THE INTERNATIONAL ZONE OF TWILIGHT:

ENFORCING CUSTOMARY INTERNATIONAL LAW BY EXECUTIVE ORDER

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INTRODUCTION

Given that the status of customary international law in the domestic legal system of the United States remains unclear,[1]

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[1] There is strong support for the claim that customary international law is equivalent to federal common law. *See, e.g.*, Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1497 (2011); Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary*

understanding the role of the president as sole organ of the United States in the field of international relations[2] becomes increasingly more important. In light of continuing global integration, the interplay between international law and international relations calls into question how far the president may act to ensure domestic compliance with international obligations as a matter of foreign policy. In this regard, this article poses the following questions: can the president issue an executive order to enforce customary international law and, if so, what preemptive effect does it have on inconsistent state law?[3] Assuming a court finds these questions justiciable,[4] this article suggests the following three-part analytical framework for a court to adopt in rendering a decision on this matter.

First, does the executive order seek to enforce customary international law? Beginning with this inquiry is not only uniquely fitting for a court to address, but if the answer is no, then a court can avoid

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Law of Nations, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 206 (2008); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555 (1984); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, Reporters' Note 4 (1986) ("Matters arising under customary international law also arise under 'the laws of the United States,' since international law is 'part of our law' . . . and is federal law."). However, several "revisionist" scholars have criticized this "modern" position. *See, e.g.*, Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After* Erie, 26 DENV. J. INT'L L. & POL'Y 807, 808–09 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816–17 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*]; Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 319 (1997); Curtis A. Bradley & Jack L. Goldsmith, Commentary, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2260 (1998). Revisionists argue that, in light of the U.S. Supreme Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), customary international law has the status of non-federal law. *See* Bradley & Goldsmith, *Customary International Law*, at 852–58. Thus, according to their approach, customary international law has the status of domestic law only if the federal political branches or the states authorize it. *Id.* at 863, 868, 870.

2 *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

3 By using an executive order to preempt state law, this Article also seeks to avoid any controversy surrounding the "dormant foreign affairs" preemption doctrine. *See* Joseph B. Crace, Jr., Gara-*mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 210–13 (2004).

4 *Cf.* Dole v. Carter, 569 F.2d 1109, 1110 (10th Cir. 1977) ("[W]hether the understanding between the United States and Hungary is a treaty or an executive agreement . . . . having its origins in the field of foreign relations, presents a nonjusticiable political question. . . . [for which there are] no 'judicially discoverable and manageable standards for resolving [the issue].'"); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 134 (Oxford Univ. Press 2d ed. 1996) (1972) (In scrutinizing foreign affairs actions, "judicial review rarely asserts or spends itself; foreign affairs 'are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (internal citation omitted).

having to answer the more contentious question of whether the president even has the authority to issue such an order. Part I starts by defining customary international law. This section then accounts for the role of the courts in determining whether a rule or norm represents customary international law. Second, does the executive have a valid claim of authority to issue the executive order? Part II examines executive orders, proclamations, and memoranda in general. It also provides an overview of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[5] and explores the executive power under Article II of the Constitution, particularly in the context of foreign affairs. Third, is inconsistent state law preempted? To answer this question, Part III compares two cases involving international agreements and preemption, *American Insurance Association v. Garamendi*[6] and *Medellín v. Texas*.[7]

Overall, with increased global integration, the line dividing domestic from international legal obligations will continue to blur, calling into question the constitutional limitations on the executive power in foreign affairs. My hope is that this article raises awareness for the importance of understanding the role of international law in our domestic legal system via executive orders, and therefore provides courts with an analytical framework for addressing these particular issues should they arise.

II. DOES THE EXECUTIVE ORDER SEEK TO ENFORCE CUSTOMARY INTERNATIONAL LAW?

A. DEFINING CUSTOMARY INTERNATIONAL LAW

A number of sources provide relatively consistent definitions for customary international law.[8] To begin with, Article 38 of the Statute of the International Court of Justice recognizes custom derived from a "general practice accepted as law" as one source of international law.[9]

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5 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952).

6 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401–02 (2003).

7 Medellín v. Texas, 552 U.S. 491, 500–01 (2008).

8 Customary international law is undefined in the U.S. Constitution and only mentioned once. *See* U.S. CONST. art. I, § 8, cl. 10 (providing that "[t]he Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the *Law of Nations* . . . .") (emphasis added).

9 Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993.

Additionally, the *Restatement (Third) of Foreign Relations Law of the United States* describes customary international law as "a general and consistent practice of states followed by them from a sense of legal obligation."[10] Each of these definitions emphasizes the two necessary components for customary international law—(1) general state practice and (2) a sense of legal obligation (or *opinio juris*[11]).[12]

State practice may be deciphered from "diplomatic contacts and correspondence, public statements of government officials, legislative and executive acts, military manuals and actions by military commanders, treaties and executive agreements, decisions of international and national courts and tribunals, and decisions, declarations, and resolutions of international organizations, among many others."[13] The *Restatement* mentions that the practice need not be universal or of lengthy duration, but rather "general and consistent," as "there is no precise formula to indicate how widespread a practice must be."[14] Accordingly, state practice "should reflect wide acceptance among the states particularly involved in the relevant activity."[15] It is important to recognize that inaction may also constitute state practice.[16] For instance, a state's acquiescence to the acts of another state, when those actions affect legal rights, may amount to state practice.[17] Conversely, this means that a state will not be bound to an emerging rule of customary international law if it objects to the rule during its development.[18]

While there may be evidence of a general and consistent practice among states, this alone is insufficient to establish customary

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[10] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, Reporters' Note 2 (1986).

[11] From the phrase '*opinio juris sive necessitatis*.' *See id.* §102, cmt. c.

[12] *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003) (Customary international law comprises "those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.").

[13] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 78 (3d ed. 2010). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. b (1986) (The practice of states "includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states, for example in organizations such as the Organization for Economic Cooperation and Development (OECD).").

[14] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. b (1986).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* § 102, cmt. d.

international law. Such practice becomes law when it is followed by states from a sense of legal obligation.[19] According to the *Restatement*, "a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law."[20] Determining whether this subjective element has transformed into a legal obligation may be difficult to prove. It is not necessary, however, to rely on explicit evidence, such as official statements; *opinio juris* is often "inferred from the nature and circumstances of the practice itself."[21]

A recent opinion of the United States Supreme Court may also shed light on a definition of customary international law. In the 2004 case of *Sosa v. Alvarez-Machain*,[22] the Court narrowly interpreted the Alien Tort Statute.[23] According to the Court, federal courts may recognize claims "based on the present-day law of nations" provided that the claims rest on "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court had] recognized."[24] The eighteenth-century paradigms the Court referred to include violations of safe conducts, infringement of the rights of ambassadors, and piracy.[25] To attain the status of customary international law regarding actionable violations under the Alien Tort Statute, a norm must be "specific, universal, and obligatory."[26] This understanding was reaffirmed in the Court's 2013 opinion in *Kiobel v. Royal Dutch Petroleum Company*.[27]

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19 *Id.* § 102, cmt. c.

20 *Id.*

21 DUNOFF ET AL., *supra* note 13, at 79; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. c (1986).

22 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

23 28 U.S.C. § 1350 (2006) ("[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

24 *Sosa*, 542 U.S. at 725.

25 *Id.* at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

26 *Id.* at 732 (quoting *In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)). *See also* United States v. Hasan, 747 F. Supp. 2d 599, 630 n.27 (E.D. Va. 2010) ("A norm need not literally be implemented by every member of the international community in order to be 'universally' accepted for purposes of becoming a rule of customary international law.").

27 Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, slip op. at 6 (U.S. Apr. 17, 2013).

B. INTERPRETING CUSTOMARY INTERNATIONAL LAW

When it comes to interpreting the law, the judicial branch has positioned itself as the predominate authority.[28] In the seminal case of *Marbury v. Madison*, the Court held that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[29] Exercising this power of judicial review, the courts have proven their institutional competency in determining whether a rule or norm represents customary international law.[30]

During the Constitution's formative years, John Jay wrote, "[U]nder the national government . . . the laws of nations, will always be expounded in one sense . . . . [and there is] wisdom . . . in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national government . . . ."[31] Later in 1793, as Chief Justice, John Jay wrote that "the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed."[32] For two centuries, the Court has affirmed that the domestic law of the United States recognizes the law of nations.[33]

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[28] *See* HENKIN, *supra* note 4, at 131 ("The courts have successfully established 'judicial review' and 'judicial supremacy', their final and 'infallible' authority to impose their readings of the Constitution on the political branches of the federal government as well as on the states, to monitor the separation of powers and the divisions of federalism.") (internal citation omitted).

[29] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[30] *Cf.* HENKIN, *supra* note 4, at 134 (In scrutinizing foreign affairs actions, "judicial review rarely asserts or spends itself; foreign affairs 'are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (internal citation omitted).

[31] John Jay, *The Federalist No. 3*, *in* THE FEDERALIST 13, 15 (Jacob E. Cooke ed., Wesleyan Univ. Press 2010) (1788). Alexander Hamilton also wrote that, under the Constitution, "cases arising upon . . . the law of nations" are "proper" before the federal judiciary. Alexander Hamilton, *The Federalist No. 80*, *in* THE FEDERALIST 534, 536 (Jacob E. Cooke ed., Wesleyan Univ. Press 2010) (1788).

[32] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793). *See also*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").

[33] Sosa v. Alvarez-Machain, 542 U.S. 692, 729–30 (2004) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); The Paquete Habana, 175 U.S. 677, 700 (1900); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land."); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

In the notable case *The Paquete Habana*, the Court held that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[34] In that case, the Court had to determine whether the United States had lawfully captured two fishing vessels and their cargoes as prizes of war during the then recent war with Spain.[35] An answer to this question resulted in a lengthy examination of state practice[36] and the works of foreign commentators.[37] After careful review, the Court concluded that, independent of an express treaty or public act, the "general consent of the civilized nations of the world . . . established [the] rule of international law" that coastal fishing vessels honestly pursuing their trade are exempt from capture as prizes of war.[38]

More recently, regarding the Alien Tort Statute,[39] the Court has also determined whether certain civil claims are recognizable under customary international law. In *Sosa v. Alvarez-Machain*,[40] the Court considered whether the prohibition against "arbitrary detention"[41] has the status of a binding norm of customary international law.[42] The Court concluded that such a claim lacked the same specificity as the three common law offenses of violations of safe conducts, infringement of the rights of ambassadors, and piracy:[43] "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[44]

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34 The Paquete Habana, 175 U.S. at 700.

35 *Id.* at 686.

36 *See id.* at 686–99 (including England, France, Netherlands, United States, Prussia, and Mexico).

37 *See id.* at 700–07 (from England, France, Argentina, Germany, Netherlands, Austria, Spain, Portugal, and Italy).

38 *Id.* at 708. *See also id.* at 686 ("By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.").

39 28 U.S.C. § 1350 (2006).

40 *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

41 *See id.* at 736 (Alvarez defined arbitrary detention as "officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances.").

42 *Id.*

43 *Id.* at 715, 737.

44 *Id.* at 738.

If a president were to issue an executive order enforcing customary international law, a court should find itself in a comfortable position to answer whether the rule actually represents customary international law. Under the definitional framework provided above, a court would look to see if there is a general and consistent practice among states relating to the rule. If so, a court must then consider whether this practice is adhered to out of a sense of legal obligation. Furthermore, in light of *Sosa*, a court could also look to see whether the rule is "specific, universal, and obligatory."[45] If the rule represents customary international law, a court would then turn to the second question under the framework and assess whether the president has the authority to issue the executive order.

III. DOES THE EXECUTIVE HAVE A VALID CLAIM OF AUTHORITY TO ISSUE THE EXECUTIVE ORDER?

A. EXECUTIVE ORDERS, PROCLAMATIONS, AND MEMORANDA

Although the Constitution does not explicitly define or authorize the issuance of executive orders, proclamations, or memoranda, every president has, since the inception of the Republic, employed these instruments with varying degrees of significance.[46] For example, executive orders have been used to suspend the writ of habeas corpus,[47] establish Japanese internment camps during World War II,[48] and prohibit discrimination based on race, color, religion, or national origin in the

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[45] *Id.* at 732 (quoting *In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

[46] VANESSA K. BURROWS, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 2 (2011) (citing THE N.J. HISTORICAL RECORDS SURVEY, WORK PROJECTS ADMIN., LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS 1 (1943); 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 64, 80–81 (James D. Richardson ed., 1896)). See JOHN CONTRUBIS, CONG. RESEARCH SERV., 95-772 A, EXECUTIVE ORDERS AND PROCLAMATIONS (1999), for a more detailed account of the evolving use and treatment of executive orders,

[47] Executive Order from President Lincoln to Major-General H.W. Halleck, Commanding in the Department of Missouri (1861), *in* VI A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 99 (James D. Richardson ed., 1896) ("General: As an insurrection exists in the United States and is in arms in the State of Missouri, you are hereby authorized and empowered to suspend the writ of habeas corpus within the limits of the military division under your command and to exercise martial law as you find it necessary, in your discretion, to secure the public safety and the authority of the United States.")

[48] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942). *See also* Korematsu v. United States, 323 U.S. 214 (1944).

armed services–just to name a few.[49] More recently, President Obama issued executive orders regarding the closure of Guantanamo Bay[50] and the prohibition on the use of torture.[51]

In 1957, the House Government Operations Committee prepared what is now the most commonly accepted description[52] for executive orders and proclamations:

> Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.
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> . . . In the narrower sense Executive orders and proclamations are written documents denominated as such. . . .
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> Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.
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> Proclamations in most instances affect primarily the activities of private individuals.
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> Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority.[53]

Put another way, executive orders and proclamations are directives that require or sanction actions of government officials and agencies. Commentators note that the difference between these instruments and presidential memoranda is "more a matter of form than of substance."[54] Unlike executive orders and proclamations, which must be published in the *Federal Register*,[55] memoranda are only published

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[49] Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948) ("It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.").

[50] Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009) (closure of Guantanamo detention facilities).

[51] Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009) (ensuring lawful interrogations).

[52] BURROWS, *supra* note 46, at 1.

[53] STAFF OF HOUSE COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957).

[54] BURROWS, *supra* note 46, at 1.

[55] 44 U.S.C. § 1505 (2006). The Federal Register Act requires that executive orders and proclamations be published in the *Federal Register*. *Id.* Established by an executive order issued by President Kennedy, the president must also comply with preparation, presentation, and

when the president determines that they have "general applicability and legal effect."[56] Accordingly, all three instruments have the force and effect of law when published under a valid claim of authority, "of which all courts are bound to take notice, and to which all courts are bound to give effect."[57]

The authority for the president to issue executive orders must derive from either an act of Congress or from the Constitution.[58] Under the Constitution, the presidential power to issue executive orders may be supported by Article II as explored below, which provides that "the executive Power shall be vested in a President of the United States," that "the President shall be Commander in Chief of the Army and Navy of the United States," and that the president "shall take Care that the Laws be faithfully executed."[59] The president's foreign affairs powers may also provide the requisite constitutional authority to issue an executive order, as will be explored later in this article.[60] Furthermore, authority may derive from explicit or implied statutory authority.[61] The issuance of an executive order may raise concerns about whether the order falls outside the realm of the president's authority in relation to both the Constitution and validly enacted legislation, thus calling for a greater degree of analysis.

In *Youngstown Sheet & Tube Co. v. Sawyer*,[62] the Supreme Court established the analytical framework for reviewing executive orders. In that case, President Truman had issued an order that authorized the Secretary of Commerce to seize most of the nation's steel mills in an effort prevent a workers' strike during the Korean War.[63] In writing for the majority, Justice Black maintained that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from

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publication requirements regarding executive orders. *See* Exec. Order No. 11,030, 27 Fed. Reg. 5847 (June 21, 1962).

56 44 U.S.C. § 1505(a).

57 BURROWS, *supra* note 46, at 1 (citing Armstrong v. United States, 80 U.S. (13 Wall.) 154, 155–56 (1871)). *See also* Phillip J. Cooper, *By Order of the President: Administration by Executive Order and Proclamation*, 18 ADMIN. & SOC'Y 233, 240 (1986); Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir. 1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964); Jenkins v. Collard, 145 U.S. 546, 560–61 (1893)).

58 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

59 U.S. CONST. art. II, §§ 1–3. *See also Youngstown*, 343 U.S. at 587.

60 *See infra* Part III.B–C.

61 *Youngstown*, 343 U.S. at 585.

62 343 U.S. 579 (1952).

63 Exec. Order 10,340, 17 Fed. Reg. 3139 (Apr. 10, 1952).

the Constitution itself."[64] Because there was neither statutory nor constitutional authority for the seizure of the steel mills,[65] the Court held that the executive order was invalid. [66] The Court further held that the executive order infringed upon the separation of powers doctrine: "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[67] While the majority opinion in *Youngstown* would appear to refute the claim that presidential powers may be implied from the Constitution, there were five concurring opinions, four of which maintain that there may be implied authority in certain contexts.[68] Of these, it is Justice Jackson's concurring opinion that has emerged as the most influential.[69]

According to Justice Jackson's concurrence, the validity of an executive order is evaluated under a tripartite scheme.[70] First, a court must determine if the president acted according to an explicit or implied grant of congressional authority.[71] If so, the president's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[72] In these circumstances, an executive order has "the strongest presumption[] and the widest latitude of judicial interpretation."[73] Any challenger would bear a heavy burden of persuasion.[74]

Second, when the president has been neither granted nor denied congressional authority, he must "rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[75] When it comes to analysis within this *zone of twilight*, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[76] Third, when the

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64 *Youngstown*, 343 U.S. at 585.

65 *Id.* at 585–88.

66 *Id.* at 589. More specifically, the Court found that authority could not be implied from the "aggregate" of his constitutional powers. *Id.* at 587.

67 *Id.* at 589.

68 BURROWS, *supra* note 46, at 3 (citing *Youngstown*, 343 U.S. at 610, 659, 661).

69 *Id.*

70 *See Youngstown*, 343 U.S. at 634.

71 *Id.* at 635.

72 *Id.*

73 *Id.* at 637.

74 *Id.*

75 *Id.*

76 *Id.*

president's actions are "incompatible with the expressed or implied will of Congress," his power is at a minimum.[77] For the action to be valid, the president must "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[78] Justice Jackson further noted that any "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[79]

Under this tripartite framework, Justice Jackson initially found that the executive order did not fall within either of the first two categories. First, there was no congressional authorization for the seizure of steel mills.[80] As for the second category, Justice Jackson noted that the presidential action was "clearly eliminated from that class" as there were three statutory policies that covered the seizure of private property inconsistent with the executive order.[81] Relegated to the third category, President Truman's order would be valid provided it was "within his domain and beyond control by Congress."[82] According to Justice Jackson, the executive order "originate[d] in the individual will of the President and represent[ed] an exercise of authority without law."[83]

The Jackson tripartite framework remains applicable in contemporary cases. As the Supreme Court recently noted in the 2008 case of *Medellín v. Texas*,[84] "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action. . . ."[85] The use of the scheme in *Medellín* will be explored later in Part III of this article, and it will also provide the framework when analyzing an executive order that seeks to enforce customary international law.

B. CONSTITUTIONAL AUTHORITY AND THE FOREIGN AFFAIRS POWERS

As noted above, the president's authority to issue executive orders must derive from either an act of Congress or from the Constitution. As there is no legislative enactment granting the president

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77 *Id.*
78 *Id.*
79 *Id.* at 638.
80 *Id.*
81 *Id.* at 639.
82 *Id.* at 640.
83 *Id.* at 655.
84 552 U.S. 491 (2008).
85 *Id.* at 524.

the authority to issue an executive order enforcing customary international law, the authorization in this matter must derive from the executive power under Article II of the US Constitution. However, unlike Article I, which explicitly limits Congress's powers to "[a]ll legislative Powers *herein granted*,"[86] Article II vests the "executive Power"[87] in a president without such textual limitations. This broad and ambiguous grant of authority may account for the relatively few and modest powers explicitly vested in the president.[88] In addition to those powers specifically enumerated in Article II, the president also possesses certain inherent foreign affairs powers.[89] To avoid a lengthy examination of every facet presidential powers may take, this article will focus on those powers that predominately touch and concern foreign affairs.

First, the president has the express power to make treaties, subject to the advice and consent of two-thirds of the senators present.[90] While the Senate's consent is required, it is the president who makes and ultimately ratifies treaties.[91] Despite significant support by the Senate or Congress, a treaty will not be entered into absent presidential action.[92]

In addition to treaties, the Supreme Court has recognized that the president has the "power to make such international agreements as do not constitute treaties in the constitutional sense."[93] Colloquially referred to as "sole Executive agreements,"[94] the president "may conclude an international agreement on any subject within his [or her] constitutional authority so long as the agreement is not inconsistent with legislation enacted by Congress in the exercise of its constitutional authority."[95] On par with other international agreements, "sole executive agreement[s] made by the President on his or her independent constitutional authority

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86 U.S. CONST. art. I, § 1 (emphasis added).

87 *Id.* art. II, § 1, cl. 1.

88 *See id.* art. II, § 2, cls. 1–3.

89 *See* HENKIN, *supra* note 4, at 34 ("[A]s Justice Sutherland taught, the authority of the federal government in foreign relations derives from national sovereignty and is essentially extra-constitutional, the powers of the President might also have to be sought elsewhere.").

90 U.S. CONST. art. II, § 2, cl. 2.

91 HENKIN, *supra* note 4, at 34, 37.

92 *Id.* at 37.

93 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (citing Altman & Co. v. United States, 224 U.S. 583, 600–01 (1912)) (The Court's conclusion was warranted not by "the provisions of the Constitution, but in the law of nations.").

94 Robert E. Dalton, *United States*, *in* NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH 765, 780 (Duncan B. Hollis et al. eds., 2005).

95 11 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, § 723.2-2(C) (2006), *available at* http://www.state.gov/documents/organization/88317.pdf.

[are] the law of the land and supercede[] state law under Article VI of the Constitution."[96] However, the power to enter into executive agreements is still subject to certain limitations. For instance, while recognizing that "the President has certain inherent powers under the Constitution . . . the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress."[97]

Second, the president has the authority to appoint ambassadors, subject to majority consent from the Senate,[98] as well as receive foreign "Ambassadors and other public Ministers."[99] These provisions illustrate how the Constitution empowers the president to do "strikingly little" in regard to other nations.[100] However, some have argued that the authority to appoint and receive ambassadors implies the power to "recognize (or not to recognize) governments; to establish (or not to establish) relations with them; and to modify or terminate relations by withdrawing the U.S. Ambassador or having a foreign ambassador recalled."[101]

Third, the president serves as the "Commander in Chief of the Army and Navy of the United States."[102] Following within this broad grant of authority, presidents have "exercised full and exclusive control of the conduct of . . . war,"[103] "enter[ed] into armistice agreements terminating hostilities,"[104] "use[ed] . . . troops and do[ne] anything else necessary to repel invasion" while awaiting a Congressional declaration of war,[105] and declared neutrality concerning the wars of other nations.[106] These powers demonstrate how this clause may concern matters of foreign relations, particularly relating to both ongoing and future armed conflicts.

Fourth, while not placed among his or her other powers, the president has the duty to "take Care that the Laws be faithfully

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96 Dalton, *supra* note 94, at 782 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)).

97 *Id.* at 783 (quoting United States v. Guy W. Capps, Inc., 204 F.2d 655, 659 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955)).

98 U.S. CONST. art. II, § 2, cl. 2.

99 *Id.* art. II, § 3.

100 HENKIN, *supra* note 4, at 38.

101 *Id. See also* Baker v. Carr, 369 U.S. 186, 212–13 (1962); Jones v. United States, 137 U.S. 202, 212 (1890).

102 U.S. CONST. art. II, § 2, cl. 1.

103 HENKIN, *supra* note 4, at 46.

104 *Id.* at 47.

105 *Id.* at 47–48.

106 *Id.* at 48.

executed."[107] Historically, presidents have invoked this authority to comply with treaty obligations to send troops abroad,[108] extradite individuals to a foreign country,[109] suppress piracy and slavery,[110] restore property to a foreign government,[111] and compel domestic compliance with obligations of neutrality.[112]

Lastly, the "executive Power" clause,[113] coupled with the president's role as "sole organ" in foreign relations[114] and "sole representative" with foreign nations[115] arguably confers a "large grant of power" over conducting foreign affairs.[116] In addition to deciding how, when, where, and by whom the United States should make or receive communications, as sole organ, the president also may determine the content of the communication.[117] This is readily apparent where the president declares the attitudes and intentions of the United States concerning matters involving other nations.[118]

The president's powers, however, are subject to a number of limitations. Such constraints on power include "implications in constitutional grants to Congress," "Congressional legislation that is within its constitutional authority," "prohibitions applicable to all acts of government," as well as challenges under the Bill of Rights.[119]

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[107] U.S. CONST. art. II, § 3.

[108] HENKIN, *supra* note 4, at 50–51 (citing QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 217, 227 (1922)).

[109] *Id.* (citing *In re* Kaine, 55 U.S. (14 How.) 103, 112 (1852); Valentine v. United *ex rel.* Neidecker, 299 U.S. 5 (1936); Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893)).

[110] *Id.* (citing QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 192–94, 296 (1922)).

[111] *Id.*

[112] *Id.*

[113] U.S. CONST. art. II, § 1, cl. 1.

[114] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936) (internal citation omitted).

[115] *Id.* at 319 (internal citation omitted).

[116] *See* HENKIN, *supra* note 4, at 39, 41–45. This perspective has historical roots. For example, to support the constitutionality of President George Washington's proclamation of neutrality in the war between Great Britain and France, Alexander Hamilton celebrated the executive character of foreign relations. *See id.* at 43.

[117] *Id.* at 42–43.

[118] *Id.* at 44 (referencing 'Doctrines' of former Presidents, including Monroe, Truman, Eisenhower, Nixon, and Reagan).

[119] *Id.* at 45.

C. CUSTOMARY INTERNATIONAL LAW AND THE ZONE OF TWILIGHT

The Supreme Court has reaffirmed Justice Jackson's tripartite framework in *Youngstown* for analyzing executive orders.[120] As there is neither congressional approval nor any incompatibility with the will of Congress, determination of the president's authority to issue an executive order enforcing customary international law falls within the "zone of twilight."[121] Although authority must derive from the Constitution in this matter, it is important for a court to remember that presidential action may involve some or all of his or her powers together, rather than specifically singling out an individual power.[122] This is no more apparent than when the president acts in foreign affairs.

First, if the status of customary international law is equivalent to federal common law, then the president could simply find constitutional authority to issue the executive order pursuant to his or her power under the Take Care clause.[123] Relating the president's duty to faithfully execute the law as incorporating customary international law is not a novel perspective to hold. In 1793, Alexander Hamilton wrote:

> The Executive is charged with the execution of all laws, [including] the laws of nations, [and t]he President is the Constitutional Executor of the laws, [which include o]ur treaties, and the law of nations . . . . It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid giving a cause of war . . . . [And since o]ur Treaties and the laws of Nations form a part of the law of the land, . . . [the President has both] a right, and . . . duty, as Executor of the laws . . . . [He has a duty] to do whatever else the laws of Nations . . . [and "Treaties"] enjoin.[124]

In addition, Louis Henkin wrote that "U.S. treaties and customary international law that have domestic normative quality . . . are also law of the land, and Presidents have asserted responsibility (and

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[120] *See* Medellín v. Texas, 552 U.S. 491, 524 (2008).

[121] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952). *See also* HENKIN, *supra* note 4, at 32 ("In foreign affairs . . . the allocation of authority to the two branches is sometimes disputed, and there may be *concurrent powers* as to which President and Congress strive for priority or preference.") (emphasis added).

[122] *See* HENKIN, *supra* note 4, at 36 ("In law as in politics, what matters is the total of Presidential power, rather than the shape and size of its individual components. Constitutionally, every Presidential act stands on all his powers together (as well as on authority delegated to him by Congress).").

[123] *See* U.S. CONST. art. II, § 3.

[124] Paust, *supra* note 1, at 244 (quoting Alexander Hamilton, *Pacificus No. 1*, *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 35, 38, 40, 43 (Harold C. Syrett ed., 1969)).

authority) to interpret such international obligations and to see that they are 'faithfully executed,' even when Congress has not enacted implementing legislation."[125]

Second, the Commander-in-Chief clause[126] may provide for authority relating to foreign relations.[127] Given the president's authority to exercise full and exclusive control in conducting armed conflicts,[128] one could imagine the president ensuring compliance with norms of international humanitarian law customarily practiced by states. As Commander-in-Chief of the US armed forces, the president has the unique position of shaping customary international law through its own practice. This would also imply the authority to then ensure compliance with that policy domestically.

Third, the president's power to appoint and receive ambassadors,[129] as well as recognize or not recognize foreign governments,[130] may provide authority to issue an executive order regarding the customary norm of immunity. Courts have recognized that "head-of-state immunity" represents a "doctrine of customary international law," and provides immunity to an incumbent head-of-state from the jurisdiction of a foreign state's courts.[131] The rationale for head-of-state immunity is to "promote comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system."[132] An executive order seeking to enforce a customary norm of immunity illustrates how such authority would likely derive from the power to appoint and receive ambassadors and recognize foreign governments.

Last, authority to issue an executive order enforcing customary international law may lie within the president's implicit "executive Power"[133] in foreign affairs, which also arguably includes the ability to enter into international agreements other than treaties[134] and to act as sole

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[125] HENKIN, *supra* note 4, at 50.

[126] *See* U.S. CONST. art. II, § 2, cl. 1.

[127] HENKIN, *supra* note 4, at 45.

[128] *Id.* at 46.

[129] U.S. CONST. art. II, § 2, cl. 2; *Id.* art. II, § 3.

[130] *See* HENKIN, *supra* note 4, at 38. *See also* Baker v. Carr, 369 U.S. 186, 212–13 (1963); Jones v. United States, 137 U.S. 202, 212 (1890).

[131] Yousuf v. Samantar, 699 F.3d 763, 768–69 (4th Cir. 2012) (quoting *In re* Grand Jury Proceedings, 817 F.2d 1108, 1110 (4th Cir. 1987)).

[132] *Id.* (quoting *In re* Grand Jury Proceedings, 817 F.2d 1108, 1110 (4th Cir. 1987)).

[133] *See* U.S. Const. art. II, § 1, cl. 1.

[134] *See supra* notes 93–97 and accompanying text.

organ of the United States in international relations.[135] It is this "sole organ" role of the president that is unique when it comes to setting foreign policy objectives and customary international law. As Louis Henkin noted, the president "acts and speaks the part of the United States in the subtle process by which customary international law is formed."[136] If the president has the authority as sole organ in the field of international relations in the formation of customary international law, it would logically follow that he or she would then have the authority to ensure domestic compliance with that rule of international law.

This executive foreign affairs power, however, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[137] For example, if a rule of customary international law concerns foreign commerce, this is the constitutionally delegated realm of Congress.[138] A president would most likely find himself relegated to the third *Youngstown* category, as an executive order in this area is incompatible with the will of Congress.[139] This is quite similar to non-self-executing treaties, whose domestic implementation is also the responsibility of Congress.[140]

What source of authority the president might rely upon to issue the executive order will ultimately depend on what rule of customary international law is sought to be enforced. The authority may fit within the duty to take care that the laws are faithfully executed, the power as Commander-in-Chief, and the ability to appoint and receive foreign ambassadors. A president may also derive authority from the executive foreign affairs power. This source is undoubtedly more controversial, but may certainly provide support for an executive order enforcing customary international law. Assuming a court has determined that the executive order enforces a rule of customary international law and that the president has the authority to issue the order, the court must now consider whether the order supersedes inconsistent state law.

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135 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936).

136 HENKIN, *supra* note 4, at 43.

137 *Curtiss-Wright*, 299 U.S. at 320.

138 U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations. . . .").

139 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

140 Medellín v. Texas, 552 U.S. 491, 527 (2008).

IV. IS INCONSISTENT STATE LAW PREEMPTED?

The Supremacy Clause provides that the Constitution, federal statutes, and treaties "shall be the supreme Law of the Land."[141] In *United States v. Belmont*,[142] the Court held that "the external powers of the United States are to be exercised without regard to state laws or policies."[143] And in *United States v. Pink*,[144] the Court recognized that *all* international agreements and treaties "are to be treated with similar dignity for the reason that 'complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interfere on the part of the several states.'"[145] However, whether customary international law preempts inconsistent state law remains unanswered, particularly in the context of enforcement via a domestic mechanism such as an executive order. Reviewing two recent decisions regarding international agreements and preemption will help shed light on the preemptive power of executive orders enforcing customary international law.

A. PREEMPTION AND INTERNATIONAL AGREEMENTS

In the past ten years, the Supreme Court has had the occasion to rule twice on matters of the executive power regarding international agreements and the preemption of state law. First, in the 2003 case of *American Insurance Association v. Garamendi*,[146] the Court was faced with a state law conflicting with the president's sole-executive agreements conducted with Germany, Austria, and France.[147] Five years later, in *Medellín v. Texas*,[148] the Court examined an executive memorandum that sought to enforce a provision of a non-self-executing treaty to preempt state law.[149] This section explores these two cases in greater detail.

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141 U.S. CONST. art. 6.
142 301 U.S. 324 (1937) (involving an executive agreement with the USSR).
143 *Id.* at 331.
144 315 U.S. 203 (1942) (involving an executive agreement with the USSR).
145 *Id.* at 223 (citing *Belmont*, 301 U.S. at 331).
146 539 U.S. 396 (2003).
147 *Id.* at 413.
148 552 U.S. 491, 500–01 (2008).
149 *Id.* at 523.

i. Sole-Executive Agreements: American Insurance Association v. Garamendi

Before and during the Second World War, the Nazi government of Germany encouraged the confiscation of Jewish assets, including insurance policies.[150] These policies ended up being either paid to the Reich or never paid at all.[151] After the war, insurance policies were often dishonored by insurers denying the existence of the policy, claiming they had lapsed from unpaid premiums or because the government denied heirs the documentation of the policyholder's death.[152] And the London Debt Agreement, which established a moratorium on Holocaust claims, meant survivors were prevented from seeking compensation via the court system.[153]

In an effort to address the issue of unpaid claims under Nazi-era insurance policies, California enacted the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which allowed state residents to pursue litigation in state courts for insurance claims based on acts committed during the Holocaust.[154] The HVIRA was designed to "ensure the rapid resolution" of unpaid insurance claims, "eliminating the further victimization of these policyholders and their families."[155] The provisions of the HVIRA in dispute required any insurance company doing business in California to disclose the details of "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies" that were issued "to persons in Europe, which were in effect between 1920 and 1945."[156]

During this time, international efforts were also underway to resolve "the last great compensation related negotiation arising out of World War II."[157] To serve as an "alternative to endless litigation" which promised little relief to Holocaust survivors, President Clinton and German Chancellor Schröder signed the German Foundation Agreement in July 2000, whereby Germany agreed to establish a foundation for the

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[150] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401–02 (2003).

[151] *Id.* at 403.

[152] *Id.* at 402.

[153] *Id.* at 403–04. The moratorium lasted until the reunification of East and West Germany, which lifted the moratorium and resulted in a flood of class-action lawsuits in United States courts. *Id.* at 404–05.

[154] *Id.* at 408–09.

[155] CAL. INS. CODE § 13801(e) (West 2014).

[156] *Garamendi*, 539 U.S. at 409 (quoting CAL. INS. CODE § 13804(a) (West Cum. Supp. 2003)).

[157] *Id.* at 405 (internal citations removed).

German government and German companies to contribute 10 billion deutsch marks.[158] This voluntary compensation fund was contingent upon the US government's submission of a statement that "it would be in the foreign policy interests of the United States for the Foundation to be the *exclusive forum and remedy* for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II."[159]

The German Foundation also agreed to work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), which is a voluntary organization formed in 1998 that negotiates with European insurers and settles claims for unpaid insurance policies issued to Holocaust victims.[160] More importantly, the German Foundation Agreement served as a model for subsequent agreements with Austria and France.[161]

After the HVIRA was enacted, Former Deputy Treasury Secretary Stuart Eizenstat "wrote to the insurance commissioner of California" arguing "that although HVIRA 'reflects a genuine commitment to justice for Holocaust victims and their families, it has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the [ICHEIC].'"[162] Deputy Secretary Eizenstat also argued that "actions by California . . . have already threatened to damage the cooperative spirit which the [ICHEIC] requires to resolve the important issue for Holocaust survivors."[163]

Despite the plea of the national government, the California commissioner announced that he would "enforce HVIRA to its fullest, requiring the affected insurers to make the disclosures, leave the State voluntarily, or lose their licenses."[164] Faced with this ultimatum, several

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158 *Id.*

159 *Id.* at 406 (emphasis added) (citation omitted).

160 *Id.* at 406–07.

161 *Id.* at 408. *See also id.* at 408 n.3 (citing Agreement Between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffered During World War II, U.S.-Fr., Jan. 18, 2001, 2001 WL 416465; Agreement between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation", U.S.-Austria, Oct. 24, 2000, 40 I.L.M. 523 (2001); Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and Cooperation", U.S.-Austria, annex A, § 2(n), Jan. 23, 2001, 2001 WL 935261).

162 *Id.* at 411 (citation omitted).

163 *Id.* (citation omitted).

164 *Id.* at 411–12 (citation omitted).

American and European insurance companies and the American Insurance Association challenged the constitutionality of the HVIRA, seeking injunctive relief.[165] The district court issued a preliminary injunction given the probability that the HVIRA is unconstitutional.[166] In a second appeal, the Ninth Circuit reversed, claiming that the HVIRA violated neither the foreign affairs nor the foreign commerce powers.[167]

In reversing the Ninth Circuit, the Supreme Court held that the HVIRA was preempted by the federal foreign affairs power.[168] Beginning with a review of the executive authority in the context of foreign affairs, the Court wrote that there is

> no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.[169]

While acknowledging that the text of the Constitution does not explicitly provide the president the power to act in foreign affairs, the Court noted "the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'"[170] Thus, when it comes to foreign affairs, "the President has a degree of independent authority to act."[171]

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[165] *Id.* at 412.

[166] *Id.*

[167] *Id.* at 412–13.

[168] *See id.* at 420–25.

[169] *Id.* at 413 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964)) (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381–82 n.16 (2000); Alexander Hamilton, *The Federalist No. 80*, *in* THE FEDERALIST 534, 535–35 (Jacob E. Cooke ed., Wesleyan Univ. Press 2010) (1788); James Madison, *The Federalist No. 44*, *in* THE FEDERALIST 299 (Jacob E. Cooke ed., Wesleyan Univ. Press 2010) (1788); James Madison, *The Federalist No. 42*, *in* THE FEDERALIST 279 (Jacob E. Cooke ed., Wesleyan Univ. Press 2010) (1788); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 769 (1972) (plurality opinion); Japan Line, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434, 449 (1979)).

[170] *Id.* at 414 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

[171] *Id.* (citing Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs."); *Youngstown*, 343 U.S. at 635–36 n.2 (Jackson, J., concurring in judgment and opinion of Court) (The president can "act in external affairs without congressional authority.") (citing United States v. Curtiss–Wright Exp. Corp., 299 U.S. 304 (1936)); *First Nat'l City Bank*, 406 U.S. at 767 (The president has "the lead role . . . in foreign policy.") (citing *Sabbatino*, 376 U.S. 398); Sale v. Haitian Ctrs.

Relying on its decisions in *Dames & Moore*, *Pink*, and *Belmont*, the Court reasoned that the president is authorized to make "executive agreements" with other countries, which do not require any ratification by the Senate or approval of Congress.[172] Further, a valid sole-executive agreement generally preempts state law, just like treaties, but is subject to the Constitution's guarantees of individual rights.[173] While the German Foundation Agreement differed from prior executive agreements, as it addressed claims against corporations and not foreign governments, the Court concluded that "the distinction does not matter" because "insisting on [a sharp line between public and private acts] in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies."[174]

The majority opinion then turned its attention to its decision in *Zschernig v. Miller*,[175] which roughly held that state action that has more than an incidental affect on foreign affairs is preempted, even in the absence of federal activity in the subject area at issue.[176] Rather than try to define any so-called dormant foreign affairs preemption under *Zschernig*, the Court decided to leave the question of whether "the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption" unanswered, as there was a "sufficiently clear conflict" requiring preemption in this case.[177]

According to the Court, when there is evidence of a clear conflict between the exercise of the federal executive authority and state law, the latter must give way.[178] And the evidence of conflict in this case is "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives."[179] As Justice Souter wrote for the majority, "The basic fact is that California seeks to use an iron fist where

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Council, Inc., 509 U.S. 155, 188 (1993) (The president has "unique responsibility" for the conduct of "foreign and military affairs.")).

172 *Id.* at 415 (citing Dames & Moore v. Regan, 453 U.S. 654, 679, 682–83 (1981); United States v. Pink, 315 U.S. 203, 223, 230 (1942); United States v. Belmont, 301 U.S. 324, 330–31 (1937); HENKIN, *supra* note 4, at 219, 496 n.163).

173 *Id.* at 416.

174 *Id.* at 415–16.

175 389 U.S. 429 (1968).

176 *Garamendi*, 539 U.S. at 418.

177 *Id.* at 419–20.

178 *Id.* at 421.

179 *Id.* at 427 (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 386 (2000)).

the President has consistently chosen kid gloves."[180] The executive agreements represent a consistent foreign policy, and the HVIRA was clearly in conflict.[181]

ii. Non-Self-Executing Treaties: Medellín v. Texas

On June 29, 1993, José Ernesto Medellín, a Mexican national, was arrested with several gang members for the rape and murder of two teenagers in Texas.[182] After his arrest, Medellín was given *Miranda* warnings, which he waived in writing and gave a detailed written confession.[183] However, law enforcement did not inform Medellín of his right under the Vienna Convention on Consular Relations (Vienna Convention) to notify the Mexican consulate of his detention.[184] Medellín was subsequently convicted at trial of capital murder and sentenced to death.[185]

The failure to be notified of the right to consular notification was raised for the first time in Medellín's application for state post-conviction relief.[186] Because it was not raised at trial or on direct review, the state trial court held that the claim was barred under the procedural default rule, which the Texas Court of Criminal Appeals affirmed.[187] Medellín then filed a habeas petition in federal court.[188] The district court denied relief, stating that the claim was procedurally defaulted.[189]

While Medellín's application for a certificate of appealability was pending in the Fifth Circuit, the International Court of Justice[190]

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[180] *Id.*

[181] *See id.* at 422–24.

[182] Medellín v. Texas, 552 U.S. 491, 500–01 (2008).

[183] *Id.* at 501.

[184] *Id. See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 [hereinafter Vienna Convention]. If a person is detained by a foreign country and "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his right[]" to request assistance from the consul of his own state. *Id.* art. 36(1)(b).

[185] *Medellín*, 552 U.S. at 501.

[186] *Id.*

[187] *Id.* at 501–02.

[188] *Id.* at 502.

[189] *Id.*

[190] The ICJ was established in 1945 pursuant the United Nations Charter, and serves as "the principal judicial organ of the United Nations." U.N. Charter art. 92. Under Article 94, paragraph 1 of the U.N. Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." *Id.* art. 94, para. 1.

(ICJ) issued its decision in *Case Concerning Avena and Other Mexican Nationals*.[191] In that case, the ICJ held that the United States had violated the Vienna Convention by failing to inform fifty-one Mexican nationals, including Medellín, of their Vienna Convention right to consular notification.[192] In the opinion of the ICJ, the United States was obligated "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals."[193]

After the *Avena* decision was rendered, the Fifth Circuit denied a certificate of appealability.[194] According to the Fifth Circuit, the Vienna Convention did not confer individual enforceable rights,[195] and that it was bound to the Supreme Court's decision in *Breard v. Greene*,[196] which held that claims under the Vienna Convention are subject to procedural default rules.[197] The Supreme Court granted certiorari.[198]

Before oral argument, President George W. Bush issued a memorandum to the United States Attorney General, which stated:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[199]

Relying on the *Avena* decision and the presidential memorandum, Medellín filed a second writ of habeas corpus in the Texas Court of Criminal Appeals.[200] In dismissing the application as an abuse of the writ, the court held that "neither the *Avena* decision nor the President's Memorandum was 'binding federal law' that could displace

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[191] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31). The International Court of Justice is the proper venue to resolve disputes arising out of the interpretation or application of the Vienna Convention. *See* Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, Apr. 24, 1963, 21 U.S.T. 325 [hereinafter Optional Protocol].

[192] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 153 (Mar. 31).

[193] *Id.* at 72.

[194] *Medellín*, 552 U.S. at 503.

[195] *Id.* (citing Medellín v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004)).

[196] 523 U.S. 371, 375 (1998) (per curiam).

[197] *Medellín*, 552 U.S. at 503 (citing Medellín v. Dretke, 371 F.3d at 280).

[198] Medellín v. Dretke (*Medellín I*), 544 U.S. 660, 661 (2005) (per curiam).

[199] *Medellín*, 552 U.S. at 503.

[200] *Id.* (citing *Ex parte Medellín*, 223 S.W.3d 315, 322–23 (Tex. Crim. App. 2006)).

the State's limitations on the filing of successive habeas applications."[201] Again, the Supreme Court granted certiorari.[202]

In granting certiorari for a second time, the Supreme Court had to decide two questions: first, was the *Avena* judgment directly enforceable in a state court[203] and second, did the president have the authority to issue a memorandum that independently required states to give effect to the *Avena* judgment.[204] After holding that Article 94(1) of the UN Charter was non-self-executing and the judgment in *Avena* did not constitute binding federal law that would preempt state law,[205] the Court turned its attention to the president's memorandum.

The Court began by acknowledging certain interests in this case were "plainly compelling."[206] These included the president's interest "in ensuring the reciprocal observation of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law."[207] The Court went on to reaffirm the fundamental principle that "[t]he 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.'" [208] Furthermore, Justice Jackson's tripartite scheme in *Youngstown* provided the accepted framework for evaluating the president's memorandum.[209] Against this backdrop, the Court responded to three different arguments.

First, the United States argued that the relevant treaties authorized the president to enforce the *Avena* judgment.[210] Since they "'create an obligation to comply with *Avena*,' they 'implicitly give the President authority to implement that treaty-based obligation.'"[211] Thus, according to the United States, this authority placed the memorandum in the first category of the *Youngstown* framework.[212]

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[201] *Id.* at 504 (quoting *Ex parte Medellín*, 223 S.W.3d at 352).
[202] *Id.*
[203] *Id.* at 523.
[204] *Id.* at 498.
[205] *Id.* at 513, 522–23.
[206] *Id.* at 524.
[207] *Id.*
[208] *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952)).
[209] *Id.*
[210] *Id.* at 525.
[211] *Id.* (internal citations omitted).
[212] *Id.*

The Court disagreed.[213] Although the president exercises an "array of political and diplomatic means . . . to enforce international obligations," he cannot unilaterally covert a non-self-executing treaty into a self-executing treaty.[214] When a treaty is not self-executing, it can only be enforced by domestic legislation; it is the responsibility of Congress to transform the international obligation into domestic law.[215] This congressional requirement is derived from the Constitution, which divides the treaty-making power between the president and the Senate.[216] When a treaty is ratified without reference to its domestic effect, "it is governed by the fundamental constitutional principle that '[t]he power to make the necessary laws is in Congress; the power to execute in the President.'"[217] Given the absence of congressional legislation, the relevant non-self-executing treaties did not provide either explicit or implied authority for the president to unilaterally make them self-executing.[218] Accordingly, the Court concluded that the memorandum did not fall with the first *Youngstown* category.[219]

The United States further claimed that the memorandum should be given effect as domestic law as this case involved presidential action in the context of congressional acquiescence.[220] While acknowledging that "[u]nder the *Youngstown* tripartite framework, congressional acquiescence is pertinent when the President's action falls within the second category—that is, when he 'acts in absence of either a congressional grant or denial of authority,'"[221] the Court held that the memorandum did not fit the second *Youngstown* category because prior cases failed to support that Congress acquiesced to this particular exercise of authority.[222] This means that any assertion of authority must be found within the third *Youngstown* category.[223] The Court then concluded that since it is the responsibility of Congress to enact

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213 *Id.*

214 *Id.*

215 *Id.* at 525–26.

216 U.S. CONST. art. II, § 2; *Medellín*, 552 U.S. at 526.

217 *Medellín*, 552 U.S. at 526 (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006)) (other internal citations omitted).

218 *Id.* at 527 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

219 *Id.*

220 *Id.* at 528 (internal citations omitted).

221 *Id.* (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

222 *Id.* at 528–30.

223 *Id.* at 527.

legislation enforcing a non-self-executing treaty, a president's enforcement of such a treaty by unilaterally creating domestic law is in clear conflict "with the implicit understanding of the ratifying Senate,"[224] and thus, invalid.[225]

Second, independent of any treaty obligations, United States argued that the memorandum was a valid exercise of the president's independent foreign affairs authority to resolve disputes with foreign nations.[226] Thus, the president's independent source of authority can preempt conflicting state law.[227] The United States relied principally on the Court's past decisions regarding executive agreements.[228]

Again, the Court disagreed. According to the Court, the claims-settlement cases were "based on the view that 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,' can 'raise a presumption that the [action] had been [taken] in pursuance of its consent.'"[229] A presidential memorandum that seeks to preempt procedural default rules and compel state courts to reopen final criminal judgments, on the other hand, is an "unprecedented action" that "is not supported by a 'particularly longstanding practice' of congressional acquiescence."[230] Narrowly interpreting executive agreement precedent, the Court wrote that the president's "strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum."[231]

Third, Medellín argued that the president was authorized by his "Take Care" power to issue the memorandum.[232] The Court made quick work of this argument. The Take Care power only allows the president to execute the laws, not make them.[233] Given the Court's holding that the

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[224] *Id.*

[225] *Id.* at 527–30.

[226] *Id.* at 530.

[227] *Id.* at 531.

[228] *Id.* at 530–31 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003); Dames & Moore v. Regan, 453 U.S. 654, 679–80 (1981); United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937)).

[229] *Id* at 531 (alteration in original) (internal citation omitted).

[230] *Id.* at 532 (internal citation omitted).

[231] *Id.*

[232] *Id.*

[233] *Id.*

Avena judgment is not domestic law, the president cannot rely on the Take Care power to implement it by memorandum.[234]

In his dissent, Justice Breyer chose to "leave the matter in the constitutional shade from which it ha[d] emerged," given his view that the relevant treaty provision was self-executing.[235] While he did not answer the question, Justice Breyer wrote that the president's memorandum would "fall[] within that middle range of Presidential authority where Congress has neither specifically authorized nor specifically forbidden the Presidential action in question."[236] According to Justice Breyer, it would be difficult to believe that the president's actions could never preempt state law when he exercises his Article II powers pursuant to a ratified treaty.[237] At the same time, the Constitution must impose significant restrictions over the president's ability to circumvent the legislative process and preempt state law.[238]

Justice Breyer further acknowledged that the Court's jurisprudence has not provided much of an answer to this question.[239] In the context of international claims settlement, the Court has held that "the President has a fair amount of authority to make and to implement executive agreements, . . . and that this authority can require contrary state law to be set aside."[240] The Court made clear that the Executive can act without explicit legislative authority to assert principles of foreign sovereign immunity in state court.[241] The Court has also held that the Executive has inherent authority to bring a lawsuit in order to carry out treaty obligations.[242]

Given that the Court lacks expertise in foreign affairs when compared to the political branches; the importance of United States foreign relations; the difficulty in striking the proper constitutional balance between federal and state and executive and legislative powers in these matters; and the predictably important efforts of the Court to do so in the future, Justice Breyer cautioned against a conclusion that the

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234 *Id.*

235 *Id.* at 566 (Breyer, J., dissenting).

236 *Id.* at 564.

237 *Id.*

238 *Id.* at 565.

239 *Id.*

240 *Id.* (citing United States v. Pink, 315 U.S. 203, 223, 230–31, 233–34 (1942); United States v. Belmont, 301 U.S. 324, 326–27 (1937)).

241 *Id.* (citing *Ex parte* Peru, 318 U.S. 578, 588 (1943)).

242 *Id.* (citing Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 425–26 (1925)).

Constitution implicitly imposes either broad prohibitions or permissions in this area.[243]

B. PREEMPTION AND CUSTOMARY INTERNATIONAL LAW

The question of preemption would be pretty easy to answer if customary international law is equivalent to federal common law; any inconsistent state law would be preempted. Assuming otherwise, whether an executive order enforcing customary international law preempts inconsistent state law requires reconciliation of *Garamendi* and *Medellín*. Each case considered authorization for executive action differently, which ultimately determined the outcome of the case.

In *Garamendi*, the Court did not use the *Youngstown* tripartite framework, recognizing instead that the president has inherent executive power regarding foreign affairs and the making of executive agreements.[244] While the Constitution does not explicitly provide the president the power to act in foreign affairs, the executive power vested in Article II places the "vast share of responsibility for the conduct of our foreign relations" in the president.[245] Thus, when it comes to foreign affairs, the president has a degree of independent authority to act; and that authority includes the power to make executive agreements that do not require any ratification by the Senate or approval of Congress.[246]

Focusing primarily on preemption, the Court strayed away from imposing broad field preemption for the federal executive power over foreign affairs. Rather, the Court considered conflict preemption between an executive agreement and an inconsistent state law.[247] Accordingly,

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[243] *Id.* at 565–66.

[244] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). *See also* Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs."); *Youngstown*, 343 U.S. at 635–36 n.2 (Jackson, J., concurring in judgment and opinion of Court) (The president can "act in external affairs without congressional authority.") (citing United States v. Curtiss–Wright Exp. Corp., 299 U.S. 304 (1936)); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (The president has "the lead role . . . in foreign policy.") (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) (The president has "unique responsibility" for the conduct of "foreign and military affairs.").

[245] *Id.* (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)).

[246] *Id.* at 415 (citing Dames & Moore v. Regan, 453 U.S. 654, 679, 682–83 (1981); United States v. Pink, 315 U.S. 203, 223, 230 (1942); United States v. Belmont, 301 U.S. 324, 330–31 (1937); HENKIN, *supra* note 4, at 219, 496 n.163).

[247] *Id.* at 420.

when there is evidence of a clear conflict between the exercise of the federal executive authority and state law, the latter must give way.[248] When a state law frustrates the president's foreign policy objectives of ensuring domestic compliance with international obligations, the inconsistent state law is preempted.

Conversely, in *Medellín*, the Court did use the *Youngstown* framework in examining the action taken by the executive.[249] As Congress is responsible for enacting domestic legislation to enforce obligations under a non-self-executing treaty, an executive memorandum attempting to do the same is in clear conflict with the implicit understanding of the ratifying Senate.[250] Therefore, the memorandum would be invalid.[251] By invalidating the memorandum in this way, the Court did not need to address whether the memorandum would preempt state law.[252]

As previously mentioned in Part II.C, the authority to enforce customary international law falls within the executive foreign affairs power. Unlike a non-self-executing treaty, customary international law does not require Congress to enact domestic legislation. Rather, the exercise of executive power is like the foreign affairs power authorizing the president to enter into executive agreements. As the Court noted in *Belmont*, the "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."[253]

Supported further by the reasoning in *Garamendi*, an executive order that enforces customary international law would inevitably preempt inconsistent state law. Customary international law is created through the general and consistent practice of *states*, followed out of a sense of legal obligation.[254] The president is authorized as sole organ of the United States in foreign relations to establish consistent foreign policy and establish state practice.[255] That policy may require compliance

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[248] *Id.* at 421.

[249] Medellín v. Texas, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 635).

[250] *Id.* at 527.

[251] *Id.* at 527–30.

[252] For an argument in favor of interpreting the President's Memorandum as preemptive under *Garamendi*, see Anne E. Nelson, Note, *From Muddled to* Medellín*: A Legal History of Sole Executive Agreements*, 51 ARIZ. L. REV. 1035, 1057–58 (2009).

[253] United States v. Belmont, 301 U.S. 324, 331 (1937).

[254] Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1986).

[255] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

domestically with international legal obligations, including obligations arising through custom. Inconsistent state law would frustrate that purpose, and should be preempted as having more than an incidental effect on foreign policy.

CONCLUSION

Courts have often strayed away from cases that require determining the extent and contours of the president's foreign affairs power.[256] But this is precisely the area that needs further judicial elucidation. As the world becomes more interconnected, understanding the permissible role of the president in international relations is of greater importance–particularly in the context of ensuring domestic compliance with international legal obligations. Whether an executive order enforcing customary international law will ever be issued and subsequently challenged as preempting state law is purely speculative at this point in time. Nevertheless, this article's straightforward three-part analytical framework will hopefully assist a court should these questions arise.

Given this article's limited focus, other questions still persist, including the impact the executive order would have on existing federal law. Does the later-in-time rule apply to executive orders enforcing customary international law?[257] If such an order is not binding, should courts still defer to its directive?[258] And if so, how much deference should be given?[259] Such inquiries only illustrate the exciting potential for further scholarship regarding the role of international law in the domestic legal system.

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[256] Henkin, *supra* note 4, at 33 (Although courts have rarely checked the "alleged Presidential usurpation" concerning the conduct of foreign affairs, presidents are well aware that "judicial review lies in wait and might yet strike them down.").

[257] *Compare* Ping v. United States, 130 U.S. 581, 600 (1889) (A treaty "can be deemed . . . only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control."), *with* Murray v. The Charming Betsey, 6 U.S. (2 Cranch) 64, 118 (1804) (Statutes should generally be interpreted so as not to override prior treaties.).

[258] *See* Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012) (concluding that the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference).

[259] *See id.* ("We give *absolute deference* to the State Department's position on status-based immunity doctrines such as head-of-state immunity. The State Department's determination regarding conduct-based immunity, by contrast, is not controlling, but it carries *substantial weight* in our analysis of the issue.") (emphasis added).