be less favorable toward international agreements that delegate some of their authority than a committee focused on foreign relations would be. Or they might be more favorable, if they broadly support action—international or domestic—in this subject area. The point is that Article II treaties and congressional-executive agreements intersect with the Senate committee process slightly differently, and in ways that could, depending on the

¹³ U.S. Dep’t of State, *Treaties Pending in the Senate* (Jan. 22, 2008), <http://www.state.gov/s/l/treaty/pending/>.

¹⁴ 91 CONG. REC. H4043 (daily ed. May 2, 1945) (statement of Rep. Kefauver).

composition and orientation of the focal committees, influence the ease of pursuing agreements through either.

There may be reasons to want a process that requires greater consensus—and hence is more cumbersome. A process that imposes higher hurdles might be considered a means of ensuring that the ephemeral views of a slim majority will not be embodied in international commitments that later majorities might oppose. As Robert Dahl once explained, “[b]ecause an international commitment might be substantially binding on future majorities, and thus may limit the options available to subsequent majorities, there is something to be said for any process that requires the consent of a rather large present majority before such a commitment may be made.”¹⁵ A more cumbersome process might also be deemed desirable on the expectation that it would ensure that international commitments would not fluctuate with small shifts in the tide of public opinion. Finally, a process that requires a supermajority might be seen as somehow more dignified and respectable on the international stage. As will be discussed in more depth in the next Section, however, these arguments are based on inaccurate assumptions about the stability and permanence of obligations made under the Article II Treaty Clause, as well as about the international context in which they exist.

C. More Reliable Commitments

Congressional-executive agreements create more reliable international commitments than do Article II treaties. This is an important and perhaps surprising advantage. It is important because the central purpose of an international agreement is to commit states to act in ways consistent with the agreement. It may be surprising, because, as just argued, the bar in Congress is generally higher for Article II treaties—which might be thought to create a stronger assurance of political durability. Indeed, the very limited scholarship on the issue to date has argued that, because of this higher bar, treaties do in fact create a stronger commitment. That scholarship is misguided. Fixated on vote thresholds in the Senate, it has missed the two core reasons why congressional-executive agreements create stronger commitments than do Article II treaties: their stronger domestic legal status and their more stringent rules regarding withdrawal from an enacted agreement.

There is a beneficial side-effect of a move away from Article II treaties toward congressional-executive agreements. As we shall see, avoiding commitments that are unenforceable or that the President might withdraw from without congressional involvement also promises to bring better balance to the exercise of authority by Congress and the President over international lawmaking, while at the same time more effectively protecting the House’s traditional scope of authority.

¹⁵ Dahl, *supra* note 5, at 24.

1. Enforcement of Treaties and Congressional-Executive Agreements

International law and domestic law are separate but deeply intertwined legal systems. The mere fact that a state is bound as a matter of international law does not ipso facto mean that the state is bound as a matter of domestic law. Whether it is or not depends on domestic law—that is, how and when international legal obligations are “brought back home.” International law truly binds only when there is a way to enforce a state’s obligation under international law in domestic courts. This is where the difference between treaties and congressional-executive agreements becomes interesting: a congressional-executive agreement creates a more reliable commitment on behalf of the United States than does a treaty because unlike a treaty it erases this line between domestic and international law—allowing for a one-stage rather than multi-stage process to create an enforceable legal commitment.

To understand this difference, we must examine how international obligations become enforceable as a matter of U.S. domestic law. With treaties, this is often a two-step process. The U.S. Constitution specifies that once ratified, treaties are the “Supreme Law of the Land.”¹⁶ That would seem to settle the matter. When it comes to applying this rule, however, it becomes quite a bit more complicated than it first appears. To begin with, there are two types of treaties: those that are self-executing—meaning that they become part of domestic law immediately upon ratification—and those that are non-self-executing—meaning that they require Congress to enact implementing legislation before they become enforceable.¹⁷

Treaties that are self-executing are, by virtue of the Supremacy Clause, enforceable in domestic court upon ratification. Yet this does not necessarily mean that treaties are always and in every case enforced. The relative legal status of state law, federal statutory law, treaties, and constitutional law has been an active subject of debate over the course of American history. Today, most scholars agree that treaties have a status equivalent to the federal statutory law. Hence where treaty obligations are inconsistent with the Constitution, the Constitution will prevail.¹⁸ Where they are inconsistent with a federal statute, courts apply the “last in time rule” where by the obligation imposed later in time prevails. And where they are inconsistent with state law, the treaty obligations prevail.

Enforcement of treaties that are not self-executing is even more complicated. In such cases, two problems can emerge. First, a non-self-executing treaty could impose an international obligation on the United States that would be unenforceable as a matter of domestic law—because the necessary implementing legislation has not been passed—leaving the country in violation of its international obligations. To avoid this problem, the Senate generally postpones its advice and consent to a non self-executing treaty until implementing legislation can be enacted concurrently. Alternatively, it might give its advice and consent to the ratification of a

¹⁶ U.S. CONST. art. VI, § 2.

¹⁷ See 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987).

¹⁸ See, e.g., *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (per curiam) (“[T]he treaty power, like all powers granted to the United States, is limited by other restraints found in the Constitution on the exercise of governmental power.”).

treaty contingent upon the subsequent enactment of implementing legislation. Although sensible, these solutions are not costless. Under each approach, non-self-executing treaties face an additional hurdle to ratification: in both cases, the treaty cannot be ratified until implementing legislation is passed. In other words, the treaty must have the support of the President and two-thirds of the Senate, *and* a majority in both the Senate and the House of Representatives to enact separate implementing legislation.

This is not the only dualist dilemma posed by the Supremacy Clause. The placement of the authority to consent to treaties solely in the Senate has created some constitutional puzzles as well. Chief among them is the question of the rights and responsibilities of the House of Representative regarding treaties that involve powers granted to it by the Constitution, such as the power to appropriate funds. The constitutional grant of authority to make treaties to the Senate without the House creates two seemingly untenable alternatives regarding the House's power of appropriations: either it is empowered to nullify treaties that require appropriations by failing to appropriate the funds necessary to carry it out, or it is required to make the appropriations specified in a treaty without exercising any independent judgment. Neither option has proven appealing or persuasive. To address the conundrum, early presidents adopted the custom of sending a message to the House of Representatives when a treaty might require an appropriation. In some of those cases, the appropriation was voted before the presentation of the treaty to the Senate.¹⁹ Similar arguments have been made in the past about treaties that provide for reciprocal raising and lowering of duties, the acquisition or cession of territory, regulations of commerce with foreign nations, naturalization of aliens, and agreements to engage in or refrain from war.²⁰

Congressional-executive agreements avoid many of these dualist dilemmas. Congressional-executive agreements are, after all, created by means of legislation. That legislation not only has the status equivalent to federal statutory law, it *is* federal statutory law. There is little difference between most congressional-executive agreements and self-executing treaties that do not infringe on the House's traditional scope of authority—in both cases, they create binding legal obligations that are inferior to the Constitution, subject to the later-in-time rule with federal statutes, and superior to state law. Yet when an agreement is not explicitly self-executing, a congressional agreement can offer significant advantages. Congressional-executive agreements are generally presumed self-executing unless specified otherwise. The legislation creating them, moreover, can include any necessary implementing language. The legislation provides, in effect, one-stop shopping: the same act that provides the authority to accede to the international agreement can also make the necessary statutory changes to implement the obligation incurred.

This advantage is even more pronounced in the wake of the Supreme Court's recent decision in *Medellin v. Texas*.²¹ The Court held that none of the treaty obligations at issue in the

¹⁹ H.R. REP. NO. 68-1569, at 9 (1925).

²⁰ *See, e.g., id.* at 9-10.

²¹ 552 U.S. ____ (2008).

case were self-executing and hence the obligations were unenforceable in federal court in the absence of implementing legislation.²² Though the full impact of this ruling is not yet entirely clear, the decision appears at the very least to raise new doubts about whether many U.S. treaty obligations are binding under domestic law—doubts that would be largely absent were the agreements instead enacted as congressional-executive agreements.

Yet another advantage of congressional-executive agreements arises because the House is an equal participant in creating them. The constitutional dilemma that exists when a treaty requires making decisions traditionally within the House’s core scope of authority does not exist in the case of a substantively identical congressional-executive agreement because the House is directly involved in the creation of the agreement. We can see this by looking once again at the changes in the way that international trade obligations are agreed to. Before enactment of the Tariff Act of 1890, international agreements to raise or lower duties ran squarely into the dilemma outlined above. A House Report from 1925 recounted that in “treaties affecting revenue legislation or the raising or lowering of duties . . . [t]he necessity of the concurrence by the House . . . has been very generally asserted by that body and acquiesced in by the Senate.”²³ The usual solution to this dilemma was to insert into the treaties a condition that the changes provided in the treaty would not be effective without the concurrence of Congress.²⁴ The gradual move toward concluding trade agreements primarily as congressional-executive agreements put an end to this two-stage process. Unlike treaties on the same topic, reciprocal trade agreements approved by Congress did not need to be separately submitted for approval by Congress before taking effect.

A congressional-executive agreement thus creates a more reliable commitment on behalf of the United States than does a treaty. Unlike treaties, congressional-executive agreements are not subject to conditional consent and the law creating them is unquestionably federal law, enforceable by the courts. As a result, the United States is able to be a more reliable negotiating partner. At the same time, the process of enacting congressional-executive agreements simply and effectively protects the prerogative of the House to participate in decisions that lie within its traditional scope of authority.

2. Withdrawal from Treaties and Congressional-Executive Agreements

Treaties and congressional-executive agreements differ not only in how they are made. They also differ in how they are unmade. It should be noted immediately that this area of law is unsettled and deserves deeper treatment than is possible here. Nonetheless, even a brief analysis of this unsettled area makes one conclusion clear: the case for congressional control over withdrawal from congressional-executive agreements is much stronger than the case for congressional control over withdrawal from treaties. On the whole, then, treaties will generally

²² *Id.*, slip op. at 8-27.

²³ *Id.* at 9.

²⁴ *Id.* at 9 (“In these treaties a condition has often been inserted to the effect that the changes provided in the proposed treaty should not be effective without the concurrence of Congress.”).

be easier to undo than congressional-executive agreements. They therefore also constitute a less reliable commitment.

The Constitution provides no direct guidance on the question. Though it specifies the process for making treaties, it is silent on the question of withdrawal. Some have argued that because the President has the power not to ratify a treaty even after the Senate's consent has been given, the President must have the parallel authority to withdraw that ratification regardless of the Senate's position on withdrawal. The Restatement endorses this view, stating that "[u]nder the law of the United States, the President has the power. . . to suspend or terminate an agreement in accordance with its terms."²⁵ This view has never been formally upheld by the courts and remains controversial. The courts have twice refused to settle the issue, declining to intervene to prevent unilateral withdrawal from a treaty by the President on the grounds that the challenge to the President's authority posed a political question, among other reasons.²⁶

The Senate, perhaps not surprisingly, opposes the idea that the President can unilaterally withdraw from a ratified treaty. The Senate Foreign Relations Committee has repeatedly contended that the termination of treaties requires the participation of the Senate or Congress.²⁷ A Report prepared in 2001 by the Senate Foreign Relations Committee concluded that whether termination of a treaty "requires conjoint action of the political branches remains. . . a live issue which the Supreme Court has sidestepped in the past."²⁸ Yet it admitted that "[a]s a practical matter. . . the President may exercise this power since the courts have held that they are conclusively bound by an executive determination with regard to whether a treaty is still in effect."²⁹

If the law on withdrawal from treaties is unsettled, the law on withdrawal from congressional-executive agreements is even more so. Some advocates have argued that congressional-executive agreements and treaties are fully interchangeable in every respect—withdrawal included.³⁰ This simple analogy is mistaken, however. Even were there "no

²⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 (1987).

²⁶ *Goldwater v. Carter*, 617 F.2d. 697, 709 (D.C. Cir.), *rev'd*, 444 U.S. 996 (1979); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2-3 (2002).

²⁷ *See, e.g.*, S. REP. NO. 96-119, at 6 (1979) ("[T]he Committee . . . cannot accept the notion advanced by Administration witnesses that the President possesses an 'implied' power to terminate any treaty, with any country, under any circumstances, irrespective of what action may have been taken by the Congress by law or by the Senate in a reservation to that treaty."); S. REP. NO. 34-97, at 3 (2d Sess. 1856) (explaining that "the President and Senate, acting together, [are competent] to terminate [a treaty]" and that under some circumstances a treaty can be terminated by the joint action of the President and Congress).

²⁸ S. COMM. ON FOREIGN RELATIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 2, 199 (2001) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS].

²⁹ *Id.* at 201 (citing *Charlton v. Kelly*, 229 U.S. 447, 474-76 (1913); *Terlinden v. Ames*, 184 U.S. 270, 290 (1902)).

³⁰ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 303 cmt. e (1987) ("The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 217 ("[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty. . . ."); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 805 (1995)

significant difference between the legal effect of a congressional-executive agreement and the classical treaty,”³¹ it would not necessarily follow that the two devices are *procedurally* interchangeable in every respect. In fact, treaties and congressional-executive agreements are *defined* by their procedural differences. The full interchangeability argument, moreover, is incoherent if it holds that congressional-executive agreements operate like ordinary federal legislation *before* ratification but like treaties *after* ratification.

The interbranch cooperation required to pass the legislation necessary to create congressional-executive agreements has deep significance for the level of cooperation required at the point of termination. Termination of congressional-executive agreements by the President is more complicated than is withdrawal from Article II treaties. Congress cannot prevent the President from communicating with foreign governments about the termination of a congressional-executive agreement (as long as the termination is consistent with the terms of the statute that created the agreement). Hence the President could unilaterally withdraw the United States from a congressional-executive agreement by communicating the withdrawal to the foreign parties. Yet the act of withdrawing from the international agreement does not undo the statute on which the agreement rests—which *cannot* be undone without the cooperation of Congress. Even though the President may be able to “unmake” the international commitment created by a congressional-executive agreement as a matter of international law, the President *cannot* unmake the legislation on which the agreement rests.³² As the Supreme Court stated in *INS v. Chadha*, “Amendment and repeal of statutes, no less than enactment, must conform with Art. I,” including the requirements of bicameralism and presentment.³³ The President is not able to terminate a statute unilaterally, and hence cannot terminate the statutory enactment that gives rise to a congressional-executive agreement. And insofar as the statute specifies a course of action by the United States, the President is required to execute it unless and until the underlying statute is repealed or superseded.

This understanding of withdrawal—that the President may unilaterally withdraw from a congressional-executive agreement but not the statute on which it rests—marks out the distinct areas of authority of each branch. Congress approves the legislation necessary to authorize (in the case of *ex ante* agreements) or to approve (in the case of *ex post* agreements) the agreement. The President, on the other hand, manages the negotiations of the agreement with the foreign government and registers the formal assent of the United States to the agreement (based on the authority or assent offered by Congress), thereby binding the country as a matter of international law. Neither can craft an agreement without the other. Congress cannot encroach on the President’s foreign affairs power, for it cannot communicate assent to the agreement on behalf of the United States—only the President can do so. What it can do without the President is enact legislation. Congress could not commit the United States to a free trade agreement without the

(“[T]here is no significant difference between the legal effect of a congressional-executive agreement and the classical treaty approved by two thirds of the Senate.”).

³¹ Ackerman & Golove, *supra* note 30, at 805.

³² Unlike self-enforcing treaties that cease to have either domestic or international legal effect once the agreement is dissolved, congressional-executive agreements have a domestic role independent of their international one.

³³ *INS v. Chadha*, 462 U.S. 919, 954 (1983).

President, for Congress cannot speak with a legally binding voice on behalf of the United States on the international stage. But it might achieve a similar result by passing a statute that unilaterally reduces tariffs on goods imported from a particular country.³⁴ Moreover, as already noted, Congress can condition its consent to a congressional-executive agreement through detailed legislation.³⁵

The bottom line is that while there are some similarities between treaties and ex post congressional-executive agreements at the time of withdrawal, the President is on the whole likely to find it more difficult to withdraw unilaterally from a congressional-executive agreement than an Article II treaty. This is because Congress can, as part of the legislation authorizing the agreement, commit the country to a certain course of action even in the absence of a formalized international commitment. A congressional-executive agreement therefore can create a more reliable commitment than an Article II treaty.

The claim that congressional-executive agreements establish a *stronger* international commitment than do treaties runs against the grain of the very limited scholarship on the issue to date. That scholarship is, in my view, misguided. Though the treaty might appear to require a “higher degree of consensus than is needed to pass an ordinary law” because it requires a two-thirds vote in the Senate,³⁶ it is far from clear that a majority vote in the Senate *and* House requires any less of a consensus. Moreover, it may be true that foreign governments have in the distant past been wary of accepting a commitment that is not labeled a “treaty,”³⁷ but it seems unlikely that wariness would remain once they understand the nature of the legal framework. Indeed, that foreign states have been entirely willing to enter trade agreements with the United States where an executive agreement was used rather than an Article II treaty suggests that other countries are perfectly willing to fully accept agreements concluded outside the Article II process. Moreover, the vast majority of foreign nations make their own international legal commitments in precisely this way (that is, through a process that is identical to that used for

³⁴ This statute could then be vetoed by the President and the veto could be overridden by a supermajority vote in both Houses of Congress.

³⁵ It can likely even set the conditions under which withdrawal from the agreement would be permissible, though not without limit: under *INS v. Chadha*, it cannot make withdrawal conditional upon its own future participation. *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 cmt. a (1987) (“Congress could impose such a condition [on withdrawal] in authorizing the President to conclude an executive agreement that depended on Congressional authority.”).

³⁶ THOMAS M. FRANCK & EDWARD WEISBARD, FOREIGN POLICY BY CONGRESS 144 (1979).

³⁷ Ackerman and Golove recount an incident in which the United States withdrew from a congressional-executive agreement without providing the notice required in the agreement itself. Ackerman & Golove, *supra* note 30, at 823-24. Putting to one side whether the arguments of the Secretary of State explaining the validity of the withdrawal were accurate at the time they were made, they certainly would not be considered accurate today. (Indeed, Ackerman and Golove recount the story precisely to illustrate the discontinuity between the treatment of such agreements in the past and in the present.) Congress is always able to pass a subsequent statute that revokes either a treaty commitment or a congressional-executive agreement as a matter of domestic law, but it does not possess the power to unilaterally revoke the international commitment as a matter of international law.

domestic lawmaking).³⁸ It would be passing strange for them to find a similar process in the United States insufficiently reliable. Replacing treaties with congressional-executive agreements would make for better international lawmaking in the United States. The process would be more democratically legitimate, less cumbersome, and less subject to political manipulation, and the United States would be able to make more reliable international legal commitments. The next Part turns to the issue of how congressional-executive agreements could come to play this near-exclusive role in U.S. international lawmaking. Far from insurmountable, the legal and practical issues that this change presents are eminently manageable. A better process is within reach.

III. Treaties' End

How, precisely, could the proposal offered here be put into effect—how, that is, should the Treaty Clause end?

The end could come in three ways. First, a constitutional amendment could change Article II to provide that both houses of Congress must pass a treaty by a majority vote in order for the President to ratify. Second, legislation could be passed akin to the fast-track legislation that would have the same effect—requiring that nearly all agreements that would have proceeded as Article II treaties proceed as congressional-executive agreements. Third, the process of gradual evolution away from the Treaty Clause toward congressional-executive agreements could simply be continued at a quicker pace, led by the executive branch. Though there are advantages to each route, I advocate the last of these options, what I will call the “informal reform strategy.” Neither a constitutional amendment nor special legislation is required to bring the era of the Treaty Clause to a close, and so there is no reason to take on the burden—far heavier in the former case than the latter—imposed by these options.

The informal reform strategy is both legally unproblematic and politically feasible. It is, as a mechanical matter, breathtakingly simple. It would require no changes to existing law or regulations. As I have argued, the regulations that currently govern the decision whether to submit an agreement as a treaty or as a congressional-executive agreement leave extraordinary room for the exercise of discretion by the executive branch.³⁹ No formal legal changes are therefore required to permit even a fairly substantial change in current practice. All that is necessary to end the use of the Article II process is for the President to cease proposing agreements as Article II treaties and instead to propose them as congressional-executive agreements.

Of course, nothing so important is likely to be so easy, and this is no exception. The barriers are political, not legal, but they are barriers nonetheless. Ending the use of the Treaty

³⁸ See Hathaway, *supra* note *; see also U.N. Legislative Series, Laws and Practices Concerning the Conclusion of Treaties, U.N. Doc. ST/LEG/SER.B/3, U.N. Sales No. 1952.v.4 (1952), cited in C.H. McLaughlin, *The Scope of the Treaty Power in the United States* (pt. 2), 43 Minn. L. Rev. 651, 658 n. 18 (1959).

³⁹ That decision is guided by extensive regulations, described in more depth in Hathaway, *supra* note *, at 1249-52. However, those regulations are vague and provide relatively little true guidance to the State Department—and do little to cabin its discretion.

Clause will require the cooperation of the two parts of government vested with the power to create Article II treaties—the President and the Senate. The President’s role is the most direct. At the present, it is the President, through the State Department, who initially decides whether an international agreement will be pursued as a treaty, a congressional-executive agreement, or a sole executive agreement. For treaties to cease, then, the President must support the decision to cease using them.

And that alone is not enough. A sufficient portion of the Senate must also buy in. Formally, the President may have unfettered control over which instrument to use for a given international agreement. But if a large enough number of Senators conclude that an agreement that has been presented as a congressional-executive agreement ought to proceed as a treaty instead, they can act to bar the agreement’s passage on that ground.⁴⁰ In short, the Senate (or at least enough of its members to end a filibuster) must accept the change in international lawmaking instruments in order for it to succeed.

It might seem unthinkable that the Senate would relinquish its sole power to provide “advice and consent” in favor of shared authority to approve congressional-executive agreements. Yet that is precisely what it has done over the last half century, repeatedly and with little overt resistance. Indeed, the history of congressional-executive agreements is the story of the gradual relinquishment of the Senate’s sole authority over international agreements in lieu of the shared authority of congressional-executive agreements. The proposal here calls for taking this process to its logical and salutary conclusion.⁴¹

As noted, Congress could actively instigate the phase-out of treaties by mandating that nearly all international agreements be submitted to it not as Article II treaties but as congressional-executive agreements. Indeed, it has, done so effectively in several other instances. Congress (acting through both houses) has specifically provided, for example, for international fisheries agreements to be made as congressional-executive agreements.⁴² Similarly, so-called “Fast Track” legislation by Congress authorizes the President to negotiate international trade agreements and bring them back to Congress for final, accelerated approval—a process used in approving NAFTA, the United States-Israel Free Trade Area, and the Uruguay Round Agreements Act, among others.⁴³ But Congress does not have to lead for the informal reform strategy to work; it merely has to follow.

⁴⁰ Indeed, the regulations noted above acknowledge this role and provide for explicit consultation of the Senate by the executive branch in cases of ambiguity.

⁴¹ Ackerman and Golove emphasize this point, noting, “Rather than demeaning the Senate, this Marshallian reading of Article I puts the Senators at the very heart of the entire process of international negotiation.” Ackerman & Golove, *supra* note 30, at 920. I take up the related issue of congressional delegation of power over international lawmaking to the President in much more depth in Hathaway, *supra* note 3.

⁴² Congress enacted a law providing for the negotiation of reciprocal international fisheries agreements, which automatically become effective 120 days after submission to both houses of Congress (excluding any days when Congress is adjourned), unless Congress rejects them through a joint resolution. See 16 U.S.C. §§ 1821-1823 (2000).

⁴³ See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT’L L. 143 (1992).

It is important to emphasize what this proposal is not. It is not an argument for Congress to abdicate responsibility over international agreements. Far from it: Both houses of Congress would now be routinely involved in international lawmaking. And it is not in any way an endorsement of sole executive agreements (agreements entered by the executive on its own constitutional authority). Quite the opposite. It is my hope that under the approach offered here, *fewer* (rather than *more*) international agreements will be made by the executive acting alone. By freeing the process of international lawmaking from the constraining bonds of the two-thirds clause, this proposal holds out the possibility that the President can and will turn more frequently to Congress for approval of, and authority for, the international agreements the President makes.

It is also essential to emphasize that this is not a proposal to replace Article II treaties with what have been called *ex ante* congressional-executive agreements, in which Congress gives the President authority to negotiate agreements that can then go automatically into effect. Such agreements are not, in my view, true congressional-executive agreements, because congressional involvement is frequently tenuous. Treaties can be replaced only by congressional-executive agreements that are submitted to Congress for an up-or-down vote in both houses.

What does this mean in practice? It means that agreements in areas of law currently thought of as reserved for treaties—human rights, arms control, extradition, dispute settlement, aviation, the environment, labor, consular relations, taxation, and telecommunications—can and should be submitted as congressional-executive agreements instead. (The very limited number of agreements that exceed Congress’s Article I powers will still need to be submitted through the Article II process.⁴⁴) There is nothing preventing the resubmission of the many stalled treaties still before the Senate as congressional-executive agreements, including, for example, the Vienna Convention on the Law of Treaties, the Convention on the Elimination of All Forms of Discrimination Against Women, or even the U.N. Convention on the Law of the Sea were it once again to fail to obtain enough support to secure the advice and consent of the Senate.⁴⁵

⁴⁴ I discuss this point in greater depth in Hathaway, *supra* note *, at 1338-49. I argue that treaties that cede territory or provide for the extradition of a U.S. citizen to a foreign country must still be concluded as Article II treaties.

⁴⁵ There is some precedent for this type of resubmission. In 1844, a treaty that would have annexed the independent Republic of Texas to the United States failed to receive the required two-thirds support in the Senate. It was then resubmitted as a congressional-executive agreement and passed by a vote of twenty-seven to twenty-five in the Senate, thus bringing Texas into the Union. The process repeated in 1897, this time with Hawaii. After it became clear that a treaty providing for its annexation could not achieve two-thirds support, the agreement proceeded instead by a joint resolution in Congress. *See* J. Res. 55, 55th Cong., 30 Stat. 750, 750-51 (2d Sess. 1898) (accepting, ratifying, and confirming an order of accession of the Hawaiian islands); S. J. Res. 8, 28th Cong., 5 Stat. 797 (2d Sess. 1845) (joint resolution of Congress admitting Texas), *reprinted with commentary in* 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA (Hunter Miller ed., 1931), at 689-739. There is only one other instance I am aware of in which an agreement was first submitted as a treaty, failed to receive sufficient support, and was later successfully resubmitted as a congressional-executive agreement. This was the agreement with Canada for the development of the St. Lawrence Seaway Project. *See* Honoré Marcel Catudal, *Executive Agreements: A Supplement to the Treaty-Making Procedure*, 10 GEO. WASH. L. REV. 653, 662-63 (1942).

These treaties may or may not succeed as congressional-executive agreements. But if they fail, they fail in a process that includes both houses of Congress and does not require that supporters scale the forbidding pinnacle of a two-thirds vote. And if they succeed, they succeed in a process that creates a stronger commitment to uphold the international laws to which America's representatives have democratically agreed.

IV. Conclusion

Almost as soon as the ink dried on the Constitution more than two hundred years ago, the original vision of the Treaty Clause proved inadequate to the realities of international lawmaking. With the rise of congressional-executive agreements, international lawmaking in the United States began to change. It is now time to take the next step, to cease approving all but a very limited number of international agreements through the Article II process and instead approve them through both houses of Congress.

This would not only put an unpalatable past behind us, but would lead to more democratic, effective, efficient, and reliable international lawmaking. Unlike the treaty-making process, a congressional-executive agreement involves the House. This not only lends the lawmaking process greater legitimacy, as it includes the legislative body intended to be most representative of the American people. It also precludes the need for separate implementing legislation for treaties that are either not self-executing or that encroach on the House's traditional scope of authority—requiring, for example, a new appropriation of funds. This in turn leads to more efficient lawmaking (requiring one step rather than two) and at the same time avoids the awkward possibility that the Senate would be willing to give its advice and consent to a treaty, but the House would be unwilling to support legislation to implement it. Moreover, because the lawmaking process would require simple majority votes in both houses rather than a supermajority vote in one house, it would be less likely to be subject to the whims of the unrepresentative political extremes that might command thirty-four votes in the Senate. And commitments once made are more likely to be kept because Congress is likely to have a greater say in undoing agreements that it has had a hand in making through legislation.

A near-exclusive reliance on congressional-executive agreements would, moreover, end the artificial divide between international and domestic lawmaking that belongs to a different time. In the founding era, there were on the order of twenty to thirty international agreements of all kinds per year. Today, there are several hundred. The range of topics covered by international agreements has exploded, including everything from traditional areas of international law, such as trade and consular relations, to areas that used to be solely within the power of domestic governments, such as human rights, the environment, taxation, and education. At the same time, domestic law has growing international implications when, for example, a domestic tax law in one country can attract investments away from another.⁴⁶ In an age when international law increasingly reaches issues that once fell exclusively within the purview of

⁴⁶ For example, Tyco International stopped paying over four hundred million dollars a year in U.S. taxes after it rechartered in Bermuda to take advantage of that country's tax structure.

domestic law and much of domestic law has new international implications, it makes no sense to make international law in a way wholly distinct from the national legislative process.

To bring to a final close the already waning influence of the Treaty Clause is not to commit the United States to a particular vision of the role or scope of international law in American public affairs. For those who favor international law, this proposal holds out the hope of allowing the United States to engage more effectively and efficiently in the international sphere in all areas of law. For those who do not, this proposal promises to cure some of what they are likely to see as the most obvious flaws of the current international lawmaking system: its exclusion of the House, its creation of obligations that require courts to look exclusively to text written by those outside the United States, and its two tiers of law whose relative priority is officiated by the federal courts.

One might object that the ex post congressional-executive agreement does not possess the dignity of an Article II treaty. The argument of this Article has been that this objection is based on a chimera. It both places unfounded faith in agreements concluded through the Article II Treaty Clause and it gravely undervalues the ex post congressional-executive agreement. Ex post congressional-executive agreements are more democratically legitimate, are made through a more representative process, are more readily enforced, and are more difficult to undo unilaterally. If the dignity of an agreement is grounded in the esteem or respect in which it should be held, then ex post congressional-executive agreements are *more*, not less, dignified than treaties.

It would be foolish to think that procedural change alone could resolve deep substantive disagreements. But procedural change could ensure that our international lawmaking process does not unduly distort or contribute to those disagreements. In this way, perhaps the end of treaties can bring a new beginning for international lawmaking in the United States.