The Vesting Clauses and Foreign Affairs

*Michael D. Ramsey**

Abstract

An enduring puzzle of U.S. constitutional law is how the Constitution divides foreign affairs powers among the branches of government. The Constitution does not refer to a single foreign affairs power, and although it allocates some specific foreign affairs powers, it seems to omit some important ones while failing to fully direct how the ones it does allocate interact with each other. This Symposium Article argues that many of the challenges of foreign affairs constitutionalism can be mitigated by giving up thinking about foreign affairs as a meaningful constitutional category. The Constitution does not refer to a foreign affairs power for the simple reason that its framers did not think of foreign affairs powers as categorically or constitutionally distinct from domestic powers. In broad terms, therefore, constitutional disputes over foreign affairs law can and should be approached in the same way as constitutional disputes over domestic law. It follows that the scope and role of the branches in foreign affairs is, as in domestic matters, guided by the vesting clauses of Articles I, II and III: Congress exercises the legislative powers "herein granted" (with legislative powers not granted to Congress by the Constitution reserved to the states or the people), the President exercises the executive power, and the courts exercise the judicial power. The Article illustrates the implications of this approach by reference to recent and longstanding foreign affairs disputes.

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* Warren Distinguished Professor of Law, University of San Diego School of Law. Thanks to Professors Edward Swaine and Sean Murphy and the editors of the *George Washington Law Review* for convening the foreign affairs law symposium at which an earlier version of this Article was presented, and thanks to the symposium participants for helpful comments.

INTRODUCTION

An enduring puzzle of U.S. constitutional law is how the Constitution divides foreign affairs powers among the branches of government. The Constitution does not refer to a single foreign affairs power, and although it allocates some specific foreign affairs powers, it seems to omit some important ones while failing to fully direct how the ones it does allocate interact with each other.

This Article argues that much of the apparent difficulty in foreign affairs constitutionalism can be mitigated by giving up thinking about foreign affairs as a meaningful constitutional category. The Constitution does not refer to a foreign affairs power for the simple reason that its framers did not think of foreign affairs powers as categorically or constitutionally distinct from domestic powers. In broad terms, therefore, constitutional disputes over foreign affairs law can and should be approached in the same way as constitutional disputes over domestic law.[1] It follows that the scope and role of the branches in

[1] These reflections on the challenges of U.S. foreign affairs law are inspired by the magnificent new treatise authored by Sean Murphy and Edward Swaine. SEAN D. MURPHY & EDWARD T. SWAINE, THE LAW OF U.S. FOREIGN RELATIONS (2023). For previous thoughts in this direction, see generally MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS (2007). The present account has overlap with and is influenced by recent scholarship regarding formalist accounts of

foreign affairs is, as in domestic matters, guided by the vesting clauses of Articles I, II, and III: Congress exercises the legislative powers "herein granted" (with legislative powers not granted to Congress by the Constitution reserved to the states or the people), the President exercises the executive power, and the courts exercise the judicial power.[2]

A crucial element of this approach is the conclusion that the executive power, which Article II vested in the President, includes foreign affairs powers traditionally considered "executive" in nature, minus specific powers the Constitution allocates elsewhere. Thinking of executive power in this way fills troublesome gaps that otherwise appear in the allocation of foreign affairs power. Although this is a longstanding reading of Article II's vesting clause, it has been sharply attacked on originalist and historical grounds in recent years, as well as receiving some spirited defenses. In describing a general approach to foreign affairs powers based on the vesting clauses, this Article undertakes a brief reexamination and defense of the vesting clause theory of executive foreign affairs powers in light of these recent critiques.

Part I of the Article provides a general background on the role of the vesting clauses in establishing separations of powers. The balance of the Article applies the vesting clause perspective to disputes over the exercise of foreign affairs powers. Part II considers the implications for foreign affairs of the vesting of legislative power in Congress. Part III turns to the vesting of executive power, in particular the idea the executive power includes elements of foreign affairs power. Part IV addresses the judicial power in foreign affairs.

I. Background: Separation of Powers, the Vesting Clauses, and Foreign Affairs

This Part briefly outlines the vesting clause framework for analyzing the constitutional allocation of foreign affairs powers. Its basic starting point is that the Constitution does not recognize a distinct category of foreign affairs powers. Neither the Constitution's text nor its structure suggests that foreign affairs powers should be treated differently from domestic powers as to their source and allocation. Rather, the Constitution approaches the distribution of all powers—foreign and domestic—through a common structure: first, the general tripartite division of powers into legislative, executive, and judicial reflected in the vesting clauses of its first three Articles,[3] and second, specification

foreign affairs law. *See, e.g.*, Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 Harv. L. Rev. 1897 (2015).

2 *See* U.S. Const. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

3 *See id*. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

of the allocation and operation of particular powers, both foreign and domestic.[4]

Subsequent Parts explore the implications of thinking about the constitutional allocation of foreign affairs powers from this perspective. Of course, doing so does not answer all difficult questions. The scope of and boundaries between legislative, executive, and judicial power are often challenging to define,[5] and the interaction among distinct types of powers can be equally troubling. But thinking of allocations from a vesting clause perspective can provide a framework with, perhaps, more direction and more tie to the Constitution's text than other approaches.

To begin with some basics: separation of powers—the division of governmental powers into legislative, executive, and judicial—was a central element of eighteenth-century political thought and formed a core foundation of the U.S. constitutional design.[6] Eighteenth-century separation of powers theory rested on two distinct but related propositions. The first was that governmental powers could be classified as legislative, executive, or judicial based on the nature of the power; how to classify particular powers was sometimes unclear and disputed, but there was common agreement on the goal of classification.[7] The second proposition was that powers should be allocated to independent parts of government based on that classification: legislative powers should be exercised by a deliberative assembly; executive powers should be exercised by a single person, or small group, independent of the body entrusted with legislative power; and judicial power should be exercised by independent courts.[8] Thus, separation of powers was not merely a direction that there should be independent branches of government—it was further the direction that the independent branches should be charged with exercise of the appropriate powers.

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4 *See id.* art. I, § 8; *id.* art. II, §§ 2–3; *id.* art. III, § 2.

5 *See* THE FEDERALIST No. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961) (noting this difficulty).

6 *See generally* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998) (tracing the development of separation of powers theory and practice in English law); W.B. Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origins to the Adoption of the United States Constitution*, *in* 9 TULANE STUDIES IN POLITICAL SCIENCE (1965). The most influential eighteenth-century writing on separation of powers was of course Montesquieu's *The Spirit of Laws*. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 198–212 (1748). On Montesquieu's influence, see FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 81 (1985) ("American republican ideologues [in the founding era] could recite the central points of Montesquieu's doctrine as if it had been a catechism."); VILE, *supra* note 6, at 3–4.

7 *See* VILE, *supra* note 6, at 14–18.

8 *See id.* at 17–21, 54–57, 60–61, 96–99, 152–153; *see also* THE FEDERALIST No. 47, *supra* note 5, at 300–08 (James Madison) (discussing these propositions with regard to the U.S. Constitution).

The American framers implemented these ideas in the Constitution's first three Articles and especially in the opening sentence of each Article, known as the vesting clauses: legislative powers are vested in Congress, the executive power is vested in the President, and the judicial power is vested in the federal courts.[9] Again, following familiar separation of powers theory, that division does not merely create three separate branches of government; it also declares the type of powers each branch shall exercise (and, by implication, which powers it shall not exercise). To this design the framers added two further elements. First, they made the national government one of limited powers, with the remaining powers to be exercised by the states (or, if denied to the states, reserved to the people). As its framers insisted at the time, the original Constitution reflects this design, particularly in Article I, Section 1's direction that Congress can exercise only the legislative powers "herein granted" and Article I, Section 8's list of specified congressional powers.[10] And to counter antifederalist objections, the Constitution's proponents agreed to make that limit clear in what became the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[11] Second, as to the national government's powers, the framers added checks on each branch's exercise of particular powers: the President could veto legislation, certain presidential powers could be exercised only with the Senate's advice and consent, and Congress had power over the creation and jurisdiction of federal courts.[12]

All this is familiar and largely uncontroversial as a description of the Constitution's allocation of domestic powers. As the Supreme Court has observed: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[13] But in considering foreign affairs powers, this description is sometimes lost or undervalued. Subsequent Parts of this Article describe a framework for the allocation of foreign affairs powers expressly from the perspective of this foundational design.

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9 *See generally* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175–81 (1992).

10 U.S. CONST. art. I, §§ 1, 8.

11 *Id.* amend. X. On the Tenth Amendment's origins and relationship to foreign affairs powers, see RAMSEY, *supra* note 1, at 13–51.

12 *E.g.*, U.S. CONST. art. I, § 7; *id.* art. II, § 2; *id.* art. III, §§ 1–2.

13 INS v. Chadha, 462 U.S. 919, 951 (1983).

II. Vesting Legislative Power over Foreign Affairs

The first sentence of Article I, Section 1 directs "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[14] The direction is categorical; it does not distinguish between foreign affairs powers and domestic powers. Presumptively, then, they are to be treated as a single category, subject to the same scope and limitations.

Article I, Section 1 has two foundational implications for foreign affairs. First, because it vests "All legislative Powers"—foreign and domestic—in Congress, no other branch of the federal government can exercise legislative power in foreign affairs. Second, because it vests Congress with only the legislative powers—foreign and domestic—that are "herein granted," Congress exercises foreign affairs powers subject to the same limits applicable to the exercise of its domestic powers. The ensuing discussion explores these implications, first as to limits on the executive and judicial branches and second as to limits on Congress.

A. The President Lacks Legislative Power in Foreign Affairs

The canonical case limiting presidential power is *Youngstown Sheet & Tube Co. v. Sawyer*,[15] holding unconstitutional President Truman's seizure of private steel mills during the Korean War. Whether *Youngstown* should be called a foreign affairs case can be debated, but from the vesting clause perspective that characterization is unimportant. The categorical constitutional rule is (or should be) that the President cannot exercise legislative power—which is what President Truman tried to do in *Youngstown* by altering the private property rights of the mill owners.[16] Justice Black thus had it right in his majority opinion in characterizing the President's action as an infringement of Congress's power, specifically referencing the Article I Vesting Clause:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws

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14 U.S. Const. art. I, § 1. The word "vested" does not appear to have particular significance apart from indicating who holds a particular power, which was its common eighteenth-century use. *See, e.g.*, 1 William Blackstone, Commentaries on the Laws of England 183 (1765) ("The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen."). Thus Article I, Section 1 should be understood simply to say that legislative powers shall be held by or exercised by Congress.

15 343 U.S. 579 (1952).

16 *See id.* at 583.

> which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[17]

Black went on to explain why the President's action in *Youngstown* had a legislative character:

> The preamble of the [President's] order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.[18]

Other Justices in the majority, notably Frankfurter and Jackson, wrote separate concurrences objecting that the matter was not so simple and somewhat diluting Black's clear division of powers.[19] But Black's division has unequivocal foundation in the Constitution's text: if "All legislative Powers" are vested in Congress, then no legislative powers are vested in the President.[20]

Black did potentially overstate on one key point. "The President's order," he observed, "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."[21] In context, he likely meant "law" rather than "policy." The distinction

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17 *Id.* at 587–88; *see also* RAMSEY, *supra* note 1, at 51–74 (discussing *Youngstown*'s relationship to executive power).

18 *Youngstown*, 343 U.S. at 588.

19 *See generally id.* at 593–615 (Frankfurter, J., concurring); *id.* at 634–55 (Jackson, J., concurring in the judgment and opinion of the Court).

20 Eighteenth-century separation of powers theory similarly rested on this categorical distinction. Blackstone observed that "the making of laws is entirely the work of a distinct part [from the executive], the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate." 1 BLACKSTONE, *supra* note 14, at 260. On the British monarch's lack of legislative power, see MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 108–11 (Stephen Macedo ed., 2020).

21 *Youngstown*, 343 U.S. at 588.

is important. Article I, Section 1 does not preclude the President from independently making policy (though the President would need an independent source of constitutional power to do so); it only precludes the President from making policy that has the effect of law.

A famous early post-ratification dispute, President Washington's 1793 Neutrality Proclamation, illustrates the distinction.[22] After the outbreak of war between Britain and France, Washington announced that the United States would pursue a policy of neutrality between the combatants. Questions arose as to whether the Proclamation was within the President's power. That issue will be addressed below;[23] for now, the key point is that, so long as the Proclamation did not claim the force of law, it did not infringe Article I, Section 1, even though Congress did not approve it.

After announcing the Proclamation, Washington attempted to enforce it, including—controversially—by bringing criminal charges against U.S. citizens who aided France in the conflict with Britain. Importantly, though, Washington and his subordinates did not claim that the Proclamation itself was a source of law; rather, they based the prosecutions on preexisting laws, including treaties and the law of nations. Public perception, however, was that the preexisting sources were inadequate and that the prosecutions as a practical matter were attempting to enforce the Proclamation as law, which was widely regarded as unconstitutional. In a critical test case, a jury acquitted U.S. citizen Gideon Henfield, even though he plainly had sailed on a French privateer. Commentary of the time saw the acquittal as rooted in concerns that the Proclamation was in fact a presidential effort to create law.

The distinction between policy and law indicates that both sides in the neutrality debate were partly right. Announcing a nonlegislative policy does not infringe the vesting of legislative power in Congress, but attempting to turn that policy into a rule of conduct for private persons does.[24]

The general rule that the President cannot exercise independent legislative power is not always easy to apply. The distinction between legislative and executive power can be a troublesome one. Moreover, the general rule is subject to exceptions derived from the Constitution's text. For example, the President, with the Senate's advice and consent, can make treaties that are the supreme law of the land.[25] As commander in chief of the armed forces and head of the executive branch, the

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22 The following is taken from Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 328–39 (2001), and sources cited therein.

23 *See infra* Part III.

24 *See* MCCONNELL, *supra* note 20, at 113 (making this distinction).

25 *See* U.S. CONST. art. II, § 2; *id.* art. VI.

President can prescribe rules of conduct for people serving within those institutions (at least in the absence of contrary direction from Congress).[26] The President's specified authority to act in certain areas, such as recognition of foreign governments, may exclude other lawmaking entities from acting in those areas.[27] And the President may exercise power that Congress delegated, at least to the extent as in domestic matters, even though exercise of that delegated power may involve making rules of conduct for private individuals.[28]

Nonetheless, the general rule that the President cannot exercise legislative power, including in matters affecting foreign affairs, is an important one that the Supreme Court has not always honored. For example, in a line of cases beginning with *United States v. Belmont*,[29] the Court allowed presidential policies with respect to international claims settlements to alter the legal rights of individuals within the United States. Initially the Court permitted this effect for policies reflected in executive agreements incident to recognition of foreign governments,[30] where the President perhaps has special constitutional authority. But in *Dames & Moore v. Regan*[31] the Court extended its approval to a claims settlement by executive agreement that did not involve recognition, in large part because Congress had (the Court said) "acquiesced" in the practice of executive claims settlement.[32] And in *American Insurance Ass'n v. Garamendi*,[33] the Court gave the force of law to a presidential

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26 *See id.* art. II, §§ 1–2.

27 *See* Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) ("But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.").

28 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–73 (2001); MCCONNELL, *supra* note 20, at 111. The extent to which the Constitution's original meaning permits Congress to delegate rulemaking authority to the President or executive agencies is sharply and extensively debated, and is beyond the scope of this Article.

29 301 U.S. 324, 330 (1937).

30 *Id.*; United States v. Pink, 315 U.S. 203 (1942). These cases involved President Roosevelt's agreement, pursuant to recognition of the Soviet Union, to settle claims arising from Soviet nationalization of property located in the United States. The Court held that the agreement, not state property law, governed title to the nationalized property. According to the Court in *Belmont*, that was because executive agreements have the same force of law as treaties. But as a general matter that cannot be correct, because treaties derive their force as law from Article VI of the Constitution, which lists treaties but not executive agreements as supreme law of the land. *See* Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007). A better argument might be that the President's power to recognize foreign governments implies a power to remove obstacles to recognition.

31 453 U.S. 654 (1981).

32 *Id.* at 678–83. Specifically, the Court held that in connection with implementing the executive agreements ending the Tehran hostage crisis, the President could compel the transfer of claims pending in U.S. court to an international tribunal. *Id.* at 686.

33 539 U.S. 396 (2003).

policy relating to international claims, without relying on congressional acceptance.[34]

These cases marked a troubling trajectory into presidential lawmaking in foreign affairs, which the President sought dramatically to expand beyond claims settlements in *Medellin v. Texas*.[35] Relying heavily on *Garamendi*, the George W. Bush Administration argued that a presidential policy of complying with an International Court of Justice ("ICJ") judgment allowed the President to override a state's criminal procedure rules in a particular case.[36] The Court rightly refused this expansion, limiting *Garamendi* to the special circumstances of claims settlements,[37] and it directly invoked the President's lack of legislative powers:

> The President's authority to act, as with the exercise of any governmental power, "must stem either from an act of Congress or from the Constitution itself." [quoting *Youngstown*]. . . .
>
> The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. . . .
>
> The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution . . . .
>
> Once a treaty is ratified without provisions clearly according it domestic effect . . . whether the treaty will ever have such effect is governed by the fundamental constitutional principle that the power to make the necessary laws is in Congress; the power to execute in the President. . . . see U.S. Const., Art. I, § 1 ("All legislative Powers herein granted shall be vested in a

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34 *Id. Garamendi* involved insurance claims for Holocaust-era injuries against major European insurers. The Clinton administration pursued a policy of international negotiation to settle the claims, which the Court held preempted a California statute that would have facilitated resolution of the claims in California courts. *See* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825 (2004) (criticizing the decision on separation of powers grounds).

35 552 U.S. 491 (2008). The Court first found that the International Court of Justice judgment was non-self-executing and so not part of domestic law of its own force (a conclusion subject to some dispute); the Court then found that the President lacked independent power to convert it into a binding domestic obligation and compel the state to comply with it. *Id.*

36 *See id.* at 525–26, 530–31.

37 *See id.* at 532 ("The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.").

> Congress of the United States"). . . . Indeed, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S., at 587.[38]

Thus, while the President's claims settlement power remains an anomaly, *Medellin* reflects a reversion to the correct general rule—derived from Article I's vesting clause—that the President lacks lawmaking power, even as to matters implicating foreign affairs.[39]

B. Federal Courts Lack Legislative Power in Foreign Affairs

Like the President, federal courts are denied lawmaking powers by the vesting of "[a]ll legislative Powers herein granted" in Congress.[40] As with the President—but even more so—it may be difficult to mark out the precise boundaries on the exercise of legislative power. The federal courts' judicial power (which Article III vested in them[41]) authorizes them to apply existing law—which may include applying longstanding common law rules in some circumstances—but Article I, Section 1 precludes them from creating new law. Thus, to the extent that courts' actions in developing federal common law partake of lawmaking rather than application of longstanding rules, they should be treated with suspicion.

Again, that should be equally true in foreign affairs as in domestic affairs. Numerous judicial opinions (though generally not Supreme Court opinions) contain loose talk about a supposed judge-created federal common law of foreign affairs. The vesting clause perspective suggests this is problematic. Courts historically had no special license to make law relating to foreign affairs, and even if they did, the categorical direction of the legislative vesting clause would seem to override it.

One should not overstate the implications of that conclusion. Application and development of longstanding common law rules is traditionally a judicial function that would not have been understood as law *making* in the founding era. Some apparently judge-made doctrines

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38 *Id.* at 526–27 (some citations and internal quotations omitted).

39 The Court in *Medellin*, citing Justice Jackson's *Youngstown* concurrence, implied that the situation might be different if Congress had approved the President's action. That suggestion is discussed below. *See infra* Part II.D. A related ongoing dispute is the President's power to make determinations of foreign sovereign immunity in cases not covered by statute. To the extent such determinations are understood as lawmaking, they should be seen as outside the President's constitutional authority. *See* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 929–39 (2011).

40 U.S. CONST. art. I, § 1.

41 *Id*. art. III, § 1.

in foreign affairs might be justified on this ground.[42] And some doctrines described as federal common law may better be understood as implications from statutes or the Constitution.[43] Thus, federal common law doctrines in foreign affairs need to be analyzed individually in light of the vesting clauses. But the core point remains that federal courts should not make law, and in particular federal courts have no special authority to make foreign affairs law.

The Supreme Court seems to be increasingly taking that view, especially with respect to the creation of federal common law causes of action.[44] The progression of cases under the Alien Tort Statute ("ATS") is illustrative. The ATS gives federal courts jurisdiction over tort suits by aliens for violations of the law of nations.[45] As the Court held in *Sosa v. Alvarez-Machain*,[46] the ATS's text speaks only to jurisdiction, which is the power to apply existing law, not a power to create new law.[47] In *Sosa*, the Court (over Justice Scalia's objection) nonetheless held that federal courts could create federal common law causes of action

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42 *E.g.*, Underhill v. Hernandez, 168 U.S. 250 (1897) (act of state doctrine); Schooner Exch. v. McFaddon, 7 U.S. (1 Cranch) 116 (1812) (foreign sovereign immunity); *see also* Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 Geo. L.J. 1825 (2018).

43 *See* Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 Ohio St. L.J. 559 (2013).

44 *See* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

45 28 U.S.C. § 1350.

46 542 U.S. 692 (2004).

47 *Id.* at 713–14 ("In sum, . . . the [ATS] was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject."); *see also id.* at 739–51 (Scalia, J., concurring in part and concurring in the judgment). Scalia argued:

> Because post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it. "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981).
>
> The general rule . . . is that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." This rule applies not only to applications of federal common law that would displace a state rule, but also to applications that simply create a private cause of action under a federal statute.

Id. at 741–42 (Scalia, J., concurring in part and concurring in the judgment) (citations and quotations omitted). More colorfully he concluded, implicitly invoking the Constitution's vesting clause structure:

> We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained.

Id. at 750 (Scalia, J., concurring in part and concurring in the judgment).

under the ATS,[48] although *Sosa* called for "great caution" in doing so.[49] But in subsequent cases the Court has refused to recognize new ATS causes of action,[50] with multiple Justices expressing concern about the legislative aspect of the courts' ATS project. Justice Thomas, writing for himself and Justices Gorsuch and Kavanaugh in *Nestlé USA, Inc. v. Doe*,[51] argued:

> Respondents' suit fails for another reason . . . : We cannot create a cause of action that would let them sue petitioners. That job belongs to Congress, not the Federal Judiciary. . . . [J]udicial creation of a cause of action is an extraordinary act that places great stress on the separation of powers. Although this Court in the mid-20th century often assumed authority to create causes of action, "[i]n later years, we came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." Because *Erie* denied the existence of a federal general common law, "a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." It follows that any judicially created cause of action risks "upset[ting] the careful balance of interests struck by the lawmakers."[52]

The vesting clause perspective indicates that these concerns are well-placed. To the extent the Court understands itself to be creating new law (by creating new causes of action) in ATS cases,[53] it is

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48 *Id.* at 724, 728–29 (concluding that "the door is still ajar" to "independent judicial recognition of actionable international norms" albeit "subject to vigilant doorkeeping").

49 *Id.* at 728 ("Several reasons argue for great caution in adapting the law of nations to private rights."); *see also* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 Harv. L. Rev. 869, 924–29 (2007).

50 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (refusing to recognize ATS cause of action for extraterritorial injuries); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (refusing to recognize ATS cause of action against foreign corporations); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (refusing to recognize ATS cause of action based on location of corporate headquarters in United States).

51 141 S. Ct. 1931 (2021).

52 *Nestlé*, 141 S. Ct. at 1937–38 (plurality opinion) (citations omitted) (quoting Hernandez v. Mesa, 140 S. Ct. 735, 742–43 (2020)). Similarly, Justice Gorsuch argued in *Jesner*:

> [T]he job of creating new causes of action and navigating foreign policy disputes belongs to the political branches. For reasons passing understanding, federal courts have sometimes treated the Alien Tort Statute as a license to overlook these foundational principles. I would end ATS exceptionalism. We should refuse invitations to create new forms of legal liability.

Jesner, 138 S. Ct. at 1412 (Gorsuch, J., concurring in part and concurring in the judgment); *see also id.* at 1409 (Alito, J., concurring in part and concurring in the judgment) (signaling potential agreement with Gorsuch's opinion in *Jesner* and Scalia's opinion in *Sosa*).

53 There may be other ways of understanding the judicial role in ATS cases that are less in tension with the legislative vesting clause, but these are not reflected in the Supreme Court's view

inappropriately exercising legislative powers that Article I, Section 1 constitutionally reserved to Congress.

C. Congress Has Only Delegated Powers in Foreign Affairs

1. Congress Lacks Inherent Extraconstitutional Powers

Article I, Section 1 vests only the legislative powers "herein granted." Its strong negative implication, backed up by the Tenth Amendment and considerable contemporaneous commentary, is that Congress is not vested with legislative powers not "herein granted." That is, Congress has no inherent extraconstitutional powers in foreign affairs (or elsewhere); any foreign affairs powers Congress exercises must be associated with a grant of power in the Constitution.

The Supreme Court suggested the idea of inherent congressional powers in a series of cases in the late nineteenth century,[54] and the great foreign affairs law scholar Louis Henkin later endorsed it (albeit a bit tentatively) in the late twentieth century.[55] The existence of inherent power would obviate the need for Congress to identify a source of constitutionally delegated power to support its foreign affairs legislation. However, the idea of inherent congressional power has substantial flaws.

In the late nineteenth century, the Court rejected challenges to Congress's authority over matters such as immigration, acquisition of territory, and regulation of Native American tribes. Rather than seeking a source of delegated power in the Constitution (in Article I, Section 8, or otherwise), the Court found that these powers belonged to the United States as inherent attributes of sovereignty under international law.[56] Discussing these cases a century later, Professor Henkin posited

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of its actions. For example, the ATS could be understood as authorizing courts to apply existing state law, general law, or foreign law as applicable.

54 *See* Thomas H. Lee & David L. Sloss, *International Law as an Interpretive Tool in the Supreme Court, 1861–1900*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 124, 152–55 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011). *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

55 LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 70 (2d ed. 1996) ("Congress derives additional legislative authority from the powers of the United States inherent in its sovereignty and nationhood.").

56 *E.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 604–05 (1889) ("Jurisdiction over its own territory to that extent is an incident of every independent nation. . . . [T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security."); Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty . . . to forbid the entrance of foreigners within its dominions . . . . In the United States this power is vested in the national government, to which the Constitution has committed the

a principle of extraconstitutional foreign affairs power necessarily conveyed on Congress. His concern was mainly practical: restricting Congress to delegated powers appeared to him to leave out some critical powers which he thought the framers would have wanted Congress to have.[57]

There are several reasons to doubt this suggestion. To begin, the foundation of the nineteenth-century Court's reasoning is logically misconceived. We may readily agree that as a sovereign entity *the United States* possesses under international law all the rights and powers of a sovereign nation (as all sovereign nations do), including the powers the Court identified. But the international law of sovereignty says nothing about the internal allocation of sovereign powers within a sovereign entity, nor does it say anything about the ultimate location of U.S. sovereignty. In the U.S. constitutional system, ultimate sovereignty is held by the people, and the people, through the Constitution, decide where to vest sovereign powers.[58] As to any particular sovereign power, the people could decide to give it to Congress, to give it to some other branch of the federal government, to deny it to the federal government and leave it with the states, or to deny it to both the states and the federal government. None of these options would make the United States less sovereign under international law, even a decision by the people (through the Constitution) to deny all parts of government a particular sovereign power. The power would still remain—unexercised—with the people, as the ultimate sovereign, though it would require a constitutional amendment to exercise it.[59]

The nineteenth-century Court's claim that Congress must have certain powers as a consequence of U.S. sovereignty is, therefore, doubly wrong. The people need not authorize any part of the government to exercise a sovereign power, and if they do, they may authorize some part of government other than Congress. Taking the example of immigration, the United States as a sovereign entity has the right and power

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entire control of international relations."); *see also* Lee & Sloss, *supra* note 54, at 152–55; Cleveland, *supra* note 54.

57 Henkin, *supra* note 55, at 70–72 (listing an array of powers Congress exercises but which he doubted could be encompassed by Congress's enumerated powers).

58 *See* U.S. Const. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404–05 (1819) ("The government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them.").

59 *See* Ramsey, *supra* note 1, at 201–04; *id.* at 203 ("According to the Court, the United States has the powers all independent nations necessarily have. Surely this is true; but the Court's error was to suppose that the *national government* of the United States must have the powers that independent nations necessarily have. Powers not possessed by the national government remain with the states or the people . . . The *United States* still has these powers—they just have not been granted to its national government.").

under international law to control its borders. In the U.S. system, that is a power of the ultimate sovereign, which is the people. The people decide how to allocate it: they could give it to Congress, or to another branch of the federal government; they could leave it to the states (where, as a practical matter, it resided for the eighteenth and early nineteenth centuries); or they could decide not to exercise the power to control the border and deny all parts of government such authority. That decision is an internal matter, to which international law would be indifferent. And, in the U.S. system, the people make such internal allocations through the Constitution.

The idea of inherent power is also contrary to the Constitution's text. The Tenth Amendment declares that the national government has only delegated powers, and the amendment's background indicates that it was adopted specifically to reject the idea of inherent powers derived from national sovereignty.[60] Moreover, Article I, Section 8 strongly implies that core foreign affairs powers are delegated powers rather than inherent powers. The power to declare war—surely a central aspect of sovereignty in eighteenth-century international law—is treated as a delegated power, listed in Section 8 along with more mundane and obviously delegated powers such as building post roads. Similarly, the powers to tax and regulate foreign commerce, also key foreign affairs powers, appear in Article I, Section 8's list of delegated powers. There is even stronger reason to see the foreign commerce power as a delegated power, because under the Articles of Confederation it was not delegated to the Continental Congress and the common understanding was that the Articles's Congress therefore could not exercise it. The point of listing the foreign commerce power in Article I, Section 8 was to remedy this defect.[61]

The Constitution's drafting, ratifying, and post-ratification history further indicates that the founding generation thought of foreign affairs powers as delegated powers. These powers were discussed as delegated powers at the Convention and in the ratifying debates, especially in *The Federalist*.[62] And post-ratification cases emphasized the delegated-power structure of the original Constitution as confirmed by the Tenth Amendment, without suggesting any exception for foreign affairs.[63]

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60 *See id.* at 13–28.

61 *See id.* at 29–48.

62 *Id.* at 23–28. For example, Madison's *Federalist 41* describes war power and related powers as powers "transferred to" or "vested in" the "general government," indicating powers granted by the text rather than inherent powers. *Federalist 42* similarly describes foreign commerce powers as delegated powers. *Id.*

63 *E.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 405 ("Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted.").

Further, as a practical matter, it is not obvious that inherent powers are needed to make sense of the Constitution's design. Even if one thinks that all foreign affairs powers must be located in the federal government (itself not an obvious proposition), they need not be located in Congress. Some might be exercised through the treaty power, some might be vested in the President through the President's executive power (as discussed below), and some might be implied by Congress's enumerated powers, including its "necessary and proper" power.

Finally, apart from immigration, neither the modern Court nor commentators have widely embraced the nineteenth-century idea of inherent congressional powers. In the *Curtiss-Wright* case in the mid-twentieth century, the Court shifted to a different theory of inherent powers, which it then associated with the President rather than Congress.[64] *Curtiss-Wright*'s theory was that, as a historical matter, sovereign powers passed directly from Britain to the United States as a national entity immediately at independence, and thus did not need to be (and indeed could not be) delegated to Congress in the Constitution. But the Court has since backed away from *Curtiss-Wright*'s implications, especially in *Youngstown* and more recently in *Zivotofsky v. Kerry*,[65] while *Curtiss-Wright*'s historical theory has been widely debunked.[66]

As a result, although versions of inherent powers theories retain their adherents, the core proposition seems highly suspect. The basic structure of the Constitution reflected in the vesting clauses depends on delegated powers; there is no compelling reason to think that structure does not apply to foreign affairs, and there are important reasons to think it does.

2. Ordinary Constitutional Limits Apply to Congress's Delegated Foreign Affairs Powers

If Congress lacks inherent extraconstitutional foreign affairs powers, then whatever foreign affairs powers it has must be traced to delegation to it in the Constitution, in Article I, Section 8, or otherwise. Although necessarily true in theory—once one excludes the idea of inherent powers—this conclusion might not have practical force if one could conclude readily that the Constitution gives Congress

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64 *See generally* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

65 576 U.S. 1, 19–21 (2015).

66 *See* Ramsey, *supra* note 1, at 13–28; Michael J. Glennon, Constitutional Diplomacy 18–34 (1990); Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 Yale L.J. 1, 12–32 (1973); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 Wm. & Mary L. Rev. 379, 395–437 (2000); *see also id.* at 380 n.6 (citing additional sources).

comprehensive power over foreign affairs.[67] However, such a conclusion is unlikely.

First, Congress has no textually express unified foreign affairs power. The Constitution's text grants to Congress broad and important powers relating to foreign affairs, such as declaring war, regulating foreign commerce, and regulating the military.[68] But the grants of these particular powers suggest the absence of a single "foreign affairs power," especially as they are not followed in the text with a further catch-all phrase addressing foreign affairs in general.

It might nonetheless be the case, though, that the specific foreign-affairs-related powers expressly granted to Congress, along with associated ones implied by the express grants or encompassed by the Necessary and Proper Clause, add up to a comprehensive congressional control over foreign affairs. While possible, this conclusion again is not obvious. Even if Congress has very broad delegated powers in commercial and military matters, that does not cover all foreign affairs-related regulation; many matters of transnational concern are neither commercial nor military. For example, providing rules for extraterritorial noncommercial nonmilitary conduct of U.S. citizens, though arguably related to foreign affairs, appears at least as a general matter outside Congress's delegated powers.[69] Further, Congress, as a legislative body, generally exercises only lawmaking power; many aspects of foreign affairs—especially diplomacy—do not proceed though ordinary lawmaking and, thus, appear beyond Congress's legislative power.[70]

Moreover, as discussed above, there is no practical imperative that Congress must have power over all aspects of foreign affairs. Congress is only one part of the federal government. The Constitution expressly gives some foreign affairs powers to the President or the President-plus-Senate,[71] and it may give others by implication. While the framers might have wanted Congress to have a shared role in these matters, they might not have; consistent with a checks-and-balances approach, they might have thought Congress should not be included in some of them. In sum, it is difficult to proceed on an assumption

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67 *See* Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797, 798–802 (2018) (emphasizing the breadth of Congress's powers); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1047–58 (2014) (finding very broad national powers in the Necessary and Proper Clause).

68 *See* U.S. CONST. art. I, § 8.

69 *See* United States v. Rife, 33 F.4th 838, 845 (6th Cir. 2022) (concluding that Congress's foreign commerce power does not extend to regulating noncommercial sexual misconduct of a U.S. citizen in Cambodia). The court went on to find that, in the particular case, Congress could regulate the conduct as part of its power to implement treaties. *See id.* at 848.

70 *See* RAMSEY, *supra* note 1, at 197–218 (arguing on this basis that Congress lacks power to authorize agreements with foreign nations).

71 *See* U.S. CONST. art. II, §§ 2–3.

that Congress has comprehensive foreign affairs powers. The foundational principle of delegated power requires evaluation of each instance of congressional action to assure a source of power conveyed in the Constitution.

As with earlier conclusions, it is important not to overstate the implications of this requirement. Congress undoubtedly has broad powers in foreign affairs. It has its own listed powers, plus power to make laws "necessary and proper for carrying into Execution" its listed powers.[72] Especially significant for foreign affairs, it also has power to make laws necessary and proper to carry into execution "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[73] This power, for example, appears to authorize Congress to pass laws to implement U.S. treaties—and other international agreements, to the extent such nontreaty agreements are constitutional—as to subjects it could not otherwise reach by its specific powers.[74] Moreover, to the extent the President has independent nonlegislative powers in foreign affairs (a matter discussed below), Congress would have "necessary and proper" power to make laws in support of those presidential powers.[75]

Nonetheless, focus on Congress's exercise of delegated powers can have important consequences in some cases. For example, a recurring dispute between Congress and the President is the extent to which Congress can restrict the President's exercise of military and foreign affairs powers. These disputes are often framed as questions of whether the President has an exclusive power (and that may indeed be the decisive issue). But it follows from the vesting clause perspective that Congress must establish its own source of power in the Constitution before it can regulate the President's exercise of foreign affairs power. This inquiry logically precedes the question whether a presidential power is exclusive.[76] A purported exercise of power by Congress outside

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72 *Id.* art. I, § 8.

73 *Id.*

74 *See* Missouri v. Holland, 252 U.S. 416, 433–34 (1920). *Holland* has been attacked on two grounds. First, it is argued that treaties cannot address subject matter that is not within Congress's listed constitutional powers. *See* Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*, 73 Mo. L. Rev. 969 (2008) (discussing and rejecting this claim). Second, it is argued that, even if treaties can address subject matter that is not within Congress's listed constitutional powers, Congress cannot implement treaties except as to subject matter that is within Congress's listed constitutional powers. *See* Bond v. United States, 572 U.S. 844, 873–81 (2014) (Scalia, J., concurring in the judgment) (making this argument); Michael D. Ramsey, *Congress's Limited Power to Enforce Treaties*, 90 Notre Dame L. Rev. 1539 (2015) (rejecting this argument); *see also* United States v. Rife, 33 F.4th 838, 848 (6th Cir. 2022) (questioning Congress's treaty implementation power but also applying it very broadly to matters only somewhat related to the treaty).

75 *See* Prakash & Ramsey, *supra* note 22, at 350–53.

76 The phrase "exclusive power" is potentially ambiguous. It could mean simply a power held only by the President (that is, a sole power), but more commonly it is used to mean a presidential

of its constitutionally delegated authority is not part of the supreme law of the land and, thus, is not binding upon the President or the courts. In such case, no actual conflict between congressional and presidential powers would arise—of course, the President would also have to show that an exercise of presidential power is derived from an authority the Constitution vesting in the President.

For example, in *Zivotofsky v. Kerry*, the Court considered the constitutionality of a statutory provision directing the Secretary of State to issue a passport reflecting birth in "Jerusalem, Israel"—rather than just "Jerusalem"—if an applicant born in Jerusalem requested it.[77] The President objected that the provision interfered with the President's policy of declining to recognize Israel's sovereignty over Jerusalem. The Court agreed with the President.[78]

The Court's majority began by expressing doubt that Congress had a source of power to enact the statute.[79] But in most of its substantive discussion, the majority opinion shifted to an assertion that the President had exclusive power to set U.S. policy regarding Israel's boundaries.[80] This claim, however, proved challenging to establish, requiring a considerable stretch of the President's textual power to receive ambassadors.[81] Concurring, Justice Thomas suggested a simpler approach focused on Congress's limited powers. The first step, he said, should be to question

power that displaces an otherwise valid congressional power (perhaps better called a "preclusive" power).

77 576 U.S. 1, 5–9 (2015).

78 *See id.* at 31–32.

79 *See id.* at 14 ("Congress . . . has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.").

80 *See id.* at 14–33.

81 *See id.* First, the Court posited an exclusive presidential power to receive ambassadors. Although the President's ambassador reception power is solidly grounded in constitutional text, U.S. Const. art. II, § 3, even this power is not obviously exclusive. The Court next claimed that, as a consequence, the President has exclusive power to recognize foreign governments. That claim really entails two steps, neither of which is obvious: receiving an ambassador is not the only way to recognize a foreign government, and even if the President has this power, that does not show it is exclusive of Congress's power. And the Court needed yet another step to get to the ultimate conclusion in *Zivotofsky v. Kerry*—that the President's "recognition power" included the power to set U.S. policy regarding boundaries, and that this power was exclusive. On each of these steps—and especially the last—the Court's conclusion was little more than assertion, justified largely by a functional argument that the United States needs to speak with one voice in regard to boundaries. But the connection between boundaries and receiving ambassadors is tenuous at best; the Court's attempt to bridge it conflated two distinct meanings of "recognize," recognition of a government in the formal sense being quite different from acknowledging a territorial claim by a recognized government. And the functional argument also underwhelms: even if one voice is needed, why should that voice not ultimately be Congress's voice, if Congress chooses to use it? *See* Zivotofsky v. Kerry, 576 U.S. at 67–80 (Scalia, J., dissenting) (making these points).

Congress's source of power.[82] The point of the statute was manifestly a diplomatic one—to state U.S. policy regarding Jerusalem's status as part of Israel.[83] But Congress has no general grant of diplomatic power, nor any specific power relating to foreign boundaries. As a result, one need not decide whether the President's diplomatic power is exclusive; Congress lacks power at the initial step.[84]

This approach also avoids potential problematic implications of *Zivotofsky v. Kerry*. One could imagine a statute clearly within Congress's enumerated powers yet also conflicting with presidential policy on foreign boundaries.[85] For example, Congress might designate Jerusalem as Israeli territory for tariff purposes. *Zivotofsky v. Kerry* could be read to suggest that Congress's action would be unconstitutional if contrary to the President's policy, particularly given the majority's reliance on one-voice-in-foreign-affairs functionalism. That would oddly give the President an exclusive power over a matter that seems textually granted to Congress, leading to potentially broad expansion of presidential power.

The intuition that Congress's action in the tariff hypothetical is constitutionally sound, but that the Jerusalem statute is not, comes not from the Constitution's description of presidential power but from the Constitution's description of Congress's power. Congress's power to set tariffs is clear. If, incidental to exercising this power, Congress determines what territory will be treated as belonging to what sovereign, Congress is solidly within its delegated power, even if it interferes with presidential policy. The President would need a very strong textual

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82 *See* Zivotofsky v. Kerry, 576 U.S. at 44 (Thomas, J., concurring in the judgment in part and dissenting in part) ("As with any congressional action . . . such legislation is constitutionally permissible only insofar as it is promulgated pursuant to one of Congress' enumerated powers. I must therefore address whether Congress had constitutional authority to enact § 214(d)'s regulation of passports.").

83 *See id.* at 31.

84 *See* Jack Goldsmith, *How the Supreme Court Should Resolve* Zivotofsky, Lawfare, (Oct. 30, 2014, 8:09 AM), https://www.lawfareblog.com/how-supreme-court-should-resolve-zivotofsky [https://perma.cc/7CQP-2WK8] (pointing to Congress's lack of power as a way to resolve the case). In dissent, Justice Scalia acknowledged that Congress needed an enumerated-power basis for its statute. But his argument on this ground was more bluster than analysis: he cited six different powers that might support the law, along with the necessary and proper clause, without devoting more than a sentence (or, in most cases, a sentence fragment) to any of them. Zivotofsky v. Kerry, 576 U.S. at 80–81 (Scalia, J., dissenting) (listing foreign commerce, naturalization, the Fourteenth Amendment's citizenship clause, Article I, Section 9's migration clause, Article IV's territory clause, and the power to restrict the ability of certain persons to leave the country).

85 *See* Eugene Kontorovich, Zivotofsky*'s Implications, From Israel to Immigration*, Wash. Post, (June 9, 2015, 3:13 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/09/zivotofskys-implications-from-israel-to-immigration/?utm_term=.d842f122a4a2 [https://perma.cc/8W6K-45YW] (discussing potentially broad areas of presidential exclusivity after *Zivotofsky v. Kerry*).

argument (or a very strong functional argument) to overcome it, and none is available.

In sum, from a vesting clause perspective Justice Thomas had the right approach in *Zivotofsky v. Kerry*. Focus on Congress's power reveals that the statute served a diplomatic purpose, but Congress has no constitutional power over diplomacy. Congress thus has no basis to direct the President what to say regarding Jerusalem's status, in passports or otherwise in diplomatic communications. That does not mean Congress cannot take a position on Jerusalem's status in the course of exercising powers it does have, and thus Thomas' approach, unlike the majority's, does not threaten textual powers of Congress. But it does show that the Jerusalem statute was unconstitutional, without any need to find an "exclusive" presidential power to override it. The President's diplomatic power is "exclusive" only in the sense that Congress does not have any power to compete with it.[86]

D. Congress Must Exercise Foreign Affairs Powers According to Constitutional Procedures

A final point about legislative powers in foreign affairs is that Congress must exercise them according to constitutional procedures. This requirement follows from the proposition that all foreign affairs powers are delegated powers and that the Constitution does not distinguish between foreign affairs powers and domestic powers. The same constitutional procedures apply to all fields of congressional action—a point confirmed by Article VI's requirement that only laws "made in Pursuance" of the Constitution are part of supreme law.[87] Two illustrations are Article I, Section 7's bicameralism and presentment requirements and the nondelegation doctrine derived from Article I, Section 1.

Bicameralism and Presentment. Congress can only exercise its legislative powers via the bicameralism and presentment process of Article I, Section 7.[88] Specifically, in exercising legislative powers, Congress must act through formal enactment of a bill by separate majorities in each chamber, with the bill then submitted to the President for signature or veto.[89] Actions (or nonactions) by Congress (or parts of Congress) outside this process cannot have legislative effect. As the Court and

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86 Again, this conclusion assumes the President has independent diplomatic powers, a matter discussed below. For a similar analysis applied to congressional regulation of military affairs, see Michael D. Ramsey, Response, *Directing Military Operations*, 87 TEX. L. REV. *SEE ALSO* 29 (2009).

87 *See* U.S. CONST. art. VI, cl. 2.

88 *Id.* art. I, § 7.

89 INS v. Chadha, 462 U.S. 919, 951–59 (1983). As the Court noted, these requirements do not apply to all actions of the two Houses of Congress, but they do apply to all exercises of legislative power. *See id.* at 951–52.

commentators have noted, this process is itself a deliberate limit on Congress, making it more difficult for Congress to act and working as an important part of the Constitution's checks and balances.[90]

This conclusion raises doubts about Justice Jackson's celebrated concurrence in *Youngstown*, or at least about ways in which that concurrence has been interpreted and applied. Jackson famously described three categories of presidential actions: those taken with Congress's approval, those on which Congress has been silent, and those taken despite congressional disapproval.[91] Jackson did not make entirely clear how he thought Congress might indicate approval or disapproval. Plainly, if Congress acts by enacting a statute, that would not raise Article I, Section 7 problems (though the statute might be unconstitutional on other grounds). But Jackson can be read as saying that congressional approval or disapproval can be found in congressional actions or nonactions other than enactment of a statute.

In *Dames & Moore v. Regan*,[92] the Court considered a presidential action which, it said, had not approved by statute.[93] However, because the President had taken (somewhat) similar actions in the past without congressional objection, the Court—citing Justice Jackson—concluded that Congress had "acquiesced" in the President's exercise of power.[94] The Court's approach in *Dames* appears to rest on a claim that Congress can act in a legally relevant way outside Article I, Section 7. What the Court called Congress's "acquiescence" was not embodied in a statute. But (with only a few exceptions not relevant here) Congress is not vested with powers apart from those vested by Article I, Section 1 and exercised through constitutionally prescribed methods including Article I, Section 7. Put another way, because Congress's acquiescence was not contained in a law made in pursuance of the Constitution, it was not part of Article VI's supreme law of the land and so should not have been given legal effect. The project of searching for congressional approval or disapproval in conduct other than enactment of a statute

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90 *Id.* at 944–51; Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1324, 1331–67 (2001).

91 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Jackson also said, however, in a sometimes-overlooked passage at the end of his opinion, "[t]he Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law." *Id.* at 655.

92 453 U.S. 654 (1981).

93 *See id.* at 675.

94 *Id.* at 678–83. The Court also cited Justice Frankfurter's *Youngstown* concurrence, arguing that longstanding practice might create a "gloss" on the Constitution's text in separation of powers matters. *Id.* at 686. This is a distinct argument not addressed here. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 417–24 (2012).

is, in addition to being highly speculative, contrary to the Constitution's specification of how Congress exercises its delegated legislative powers.

Nondelegation. The requirement that Congress follow ordinary constitutional procedures in exercising its foreign affairs powers also raises substantial doubts about the reasoning (though not necessarily the result) in *Curtiss-Wright*.[95] In that case, Curtiss-Wright challenged, on nondelegation grounds,[96] a congressional statute authorizing the President to prohibit arms sales to Bolivia and Paraguay if the President determined that a prohibition would help restore peace to the region.[97] The Court upheld the delegation, principally on the ground that, because the President had substantial independent power in foreign affairs, ordinary rules of nondelegation did not apply.[98]

Curtiss-Wright has been widely criticized for its assertion of broad presidential powers in foreign affairs (a matter discussed elsewhere in this Article).[99] But even assuming some substantial independent presidential powers, the vesting clause perspective indicates that the Court misanalysed the nondelegation issue. The specific power in *Curtiss-Wright* was the power to prohibit private transnational commerce in arms. As discussed, establishing rules for private conduct is a legislative power. Moreover, the Constitution expressly includes regulation of "Commerce with foreign Nations" within Congress's Article I, Section 8 legislative powers. Thus, whatever independent foreign affairs powers the President may have, regulation of foreign commerce is not one of them.

This conclusion does not mean Congress cannot authorize the President to issue regulations of foreign commerce. Rather, it means that whatever constitutional limits govern Congress's ability to authorize the President to exercise domestic rulemaking power also apply to Congress's ability to authorize the President to regulate foreign commerce. It may be that the delegation in *Curtiss-Wright* was constitutional—but not because it involved foreign affairs.[100]

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95 299 U.S. 304 (1936).

96 The nondelegation doctrine purports to limit Congress's ability to delegate lawmaking authority to the President or executive branch officers or agencies. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

97 *Curtiss-Wright Exp. Corp*., 299 U.S. at 311–14.

98 *See id.* at 316–22.

99 *See supra* Section II.C.1; *infra* Section III.A.

100 Congress's constitutional authority to delegate power to the President has been widely debated and is beyond the scope of this Article. *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & Liberty 718 (2019). The delegation in *Curtiss-Wright* was relatively narrow and specific, involving arms exports to two named countries, and the Court cited a historical practice of delegation in foreign trade

E. Vesting Legislative Powers: Summary and Conclusion

In sum, Article I, Section 1 vests "[a]ll" legislative powers "herein granted" in Congress, followed by express statements of Congress's powers.[101] From this structure flows a series of conclusions with particular relevance to debates over the allocation of foreign affairs powers. First, neither the President nor the federal courts have independent lawmaking power in foreign affairs. Second, Congress's legislative powers in foreign affairs are only those powers "herein granted" by identifiable constitutional clauses: Congress has neither inherent extraconstitutional foreign affairs powers nor a generalized constitutional power over foreign affairs. Third, Congress must exercise the foreign affairs powers "herein granted" according to the procedures the Constitution specifies generally for the exercise of legislative powers.

III. Vesting Executive Power over Foreign Affairs

A. The President Exercises Only Executive Power

Article II, Section 1—the second pillar of the Constitution's separation of powers structure—vests "the executive Power" in the President.[102] Two basic foreign affairs-related conclusions follow. First, as with Congress, the President has no extraconstitutional powers in foreign affairs; the vesting clause is the foundation of the President's power, as Article I, Section 1 is the foundation of Congress's legislative powers (and Article III, Section 1 is the foundation of the federal courts' judicial power). Second, the President's executive power is categorically distinct from and opposed to Congress's legislative powers (and the courts' judicial power). Whatever the President's foreign affairs powers may be, they must arise from grants of power in the Constitution, and they cannot be legislative or judicial in nature.

As to the absence of inherent presidential power, the argument principally tracks the foregoing argument against inherent congressional power.[103] Article II, Section 1's vesting clause says what power the President has—executive power—and, by negative implication, that excludes other powers. The Tenth Amendment, which limits all branches of the national government to powers "delegated to the United States by the Constitution," confirms that negative implication.[104]

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regulation dating to the founding era. *See Curtiss-Wright*, 299 U.S. at 322–24. Thus, the case may well have been correctly decided under ordinary principles of delegation, whatever those may be.

101 *See, e.g.*, U.S. Const. Art. I, § 8.

102 *Id.* art. II, § 1.

103 *See supra* Section II.C.1.

104 U.S. Const. amend. X.

The Court in *Curtiss-Wright* found to the contrary that the President holds extraconstitutional foreign affairs power through a two-step argument.[105] First, it said the national government derived its foreign affairs powers as a matter of national sovereignty, traced from Britain during the colonial period to the Continental Congress to the government established by the Constitution; because the states never had national sovereignty, they never had foreign affairs powers, and so could neither delegate them nor retain them.[106] And second, the President held the foreign affairs powers of the national government as the logical and necessary instrument of communication with foreign nations—the "one voice" of the nation in external matters.[107]

Neither of these propositions follows from logic, text, or history. As discussed in connection with inherent congressional powers, it is simply not true that any part of the national government has ultimate sovereign power over anything.[108] The foundational American political philosophy was (and remains) popular sovereignty: only the people ("We the People" in the Constitution's terms[109]) are sovereign, and all parts of governments, state and federal, have powers only to the extent the people have allocated them. Thus the people, not any of their governments, obtained powers (including foreign affairs powers) upon independence. Further, although the President may be a good practical choice to exercise foreign affairs powers, that is a choice for the sovereign people to make, not something that follows logically from an abstract idea of inherent sovereignty. The people could entirely withhold foreign affairs power from the President and put a collective body such as the Senate in charge of external matters. And, indeed, even a quick look at the Constitution shows that through it the people did limit or bar entirely the President's exercise of core foreign affairs powers such as declaring war and making treaties.[110] Moreover, founding-era history contains little if any support for the idea of inherent presidential foreign affairs power: key foreign affairs powers were described and treated as textually delegated powers, both under the Articles of Confederation and under the Constitution.[111]

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105 299 U.S. at 316–22.

106 *See id.* at 316–18.

107 *See id.* at 319–22.

108 *See supra* Section II.C.1.

109 U.S. CONST. pmbl.

110 *See id.* art. I, § 8; *id.* art. II, § 2.

111 *See* Ramsey, *supra* note 66, at 395–446. The Articles of Confederation specifically delegated key foreign affairs powers to the Continental Congress and withheld others; it denied some foreign affairs powers to the states and allowed others. *See* ARTICLES OF CONFEDERATION of 1781, arts. IX, X. The Constitution adopted the same approach, while striking the balance somewhat differently.

Thus, the President exercises only executive power, and while it may not be easy to say fully what that is, the vesting clauses make clear what it is not: it is not legislative or judicial power. Again, this conclusion does not avoid hard cases because—as the framers themselves recognized—some powers do not obviously belong within a particular category. As with Article I, later sections of Article II attempt to sort out some of the uncertainty, but some uncertainty necessarily remains. Nonetheless, as discussed above, the direction that (for example) the President cannot exercise legislative power can resolve some cases that have troubled foreign affairs doctrine and scholarship.

B. The President's Executive Power Includes (Some) Foreign Affairs Power

Once we conclude that the President exercises only executive power, the next question is what the executive power contains. One possibility is that it contains only the specific powers listed in the subsequent sections of Article II.[112] This suggestion has some superficial symmetry with Article I, which vests legislative power in Section 1 and then lists particular subjects of legislative power in (mainly) Section 8. But on closer examination, this reading seems implausible. First, there is a significant textual difference between Article I, which vests the legislative powers "herein granted," and Article II, which vests "the executive Power" without limitation. Article I thus necessarily confines Congress to a subset of legislative powers, while Article II appears to give the President all of the executive power (whatever that may be).[113]

Second, as a historical matter the core content of eighteenth-century executive power was the power to enforce ("execute") the law. Founding-era sources reveal broad consensus on this definition and, as applied to the Constitution, broad consensus that the President would have this power.[114] And yet, apart from Article II, Section 1, the Constitution does not clearly vest the President with this power.[115] One might say it follows from the Take Care Clause of Article II, Section 3.[116] But that clause is phrased as a duty, not a power, and it is buried among various minor powers toward the end of the Article, an odd place to list

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112 *See* McConnell, *supra* note 20, at 235–51 (discussing and rejecting this view).

113 *See id.* at 239 (making this argument).

114 *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L. J. 541 (1994).

115 McConnell, *supra* note 20, at 241 (concluding that law execution "is the heart of executive power, but it is not vested in the President unless the first sentence [of Article II] is substantive").

116 U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

the President's most fundamental power.[117] Instead, a more plausible reading is that Article II opens by vesting the power to enforce the law (as Article I opens by vesting the power to make law), with the subsequent sections clarifying or limiting particular aspects of that grant of power.[118] At minimum, then, the President's foreign affairs-related powers include the power to enforce Congress's foreign affairs-related laws, vested by Article II, Section 1 under the common historical understanding of executive power.

That conclusion raises the further question of what else might have been included in the historical concept of executive power. It is suggestive that there are various foreign affairs powers, generally related to diplomacy and international relations, that do not involve lawmaking and are not specifically listed in Article II or elsewhere. Article II lists reception of foreign ambassadors, plus shared power over appointment of U.S. ambassadors and treatymaking, but that does not seem to cover all of U.S. diplomacy, at least without extraordinary stretches of the text.[119] And Presidents, beginning with Washington, exercised control over U.S. diplomacy even without direction or authority from Congress.[120] Important figures in the early post-ratification period, including Hamilton and Jefferson, explained presidential control over diplomacy and foreign policy as arising from the President's executive power.[121]

The association of executive power and foreign affairs powers can also be found in preconstitutional sources well-known to the framers.

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117 *See id.* (listing, for example, the President's duty to give Congress information on the state of the union, to recommend legislation, and to convene and adjourn Congress).

118 *See* McConnell, *supra* note 20, at 242–45 (making these points).

119 *Id.* at 241 (noting the lack of a comprehensive enumeration of executive powers and concluding "[i]t is generally assumed—and has been since the first decade of the republic—that the President has the authority to set foreign policy and to control communications and negotiations with foreign nations. But if we confine our attention to Sections 2 and 3 [of Article II], the President has no such authority.").

120 *See* Prakash & Ramsey, *supra* note 22, at 295–340.

121 *See id.*; Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 Minn. L. Rev. 1591 (2005); *see also, e.g.*, Thomas Jefferson, *Opinion on the Powers of the Senate*, *in* 5 The Writings of Thomas Jefferson 161 (1790) (Paul Leicester Ford ed., 1894) ("The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate."); Alexander Hamilton, *Pacificus, No. 1*, *in* 4 The Works of Alexander Hamilton 432, 437 (1793) (Henry Cabot Lodge ed., 1904) (arguing that the executive power is the "*organ* of intercourse between the [United States] and foreign nations").

The present Article's use of the phrase "diplomacy" or "diplomatic relations" is not meant to suggest that the Constitution's framers' specifically understood such categories by name. Likely they did not. *See* Jean Galbraith, *The Runaway Presidential Power over Diplomacy*, 108 Va. L. Rev. 81, 114 (2022). But as the quotes from Hamilton and Jefferson (among others) indicate, they understood as "executive" a general category that encompassed interactions with foreign nations that today we call diplomacy.

Montesquieu, the eighteenth century's leading theorist of separation of powers, described executive power as implementing domestic law and, separately, "the executive [power] in respect to things dependent on the law of nations."[122] The holder of this latter power, Montesquieu continued, "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions."[123] Later eighteenth-century writers, including Thomas Rutherforth and Jean de Lolme, used similar terminology.[124] Blackstone, the century's leading expositor of British law, categorized the British monarch's independent powers as constituting the "executive part of government."[125] Under this classification, Blackstone noted that "[w]ith regard to foreign concerns, the king is the delegate or representative of his people,"[126] and specifically discussed, among other powers, sending and receiving ambassadors, the powers of war and peace, issuing letters of marque and reprisal, and issuing safe conducts.[127] The American framers of course firmly rejected this broad view of executive powers in foreign affairs, shifting the declare-war and marque-and-reprisal powers to Congress and qualifying the power to make treaties and appoint ambassadors with the requirement of Senate advice and consent.[128] But other, less important aspects of the power to act "[w]ith regard to foreign concerns" as "the delegate or representative of [the] people"[129] were not allocated elsewhere by the Constitution and, so, can be understood to remain part of the executive power Article II, Section 1 vested. Thus,

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122 MONTESQUIEU, *supra* note 6, at 198.

123 *Id.* Montesquieu later added, in describing the Roman system of government, that the Senate had "so great was the share . . . in the executive power" as a result of its control of foreign affairs matters such as determining on war and peace, arranging alliances, and sending and receiving embassies. *Id.* at 283; *see also* GWYN, *supra* note 6, at 101–03 (discussing Montesquieu's association of executive power with foreign affairs power); Prakash & Ramsey, *supra* note 121, at 1632–35 (same).

124 Rutherforth, an eighteenth-century English commentator on the law of nations, followed Montesquieu in describing "the second branch of executive power" as "the power of adjusting rights of the society with respect to foreigners." THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW bk. II, ch. III, at 54–55 (1754). De Lolme, in a chapter titled "Of the Executive Power," described the English monarch as "with regard to foreign Nations, the representative, and the depositary, of all the power and collective majesty of the Nation; he sends and receives ambassadors, he contracts alliances, and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper." JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 62–63 (David Lieberman ed., Liberty Fund, Inc. 2007) (1784).

125 1 BLACKSTONE, *supra* note 14, at 242, 245–53; *see also* Prakash & Ramsey, *supra* note 121, at 1635–37 (describing Blackstone's terminology). Blackstone added that "This ['executive part of government'] is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch." 1 BLACKSTONE, *supra* note 14, at 242.

126 1 BLACKSTONE, *supra* note 14, at 245.

127 *See id.* at 245–53.

128 *See* U.S. CONST. art I, § 8; *id.* art. II, § 2.

129 1 BLACKSTONE, *supra* note 14, at 245.

when early Presidents exercised power to control U.S. foreign relations, and early commentators explained that power as part of the executive power, their thoughts and actions followed from important commentary with which they were familiar.[130]

C. Implications of the President's Foreign Affairs Power

If Article II, Section 1 vests the President with nonlegislative diplomatic powers, that clarifies several recent prominent foreign affairs debates. This Section considers three examples: the President's power to establish U.S. foreign policy, the President's power to enter into nonbinding international agreements, and the President's power to instruct and recall ambassadors.

As discussed above, in *Zivotofsky v. Kerry*, the Supreme Court considered whether the President had power to establish U.S. policy regarding the status of Jerusalem.[131] The Court found that the President had the power (and that it was exclusive) as an extension of the Article II, Section 3 power to receive ambassadors.[132] But as also discussed above, that is an extraordinary stretch of the Ambassador Reception Clause.[133] A simpler solution, which Justice Thomas endorsed in his concurrence, is that establishing U.S. policy regarding foreign territory is part of the President's executive power.[134] It is not a lawmaking power; it is an aspect of (to paraphrase Blackstone) the power to act as the delegate or representative of the people with regard to foreign concerns,[135] and it is not part of the foreign affairs powers the Constitution assigns in whole or part to other branches of government.[136]

Another dispute, widely debated in recent commentary, is the President's power to enter into nonbinding agreements with foreign

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130 For extended discussion, see Prakash & Ramsey, *supra* note 22, at 265–78; Prakash & Ramsey, *supra* note 121, at 1629–53. For more recent defenses of the idea that Article II's vesting clause vests the President with some independent foreign affairs power, see McConnell, *supra* note 20, at 235–62; Zivotofsky v. Kerry, 576 U.S. 1, 33–40 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

131 *See* Zivotofsky v. Kerry, 576 U.S. 1 (2015); *see also supra* Section II.C.2.

132 *See* Zivotofsky v. Kerry, 576 U.S. at 10–21.

133 *See supra* note 82.

134 *See* Zivotofsky v. Kerry, 576 U.S. at 33–40 (Thomas, J., concurring in the judgment in part and dissenting in part) (reviewing eighteenth-century writings and practice and concluding that "Article II's Vesting Clause was originally understood to include a grant of residual foreign affairs power to the Executive").

135 1 Blackstone, *supra* note 14.

136 Historically, the President has long been understood to have independent constitutional power to establish the foreign policy of the United States, as reflected in episodes such as Washington's Neutrality Proclamation and the Monroe Doctrine. *See* Prakash & Ramsey, *supra* note 22, at 327–40; *see also* Hamilton, *supra* note 121, at 437 (justifying Washington's Neutrality Proclamation as an exercise of executive power).

nations. President Obama entered into two prominent agreements, the Joint Comprehensive Plan of Action ("JCPOA") regarding Iran's nuclear program, and the Paris Accord on climate change.[137] He did not seek Senate advice and consent for either agreement, which he justified on the ground that neither agreement was a treaty in the constitutional sense because neither agreement contained material binding commitments in international law.[138] As a matter of the Treaty-Making Clause, that seems correct: a defining characteristic of a treaty is that it is binding.[139] But even if the agreements did not infringe the Treaty-Making Clause, there remains the question of the source of the President's authority to enter into them (as Congress authorized neither).

Without recourse to Article II's vesting clause, that question is difficult to answer. Necessarily the authority cannot come from the Treaty-Making Clause, and neither agreement involved the President's reception of a foreign ambassador or recognition of a foreign government.[140] Article II, Section 1 again seems a straightforward source of the power[141]—and, more broadly, a source of the President's power to enter into nontreaty executive agreements.[142]

A third puzzle with implications for modern practice is the President's power to remove ("recall" in diplomatic parlance) U.S. ambassadors. For example, in 2019, President Trump recalled the U.S. ambassador to Ukraine, Marie Yovanovitch.[143] While the recall generated political controversy, it was not widely argued that the President lacked constitutional power, only that as a policy matter he had used it inappropriately.[144] And, indeed, presidents have claimed the power to recall ambassadors since the early post-ratification period; President

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137 Joint Comprehensive Plan of Action, Iran-U.S., July 14, 2015, U.S. Dep't of State Archive; Paris Agreement on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; *see also* Michael D. Ramsey, *Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements*, 11 Fla. Int'l U. L. Rev. 371, 377–87 (2016) (discussing these agreements).

138 *See* Ramsey, *supra* note 137, at 372–73.

139 *See id.* at 373–74.

140 *See id.* at 377–87.

141 *See id.* at 374–75.

142 *See* Ramsey, *supra* note 30, at 206–18 (defending the President's power to enter into executive agreements on this ground). As discussed above, however, presidential agreements (whether binding or nonbinding in international law) cannot have force as law in the U.S. domestic system because the President cannot independently exercise domestic lawmaking power.

143 Jennifer Hansler & Chandelis Duster, *'Someone Who Has Never Been Hungry for the Spotlight': Meet the Ambassador at the Center of the Ukraine Controversy*, CNN (Nov. 14, 2019, 6:07 PM), https://www.cnn.com/2019/10/10/politics/who-is-marie-yovanovitch/index.html [https://perma.cc/H67Y-KY23].

144 *See id.* "Trump personally ordered Yovanovitch's removal, according to The Wall Street Journal. She was accused without evidence by Rudy Giuliani—a former New York mayor and Trump's personal attorney—and others of trying to undermine the President and blocking efforts to investigate Democrats like former Vice President Joe Biden." *Id.*

Washington recalled James Monroe as ambassador to France when Monroe disagreed with Washington's neutrality policy.[145] But the President has no express constitutional power to recall U.S. ambassadors, and recalling ambassadors is not part of the President's law execution power, as ambassadors typically are not law enforcement officers.[146] Relatedly, the President's long-accepted power to instruct ambassadors (other than in respect of treatymaking) appears not to have a ready constitutional source. However, the Article II vesting clause provides a solution if one accepts its foreign affairs component.[147]

D. Objections to the President's Foreign Affairs Power

The idea that the President's Article II, Section 1 executive power includes foreign affairs powers is controversial and has recently been disputed at length in prominent articles by (among others) Julian Davis Mortenson[148] and Ilan Wurman.[149] Although full engagement with these important critiques is beyond the scope of this Article, a few preliminary responses can be noted.

Though writing with somewhat different emphases and conclusions, Mortenson and Wurman make two principal common points against the idea of executive foreign affairs power. First, they say, this is too large a power for the framers to have vested in the President

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145 *See* Prakash & Ramsey, *supra* note 22, at 309 (discussing the Monroe episode); *see also* McConnell, *supra* note 20, at 183 ("Washington's recall of James Monroe as ambassador to Paris was hugely controversial, but even his constitutionally fastidious critics did not argue that Washington lacked the power.").

146 *See* Prakash & Ramsey, *supra* note 22, at 244–45. Nor is the President's power to appoint ambassadors a likely source; that power is shared with the Senate, and in the parallel case of judges the power to appoint does not convey the power to instruct or remove. The President's power to instruct and remove most executive officers arises not from appointment but from the President's law execution power, but as noted in the text that cannot be a source of the President's power to instruct and remove officers who administer foreign policy.

147 *See* Prakash & Ramsey, *supra* note 22, at 317–22; McConnell, *supra* note 20, at 183.

148 Julian Davis Mortenson, *The Executive Power Clause*, 168 U. Pa. L. Rev. 1269 (2020) [hereinafter Mortenson, *Executive Power Clause*]; Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019) [hereinafter Mortenson, *Article II*].

149 Ilan Wurman, *In Search of Prerogative*, 70 Duke L.J. 93 (2020). For an earlier extended critique and response, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545 (2004); Prakash & Ramsey, *supra* note 121. An additional important recent critique of the executive foreign affairs power thesis focuses more on claims that the President's foreign affairs powers are exclusive. *See generally* Galbraith, *supra* note 122. The framework sketched here does not claim that the President's foreign affairs powers are exclusive, except (as noted) to the extent Congress does not have concurrent powers in an area. *See supra* Part II; *see also* Hamilton, *supra* note 121 (indicating that Congress might use concurrent powers to override executive foreign policy determinations).

without comment or objection during the drafting and ratification process.[150] Second, they say, seventeenth- and eighteenth-century writing generally used "executive power" to refer only to law execution power, without additional foreign affairs powers.[151] Neither point casts substantial doubt on the idea of executive foreign affairs power.

As to the first, as noted in leading accounts of the executive foreign affairs power, it is true that the drafting or ratification records contain little discussion of Article II, Section 1 vesting foreign affairs power.[152] But that does not have the necessary implication Mortenson and Wurman assign to it. As discussed above, the Constitution generally excludes the President from exercising legislative (and judicial) power, whether associated with foreign affairs or not. And the Constitution specifically assigns the most evident and important foreign affairs powers—declaring war, issuing letters of marque and reprisal, raising armies, regulating foreign commerce, making treaties, appointing diplomatic officers—either to Congress or in part to the Senate. The remaining executive foreign affairs powers are principally second-level diplomatic functions: representing the United States in its less-formal interactions with foreign nations.

Put this way, it is not so surprising that the President's foreign affairs powers were not the subject of material commentary or objection in the drafting and ratification period. This role likely seemed unthreatening and entirely appropriate for the President. One complaint against the confederation Congress was that, as a plural body, it was ill-suited to manage foreign affairs (a criticism Congress's Minister of Foreign Affairs, John Jay, particularly raised).[153] During ratification, the Constitution's defenders emphasized the need for an executive with "energy," acting with "[d]ecision, activity, secrecy and dispatch"[154]—qualities that seem well suited to the management of foreign affairs. When Washington quickly undertook the role of chief diplomat upon becoming President in 1789, it went largely uncontested.[155] If that role had been as threatening as Wurman and Mortenson suppose, there should have been objections. The lack of comment on the President's constitutional role as chief diplomat easily reflects a consensus, rather than a contradiction.

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150 *See* Wurman, *supra* note 149, at 102–03, 131–33; Mortenson, *Executive Power Clause*, *supra* note 148, at 1346–65.

151 *See* Mortenson, *Executive Power Clause*, *supra* note 148, at 1311–39 (finding no evidence of a foreign affairs meaning); Wurman, *supra* note 149, at 107–21 (concluding that the evidence is mixed).

152 *See* Prakash & Ramsey, *supra* note 22, at 279–94.

153 *See id.* at 272–78.

154 *See* THE FEDERALIST NO. 70, *supra* note 5, at 424 (Alexander Hamilton); *see also* RAMSEY, *supra* note 1, at 115–19 (describing the framers' preference for a stronger executive after their experience under the Articles of Confederation).

155 *See* Prakash & Ramsey, *supra* note 22, at 295–323.

On the second point, it is true that seventeenth-century separation of powers theory and advocacy focused on executive power as law enforcement power (chiefly as a limit on the Stuart monarchs' claim to legislative power).[156] Thus, it was common then and continuing into the eighteenth century for writers to equate executive power with law enforcement power; as Mortenson emphasizes, that was the common dictionary definition, including in Samuel Johnson's celebrated work, first published in 1755.[157] But even as Johnson published his dictionary, the definition in political writing was shifting. John Locke's late seventeenth-century treatment of separation of powers recognized a distinct category of foreign affairs powers that Locke called "federative power"—something that was neither lawmaking nor law execution.[158] As noted, Montesquieu, writing in 1748, instead included foreign affairs as a branch of executive power.[159] Blackstone, a decade after Johnson, followed Montesquieu in listing the main foreign affairs powers as within the "executive part of government."[160] Rutherforth and De Lolme, also in this period, used similar terms.[161] In America, the Essex Result of 1778 (written in the context of Massachusetts's rejected state constitution) reflected Montesquieu's classification: "The executive power is sometimes divided into the external executive, and internal executive. The former comprehends war, peace, the sending and receiving ambassadors, and whatever concerns the transactions of the state with any other independent state."[162] Political scientist W.B. Gwyn later wrote (with perhaps some exaggeration) that theorists of the time were "inclined to think of the executive branch of government as being concerned nearly entirely with foreign affairs."[163] In short, Johnson's

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156 *See generally* VILE, *supra* note 6.

157 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (definition of "executive"); *see also* Mortenson, *Executive Power Clause*, *supra* note 148, at 1311.

158 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 382–83 (Peter Laslett ed., Cambridge Univ. Press 1960).

159 *See* MONTESQUIEU, *supra* note 6, at 151.

160 1 BLACKSTONE, *supra* note 14, at 242, 245–53.

161 RUTHERFORTH, *supra* note 124, at 54–55; DE LOLME, *supra* note 124, at 62–63.

162 *The Essex Result, 1778*, *in* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, 324, 337 (Oscar Handlin & Mary Handlin eds., Belknap Press 1966).

163 GWYN, *supra* note 6, at 102. Professor Mortenson also strongly presses his view that eighteenth-century writers such as Montesquieu, Blackstone, and others did not actually describe foreign affairs powers as executive powers. Mortenson, *Article II*, *supra* note 148, at 1220–50. Alternatively, he describes Montesquieu and Rutherforth as "idiosyncratic" in separating executive power into internal and external components. *Id.* at 1250–59. As to the first point, the relevant sources are quoted extensively in prior writings, see Prakash & Ramsey, *supra* note 22, at 266–72; Prakash & Ramsey, *supra* note 121, at 1629–41, and (in the view of this Author) simply do not support Mortenson's reading. As to the second point, Montesquieu and Rutherforth may well have been idiosyncratic when they wrote in the mid-1700s, but their classification became widely known and adopted. Montesquieu in particular is conventionally understood as the central influence on

definition did not capture a new way of thinking about executive power, especially among separation of powers theorists.

To be sure, the identification of executive power with law enforcement power continued, and domestic law enforcement power likely remained the most prominent executive power in the minds of many people in the founding era. But that does not necessitate rejection of the idea of executive foreign affairs power. At most, one might say that there were two meanings of executive power in common use, one narrow (encompassing domestic law enforcement only) and one broader (encompassing domestic law enforcement and management of relations with foreign nations). Structural and historical evidence indicates that the Constitution used the latter.[164]

Importantly, neither Wurman nor Mortenson has a satisfactory account of the Constitution's allocation of diplomatic power to compete with the executive vesting approach. Mortenson apparently would require Congress to approve and direct all diplomatic activity (although he does not elaborate the point).[165] This claim, though, is contrary to post-ratification practice. As noted, Washington in 1789 promptly undertook control of U.S. diplomacy without Congress's authorization.[166] When Congress created the new Department of Foreign Affairs (later renamed the Department of State) in mid-1789, it did not assign any foreign affairs duties to the President and provided only that the Secretary of Foreign Affairs should act as the President directed in foreign affairs matters.[167] It seems clear that Congress assumed the President had an independent constitutional role as chief diplomat. While it is possible that Washington and the First Congress jointly acted on a mistaken understanding of the Constitution's allocation of foreign affairs power, that seems quite unlikely. Moreover, since Congress does not have a comprehensive power over foreign affairs and exercises only legislative power,[168] it is unclear how Congress could claim authority to manage U.S. diplomatic relations under Mortenson's approach.

Wurman, in contrast, would assign substantial foreign affairs powers to the President through what he calls a "thick" understanding of law enforcement power.[169] But it is unclear how this approach would

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the framers' separation of powers theory. *See* THE FEDERALIST No. 47, *supra* note 5, at 301 (James Madison) (referring to "the celebrated Montesquieu" as "[t]he oracle who is always consulted and cited" on separation of powers). That Montesquieu in some respects introduced new ways of thinking about separation of powers is not reason to dismiss his influence.

164 *See* Prakash & Ramsey, *supra* note 22, at 279–355.

165 *See* Mortenson, *Executive Power Clause*, *supra* note 148, at 1367.

166 *See* Prakash & Ramsey, *supra* note 22, at 295–323.

167 *See* Act of July 27, 1789, ch. 4, 1789 U.S.C.C.A.N. (1 Stat. 28); Prakash & Ramsey, *supra* note 22, at 300–03.

168 *See supra* Section II.C.

169 Wurman, *supra* note 149, at 159–73.

justify the President's longstanding exercise of some basic diplomatic powers. For example, as noted, Washington asserted and exercised the power to recall diplomatic personnel, most notably U.S. ambassador to France James Monroe.[170] Ambassadors have no law enforcement role, so it seems unlikely that even a "thick" version of law enforcement power could extend to this authority, yet Washington's recalls were not contested on constitutional grounds at the time.[171]

In sum, neither of the major recent critiques of the executive vesting theory materially undermines its foundations nor provides a viable alternative.[172] The idea that Article II, Section 1 vests the executive power over foreign affairs in the President remains the best explanation of how the Constitution allocated diplomatic power.

IV. Vesting Judicial Power in Foreign Affairs

Article III, Section 1 vests the "judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[173] As with the vesting clauses of Articles I and II, this seems necessarily to be a substantive grant of power. The balance of Article III is mostly directed to listing (and so limiting) the federal courts' areas of jurisdiction; nothing elsewhere in Article III explains what it means for a court to have jurisdiction nor gives courts power to authoritatively resolve disputes. It did not need

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170 *See supra* Section III.C.

171 *See* Prakash & Ramsey, *supra* note 22, at 309; McConnell, *supra* note 20, at 183. Wurman argues that ambassadorial recalls might be included within the President's treatymaking power, but Monroe's recall (like Yovanovitch's, and presumably many others) had nothing to do with treatymaking. *See supra* Section III.C.

172 In addition to the points mentioned in the text, Professor Wurman's strongest remaining argument is that the founding generation did not think certain other powers described by Blackstone as executive (or prerogative) powers of the monarch were presidential powers under the Constitution, even though those powers were not specifically allocated elsewhere by the Constitution's text. He points in particular to the power to erect corporations and the power over immigration. Wurman, *supra* note 148, at 125–31. Wurman is surely correct about corporations (perhaps less so about immigration). But the framers likely viewed the power to erect corporations (and at least some immigration powers) as legislative in nature, even though Blackstone described them as executive/prerogative powers, because they involved changing legal rights and duties. *See* McConnell, *supra* note 20, at 224–27 (discussing immigration power). *But see* United States *ex rel.* Knauff v. O'Shaughnessy, 338 U.S. 537, 542 (1950) (describing immigration as partly an executive power). Thus, the framers likely understood these powers as excluded from presidential control by Article I, Section 1. As shown by their view of war and treatymaking powers, the framers did not exactly adopt Blackstone's characterizations (and no one claims they did). The key to the allocation of the President's foreign affairs powers is not merely that Blackstone called them executive, but that the framers agreed with that classification to the extent that those foreign affairs powers did not involve lawmaking. *See* McConnell, *supra* note 20, at 224–27 (suggesting that the framers did not view immigration power as executive even though Blackstone did).

173 U.S. Const. art. III, § 1.

to because that was the traditional nature of the "judicial Power" the Article's first sentence conveyed.[174]

Consistent with the discussion in previous sections, Article III's reference only to judicial power, together with the grants of legislative and executive power in Articles I and II, shows that courts exercise only judicial power (and that other branches do not exercise judicial power).[175] And as with other powers, this division should hold equally in foreign affairs matters as in domestic matters because nothing in the Constitution's text or structure suggests any special rules for foreign affairs. Unlike the other branches, however, courts may be criticized for underusing their vested foreign affairs power as well as for exceeding it.

A recurring debate in U.S. foreign affairs law is the extent to which courts should refrain from deciding foreign affairs-related disputes. Hesitancy to interfere with foreign relations underlies various modern lines of cases, the foremost being the political question doctrine.[176] In a well-known opinion in *Baker v. Carr*,[177] Justice Brennan listed multiple factors that might make a case a nonjusticiable political question; while he noted that a connection to foreign affairs would not categorically place a dispute beyond judicial power,[178] he counseled that courts should refrain from deciding cases that might "embarrass[]" the political branches' conduct of foreign affairs or impede the nation's ability to speak with one voice on external matters.[179] Applying *Baker*, a plurality of the Court in *Goldwater v. Carter*[180] declined to decide a challenge to the President's power to terminate a treaty.[181]

In *Zivotofsky v. Clinton*[182]—a precursor to the *Zivotofsky v. Kerry* case discussed earlier[183]—the Supreme Court appeared to cut back sharply on the foreign affairs aspect of the political question doctrine.[184] As discussed, the issue in *Zivotofsky v. Kerry* was whether Congress could compel the President to issue passports reflecting birth in "Jerusalem,

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174 *See* McConnell, *supra* note 20, at 240 (arguing that because Article III, Section 1 is a substantive grant of power, that implies that Article II, Section 1 is also a substantive grant of power); Calabresi & Rhodes, *supra* note 9 (same).

175 *See supra* Section II.B. (discussing courts and legislative power).

176 *See* Martin S. Flaherty, Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs (2019) (describing and criticizing this approach).

177 369 U.S. 186 (1962).

178 *See id.* at 211.

179 *Id.* at 211–12, 217.

180 444 U.S. 996 (1979).

181 *See id.* at 1002–06 (Rehnquist, J., joined by Burger, C.J., Stewart, J., & Stevens, J., concurring). In the lower courts, a six-factor test derived from *Baker* became a standard framework, often leading to findings of nonjusticiability in foreign affairs cases. *See, e.g.*, Alperin v. Vatican Bank, 410 F.3d 532, 544, 549–58 (9th Cir. 2005) (applying six factors expressed in *Baker*).

182 566 U.S. 189 (2012).

183 *See supra* Section II.C.2.

184 *See* Zivotofsky v. Clinton, 566 U.S. at 201–02.

Israel"—rather than just "Jerusalem"—contrary to the President's policy of avoiding definitive statements on the status of Jerusalem.[185] The court below initially found the dispute to be a nonjusticiable "political question" under *Baker* and *Goldwater*, based on the dispute's connection to U.S. foreign affairs.[186] The Supreme Court reversed, holding that the case presented an ordinary question of constitutional interpretation which courts could appropriately answer as part of their judicial power; the Court did not discuss *Goldwater* or *Baker*'s embarrassment or one-voice factors.[187]

This Part argues that the vesting clause perspective strongly supports the Supreme Court's decision in *Zivotofsky v. Clinton*, while also supporting a narrow version of the political question doctrine.

A. Judicial Power and Duty

The independent federal judiciary was a core element of the Constitution's separation and limitation of powers. Although Hamilton, in *The Federalist*,[188] called the judiciary "the least dangerous" branch, he nonetheless described the courts' role in enforcing constitutional boundaries as the "bulwarks of a limited Constitution."[189] Further, the Constitution's text makes clear that the courts' judicial power is a duty as well: under Article VI, the "judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution . . . ."[190] Thus, as Chief Justice Marshall said in *Marbury*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[191] That is, courts have a constitutional obligation to use their judicial power to support the Constitution, including by enforcing the provisions of the Constitution and of treaties and statutes made in accordance with the Constitution and declared to be supreme law by Article VI.

Neither the text nor founding-era descriptions of the judicial power suggests a more limited judicial role in foreign affairs-related disputes. Indeed, the text's list of jurisdictional categories indicates a substantial foreign affairs role. Most notably, the framers took the novel step in Article VI of making treaties part of the supreme law of the land, and in

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185 *See supra* Section II.C.2.

186 Zivotofsky v. Sec'y of St., 571 F.3d 1227, 1232–33 (D.C. Cir. 2009).

187 *See* Zivotofsky v. Clinton, 566 U.S. at 195–201; *cf. id.* at 202 (Sotomayor J., concurring in judgment) ("In *Baker*, this Court identified six circumstances in which an issue might present a political question."). On *Zivotofsky v. Clinton*'s departure from *Baker* and *Goldwater*, see Michael D. Ramsey, *War Powers Litigation After* Zivotofsky v. Clinton, 21 CHAPMAN L. REV. 177, 178–80 (2018).

188 THE FEDERALIST No. 78, *supra* note 5 (Alexander Hamilton).

189 *Id.* at 465, 466–69.

190 U.S. CONST. art. VI, para. 3.

191 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Article III included cases arising under treaties within the federal courts' jurisdiction.[192] Article III also included jurisdiction over cases involving ambassadors, admiralty and maritime disputes (including prize cases), and cases arising under the Constitution (presumably including limitations arising from its foreign affairs provisions).[193] The text does appear to place some matters within the exclusive control of other branches: "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members"; "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member"; and "[t]he Senate shall have the sole Power to try all Impeachments."[194] There is no similar exclusion related to foreign affairs generally or to any specific foreign affairs power.

Further, the early history of Supreme Court adjudication does not suggest reluctance to decide foreign affairs-related controversies where they posed questions of legal interpretation.[195] For example, the early Court found executive branch actions in wartime to be illegal in multiple cases, without expressing reservations about justiciability.[196] Although as described below there was an early version of the political question doctrine not inconsistent with these principles, it is distinct from the modern claim that courts can and should decline to decide legal questions merely because they might produce results inconvenient for U.S. foreign affairs.[197]

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192 *See* U.S. Const. art. VI, para. 2; *id.* art. III, § 2.

193 *See id.* art. III, § 2; *see also* The Federalist, No. 78, *supra* note 5 (discussing the need for courts to enforce constitutional limitations without noting any foreign affairs reservations); *Marbury*, 5 U.S. (1 Cranch) at 176–77 (same).

194 U.S. Const. art. I, § 5, cls. 1–2; *id.* art. I, § 3, cl. 6. As discussed below, these clauses are the basis of one strand of the modern political question doctrine recognized in *Zivotofsky v. Clinton*, where a matter is "textually committed to another branch." 566 U.S. at 208.

195 *See* Flaherty, *supra* note 176, at 67–90 (reviewing the early history); Ramsey, *supra* note 187, at 191–94 (same).

196 *E.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 178 (1804); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804); Drown v. United States, 12 U.S. (8 Cranch) 110, 150–52 (1814); *see also* Ramsey, *supra* note 187, at 191 (discussing these cases); David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* International Law in the U.S. Supreme Court: Continuity and Change 7 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (discussing adjudication of foreign affairs-related cases during this period); Kevin Arlyck, *Courts and Foreign Affairs at the Founding*, 2017 BYU L. Rev. 1 (same).

197 This reasoning may also cast doubt on the modern version of abstention doctrines such as *forum non conveniens*, at least to the extent that they involve U.S. courts refusing to decide cases brought under U.S. law. *See* Maggie Gardner, *Admiralty's Influence*, 91 Geo. Wash. L. Rev. 1585 (2023) (discussing the origins of *forum non conveniens* doctrine).

B. Redeeming the Political Question Doctrine

The idea of nonjusticiable "political" questions dates at least to *Marbury*. But Chief Justice Marshall used it there in a different sense than its modern version. Rather than indicating a discretionary option for courts to avoid difficult foreign affairs questions, he invoked it as a constitutional limit on the judicial power:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . .
>
> In such cases, . . . whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.[198]

Thus, Marshall can be understood as saying that the judicial power does not extend to second-guessing the exercise of political discretion. At the same time, Marshall insisted, where the law (by the Constitution or statute) imposed a duty on the President, the judicial power allowed and required the courts to enforce that duty to the extent of protecting individual rights.[199]

The distinction between judicial power and executive (or, one might add, legislative) discretion underlies a number of nineteenth-century political question cases touching on foreign affairs. In early cases where the Court ruled on the merits, the question was a legal one that did not involve political branch discretion; for example, in *Little v. Barreme*,[200] the question was whether a statute precluded the President's seizure of a ship.[201] In contrast, in *United States v. Palmer*,[202] involving the question of whether to accept as legitimate a rebellious foreign government, Marshall observed

> [S]uch questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such

198 *Marbury*, 5 U.S. (1 Cranch) at 165–66.

199 *See id.*; *see also* Ramsey, *supra* note 187, at 189–91 (further developing this distinction). It is less clear that the courts have a constitutional duty to act in cases not involving the application of U.S. law, so in such cases there may be broader scope for the political question doctrine and related discretionary ways to avoid the merits of foreign affairs-related disputes.

200 6 U.S. (2 Cranch) 170 (1804).

201 *Id.* at 178; *see also* cases cited *supra* note 196 and accompanying text.

202 16 U.S. (3 Wheat.) 610 (1818).

> a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.[203]

Zivotofsky v Clinton reflects this distinction. The question of Jerusalem's status (or the U.S. position on Jerusalem's status) would seem to be a political question in the sense expressed in *Marbury* and *Palmer*. But that was not the question in *Zivotofsky v. Clinton*—rather, the question was *which branch* of the U.S. government (President or Congress) the Constitution empowered to address the status of Jerusalem.[204] As Chief Justice Roberts wrote for the Court in *Zivotofsky v. Clinton*, that is simply a question of constitutional interpretation.[205] Although it may be a difficult one, it is not different in kind from questions of constitutional interpretation courts routinely address—and that the conclusion is not altered by the fact that the case involved foreign affairs.[206] Thus, a focus on judicial power and duty suggests not that the political question doctrine is unwarranted, but that it was (at least prior to *Zivotofsky v. Clinton*) applied too broadly and imprecisely in modern times.[207]

Conclusion

The Constitution contains no general allocation of foreign affairs power, a seeming omission that has led to considerable confusion and debate. But much uncertainty can be avoided by recognizing that the Constitution allocates foreign affairs power in the same way it allocates domestic power. Through the vesting clauses of Articles I, II, and III, Congress exercises the listed legislative powers, the President exercises executive power, and the courts exercise judicial power. These are

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203 *Id.* at 634. Marshall added that for the court to decide such questions "would transcend the limits prescribed to the judicial department." *Id.* at 635. For discussion of additional cases in this vein, see Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. Rev. 1908, 1909–15 (2015); Ramsey, *supra* note 187, at 193, 193 n.73.

204 *See* Zivotofsky v. Clinton, 566 U.S. 189, 191 (2012).

205 *Id.*

206 *See id.* at 201 (observing that interpreting the Constitution is "what courts do"). *Zivotofsky v. Clinton* thus seems inconsistent with the plurality's application of the political question doctrine in *Goldwater*, discussed above; the question there, as in *Zivotofsky v. Clinton*, was how the Constitution allocated power between the President and Congress.

207 *See* Ramsey, *supra* note 187, at 183–88 (exploring appropriate applications of the political question doctrine in the context of war powers litigation). One aspect of the political question doctrine consistent with its constitutional foundations may be courts' deference to the executive branch on questions of customary international law. *See* Curtis A. Bradley, *The Political Question Doctrine and International Law*, 91 Geo. Wash. L. Rev. 1555, 1558–60 (2023); Ramsey, *supra* note 1, at 362–76.

not empty phrases but rather represent the basic foundation of eighteenth-century separation of powers theory. The Constitution contains no suggestion that this framework—readily accepted in domestic matters—should not also apply to foreign affairs. Of course, the Constitution goes on to specifically allocate particular foreign affairs powers, as it also goes on to specifically allocate particular domestic powers. But in the absence of a specific direction, we can recur to the basic principles set forth in the vesting clauses. These principles will not resolve all hard cases. They may, however, resolve some apparently hard cases, and may make some apparently hard cases somewhat less daunting.