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STARE DECISIS AND FOREIGN AFFAIRS

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ABSTRACT

This Article examines whether the jurisprudential and institutional premises of the doctrine of stare decisis retain their validity in the field of foreign affairs. The proper role of the judicial branch in foreign affairs has provoked substantial scholarly debate—historical, institutional, and normative—since the founding of the Republic. Precisely because of the sensitivity of the subject, the Supreme Court has both warned about the judicial branch's comparative lack of expertise in the field and established a web of deference doctrines designed to protect against improvident judicial action. Notwithstanding all of this discussion, however, neither the Supreme Court nor any scholar has ever examined the complicated relationship between stare decisis and foreign affairs.

This Article first contextualizes the discussion with an analysis of the foundations of stare decisis. After a review of the values that animate the doctrine, it explores the subtly important jurisdictional premises of stare decisis. Almost entirely overlooked by both courts and scholars, these inherent jurisdictional limitations on the force of precedent have direct implications for the proper role of stare decisis in foreign affairs law. The Article then examines the special constitutional arrangement of powers in the field, in particular the

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respective roles of Congress and the executive. Just as significant, the Article also canvasses the multiplicity of avenues by which the American legal system channels foreign affairs issues to the federal courts. This growing interbranch tension highlights the significance of reflexively cloaking the resultant judicial precedents with full stare decisis effect.

The analysis in this Article demonstrates that in fact a more nuanced and accommodating understanding of precedent is required with respect to certain fundamental aspects of foreign affairs law. For purely domestic statutes, fidelity to the value judgments first made by Congress within and for the domestic legal system should avoid both the fact and appearance of independent judicial agency. Moreover, when Congress takes it upon itself to define the entire content of the law—without importing international legal norms—the courts need look only to familiar domestic sources and materials in their interpretive inquiries.

Matters are different, however, for the broad and expanding field of controversies that likewise fall within the Article III "judicial Power" but that involve the courts in the enforcement of rights or obligations grounded in international law. Within this field, the analysis in this Article demonstrates that the likelihood and consequences of judicial error are greater, that precedents are particularly susceptible to rapid erosion by exogenous forces of change, and that institutional considerations make judicial leadership that has been fortified by rigid precedent particularly problematic. It ultimately concludes that these distinct considerations should function as an additional "special justification" for reexamining international-law precedents. Consistent with the systemic values of stare decisis, however, the reexamination power should exist only for the issuing court; lower courts in the hierarchically integrated judicial branch—courts that are subject to the vertical dimension of stare decisis—should remain bound by precedents to the full extent of existing law.

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INTRODUCTION

Stare decisis and the law of foreign affairs seem to inhabit entirely different jurisprudential worlds with no apparent means of communication. In matters of foreign affairs, the Supreme Court has often warned about the judicial branch's comparative lack of expertise and inability to gauge the implications of its judgments for

external relations.[1] Separately, a web of deference doctrines and related interpretive presumptions function to protect against improvident judicial detours into foreign affairs, especially on matters of international law.[2] Together, these related considerations constitute admonitions to the courts about the unfamiliarity of the terrain and the consequent risks of judicial leadership in the field.

Curiously, however, these concerns seemingly evaporate once a court creates a precedent. An analysis of stare decisis jurisprudence fails to uncover any sensitivity to the special risks and "collateral consequences"[3] of judicial error in foreign affairs matters. That is, ex ante admonitions about improvident judicial action do not find even the faintest echo in the stare decisis force of judicial precedents ex post. My goal here is to mine this curiosity.

The proper role of the judicial branch in foreign affairs has provoked substantial scholarly debate—historical, institutional, and normative—since the founding of the Republic.[4] In all of this

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1. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727 (2010) (observing that "when it comes to collecting evidence and drawing factual inferences in [national security and foreign affairs], 'the lack of competence on the part of the courts is marked'" (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981))); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 386 (2000) ("We have . . . recognized the limits of our own capacity to 'determin[e] precisely when foreign nations will be offended by particular acts.'" (alteration in original) (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983))); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (declaring that decisions in foreign affairs are "delicate, complex, and involve large elements of prophecy . . . . of a kind for which the Judiciary has neither aptitude, facilities nor responsibility"); *infra* notes 138–52 and accompanying text.

2. *See, e.g.*, Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010) (declaring that the executive branch's views on the interpretation of treaties are entitled to "great weight"); Medellín v. Texas, 128 S. Ct. 1346, 1361 (2008) (same); *infra* notes 194–96, 340–45 and accompanying text.

3. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004) (emphasizing the "collateral consequences" of recognizing domestically enforceable torts for violations of international law).

4. For an introduction to the voluminous scholarship on the propriety of judicial deference to the political branches in foreign affairs, see generally THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992); Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976); and Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450 (2006). Relatedly, few issues have excited as many scholarly debates as the power of federal courts to apply international law on their own initiative. *See generally* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869 (2007); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

discussion, however, the relationship between foreign affairs and stare decisis has been met with little comment[5] and no detailed analysis. Similarly, the Supreme Court has never seriously examined whether the prudential and institutional premises of stare decisis retain their validity in the field of foreign affairs, even for precedents that define the United States' sovereign obligations under international law.[6] Indeed, aside from including marginal notes in a pair of dissents,[7] the Court missed two prime opportunities to opine on the subject in the opening years of the twenty-first century.[8]

The analysis in this Article demonstrates that a more nuanced understanding of precedent is appropriate with respect to certain fundamental aspects of foreign affairs law. Judicial rulings on the Constitution's allocation of powers in the field are already subject to a less rigorous version of stare decisis.[9] In light of the practical impossibility of correction by the political branches, sound reasons

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5. *See* ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 142 (2006) (observing that "interstitial uses of international law" by the judiciary "are subject to subsequent legislative overruling, but [that] courts also can choose to abandon them on their own initiative in the face of reflection and experience"); Jonathan I. Charney, *Judicial Deference in Foreign Relations*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 98, 106 (Louis Henkin, Michael J. Glennon & William D. Rogers eds., 1990) (suggesting that stare decisis need not require "that rules of decision regarding international law in U.S. court cases are binding in all later cases"); Harlan G. Cohen, *Undead Wartime Cases:* Stare Decisis *and the Lessons of History*, 84 TUL. L. REV. 957, 990–95 (2010) (analyzing the historical significance of precedents in the shadow of World War II); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 486 (2003) (noting briefly that the difficulty of override by the political branches might justify a weakened form of stare decisis for international-law precedents).

6. Other than in cases considering constitutional allocations of power, the Supreme Court has rarely even paused to mention the force of precedent in cases with implications for foreign affairs. *See* Clark v. Allen, 331 U.S. 503, 516 (1947) (refusing to revisit a treaty precedent because of consistent judicial interpretation over time and because of the plain language of the treaty); The Adula, 176 U.S. 361, 371 (1900) (refusing to overrule an international-law precedent simply "to conform to the opinions of foreign writers as to what they suppose to be the existing law upon the subject"); The Paquete Habana, 175 U.S. 677, 700 (1900) (acknowledging the possibility of a "controlling . . . judicial decision" on international law); Jones v. Meehan, 175 U.S. 1, 22 (1899) (concluding that the subsequent practical construction of a treaty by the executive branch was not so compelling as to "warrant the court in overruling its own opinions" on the matter).

7. Sanchez-Llamas v. Oregon, 548 U.S. 331, 389–90 (2006) (Breyer, J., dissenting); Medellín v. Dretke, 544 U.S. 660, 689 (2005) (O'Connor, J., dissenting); *see also infra* note 248 and accompanying text.

8. *See* Medellín v. Texas, 128 S. Ct. 1346 (2008); *Sanchez-Llamas*, 548 U.S. 331; *infra* notes 244–52 and accompanying text.

9. *See infra* notes 70–74 and accompanying text.

support this outcome.[10] The special concern in this Article is instead the broad and expanding swath of controversies that likewise fall within the Article III "judicial Power"[11] but that involve the courts in the identification of rights or obligations under international law. Inquiries into such matters, by their nature, inject the judicial branch into the uncharacteristic position of leadership in defining the very content of the nation's formal legal relations with foreign states. My analysis demonstrates, moreover, that even the basic premises of stare decisis become unreliable, and in some respects fail to obtain at all, when courts create precedents on such matters.

In contrast, foreign-policy implications should not compromise the foundations of stare decisis for purely domestic statutes. When Congress takes it upon itself to define the entire content of the law—without importing international norms—the relationship between lawmaker and law applier is solely an internal, domestic affair. To be sure, congressional statutes, and thus judicial interpretations of them, may have consequences for foreign relations.[12] But fidelity to the value judgments first made by Congress within its constitutionally delegated authority should mitigate any concerns about independent judicial agency in foreign affairs lawmaking. Standard approaches to precedent founded on standard institutional relationships remain appropriate here.[13]

To establish the context for an analysis of these points, Part I first reviews the jurisprudential and institutional foundations of stare decisis. The force of a given precedent ultimately hinges on weighing the systemic values of stability, predictability, and judicial legitimacy against a set of situation-specific "antivalues" that focus on the precedent's original and continuing validity. But as I show in Part I, the notion of adherence to precedent is also animated by an appreciation of the respective constitutional stations of the judicial branch and Congress. That Part then explores the subtly important jurisdictional premises of stare decisis. Almost entirely overlooked by courts and scholars, these inherent jurisdictional limitations on the

10. *See infra* notes 68–74 and accompanying text.

11. U.S. CONST. art. III, § 1.

12. *See, e.g.*, Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.); Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

13. *See infra* notes 66–67 and accompanying text.

force of precedent have direct implications for the proper place of stare decisis in matters of international law.

The Constitution's special arrangement of authority over foreign affairs is the subject of the analysis in Part II. In this field as well, Congress remains the preeminent domestic lawmaker. But in its text and structure, the Constitution also allocates special responsibilities to the executive in managing the nation's relations with foreign states. This enhanced executive authority provides the backdrop for the web of admonitions about the risks of untutored judicial action in foreign affairs. The friction arises, however, from the expanding mandate of the courts to participate in the definition of rights and obligations under international law. To highlight the significance of this growing interbranch tension, Part II canvasses the multiplicity of avenues—treaties, "treaty-statutes," delegated lawmaking authority, "international law *cum* common law,"[14] executive agreements, and metanorms of interpretation—through which the American legal system now channels such matters to the courts.

This all provides the foundation for an examination in Part III of the proper relationship between the Article III "judicial Power" in foreign affairs and the doctrine of stare decisis. That Part first explains why judicial enforcement of international law differs as a matter of kind, not merely of degree, from the application of law of a purely domestic origin. The necessary consequence of precedent in foreign matters is the definition of rights or obligations that govern the nation's legal relations with foreign states. Indeed, one might view international law as the "hardest" form of foreign relations law.[15] The gravity of this responsibility, properly appreciated, should alone give courts pause before reflexively cloaking foreign affairs precedents with full stare decisis effect.

Careful analysis reveals that the values that animate stare decisis become unstable when courts create precedents founded on international law. Even when legal norms have been validated by domestic authorities, their origin—the source from which they derive their content—remains the international legal system. And in contrast to the mechanisms for interpreting purely domestic statutes, the only

14. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (coining this term to describe federal common law derived from customary international law).

15. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (1987) (stating that the foreign-relations law of the United States consists of both domestic law that has substantial effects on foreign relations and "international law as it applies to the United States").

mechanism for the interpretation and clarification of international law is a multipolar system of judicial cooperation that entirely lacks hierarchical integration.

As a result, the factual and doctrinal premises of a "final" decision on an international-law norm, even a decision by the U.S. Supreme Court, may be subject to almost immediate destabilization in the same legal system from which the norm emerged and in which it continues to operate. As Part III.B explores, this international legal structure again contrasts with standard congressional statutes. Unlike in the domestic realm, the disaggregated process of the interpretation and enforcement of international law creates substantial forces of judicial change exogenous to the domestic system and thus beyond the control of the Supreme Court. Moreover, the cultural, legal, linguistic, and related differences among international lawmakers greatly increase the risk of judicial error from the outset. These uncertainties combine to compromise the "calm"[16] that stare decisis is designed to secure and reinforce.

Consider as an illustration of this point the Supreme Court's series of cases on the domestic enforcement of certain individual rights protected by the Vienna Convention on Consular Relations.[17] In two initial decisions, the Court expressly determined that protected individuals could waive their treaty rights under domestic procedural rules.[18] Although definitive as a matter of domestic stare decisis, these decisions could not control even immediate developments under international law. Within only a few years, the International Court of Justice (ICJ) had interpreted the treaty in a directly contrary way[19] and had then ordered the United States to take certain remedial

16. The term "stare decisis" derives from the Latin maxim *stare decisis et non quieta movere*—that is, "stand by the precedents and do not disturb the calm." John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 1 & n.2 (1983) (quoting Stanley Reed, Address, Stare Decisis *and Constitutional Law*, 9 PA. B. ASS'N Q. 131, 131 (1938)) (internal quotation marks omitted).

17. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

18. *See* Federal Republic of Germany v. United States, 526 U.S. 111, 111–12 (1999) (per curiam) (holding that because the United States had not waived its sovereign immunity, Germany could not prevent Arizona's execution of a German prisoner); Breard v. Greene, 523 U.S. 371, 375–76 (1998) (per curiam) ("Claims not [raised in state court] are considered defaulted. By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention . . . ." (citation omitted)).

19. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶¶ 61, 63 (Mar. 31) (stating that detaining authorities must respect the treaty rights of foreign nationals).

actions on behalf of affected individuals.[20] The ICJ authoritatively rejected the Supreme Court's interpretation of the international-treaty obligations of the United States. Unfortunately, however, in two subsequent cases, the Supreme Court refused to give effect to the ICJ's interpretation and thereby failed to recognize the inability of domestic stare decisis to create "calm" with respect to matters of international law.[21]

An institutional perspective on stare decisis also supports a more accommodating understanding of the proper force of international-law precedents. The enforcement of norms derived from international law, as I explain in Part III.C, involves a kind of problematic judicial discretion, and thus judicial leadership, that differs in essence from the application of purely domestic law. I then confront the most obvious and significant institutional counterargument: the availability of congressional override. Congress may well have the power to overturn a judicial precedent founded on international law, and perhaps even a precedent founded on the interpretation of treaties.[22] Nonetheless, this formal argument ultimately is based upon a legally suspect and factually unrealistic inversion of the Constitution's prescribed lawmaking sequence—Congress creates, the courts apply—for law Congress did not even create in the first place. Part III then concludes with an analysis of the proper means of calibrating stare decisis with the special responsibilities of the executive in foreign affairs.

The final Part distills the various themes into a summary analysis. I conclude that extant stare decisis norms remain appropriate for purely domestic statutes and regulations, even those that affect foreign affairs. My conclusions are different, however, for the judicial enforcement of international law. To be sure, even in that arena, the systemic and institutional values of stare decisis justify a prima facie respect for precedent. But the analysis in Part IV demonstrates that

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20. *See id.* ¶¶ 121–23, 138–43, 153(9) (finding "that the appropriate reparation in this case consists in the obligation of the United States of America to provide . . . review and reconsideration of the convictions and sentences" of the affected individuals).

21. *See* Medellín v. Texas, 128 S. Ct. 1346, 1358 (2008) (concluding that domestic courts are not bound by ICJ decisions); Sanchez-Llamas v. Oregon, 548 U.S. 331, 352–60 (2006) ("Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." (footnote omitted)). For a more detailed analysis of this example, see *infra* notes 246–50 and accompanying text.

22. Indeed, in response to *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Congress purported to do just that. *See infra* notes 311–13.

the distinctive considerations that attend judicial action involving international law should function as a significant weight on the scale—that is, as an additional "special justification"[23] for revisiting the original and continuing validity of a precedent. Enhanced modesty of this type should strengthen the institutional position of the judiciary, for it would permit, but not require, the reexamination of a precedent as an alternative to routine ex ante acquiescence to the executive branch's policy preferences.

The argument for increased flexibility toward international-law precedents is especially compelling for the federal courts of appeals. As they do for most matters, these regional courts create the vast bulk of precedents on international law.[24] Because of this reality, I address their particularly misguided, and nearly rigid, stare decisis practices in a separate section at the end of Part IV.

Over the years, an aphorism from Justice Brandeis has become a darling of stare decisis enthusiasts. "[I]n most matters," he declared, "it is more important that the applicable rule of law be settled than that it be settled right."[25] The analysis in this Article strongly suggests, however, that the significant and sensitive subject of our nation's international legal relations is not one of those routine "most matters." In any event, neither of Justice Brandeis's alternative propositions fully holds for disputed issues in the field of foreign affairs. The special circumstances in that field decrease substantially the likelihood that a first judicial impression actually will settle the matter or that it will be right in the first place.

I. THE FOUNDATIONS OF STARE DECISIS

A. *Understanding the Notion of Precedent*

For the common-law mind steeped in the tradition of progressive advancement on a foundation of progressively refined reason, there is

23. *See* Randall v. Sorrell, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.) (explaining that departure from precedent requires a "special justification"); *infra* notes 55–57 and accompanying text.

24. *See infra* notes 384–85.

25. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled by* Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938). For endorsements of Justice Brandeis's statement by the Supreme Court, see, for example, John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 757 (2008); Agostini v. Felton, 521 U.S. 203, 235 (1997); Vasquez v. Hillery, 474 U.S. 254, 268–69 (1986) (Powell, J., dissenting); and New York v. United States, 326 U.S. 572, 590 (1946) (Douglas, J., dissenting).

a self-evident quality to the notion of precedent. Precedent appeals to primal desires for—and, in a system of laws, justified expectations of—rationality, regularity, and stability.[26] Indeed, Justice Cardozo's famous metaphor that judges merely "lay [their] own course of bricks on the secure foundation of the courses" of their forebears[27] is now so ingrained in common-law thinking as to seem almost trite.[28]

But stare decisis also marches in service of loftier causes. Stripped to its essence, the concept of binding precedent is a self-imposed rule-of-law norm for the judiciary.[29] That is, by constraining situational discretion, stare decisis reflects the proposition that objectively determined rules of law are binding on an independently constituted judicial branch. Stare decisis might even be a jurisprudential imperative. As Justice Breyer confidently declared in *Randall v. Sorrell*,[30] "[T]he rule of law demands that adhering to our prior case law be the norm."[31]

Self-evident propositions can be tricky things, however. The Constitution nowhere expressly empowers the federal judiciary to endow its own opinions with a legal force that binds subsequent courts. Since the Court's landmark holding in *Erie Railroad Co. v. Tompkins*,[32] moreover, "[f]ederal courts . . . [have] not possess[ed] a general power to develop and apply their own rules of decision."[33] Stare decisis butts up against this principle as one approaches the

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26. *See infra* notes 41–54 and accompanying text.

27. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

28. Justice Stevens has been a particular fan of this quotation. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2824 (2008) (Stevens, J., dissenting); Rita v. United States, 127 S. Ct. 2456, 2470 (2007) (Stevens, J., concurring); Hubbard v. United States, 514 U.S. 695, 711 (1995) (Stevens, J.).

29. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch . . . ."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) ("A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law.").

30. Randall v. Sorrell, 548 U.S. 230 (2006).

31. *Id.* at 244 (opinion of Breyer, J.); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

32. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.").

33. City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).

more absolute edges of the notion of adherence to precedent. No matter how faithful a court may be in discerning the law established by others, communication across time, institutions, and circumstances inevitably involves uncertainty and, thus, choice. The power to interpret, in short, is infected with the temptation, and sometimes the need, to create. A version of stare decisis that would consecrate every legal ruling with unyielding permanence thus would transform judicial interpreters into lawmakers in every sense but name.

It should not be surprising, then, that the Supreme Court founds its modern canon of stare decisis not on constitutional compulsions or even powers but rather on prudential impulses anchored, as I have suggested, in the rule of law.[34] As is so often the case with this doctrine, the Court has a quotation of ancient lineage ready-made for any serious discussion of the issue: "[I]t is common wisdom," the Court has frequently observed, "that the rule of *stare decisis* is not an 'inexorable command.'"[35] It is, rather, "a principle of policy and not a mechanical formula of adherence to the latest decision."[36]

The word "policy" here, however, carries a serious risk of misdirection. To some skeptics, the absence of any absolute formula

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34. *See, e.g.*, *Randall*, 548 U.S. at 243–44 (opinion of Breyer, J.) ("The Court has pointed out that *stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm." (citation omitted) (quoting United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996)) (internal quotation marks omitted)); Harris v. United States, 536 U.S. 545, 556–57 (2002) (plurality opinion) ("*Stare decisis* is not an 'inexorable command,' but the doctrine is 'of fundamental importance to the rule of law.'" (citations omitted) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting))); *Casey*, 505 U.S. at 854 ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law . . . ."); Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) ("Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.' Adherence to precedent promotes stability, predictability, and respect for judicial authority." (citations omitted) (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987) (plurality opinion))); *Welch*, 483 U.S. at 478–79 ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*.").

35. *Casey*, 505 U.S. at 854 (quoting *Burnet*, 285 U.S. at 405 (Brandeis, J., dissenting)); *see also* Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("*Stare decisis* is not an inexorable command . . . ." (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)) (internal quotation mark omitted)); *Harris*, 536 U.S. at 556 ("*Stare decisis* is not an 'inexorable command . . . .'" (quoting *Burnet*, 285 U.S. at 405 (Brandeis, J., dissenting))).

36. Citizens United v. FEC, 130 S. Ct. 876, 911–12 (2010) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)); *Lawrence*, 539 U.S. at 577.

has served merely to open the gates for selective manipulation to suit judges' subjective predilections.[37] But the Supreme Court "[t]ime and time again" has emphasized the "fundamental importance" of stare decisis for the rule of law in our case-based system.[38] And as I demonstrate in Section B, this observation has teeth, for departure from precedent is considered an "exceptional"[39] move allowable only pursuant to a "compelling" justification.[40]

B. The Values that Animate Stare Decisis

The notion that judges should adhere to authoritative decisions of the past has a deep lineage in America's common-law heritage.[41] After two hundred years of domestic judicial pronouncements on the subject,[42] legal scholars have had ample source material for examinations of the foundations of stare decisis.[43] Thus, although a

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37. *See, e.g.*, Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 404 (1988) ("The doctrine of stare decisis . . . is inherently subjective, and few judges, including Supreme Court Justices, can resist the natural temptation to manipulate it."); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1598 (2000) ("The Supreme Court's practice today is plainly one of *selective* stare decisis in the first place. Precedent is followed, except when it isn't.").

38. *Hilton*, 502 U.S. at 202 (quoting *Welch*, 483 U.S. at 494); *see also Randall*, 548 U.S. at 243–44 (opinion of Breyer, J.) (citing numerous cases that emphasize the importance of stare decisis).

39. *Randall*, 548 U.S. at 244 (opinion of Breyer, J.).

40. *Hilton*, 502 U.S. at 202; *see also infra* notes 55–57 and accompanying text.

41. The famous *Commentaries* by James Kent in 1826 traced the notion of precedent to judicial practice during the reign of Edward III in the fourteenth century. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *476–77 (O.W. Holmes, Jr., ed., Boston, Little, Brown & Co. 12th ed. 1873) (1826) ("[F]rom the reign of Edward III. to that of Henry VII., the judges were incessantly urging the sacredness of precedents, and that a counsellor was not to be heard who spoke against them, and that they ought to judge as the ancient sages taught.").

42. For an historical review of American practice, see generally Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

43. *See generally* Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006) (discussing the pragmatic arguments for stare decisis and the relationship between originalism and stare decisis); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) (analyzing the role of stare decisis in the Court's effort to appear principled); Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411 (2010) (aiming "to isolate the various components of the Supreme Court's *stare decisis* jurisprudence and to study their individual and collective functions"); Lee, *supra* note 42 (tracking "the primary aspects of the Rehnquist Court's doctrine of stare decisis from founding-era commentary to [its] origins in decisions of the Supreme Court"); Paulsen, *supra* note 37 (examining "whether Congress may abrogate stare decisis in a particular class of constitutional cases (or in federal question cases generally)").

careful appreciation of the values that animate stare decisis is essential for my subsequent analysis of the proper role of the doctrine in the field of foreign affairs, a brief review will suffice here.

The Supreme Court itself settled some time ago on a customary formulation for the justification of stare decisis. According to the Court, the doctrine "promotes the evenhanded, predictable, and consistent development of legal principles."[44] Adherence to precedent likewise "fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[45] When considered carefully, these broad values coalesce into three essential, interrelated categories: stability, predictability, and legitimacy.[46]

The most recognizable value of stare decisis is its ability to enhance stability and consistency across time and similar circumstances.[47] At its most elemental level, it satisfies the impulse that, all other things being equal, a legal system is better advised to resolve matters firmly and finally than to search for normatively more appealing solutions on a case-by-case basis.[48] In the same vein, adherence to precedent fosters the orderly and efficient administration of justice by discouraging successive relitigation of issues that have already been authoritatively resolved.[49]

Stability functions in tandem with predictability. Adherence to precedent establishes a framework for efficient public and private

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44. *E.g.*, Pearson v. Callahan, 129 S. Ct. 808, 816 (2009) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)) (internal quotation mark omitted); *see also* Thomas v. Wash. Gas Light Co., 448 U.S. 261, 272 (1980) (plurality opinion) (noting that stare decisis "serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules").

45. Randall v. Sorrell, 548 U.S. 230, 243 (2006) (opinion of Breyer, J.) (quoting United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996)) (internal quotation mark omitted); *see also Hilton*, 502 U.S.at 202 ("Adherence to precedent promotes stability, predictability, and respect for judicial authority.").

46. For articles discussing this taxonomy, see Hellman, *supra* note 43, at 1109–11; and Lee, *supra* note 42, at 652–53.

47. *See, e.g.*, CBOCS W., Inc. v. Humphries, 128 S. Ct. 1951, 1961 (2008) (observing that "legal stability" is the goal of "[p]rinciples of *stare decisis*"); Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("The doctrine of *stare decisis* is essential . . . to the stability of the law."); *supra* note 44.

48. This point, of course, is the thrust of the Justice Brandeis aphorism quoted in the Introduction. *See supra* note 25 and accompanying text.

49. The standard, almost obligatory, quotation supporting this proposition comes from Justice Cardozo. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403–04 (1970) (declaring that stare decisis advances the interest of "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case"); *see also* CARDOZO, *supra* note 27, at 149 ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . .").

planning.[50] The resulting reliance interests, in turn, make out a compelling claim for legal protection.[51] Not surprisingly, this reasoning is particularly germane with respect to principles reaffirmed by "iteration and reiteration over a long period of time."[52]

Finally, stare decisis serves to sustain the public's trust in a principled, law-bound judiciary. In other words, adherence to precedent reinforces both the fact and the perception that in America's constitutional system, federal courts fundamentally are not lawmakers; their role, rather, is to identify and apply the objective rules of law that have been generated by the political branches.[53] In the words of Justice Thurgood Marshall, stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."[54]

C. The Stare Decisis Antivalues: The Justifications for Reexamining Precedent

Under the combined weight of these considerations, the doctrine of stare decisis ultimately functions as a strong presumption against revisiting precedent. The Supreme Court has described this presumption in a variety of ways, but the basic thrust has been the same: stare decisis imposes a "severe burden" on those judges who

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50. *See, e.g.*, *Randall*, 548 U.S. at 244 (opinion of Breyer, J.) ("*Stare decisis* . . . avoids the instability and unfairness that accompany disruption of settled legal expectations."); *Hilton*, 502 U.S. at 202 (observing that "[a]dherence to precedent promotes stability [and] predictability"); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 812–15 (2002) (observing that the certainty enhanced by adherence to precedent creates a "framework for less costly, more accurate, and thus more effective planning for future activity").

51. The cases in which the Supreme Court has emphasized this point are legion. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2724 (2007) ("[R]eliance on a judicial opinion is a significant reason to adhere to it . . . ."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) ("[W]hen this Court reexamines a prior holding . . . . we may ask . . . whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling . . . ."). This principle is especially forceful in property and commercial matters. *See Casey*, 505 U.S. at 855–56 (observing that "the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context"); *Payne*, 501 U.S. at 828 (declaring that "*stare decisis* [is] at [its] acme in cases involving property and contract rights").

52. *Randall*, 548 U.S. at 244 (opinion of Breyer, J.).

53. *See, e.g.*, *Casey*, 505 U.S. at 865–66 (examining in detail the role stare decisis plays in advancing the legitimacy of the judicial branch); *Payne*, 501 U.S. at 827 (declaring that stare decisis "contributes to the actual and perceived integrity of the judicial process"). For a broader analysis of this factor, see Hellman, *supra* note 43, at 1112, 1115–20.

54. Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

are dissatisfied with established case law.[55] Disavowal of precedent thus is "exceptional"[56] and requires, as the Court has observed, "the most convincing of reasons."[57]

Nevertheless, the doctrine is one of prudence and pragmatism. Even supreme courts are fallible. To avoid both ossification in the law and unthinking adherence to past mistakes, a rational doctrine of precedent must leave some room for reconsideration. To this end, the Supreme Court has recognized what can be seen as a set of stare decisis antivalues, which balance the system by permitting the review and correction of conspicuous judicial misfires of the past.

Although the grounds for overruling precedent are easily stated, their application is necessarily highly specific to each particular situation. One standard consideration is whether a precedent has proved to be "unworkable" in practice.[58] On a similar note, reconsideration is appropriate when an earlier decision is seen as poorly reasoned from the outset or otherwise "has been the subject of continuing controversy and confusion."[59] When carefully considered, each of these related ideas is simply another way of saying that a particular precedent never succeeded in establishing the stability and predictability that justify stare decisis in the first place.

An even more significant consideration has been the influence of subsequent developments on the foundation of a precedent. Reevaluation of a precedent is justified when "facts have so changed, or [have] come to be seen so differently, as to have robbed the old rule of significant application or justification."[60] "Of most relevance,"

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55. Thomas v. Wash. Gas Light Co., 448 U.S. 261, 272 (1980) (plurality opinion) ("The doctrine of *stare decisis* imposes a severe burden on the litigant who asks us to disavow one of our precedents.").

56. *Randall*, 548 U.S. at 244 (opinion of Breyer, J.).

57. Citizens United v. FEC, 130 S. Ct. 876, 911–12 (2010); *see also, e.g.*, Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) ("[W]e will not depart from the doctrine of *stare decisis* without some compelling justification.").

58. Montejo v. Louisiana, 129 S. Ct. 2079, 2088 (2009) (quoting *Payne*, 501 U.S. at 827) (internal quotation marks omitted); *see also, e.g.*, *Casey*, 505 U.S. at 854 (stating that overruling might be justified when a decision "has proven to be intolerable simply in defying practical workability").

59. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47 (1977); *see also Montejo*, 129 S. Ct. at 2088–89 ("Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.").

60. *Casey*, 505 U.S. at 854–55 (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)); *see also* Pearson v. Callahan, 129 S. Ct. 808, 817 (2009) (relying on "a considerable body of new experience" to overrule a precedent); *Randall*, 548 U.S.

however, has been the effect of intervening developments in the law itself.[61] The "primary reason" for overruling precedent, the Supreme Court has declared, is that "either the growth of judicial doctrine or further action taken by Congress . . . . ha[s] removed or weakened the conceptual underpinnings from [a] prior decision."[62] Thus, for example, in the 2007 case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[63] the Court chronicled nearly one hundred years of corrosive case-law developments to justify overruling an established precedent on the per se invalidity of vertical price restraints.[64]

D. Institutional and Instrumental Considerations

A further fixture of stare decisis jurisprudence is perhaps the most important for understanding the doctrine in application. The Supreme Court has long held that stare decisis is most potent in statutory cases and is weakest in constitutional cases.[65] At its most

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at 244 (opinion of Breyer, J.) (declining to overrule a precedent because of the absence of a showing "that circumstances ha[d] changed so radically as to undermine [its] critical factual assumptions").

61. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2721 (2007) ("Of most relevance, 'we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings.'" (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000))).

62. Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004); *see also* United States v. Gaudin, 515 U.S. 506, 521 (1995) (declaring that stare decisis may yield when a precedent's "underpinnings [have been] eroded, by subsequent decisions of [the] Court"); *Casey*, 505 U.S. at 854–55 (observing that review of a precedent might be justified when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine").

63. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

64. *See id.* at 2710 (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which "established the rule that it is *per se* illegal under [federal antitrust law] for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods").

65. *See, e.g.*, *Pearson*, 129 S. Ct. at 816–17 ("[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction . . . ." (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)) (internal quotation mark omitted)); John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 756–57 (2008) ("[*S*]*tare decisis* in respect to statutory interpretation has 'special force' . . . ." (quoting *Patterson*, 491 U.S. at 172–73)); *Patterson*, 491 U.S. at 172–73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, . . . Congress remains free to alter what we have done."). Some leading scholars have criticized this established Supreme Court jurisprudence. *See, e.g.*, William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1398–1409 (1988) (arguing against a heightened form of stare decisis for statutory cases); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 40–54 (1988) (advancing a similar critique). At the other end of the spectrum, some critics have questioned the propriety of weakened stare decisis in constitutional cases. *See, e.g.*, Frank H. Easterbrook,

elemental level, this distinction is grounded in the availability—both formally and practically—of alternative constitutional vehicles for error correction. Stated simply, when a court interprets a statute, the legislative branch is available to correct, update, or otherwise revise the judicial determination. Thus, as the Supreme Court has reiterated, "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."[66] So potent is this principle that Justice Scalia has described it as an "almost categorical rule of *stare decisis* in statutory cases."[67]

The institutional landscape is quite different in constitutional cases. When the Supreme Court grounds a decision in the Constitution, the only vehicles for revision or adaptation are the Court itself and the amendment procedure of Article V.[68] Precisely because correction through the latter option "is practically impossible,"[69] stare decisis in constitutional cases "is at its weakest."[70] Indeed, the Supreme Court has declared that constitutional precedents in foreign affairs matters in particular "afford little precedential value for subsequent cases."[71] To be sure, here as well

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Stability and Reliability in Judicial Decisions, 73 CORNELL L. REV. 422, 429–33 (1988) ("I want to kick sand on the shibboleth that it should be easier to overrule a constitutional decision than a statutory or common law decision."); Monaghan, *supra* note 29, at 741–42 (noting that the main argument in favor of a weak constitutional stare decisis is that "correction through legislative action is practically impossible" but asserting that "the argnment's [*sic*] central factual premise is overdrawn" (quoting *Burnet*, 285 U.S. at 406–07 (Brandeis, J., dissenting)) (internal quotation marks omitted)).

66. *Pearson*, 129 S. Ct. at 816–17 (quoting *Ill. Brick Co.*, 431 U.S. at 736) (internal quotation marks omitted); *see also Sand*, 128 S. Ct. at 756–57 (making a similar observation). For a broad analysis of this issue, see generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

67. Rasul v. Bush, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting); *see also* Eskridge, *supra* note 65, at 1363–69 (reviewing critically the Supreme Court's "super-strong presumption against overruling statutory precedents").

68. *See* U.S. CONST. art. V (describing the amendment procedure).

69. Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)) (internal quotation marks omitted). History abundantly proves the point. What Justice Brandeis observed in 1932 continues to ring true: "In only two instances—the Eleventh and the Sixteenth Amendments—has the process of constitutional amendment been successfully resorted to, to nullify decisions of this Court." *Burnet*, 285 U.S. at 409 n.5 (Brandeis, J., dissenting).

70. Agostini v. Felton, 521 U.S. 203, 235 (1997); *see also Payne*, 501 U.S. at 828 ("*Stare decisis* is not an inexorable command . . . . This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" (quoting *Burnet*, 285 U.S. at 407 (Brandeis, J., dissenting))).

71. Dames & Moore v. Regan, 453 U.S. 654, 661 (1981).

the requirement of special justification remains.[72] Nonetheless, it is not uncommon for the Court to revisit even recent constitutional precedents, as its controversial decision in *Citizens United v. FEC*[73] demonstrated.[74]

The justification for differential application of stare decisis runs deeper, however, than the mere fact that expedient, nonjudicial sources of error correction are more readily available in cases of statutory interpretation than in cases of constitutional interpretation. Rather, the distinction finds essential color and texture in the courts' respect for the distinct constitutional allocations of authority to—and, presumably, the derivative institutional competences of—the judicial branch and Congress. The doctrine is thus animated not only by which institution *is*, but also by which institution *should be*, the principal source of continued development in a given field of law.

When a court interprets a statute, it operates against the backdrop of the legislative competence of Congress acting within its constitutionally founded lawmaking powers. The special force of stare decisis in statutory cases recognizes the primacy of Congress in Article I lawmaking by deferring to the original lawmakers for correction, adjustment, or modernization of their own legislative products. As the Supreme Court thus observed in *Neal v. United States*,[75] "Our reluctance to overturn [statutory] precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress. . . . Congress, not this Court, has the responsibility for revising its statutes."[76]

In constitutional matters, by contrast, the Supreme Court "bears the ultimate obligation for the development of the law as institutions

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72. Harris v. United States, 536 U.S. 545, 557 (2002) (plurality opinion) ("Even in constitutional cases, in which *stare decisis* concerns are less pronounced, we will not overrule a precedent absent a 'special justification.'" (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984))).

73. Citizens United v. FEC, 130 S. Ct. 876 (2010).

74. *See id.* at 911–12 (overruling in part *McConnell v. FEC*, 540 U.S. 93 (2003), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)).

75. Neal v. United States, 516 U.S. 284 (1996).

76. *Id.* at 295–96; *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated . . . ."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 208–15 (1989) (exploring a "heightened or absolute rule of statutory stare decisis").

develop."[77] In other words, in a tradition derived from no less than *Marbury v. Madison*,[78] the Court has assigned itself ultimate authority over the meaning of the Constitution.[79] The judicial branch, therefore, is the institution with the independence and expertise to review—and, as appropriate, to correct and update—prior constitutional precedents.

The role of these institutional considerations in relation to the rare subject of federal common law is unclear.[80] Lacking guidance from the Supreme Court, some scholars assume that common-law decisions enjoy a "normal" level of precedential force.[81] Others take the view, in contrast, that the strong version of stare decisis for statutory decisions should apply to common-law precedents as well.[82] This matter, of course, will return to significance in my later review of "international law *cum* common law."[83] It suffices at this point to observe that the Supreme Court seemingly has endorsed a more relaxed version of the doctrine of stare decisis when courts take the lead in developing the law based on a corresponding delegation of authority from Congress.[84]

E. The Unexamined Boundaries of Stare Decisis

Finally, inherent in the doctrine of binding precedent is a principle that courts and scholars have almost entirely overlooked: stare decisis is inseparably bound up in, and constrained by, the concept of jurisdiction. As I explain, I use the term "jurisdiction" in its essential sense of the realm of authority within which a court has the power to declare the law. Alexander Hamilton once aptly parsed

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77. Monroe v. Pape, 365 U.S. 167, 221 (1961).

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

79. *See id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

80. *See infra* notes 175–77 and accompanying text.

81. *See, e.g.*, Eskridge, *supra* note 67, at 1366 ("Presumably, common law precedents would continue to enjoy the normal stare decisis presumption."); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388 (1988) ("Common-law precedents provide the benchmark against which other case law is measured.").

82. *See, e.g.*, Marshall, *supra* note 76, at 222 (arguing that the separation-of-power concerns that support "an absolute rule of stare decisis in statutory cases" apply to federal common-law precedents as well); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980) ("The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind.").

83. *See infra* notes 177–86 and accompanying text.

84. *See infra* notes 377–78 and accompanying text.

the concept in the same way. "[J]urisdiction," he observed, "is composed of JUS and DICTO, *juris, dictio,* or a speaking or pronouncing of the law."[85]

Courts of law derive their power to issue authoritative rulings from a particular polity. They are, in the first instance, legally constituted by such a polity.[86] At a more immediate and concrete level, this foundational source of power also defines whether a court has adjudicative authority—in American legal idioms, subject-matter and personal jurisdiction—over a particular dispute.[87] When so constituted and when within their legal mandate, courts exercise a distinct function on behalf of their state: in Montesquieu's famous allocation, the "power of judging" over individual controversies.[88] It is thus not by accident that the Constitution vests "the judicial *Power* of the United States" in the Supreme Court and "in such inferior courts as the Congress may from time to time ordain and establish."[89]

Woven into this notion of judicial power is the authority to resolve disputed issues of law in a binding and—for the common-law mind at least[90]—final manner. This authority exists, however, only within the framework of the legal system from which the declaring court has derived its mandate. Although tautological, one may find insight in the observation that a court has the power to create precedent only within the legal system for which it has the power to speak with finality. The Supreme Judicial Court of Massachusetts, for example, could no more make binding pronouncements for New York courts on the law of New York than the legislature of

85. THE FEDERALIST NO. 81, at 489 & n.* (Alexander Hamilton) (Clinton Rossiter ed., 1961).

86. *See* U.S. CONST. art. III, § 1 (establishing "one supreme Court" and empowering Congress to establish inferior federal courts).

87. In international law, this concept is captured by the term "jurisdiction to adjudicate." *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b) (1987) ("Under international law, a state is subject to limitations on . . . jurisdiction to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals . . . .").

88. MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge Univ. Press 1989) (1748) (recognizing a "power of judging" that is distinct from the legislative power and executive powers).

89. U.S. CONST. art. III, § 1 (emphasis added).

90. As noted in Part III.B.1, the formal concept of stare decisis does not apply in civil-law systems. *See infra* notes 241–42 and accompanying text.

Massachusetts could validly empower this highest court of Massachusetts to do so in the first place.[91]

In the federal realm, the Constitution itself recognizes this principle with a simple, but subtly powerful, two-letter preposition: it vests in the federal Supreme Court "the judicial Power *of* the United States"—not, for example, "in" the United States.[92] For this reason, even the Supreme Court lacks the authority to create precedent concerning the law of a state that is binding on the internal organs of that state.[93]

Courts and scholars alike have almost entirely overlooked this essential jurisdictional premise of stare decisis. Nonetheless, a careful focus on this embedded limitation affords important insights into the values that animate the doctrine. One may properly speak of stability, predictability, and legitimacy from precedent precisely because a superior court—and ultimately a court of last instance—is able to speak with final authority on the law within its defined jurisdiction. It is this final authority, in other words, that creates and reinforces the value of "calm" at the foundation of stare decisis.[94]

This consideration in turn requires fidelity in both the doctrine's vertical and horizontal dimensions.[95] When a polity constitutes inferior courts with the same jurisdiction,[96] a functional concept of

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91. Massachusetts courts may, of course, resolve disputes that involve the application of New York law. But any interpretation of New York law, although final in the dispute at hand, would not be binding on New York courts in the future. This is true notwithstanding the federal Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, which was designed to mitigate the coordination problems associated with a federation of sovereign states. *See* Univ. of Tenn. v. Elliott, 478 U.S. 788, 798–99 (1986) ("Perhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force . . . ." (quoting Thomas v. Wash. Gas Light Co., 448 U.S. 261, 289 (1980) (White, J., concurring in the judgment)) (internal quotation marks omitted)); *Thomas*, 448 U.S. at 271–72 (plurality opinion) ("The Full Faith and Credit Clause 'is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.'" (quoting Sherrer v. Sherrer, 334 U.S. 343, 355 (1948))).

92. U.S. CONST. art. III, § 1 (emphasis added).

93. *See* Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 387 (1986) ("[W]e have no authority to review state determinations of purely state law."); West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236 (1940) ("When [the highest court of the state] has spoken, its pronouncement is to be accepted by federal courts as defining state law . . . .").

94. *See supra* note 16.

95. *See* Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1085–86 (2003) (examining these dimensions of stare decisis).

96. The term "jurisdiction" here does not necessarily connote a bounded geographical area. A particular polity may choose to have more than one "supreme" court, with jurisdiction delineated by subject matter. An example is Texas, which has a Supreme Court, but also has a

stare decisis requires that these courts be tied into a hierarchically integrated system with opportunities for oversight by superior courts. The great bulk of judging is done by lower courts. Vertical stare decisis thus especially serves the core values of system stability and predictability, for it is by this means that the precedents of superior courts have practical effect through mandatory adherence by inferior courts throughout the system.

Horizontal stare decisis, by contrast, addresses the force of a precedent on the issuing court itself and thus has special significance for the value of judicial legitimacy.[97] The requirement that even a supreme court identify compelling grounds before reexamining its own precedent reinforces the appearance of a principled, law-bound judiciary.[98] Presumably, moreover, the most reliable judicial expertise on the internal law of a particular jurisdiction, as well as on the legal influence of subsequent developments, is housed in the jurisdiction's own highest court.

The ability of stare decisis to advance these values depends decisively on the power of precedent to control change. In a vertically integrated system protected by horizontal fidelity to precedent, systemic stability flows from the premise that all forces of legal change are endogenous to the system. Faithfully observed, stare decisis removes any incentives for corrosive relitigation of precedents and thus avoids the destabilizing effects of judicial reexamination.[99] Once a supreme judicial authority has established a precedent within its jurisdictional mandate, the only source of future legal change—save permissible, prospective overrides by the legislature or other lawmaking institutions—should be the same court.[100] It is for this reason that intervening developments in the law—the stare decisis

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Court of Criminal Appeals with "final appellate jurisdiction coextensive with the limits of the state, [the] determinations [of which] shall be final, in all criminal cases." TEX. CONST. art. V, §§ 5–6.

97. *See* Murphy, *supra* note 95, at 1085–1101 (examining the historical foundations of the horizontal force of precedent); *id*. at 1116–26 (arguing that separation-of-powers principles preclude the courts from abandoning stare decisis as a constraint on their own discretion).

98. *See supra* notes 53–54 and accompanying text.

99. The constraint on reexamination by lower courts highlights the significance of scholarly analysis of the continuing validity of precedents. Because of stare decisis and other cultural and traditional forces, however, courts in the United States generally have not accorded substantial weight to scholarly arguments about particular precedents.

100. The one noteworthy exception is when Congress has delegated interpretive authority to an administrative agency for a particular statutory scheme. For more on this point, see *infra* notes 352–56 and accompanying text.

antivalue "of most relevance"[101]—commonly occur only through erosion at the edges of a precedent over a substantial period of time.[102]

This perspective makes sense within the framework of a modern nation-state with an independent and hierarchically integrated judicial branch. The Supreme Court, as the ultimate repository of the federal judicial power, is able to speak with finality within the scope of federal law and thereby to control all forces of legal change within the domestic federal judicial system. As my analysis explores further, however, matters become considerably more opaque and complex when one reflexively extends the jurisdictional premises of stare decisis to a multipolar legal order. Such is the case with international law. In this realm, the reality of a multipolar system of judicial cooperation that entirely lacks hierarchical integration means that the international legal order has no means to create or maintain system-wide uniformity.[103]

To properly emphasize the implications of this fact, I first return to the Constitution's core allocation of powers over foreign affairs. This foundation permits a deeper exploration of the special responsibilities of the judicial branch when international-law rights and obligations fall within its domestic power to declare the law—that is, when they fall within its "*juris dictio*."[104]

II. SEPARATION OF POWERS AND FOREIGN AFFAIRS

The boundaries of the federal judicial power are nowhere more elusive and elastic than in the field of foreign affairs law. As a general proposition, the Constitution does not require a "hermetic division among the Branches,"[105] nor does it require that "the three branches

101. *See supra* notes 61–64 and accompanying text.

102. As already noted, *see supra* note 64 and accompanying text, one of the Court's most prominent decisions of the early twenty-first century emphasizing the role of subsequent legal developments cited nearly one hundred years of erosion to justify overruling a precedent, *see* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2721 (2007) ("We have distanced ourselves from the [prior] opinion's rationales. . . . [T]he case was decided not long after enactment of the Sherman Act . . . . Only eight years after [issuing the opinion], . . . the Court reined in the decision. . . .").

103. *See infra* Part III.B.

104. *See supra* note 85.

105. Mistretta v. United States, 488 U.S. 361, 381 (1989).

of Government 'operate with absolute independence.'"[106] Nonetheless, as I demonstrate in this Part, the Constitution's special arrangement of the "dispersed powers"[107] of government in the field of foreign affairs creates even greater challenges for the "duty of the judicial department to say what the law is."[108]

I begin in Section A with a review of the foundational allocations of authority over foreign affairs in the American constitutional structure. Section B then examines the institutional and prudential reasons for judicial caution in this important field. Section C concludes with a comprehensive analysis of the myriad ways in which the modern American legal system nonetheless channels foreign affairs matters, including fundamental issues of international law, to the federal courts.

A. The Constitution's Core Allocations of Authority in Foreign Affairs

Although the Constitution's general scheme of authority is well known, a reminder of the distinctive allocations of authority in foreign affairs provides a necessary foundation for the analysis to follow. The first principle is that Congress's position as the preeminent domestic lawmaker extends to the field of foreign affairs as well. In addition to conveying a general grant of authority over foreign commerce,[109] the Constitution delegates to Congress the specific powers "[t]o define and punish . . . Offences against the Law of Nations"[110] and to declare and regulate private involvement in war.[111] Moreover, the Necessary and Proper Clause[112] generally empowers Congress to carry into execution any of the federal powers vested by the Constitution.[113] This conferral of power includes, significantly, the exclusive authority to transform so-called non-self-

106. Morrison v. Olson, 487 U.S. 654, 693–94 (1988) (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

107. *Mistretta*, 488 U.S. at 381 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

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

109. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

110. *Id.* art. I, § 8, cl. 10.

111. *See id.* art. I, § 8, cl. 11 (granting Congress the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

112. *Id.* art. I, § 8, cl. 18.

113. *Id.*

executing treaties into domestic law,[114] even beyond the otherwise-applicable limits on Congress's Article I powers.[115] The combined effect of these grants is that Congress has a virtually unlimited field within which to regulate the domestic-law incidents of foreign affairs, including through the incorporation of international-law norms into the domestic sphere.[116]

The more prominent challenge for the work of the judiciary in foreign affairs arises from the special delegations to the president in the field. Article II, Section 1 generally vests in the president "[t]he executive Power,"[117] a term that itself has generated substantial scholarly debate.[118] But the Constitution also specifically designates the president as commander-in-chief of the armed forces[119] and confers on him broad authority over ambassadorial relations.[120] These express delegations have led to the recognition of certain independent powers of the president in foreign affairs,[121] as well as a general presidential authority to manage routine external legal relations with foreign states.[122]

Of more significance for immediate purposes is the special role of the president in the creation of domestic law founded on sovereign

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114. *See* Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008) ("The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."). For more on the distinction between self-executing and non-self-executing treaties, see *infra* notes 165–71 and accompanying text.

115. *See* Missouri v. Holland, 252 U.S. 416, 432–34 (1920) ("If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.").

116. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 66 (2d ed. 1996) (concluding, after reviewing Supreme Court precedent on the foreign-commerce power, that that power "might be sufficient to support virtually any legislation that relates to foreign commerce, i.e., to foreign relations").

117. U.S. CONST. art. II, § 1, cl. 1.

118. *See generally* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

119. U.S. CONST. art. II, § 2, cl. 1.

120. *See id.* art. II, § 2, cl. 2 (granting the president the power, with the advice and consent of the Senate, to "appoint Ambassadors . . . and Consuls"); *id.* art. II, § 3 (conferring authority on the president to "receive Ambassadors and other public Ministers").

121. Prominent among these powers are the power to recognize foreign governments, *see, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); Baker v. Carr, 369 U.S. 186, 212 (1962), and the power to direct the tactical aspects of external military conflicts, *see, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

122. For more on this point, see *infra* notes 150–54 and accompanying text.

commitments under international law. Article II, Section 2 empowers the president to "make Treaties," provided two-thirds of the senators present concur.[123] The Supreme Court also has endorsed a unilateral executive power to conclude binding international legal agreements, in some cases with domestic-law effects—effects I consider in Section C[124]—and has not required compliance with the constitutionally prescribed procedures for the approval of treaties.[125] Finally, the president's position as the country's "constitutional representative" in foreign affairs[126] affords him substantial authority, in the external realm, over the acceptance of norms of customary international law on behalf of the United States.[127]

The legal norms created by the political branches that regulate foreign affairs, like any other form of federal law, may fall within the enforcement authority of federal courts. In parallel with corresponding clauses for the legislative and executive powers, Article III, Section 1 "vest[s]" the judicial power of the United States in the Supreme Court and such inferior courts as Congress may establish.[128] Offering no textual differentiation, Section 2 of the same article then defines the judicial power to include "all Cases" arising under the Constitution, laws, and treaties of the United States.[129] The Supremacy Clause of Article VI likewise includes treaties within the scope of the "supreme Law of the Land."[130] The inclusion of treaties

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123. U.S. CONST. art. II, § 2, cl. 2.

124. *See infra* notes 189–91 and accompanying text.

125. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) (recognizing such a power); Dames & Moore v. Regan, 453 U.S. 654, 682 (1981) ("[T]he President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate . . . ."); United States v. Belmont, 301 U.S. 324, 330 (1937) ("[A]n international compact . . . is not always a treaty which requires the participation of the Senate.").

126. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (quoting S. COMM. ON FOREIGN RELATIONS, 14TH CONG., 1ST SESS., REP. OF FEBRUARY 15, 1816, *reprinted in* S. DOC. NO. 56-231, pt. 6, at 19, 21 (1901)).

127. *See, e.g.*, *Garamendi*, 539 U.S. at 414 (declaring that "in foreign affairs the President has a degree of independent authority to act"); *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320 (observing that in foreign affairs, the president has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"). In more practical terms, the president controls the expression of consent through the formal representatives of the United States in a variety of international organizations, including the United Nations, *see, e.g.*, 22 U.S.C. § 287 (2006) (authorizing the president to appoint representatives to the United Nations), nearly all of whom participate in creating norms of international law.

128. U.S. CONST. art. III, § 1.

129. *Id.* art. III, § 2, cl. 1.

130. *Id.* art. VI, cl. 2.

in these parallel lists has obvious significance for my analysis. Also of note, Article III expressly extends the federal judicial power to cases involving ambassadors and similar matters that carry special foreign affairs sensitivities.[131]

Article III's description of federal judicial authority nonetheless draws no distinction between foreign affairs and any other category of cases. Even the traditional judicial concerns over federalism constraints on national power wither to near insignificance in foreign affairs.[132] Moreover, as underscored by federal judges' Article VI oath "to support th[e] Constitution,"[133] nothing in the Constitution requires or permits judges to refuse either "to render dispositive judgments"[134] in foreign affairs disputes properly before them or to resolve disputed issues of law in the process.[135] As the Supreme Court thus observed in a 1990 opinion with immediate foreign-policy implications, "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."[136]

B. Judicial Reticence, Judicial Deference

Nonetheless, the federal courts' opinions at times have reflected a lack of judicial self-esteem in the field of foreign affairs. The judicial branch, of course, has no authority to conduct or oversee the foreign *policy* of the United States. But occasional judicial rhetoric has suggested that, even in actual cases and controversies properly before

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131. *Id.* art. III, § 2 (extending the judicial power to cases affecting "Ambassadors, other public Ministers and Consuls," "all Cases of admiralty and maritime Jurisdiction," and controversies between states or citizens "and foreign States, Citizens or Subjects").

132. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429, 436 (1968) ("[F]oreign affairs and international relations [are] matters which the Constitution entrusts solely to the Federal Government . . . ."); Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (making the same point and declaring that the Constitution "speaks with no uncertain sound upon this subject"). To emphasize the point, the Constitution also expressly prohibits the states—in a departure from the default assumption of mostly concurrent lawmaking powers—from entering into any formal foreign affairs obligations on their own. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . ."); *id.* art. I, § 10, cl. 3 (prohibiting the states from concluding "any Agreement or Compact with . . . a foreign Power" without the consent of Congress).

133. U.S. CONST. art. VI, cl. 3.

134. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (declaring that "a 'judicial Power' is one to render dispositive judgments" (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)) (internal quotation marks omitted)).

135. *See* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 323 (2007) (making a similar point based on Article VI's required oath to support the Constitution).

136. W. S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 409 (1990).

them, the courts generally believe that they lack the competence to question the judgments of the political branches in the field of foreign affairs. Thus, as the Supreme Court declared in *Regan v. Wald*[137]—to choose just one example of the many "sweeping statements"[138] to this effect—"Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'"[139]

Such rhetorical flights have provoked excited scholarly debates that continue to this day.[140] *Baker v. Carr*[141]—certainly the most significant modern opinion on the political question doctrine—put to rest the extreme notion that every case with foreign-policy implications falls outside judicial cognizance.[142] Moreover, no majority opinion of the Supreme Court has actually applied the formal political question doctrine to justify abstention in a foreign affairs case,[143] although several opinions have acknowledged the targeted constitutional powers distinctly delegated to the other branches.[144]

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137. Regan v. Wald, 468 U.S. 222 (1984).

138. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) ("There are sweeping statements to the effect that all questions touching foreign relations are political questions.").

139. *Regan*, 468 U.S. at 242 (omission in original) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)); *see also* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

140. For comprehensive treatments of the subject, see generally THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY (David Gray Adler & Larry N. George eds., 1996); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); and JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

141. Baker v. Carr, 369 U.S. 186 (1962).

142. *See id.* at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). The Court reiterated the point two years later in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). *See id.* at 423 ("[I]t cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.'" (quoting *Baker*, 369 U.S. at 211)).

143. What Professor Louis Henkin said in 1996 remains true: "There is . . . no Supreme Court precedent for extraordinary abstention from judicial review in foreign affairs cases." HENKIN, *supra* note 116, at 146; *cf.* Goldwater v. Carter, 444 U.S. 996, 1002–04 (1979) (Rehnquist, J., concurring) (arguing, in an opinion joined by three other Justices, that the issue of termination of a treaty by the president is "nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President").

144. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (recognizing the power of the president to recognize foreign governments); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634–35 (1818) (observing that an executive determination on the legal status of a foreign

And although the number of lower court abstention opinions is not insignificant, all of these opinions have addressed specific disputes over the constitutional allocation of powers in the field.[145]

These engagements with the political question doctrine are reflective of a primitive judicial sense that something is qualitatively different when courts are called on to apply foreign affairs law. Justice Sutherland's description of foreign affairs in *United States v. Curtiss-Wright Export Corp.*[146] as a "vast external realm, with . . . important, complicated, delicate and manifold problems"[147] continues to resonate in modern opinions. Indeed, *Baker v. Carr* itself sketched the reasons for a special judicial modesty in this context. Even aside from formal constitutional commitments to another branch, the Court has observed that the resolution of issues in the field "frequently turn[s] on standards that defy judicial application" or that "uniquely demand single-voiced statement of the Government's views."[148] More generally, the Court's opinions have emphasized the inability of courts to gauge the precise implications of their decisions for the delicate subject of foreign relations.[149]

For reasons institutional and prudential, the primary beneficiary of these judicial sentiments has been the executive branch. Time and again, federal court opinions have expressed respect for the

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conflict under international law "transcend[s] the limits prescribed to the judicial department"). For a comprehensive analysis of this issue from a textual perspective, see RAMSEY, *supra* note 135, at 155–73; and Prakash & Ramsey, *supra* note 118, at 264–65.

145. *See, e.g.*, Alperin v. Vatican Bank, 410 F.3d 532, 558–62 (9th Cir. 2005) (refusing to sit in judgment on the president's conduct of war); Made in the USA Found. v. United States, 242 F.3d 1300, 1311–20 (11th Cir. 2001) (addressing the approval of treaties by an act of Congress); Dole v. Carter, 569 F.2d 1109, 1109–11 (10th Cir. 1977) (addressing the power of the president to return cultural property by executive agreement); Lowry v. Reagan, 676 F. Supp. 333, 337–41 (D.D.C. 1987) (addressing the president's power to initiate hostilities).

146. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936)

147. *Id.* at 319.

148. Baker v. Carr, 369 U.S. 186, 211 (1962); *see also id.* at 217 (citing the influence of "an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question").

149. *See supra* note 1 and accompanying text. But concerns about offending foreign states have not led the Court to shrink from its judicial responsibilities when it determines that the law is clear, as two prominent decisions on treaty law have demonstrated. *See* Medellín v. Texas, 128 S. Ct. 1346, 1360 (2008) (refusing to enforce the judgment of the ICJ as domestic law because doing so would "undermin[e] the ability of the political branches to determine whether and how to comply with an ICJ judgment"); Sanchez-Llamas v. Oregon, 548 U.S. 331, 352–53 (2006) (affirming a procedural-default judgment despite the ICJ's determination that procedural defaults do not apply to Article 36 of the Vienna Convention on Consular Relations, *supra* note 17).

president's independent authority to act in the field and for his "vast share of responsibility"[150] for the nation's relations with foreign states.[151] Derivative of this sense of respect has been a judicial recognition, at least in a comparative sense, of the executive's superior expertise and access to reliable information on such issues.[152] In light of the executive branch's institutional advantages—especially its ability to consider broader perspectives and to act with secrecy and dispatch—sound reasons support the courts' perspective. Moreover, as a practical matter, the president's ability to take the lead—to give solemn assurances to foreign states and to pursue paths of action founded on autonomous interpretations of the law—may work to constrain future judicial reexamination.[153] As I show in more detail in Part III.C.3,[154] this perspective also has been condensed into formal doctrines that grant deference to the executive branch's views on the very content of the law.

In spite of these realities, the field for judicial action in foreign affairs matters, as demonstrated in the next Section, is considerable and expanding. A full appreciation of the breadth of this engagement highlights the significance of establishing inflexible precedents when the judiciary unavoidably participates in defining the content of America's foreign affairs law.

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150. 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)) (internal quotation mark omitted).

151. *See, e.g.*, *id.* ("[I]n foreign affairs the President has a degree of independent authority to act."); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) (observing that the president has "unique responsibility" for the conduct of "foreign and military affairs"); Chi. & 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.").

152. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727 (2010) ("[W]hen it comes to collecting evidence and drawing factual inferences in [the area of national security and foreign relations], 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate." (citation omitted) (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981))); Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010) (accepting an executive treaty interpretation on the ground that "[t]he Executive is well informed concerning the diplomatic consequences resulting from this Court's interpretation" of a treaty, "including the likely reaction of other contracting states"); *see also supra* note 1.

153. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(1) (1987) (stating that the president has the authority to interpret treaties "asserted by the United States in its relations with [foreign] states").

154. *See infra* notes 340–45 and accompanying text.

C. The Significant and Expanding Judicial Responsibilities in Foreign Affairs Lawmaking

In this Section, I refine my discussion to focus on those aspects of foreign affairs law that raise special concerns regarding the force of stare decisis. I have noted that constitutional decisions on foreign affairs powers are already subject to a weakened form of the doctrine.[155] By contrast, and for reasons that will become clearer in this Section,[156] judicial application of foreign affairs statutes—and derivative administrative regulations—does not require the same compromise of the prudential and institutional values at the foundation of stare decisis. To illustrate this distinction, however, I must first identify the special category of controversies that fall within the Article III "judicial Power" of the federal courts and that directly or indirectly involve those courts in the very definition of the nation's rights and obligations under international law.

It is no secret, even for the casual observer of public affairs, that international law and institutions have played an increasingly prominent role in the modern law of the United States. Treaty regimes have proliferated, international institutions have grown in both number and range of authority, and references to international-law norms in domestic litigation have become commonplace.[157] The mandate of the judicial branch does not extend to purely sovereign-to-sovereign legal disputes, a point Chief Justice Marshall emphasized early in America's constitutional history.[158] But international law now also makes increasing claims to issues in the domestic space. It is precisely because of this development that the authority of the

155. It is this confined, though significant, subset of issues to which Professor Michael Ramsey refers with his observation that "[f]oreign affairs law is, at its root, constitutional law." RAMSEY, *supra* note 135, at 1.

156. *See infra* notes 225–29 and accompanying text.

157. Thus, for example, one list published by the U.S. Department of State lists many thousands of treaties and other international agreements. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2011 (2011), *available at* http://www.state.gov/documents/organization/169274.pdf. In addition, a search in the Westlaw database for federal court opinions reveals more than ten thousand references to "treaty" or "international law" in the years from 2001 to 2011.

158. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 307 (1829) ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided . . . ."), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); *see also* United States v. Arredondo, 31 U.S. (6 Pet.) 691, 711 (1832) (endorsing this quotation).

judiciary to resort to international norms as rules of decision is among the most controversial issues in modern legal scholarship.[159]

Although my allusion to the debate offers some flavor for the sensitivity of the subject, I need not wade into the controversy in this Article. My concern is instead the product of judicial action, regardless of how domestic law has empowered the courts to resolve disputes by reference to international-law sources. My analysis begins, in other words, with international legal norms that have already been validated through domestic recognition mechanisms—whether those mechanisms be the Constitution, laws, or treaties of the United States.

These norms share five essential characteristics: (1) they have come into being through international lawmaking processes, and thus their substance derives in whole or in part from international law; (2) they affect legal rights or obligations; (3) they have been validated as domestic law through domestic recognition mechanisms; (4) they fall within the authority of domestic courts to determine through binding pronouncements; and (5) they are enforceable through domestic legal sanctions.[160] When these five characteristics are present, the Article III judicial power extends to the enforcement of international-law rights and obligations in domestic law and thus to the creation of precedents in the process.

International law comes in two principal forms: treaties and customary international law.[161] Although both create formal obligations as a matter of international law,[162] disputes about the circumstances in which the courts may enforce these forms of international law in our domestic legal system have existed since the

159. *See supra* note 4.

160. I acknowledge an intellectual debt here to the thoughtful analysis by Professors Robert Scott and Paul Stephan on the general concept of the "formal enforcement" of international law. *See* SCOTT & STEPHAN, *supra* note 5, at 4, 9–16 (using "the term *formal enforcement* to distinguish legalized, institutionally based, privately initiated mechanisms from the traditional informal means of enforcement that remain subject to state control").

161. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (1987) ("A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law [or] (b) by international agreement . . . .").

162. *See id.* § 102(2) (stating that binding rules of customary international law arise "from a general and consistent practice of states followed by them from a sense of legal obligation"); *id.* § 102(3) ("International agreements create law for the states parties thereto . . . .").

founding of the Republic.[163] But what has not yet been fully appreciated is the multiplicity of avenues by which the modern American legal system formally channels norms of international law into the domestic courts. My goal in the paragraphs that follow is to canvass these avenues and thereby to highlight the broad and expanding field of unavoidable judicial involvement in foreign affairs lawmaking.

The classic example of judicially enforceable international law[164] is a self-executing treaty—that is, a treaty that "operates of itself" as domestic law.[165] To pick just one illustration, the United States has, since its founding, concluded treaties of "amity, commerce and navigation,"[166] the very purpose of which is to create reciprocal property and procedural rights for foreign citizens that are enforceable in domestic courts.[167] Because such treaties are supreme law under Article VI,[168] the courts have an "obligation" to enforce them as preemptive federal law.[169] And because of those treaties' sheer number and substantive subject matters, the scope of this

163. *See* Kimi Lynn King & James Meernik, *The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy*, 52 POL. RES. Q. 801, 802, 808–09 (1999) (purporting to survey all of the Supreme Court cases in history, although with quite limited search terms, and concluding "that the Supreme Court has often issued decisions where there are American foreign policy concerns"); Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 861 (2005) (examining "every foreign affairs case on the [Supreme] Court's docket from 1791 to 1835" and concluding that foreign affairs matters were part of "the day-to-day business of the Court").

164. *Cf.* John McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1176–77 (2007) (employing the term "domesticated international law," but only in the narrower sense of norms that "our political branches have expressly made part of our law through the legislative process").

165. Medellín v. Texas, 128 S. Ct. 1346, 1356 (2008) (quoting Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)) (internal quotation mark omitted).

166. *See, e.g.*, Treaty of Friendship, Limits and Navigation, U.S.-Spain, Oct. 27, 1795, 8 U.S.T. 138; Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 U.S.T. 116.

167. *Cf. Medellín*, 128 S. Ct. at 1365 ("[W]e have held that a number of the 'Friendship, Commerce, and Navigation' Treaties . . . are self-executing . . . ." (citation omitted)); McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485, 488 (D.C. Cir. 2008) (holding that the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, "like other treaties of its kind, is self-executing").

168. U.S. CONST. art. VI, cl. 2.

169. *See, e.g.*, *Medellín*, 128 S. Ct. at 1357 (observing that self-executing treaty provisions have "the force and effect of a legislative enactment" (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)) (internal quotation mark omitted)); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109 (1801) (holding that because a treaty is the law of the land, "its obligation on the courts of the United States must be admitted").

judicial obligation is broad indeed: the list of self-executing treaties ratified by the United States now certainly exceeds five hundred.[170] But treaties may fall within judicial cognizance by other means as well. That is, even non-self-executing treaties may have force as domestic law through congressional adoption of "treaty-statutes,"[171] whether through wholesale legislative transformation,[172] targeted incorporation—of which dozens of examples exist[173]—or so-called ex post congressional-executive agreements.[174]

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170. Unfortunately, the State Department does not keep separate records for self-executing treaties. My own research has confirmed that over five hundred exist. *See* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 921–23 (2004) ("The number of treaties that contain self-executing provisions is now over four hundred (even excluding treaties with Native American tribes)." (footnote omitted)); Michael P. Van Alstine, Self-Executing Treaties List (2004 and Before) (2004) (unpublished research) (on file with the *Duke Law Journal*). Contrary to popular perception, the Bush administration was particularly active on this score: in eight short years it oversaw the ratification of over one hundred self-executing treaties and related protocols. Michael P. Van Alstine, List of Treaties Approved During Bush Administration that Are or Likely Are Self-Executing (2009) (unpublished research) (on file with the *Duke Law Journal*).

171. For an article that develops a framework for understanding how Congress uses language and concepts from treaties in domestic legislation, see John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655 (2010).

172. Prominent examples include the acts implementing the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *see* 9 U.S.C. § 201 (2006), the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. TREATY DOC. NO. 97-12, 1438 U.N.T.S. 245 (1986), *see* 9 U.S.C. § 301 (2006), the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (1983), *see* 42 U.S.C. § 11601(b)(1) (2006), and the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, S. TREATY DOC. NO. 108-10, *see* Cape Town Treaty Implementation Act of 2004, 49 U.S.C. § 44101 (2006).

173. In this vein, Congress has often expressly referred to treaties to supplement or limit legislation or to delegate implementation authority to executive agencies. *See, e.g.*, 10 U.S.C. § 802 (2006) (providing that the Uniform Code of Military Justice applies to any person "[s]ubject to any treaty or agreement to which the United States is or may be a party"); 16 U.S.C. § 1435(a) (2006) (requiring regulations on national marine sanctuaries to comply "with treaties, conventions, and other agreements to which the United States is a party"); 18 U.S.C. § 957 (2006) (providing criminal sanctions for any person who "knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating . . . rights or obligations of the United States under any treaty"); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-227, div. G, § 2242, 112 Stat. 2681-761, 2681-822 to -823 (empowering the "appropriate agencies" to adopt regulations to implement Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (1987)); Conventional Forces in Europe Treaty Implementation Act of 1991, Pub. L. No. 102-228, § 2, 105 Stat. 1691, 1691–93 ("The authorities provided in this chapter shall be exercised consistent with the obligation incurred by the United States in connection with the CFE Treaty."); *see also* Michael P. Van Alstine, List of Statutory Incorporations of the "Law of Nations" or "International Law"

The enforcement of customary international law by federal courts is a more controversial subject.[175] As a general matter, the Supreme Court has only endorsed federal common-lawmaking for certain narrow "enclaves" of "uniquely federal interest."[176] One prime—though hotly contested—example of an enclave, however, is the federal common law of foreign affairs.[177] The Court itself reinvigorated controversy on this score in 2006 with its rhetoric about "international law *cum* common law" in *Sosa v. Alvarez-Machain*.[178] In the face of spirited scholarly debates,[179] the *Sosa* Court reaffirmed that "the domestic law of the United States recognizes the law of nations."[180] Again, however, I need not engage here with the details of

(2012) (unpublished research) (on file with the *Duke Law Journal*) (providing a comprehensive list of such legislative references to treaties).

174. Congressional executive agreements reflect legislative approval of a treaty through standard Article I legislation, not through the Article II treaty process. In such cases, however, Congress has commonly adopted comprehensive legislation that is so dense as to preclude resorting to the treaty for substantive interpretive material. One example is the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, which includes a declaration that its provisions alone "satisfy the obligations of the United States [under the Convention]" and that "no further rights or interests shall be recognized or created for that purpose," *id.* § 2(3), 102 Stat. at 2853; *see also* North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3312(a)(1) (2006) ("No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect."); Uruguay Round Agreements Act, 19 U.S.C. § 3512(a)(1) (2006) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.").

175. *See supra* note 4.

176. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426–27 (1964); *see also* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) ("But we have held that a few areas . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced . . . by federal law of a content prescribed . . . by the courts—so-called 'federal common law.'"); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) ("[T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.'" (quoting United States v. Standard Oil Co., 332 U.S. 301, 308 (1947))); *Standard Oil*, 332 U.S. at 307 ("Hence, although federal judicial power to deal with common-law problems was cut down [by the *Erie* doctrine], that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters . . . .").

177. *See, e.g.*, *Tex. Indus.*, 451 U.S. at 640 (declaring that federal common law governs "international disputes implicating . . . [American] relations with foreign nations").

178. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *id.* at 712.

179. *See supra* note 4.

180. *Sosa*, 542 U.S. at 729–30. The Court further noted that "[i]nternational law is part of [American] 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

this contentious debate. It will suffice to observe that, at least in some circumstances, the federal courts are empowered to enforce uniform federal rules founded in international law—solely on their own authority, if necessary.[181]

In any event, a far more common source of authority for judicial enforcement of customary international law is a delegation from Congress.[182] Early in America's constitutional history, the Supreme Court endorsed Congress's power to delegate discretionary authority to the courts.[183] And since then, Congress has done so with great frequency. Well over one hundred legislative provisions describe rights or obligations, or otherwise define legal norms, through an incorporation of "the law of nations" or "international law."[184] The

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their determination." *Id*. at 730 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)) (internal quotation marks omitted).

181. *See id.* (concluding that the "door" for judicial enforcement of international law remains "open to a narrow class of international norms today"); *Sabbatino*, 376 U.S. at 423 ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances . . . .").

182. The proper place of maritime and admiralty law in this analysis poses special challenges. The Supreme Court has long reasoned that Article III's express inclusion of those matters in "the judicial Power" impliedly empowers the federal courts "to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits." Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 361 (1959) (citation omitted) (quoting Crowell v. Benson, 285 U.S. 22, 55 (1932)). In some early cases, the Court referred extensively to "the law of nations" in fulfilling this responsibility. *See, e.g.*, Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 159 (1795) (relying on the "law of nations" as part of the Court's reasoning); Glass v. Sloop Betsey, 3 U.S. (3 Dall.) 6, 9 (1794) ("[B]y the law of nations, the courts of the captor can alone determine the question of prize . . . ."). Since the Judiciary Act of 1789, ch. 20, 1 Stat. 73, Congress additionally granted to the federal district courts original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333 (2006). Congress also included a savings clause that permitted such cases also to proceed in state courts under state law. *Id*. As a result, maritime and admiralty law reflects an amalgam of state and federal law. It is, to be sure, also informed by international law, but it does not derive its content directly from that source.

183. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 158 (1820) (upholding a conviction under a congressional act that criminalized piracy "as defined by the law of nations" against a claim that Congress could not leave the matter to judicial interpretation); United States v. Hasan, 747 F. Supp. 2d 599, 632 (E.D. Va. 2010) ("[W]hen Congress enacts a statute that *expressly* incorporates customary international law into the domestic law of the United States, the federal courts are required, as with any other constitutional congressional mandate, to follow the statutory language adopted by Congress and apply customary international law.").

184. *See, e.g.*, 10 U.S.C. § 821 (2006) (reserving the right of the military to try offenses that "by . . . the law of war" may be tried by military commissions); 18 U.S.C. § 1651 (2006) (criminalizing piracy "as defined by the law of nations"); 22 U.S.C. § 462 (2006) (empowering the president to detain foreign vessels at American ports when permitted "by the law of nations"); 28 U.S.C. § 1605(a)(3) (2006) (providing that a foreign state will not be immune from the jurisdiction of the federal courts when "rights of property taken in violation of international

most controversial of these provisions is the Alien Tort Statute,[185] which the Supreme Court found in *Sosa* to contain an implied delegation of authority to the courts to recognize tort claims—especially human-rights tort claims—that allege violations of international law.[186] A variety of derivative administrative regulations[187] and executive orders[188] contain similar incorporations of international law. In all such cases, the identification of the governing norms of international law falls to the federal courts.

The authority for judicial enforcement of international law also may come solely in the form of executive agreements.[189] Such agreements, made entirely on the basis of the executive's independent powers under the Constitution, may have limited domestic legal effects.[190] A much more significant field of operation for executive agreements, however, results from delegations of authority by Congress. Indeed, Professor Oona Hathaway estimates that between 1990 and 2000 alone, the executive branch concluded over 1300

law are in issue"); *see also* Van Alstine, *supra* note 173 (surveying these legislative incorporations).

185. Alien Tort Statute, 28 U.S.C. § 1350 (2006) (granting to the district courts "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").

186. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 730–31 ("The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction.").

187. *See, e.g.*, 15 C.F.R. § 922.4 (2011) (providing that regulations implementing a National Marine Sanctuary designation "shall be applied in accordance with generally recognized principles of international law"); 32 C.F.R. § 153.5(b) (2011) (requiring that military investigations of civilians in foreign countries "shall be conducted in accordance with . . . applicable international law"); 33 C.F.R. § 160.107 (2011) (providing that Coast Guard port authorities may deny entry to certain vessels "subject to recognized principles of international law").

188. *See, e.g.*, Exec. Order No. 13,178 § 11(a), 65 Fed. Reg. 76,903, 76,910 (Dec. 7, 2000), *reprinted as amended in* 16 U.S.C. § 6401 app. at 1057, 1061 (2006) (requiring that an ecosystem reserve be managed "in accordance with generally recognized principles of international law"); Exec. Order No. 10,637 § 1(m), 20 Fed. Reg. 7025, 7027 (Sept. 20, 1955), *reprinted as amended in* 3 U.S.C. § 301 app. at 617, 618 (2006) (empowering the secretary of homeland security to withhold clearance for any vessel believed to be carrying weapons "in violation of the laws, treaties, or obligations of the United States under the law of nations").

189. *See supra* note 125 and accompanying text. For a comprehensive review of the subject, see generally Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007).

190. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1987) (stating that the president may make a sole executive agreement "dealing with any matter that falls within his independent powers under the Constitution").

executive agreements pursuant to formal legislative delegations.[191] Thus, for example, in 2000, President Clinton concluded executive agreements with Germany, Austria, and France to address lingering private claims from the Second World War.[192] Beyond these formal examples, the Supreme Court has recognized a parallel executive power if supported by a "'particularly longstanding practice' of congressional acquiescence."[193]

A final method by which federal courts recognize the international legal obligations of the United States is an indirect one. Through a variety of interpretive presumptions, the courts have given effect to international legal norms not otherwise recognized through more formal mechanisms. The most prominent among this group is the general presumption that when Congress adopts domestic legislation, it intends to abide by international law.[194] A parallel presumption operates to protect international norms contained in treaties[195] and executive agreements.[196] Each of these metarules of

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191. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 155–65 & n.29 (2009) ("Between 1990 and 2000, for example, approximately twenty percent of [the 1747 total executive agreements concluded] were sole executive agreements. The remaining eighty percent [or 1300 executive agreements] were congressional executive agreements.").

192. *See* Agreement Concerning Payments for Certain Losses Suffered During World War II, U.S.-Fr., Jan. 18, 2001, Temp. State Dep't No. 01-36, 2001 WL 416465; Agreement Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," U.S.-Austria, Oct. 24, 2000, 40 I.L.M. 523 (2001); Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-Ger., July 17, 2000, 39 I.L.M. 1298. For a review of the history of these agreements, see *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 402–09 (2003).

193. Medellín v. Texas, 128 S. Ct. 1346, 1352 (2008) (quoting *Garamendi*, 539 U.S. at 415).

194. The rule traces its lineage to *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *id.* at 118 ("It has also been observed than an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."); *see also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (observing that "principles of customary international law" reflect "law that (we must assume) Congress ordinarily seeks to follow"). *But see* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 517–24 (1998) (questioning the legislative-intent and internationalist conceptions behind the *Charming Betsy* canon). *See generally* Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Revisited*, 106 MICH. L. REV. 61 (2007) (examining whether this presumption should extend to constitutional interpretation).

195. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 538–39 (1995) ("[A] concern [for judicial interference with international agreements] counsels against construing [the treaty] to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law."); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) ("There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous

interpretation necessarily involves a primary judicial determination of the content of international law. That is, each protective presumption first requires a court to identify the international legal norms with which ambiguous domestic law might conflict.

To be sure, the constitutional requirement of domestic recognition creates a discrete moment when domestic lawmaking institutions can filter the content of international law. In nearly all such moments thus far, however, the lawmaking institutions have merely given their blanket assent, whether ex post or ex ante, to the enforcement of international-law norms in domestic law.[197] The infrequency of controversies over the significance of preratification Senate treaty debates illustrates this point.[198] What remains is substantial judicial agency, and thus leadership, over the identification of the very content of the nation's legal obligations under international law.

III. EXAMINING THE COMPLICATED ROLE OF STARE DECISIS IN FOREIGN AFFAIRS

The striking fact from my analyses of foreign affairs and stare decisis is how little they seem to have in common. Accepted doctrine reflexively accords judicial decisions in foreign affairs the same stare decisis force as any prosaic form of domestic law. Indeed, notwithstanding the sheer volume of opportunities, the Supreme Court has never seriously examined the proper role of stare decisis

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congressional action."); Cook v. United States, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.").

196. *See* Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (applying the presumption in favor of an executive agreement).

197. The Senate is free, of course, to condition its consent on a formal amendment of the treaty's text or otherwise to attach reservations, understandings, or declarations (RUDs). Doing so is now a common practice during the Senate's ratification of human-rights treaties when the Senate considers the binary question of self-execution. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 402 (2000) (examining and defending the use of RUDs). In such a case, however, the treaty partners have the right to object and refuse renegotiation. *See* Vienna Convention on the Law of Treaties arts. 19–21, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 336–37 (1980) (defining the rules of international law on this subject).

198. *See* United States v. Stuart, 489 U.S. 353, 367 n. 7 (1989) (sanctioning the use of such materials). *But see id.* at 373–74 (1989) (Scalia, J., concurring) (rejecting resort to such materials because "[t]he question before [the Court] in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to").

when a court creates a precedent in foreign affairs, even a precedent involving the rules that govern the nation's formal legal relations with foreign states under international law.[199] This Part argues that such an examination is long overdue.

Section A first establishes the context with a review of why substantially more is at stake in matters of international law than in matters of purely domestic law. Section B demonstrates that even the basic premises of stare decisis may become compromised when courts create precedent on international law. Section C then explores the institutional perspective, specifically the fact and impropriety of judicial leadership in this sensitive field. I then pull the threads together in Part IV with an argument not only in favor of a more nuanced understanding of stare decisis for international-law precedents but also in favor of the existing regime of stare decisis for precedents involving purely domestic law.

A. The Special Responsibility of the Judicial Station

International legal norms differ importantly in both process and product from law of a purely domestic origin. By their very nature, international norms reflect formal rights or obligations under international law and thus function as elements of that independent, external legal regime. Yet disputes involving international law, as discussed, may also "arise under" federal law and may thus fall within the domestic enforcement authority of federal courts.[200]

The archetype of this duality is a treaty. A treaty is first and fundamentally a product of international law.[201] Its primary function is to create reciprocal legal obligations among sovereign states.[202] And because treaty obligations are elements of an independent, external

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199. As noted in the Introduction, the Supreme Court has only rarely even paused to mention the force of precedent in such cases. *See supra* note 6.

200. *See supra* Part II.C. For an introduction to this abstract debate over dualism versus monism, see generally Curtis A. Bradley, Breard*, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999); and Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007).

201. *See* Vienna Convention on the Law of Treaties, *supra* note 197, art. 26, 1155 U.N.T.S. at 339 (declaring as a core principle that agreements between states reflect binding obligations); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 (1987) (same).

202. *See, e.g.*, Medellín v. Texas, 128 S. Ct. 1346, 1357 (2008) (declaring that a treaty is "primarily a compact between independent nations" (quoting The Head Money Cases, 112 U.S. 580, 598 (1884)) (internal quotation marks omitted)).

legal regime, the breach of these obligations may occasion international discord, including various forms of tangible retribution.[203] But under the combined force of Articles III and VI,[204] the U.S. Constitution also permits "self-executing" treaties to fulfill the dual functions of international legal obligation and judicially enforceable domestic law.[205]

Even in the case of self-executing treaties, however, the second function operates on the foundation—and against the interpretive backdrop—of the first. The Supreme Court thus long ago recognized that even the domestic-law incidents of a treaty depend on the formal legal acts required for the treaty's entry into force under international law.[206] The substantive content of a treaty similarly is derived from its international origins. Treaty jurisprudence acknowledges this point through a web of related interpretive principles.[207] Thus, the understandings and practices of international law, not "any artificial or special sense impressed . . . by local law," provide the interpretive background.[208] Moreover, the ultimate responsibility of a court is "to

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203. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 197, art. 60, 1155 U.N.T.S. at 346 (setting forth the right of states to terminate a treaty for material breach by a member state); *The Head Money Cases*, 112 U.S. at 598 (observing that if "the interest and the honor of the governments which are parties to [a treaty] . . . . fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war").

204. *See supra* notes 128–31 and accompanying text.

205. *See, e.g.*, Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) ("[A] treaty ratified by the United States is not only the law of this land but also an agreement among sovereign powers . . . ." (citation omitted)); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 157–59 (emphasizing the dual nature of treaties); David H. Moore, Essay, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2246–48 (2010) (noting that the dual nature of treaties justifies self-execution). For a comprehensive comparative study of this subject, see generally THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009).

206. *See* Dooley v. United States, 182 U.S. 222, 230 (1901) (holding that the treaty in question did not "take effect upon individual rights, until there was an exchange of ratifications"); Haver v. Yaker, 76 U.S. (9 Wall.) 32, 34 (1869) (holding that the force of a treaty under domestic law depends on the formal international-law act of the exchange of instruments of ratification).

207. Like all such inquiries, the interpretation of a treaty "begins with its text." Abbott v. Abbott, 130 S. Ct. 1983, 1990 (2010) (quoting *Medellín*, 128 S. Ct. at 1357) (internal quotation mark omitted).

208. Geofroy v. Riggs, 133 U.S. 258, 271 (1890); *see also* United States v. Percheman, 32 U.S. (7 Pet.) 51, 86–87 (1833) (interpreting a treaty against the backdrop of the "modern usage of nations"); The Pizarro, 15 U.S. (2 Wheat.) 227, 246 (1817) ("[T]he language of the law of nations . . . is always to be consulted in the interpretation of treaties.").

read [a] treaty in a manner 'consistent with the shared expectations of the contracting parties'"[209] precisely because a treaty reflects agreed commitments among sovereigns under international law.

This "shared" aspect carries important implications for the work of the federal courts. First, and tellingly, the proper sources of interpretive material are the *international* negotiating and drafting records—the so-called *travaux préparatoires*.[210] Evidence of shared original intent likewise may be found in the "practical construction" of the treaty parties through their course of conduct post-ratification.[211] Moreover, a prime aim of judicial enforcement of a treaty is uniformity of interpretation by the parties' respective domestic courts.[212] To secure this goal, the Supreme Court has consistently emphasized that "[t]he 'opinions of our sister signatories' . . . are 'entitled to considerable weight.'"[213]

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209. Olympic Airways v. Husain, 540 U.S. 644, 650 (2004) (quoting Air Fr. v. Saks, 470 U.S. 392, 399 (1985)); *see also* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982) (observing that in interpreting a treaty, a court's "role is limited to giving effect to the intent of theTreaty [*sic*] parties").

210. *See, e.g.*, *Medellín*, 128 S. Ct. at 1357 ("Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty . . . ." (quoting *Zicherman*, 516 U.S. at 226)).

211. E. Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991) (quoting *Saks*, 470 U.S. at 396); *see also* O'Connor v. United States, 479 U.S. 27, 33 (1986) ("The course of conduct of parties to an international agreement . . . is evidence of its meaning.").

212. *See Abbott*, 130 S. Ct. at 1991 (emphasizing that in interpreting a treaty, a "uniform, text-based approach ensures international consistency"); Sanchez-Llamas v. Oregon, 548 U.S. 331, 383 (2006) (Breyer, J., dissenting) (observing that "uniformity is an important goal of treaty interpretation"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. d (1987) ("Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems.").

213. *Abbott*, 130 S. Ct. at 1993 (alteration and omission in original) (quoting El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999)) (internal quotation marks omitted); *see also E. Airlines*, 499 U.S. at 550–51 (noting that the Court "must also consult the opinions of [its] sister signatories" when determining the meaning of a treaty). *See generally Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 579, 579–81 (2004) (analyzing the Supreme Court's decision in *Olympic Airways v. Husain*, 540 U.S. 644 (2004), in which the majority and dissent applied *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), and arrived at opposite conclusions). The Supreme Court has, on occasion, also cited subsequent developments in other maritime nations as grounds for overruling admiralty precedents. *See* United States v. Reliable Transfer Co., 421 U.S. 397, 397–98 (1975) (observing, in connection with the overruling of an earlier admiralty rule, that "[t]he courts of every major maritime nation except [the United States] have long since abandoned th[e] rule"); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 388–89 (1970) (citing subsequent judicial and legislative developments in England as one ground for overruling a longstanding rule of admiralty law).

Although the authority on treaties is richer, the same basic considerations apply for the judicial application of executive agreements and customary international law. Executive agreements also may live a dual life as formal sovereign obligations under international law,[214] as well as judicially cognizable domestic law.[215] Likewise, norms of customary international law—once they coalesce through a near-universal state practice followed "from a sense of legal obligation"[216]—reflect binding rights or obligations under international law. As I have shown, in a large variety of circumstances, these international norms also may fall within the domestic enforcement authority of federal courts.[217]

The essential message here is that when courts discharge their Article III duty to enforce treaties, customary international law, and executive agreements in domestic law, they simultaneously define the content of international law. Although independent of the political branches, the judiciary is a formal institution of the United States. Therefore, when their domestic mandate extends to international law, federal courts act as functional agents of the United States in external relations. This reality is attended by the very real possibility that a misguided domestic court could cause a breach of America's international obligations. The international impact of American judicial action is amply illustrated by the German Constitutional Court's nearly immediate reaction[218] to the Supreme Court's treaty decision in *Sanchez-Llamas v. Oregon*.[219] At stake in the judicial resolution of individual disputes under international law, in short, is

214. International law makes no formal distinction between types of "international agreements." *See* Vienna Convention on the Law of Treaties, *supra* note 197, art. 2(1)(a), 1155 U.N.T.S. at 333 (defining a "treaty" as "an international agreement concluded between States in written form and governed by international law").

215. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("[T]he courts have the authority to construe . . . executive agreements . . . ." (citing Baker v. Carr, 369 U.S. 186, 211 (1962))); Kwan v. United States, 272 F.3d 1360, 1363 (3d Cir. 2001) ("Although not a treaty, treaty principles have been applied to interpreting executive agreements."); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1408 (9th Cir. 1995) ("Executive agreements . . . are interpreted in the same manner as treaties and reviewed by the same standard.").

216. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2).

217. *See supra* notes 183–88 and accompanying text.

218. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 19, 2006, docket number 2 BvR 2115/01, ¶¶ 19–20, 53, (Ger.), *available at* http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html.

219. Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

the reputation of the United States as a faithful partner in international relations.

The enforcement of international law through domestic legal proceedings thus is an immense responsibility. To return to the example of a treaty, enforcement involves judicial agency in the formal duty of "good faith" performance, which Professor Louis Henkin accurately describes as "the most important principle of international law."[220] In the formative years of the United States, the Supreme Court was acutely aware of the sensitivity of its position in such matters. The Court's analysis in the 1821 case of *The Amiable Isabella*[221] is worthy of special emphasis. "[I]n delivering [its] opinion to the world," the Court in that case declared,

> [The issues at stake in treaty enforcement] embrace principles of international law of vast importance; they embrace private interests of no inconsiderable magnitude; and they embrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our Government could not violate without disgrace, and which this Court could not disregard without betraying its duty. It need not be said, therefore, that we feel the responsibility of our stations on this occasion.[222]

These sentiments were once reflected in prudential doctrines designed to protect against judicial imprudence in foreign affairs. The twin principles of good faith and liberal treaty interpretation served to remind courts that substantially more is at stake in enforcing treaties than in applying laws of purely domestic origin.[223] But as I have explained in detail in another article, these venerable doctrines quietly disappeared from judicial consciousness early in the twentieth century.[224] And as the doctrine of stare decisis coalesced on a separate

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220. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 62 (1990).

221. The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821).

222. *Id.*; *see also* Chew Heong v. United States, 112 U.S. 536, 540 (1884) (declaring that regarding the interpretation of treaty provisions, "the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected"); Bradley, *supra* note 205, at 133 ("[E]very treaty is a contract that implicates the U.S. relationship with one or more other nations, and such a relationship inherently includes political as well as legal elements, such as considerations of reciprocity, reputation, and national interest.").

223. For a broad treatment of this subject, see generally Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885 (2005).

224. *See id.* at 1907–19 (detailing the history of good faith in treaty jurisprudence).

path, judicial decisions insensitive to these concerns were reinforced with full precedential effect.

Granted, the interpretation and application of legal norms are standard judicial fare. Additionally, prosaic domestic statutes or regulations may directly affect foreign affairs.[225] But in such cases, the relationship between lawmaker and law applier is solely a domestic one.[226] When Congress, for example, takes it upon itself to define the entire content of the law—without importing international legal norms—the courts need look only to familiar domestic sources and materials to guide their interpretive inquiries.[227] To be sure, judicial action in these situations may have consequences for foreign relations. Nevertheless, in the context of purely domestic statutes, the courts' essential role is to apply the value judgments first made by Congress within its constitutionally delegated sphere of authority.[228] Fidelity to those value judgments dispels both the appearance and effect of judicial leadership.[229]

With respect to international law, by contrast, the necessary consequence of judicial precedent is the definition of rights or obligations that govern the nation's relations with foreign states. Unavoidably, this task involves direct judicial entanglement in foreign affairs. The immensity of this responsibility should alone give judges pause before reflexively endowing such precedents with full stare decisis effect. But as the next Sections demonstrate, even the premises of stare decisis are compromised when the courts are called upon to determine the content of international law.

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225. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1(b) (1987) (including within "foreign relations law" purely domestic law that "has substantial significance for foreign relations . . . or has other substantial international consequences"); Moore, *supra* note 205, at 2250–53 (addressing the same point).

226. For administrative law, the sources of law are domestic regulatory agencies exercising authority delegated by Congress.

227. The Supreme Court missed this fundamental point in *Sanchez-Llamas*. In the process of rejecting a treaty claim in that case, the Court observed that "[i]t [wa]s no slight to the Convention to deny petitioners' claims under the same principles [the Court] would apply to an Act of Congress." Sanchez-Llamas v. Oregon, 548 U.S. 331, 360 (2006).

228. As I have noted, even in these situations, courts protect against international friction through interpretive presumptions. *See supra* notes 194–96 and accompanying text.

229. *See, e.g.*, Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (observing that although the statute in question had direct foreign-policy implications, "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes" and, thus, the Court could not "shirk this responsibility merely because [its] decision may have significant political overtones").

B. *Destabilized Values: The Limits of Authority, Stability, and Legitimacy*

1. *Stability and Exogenous Forces of Change: Unipolar Stare Decisis in a Multipolar System.* An essential foundation for a rational doctrine of binding precedent, as I have explained, is a court of last instance with the authority to settle the law within its defined jurisdiction.[230] Stare decisis, then, advances the values of stability and predictability by compelling lower court fidelity in a hierarchically integrated system and bolsters judicial legitimacy by constraining the situational discretion of even the declaring court.

Notions of stability and legitimacy take on different dynamics, however, when the subject matter for judicial precedents is international law. The origin of the legal norms in such inquiries—the source from which the norms emerge and derive their content—is the international legal system.[231] Unfortunately or not, no judicial authority with the power to issue final and enforceable determinations on the content of international law exists. The ICJ could be in a position to fulfill this function. But the United States long ago withdrew from the compulsory jurisdiction of the ICJ,[232] and it appears prepared to do the same in response to any discrete jurisdictional grants when actual controversies arise.[233] In any event, *Medellín v. Texas*[234] made abundantly clear in 2008 that the international system itself does not compel precedential effect for ICJ judgments.[235]

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230. *See supra* notes 94–102 and accompanying text.

231. *See supra* Part III.A.

232. *See* Press Statement, U.S. Dep't of State, Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction (Oct. 7, 1985), *reprinted in* 24 I.L.M. 1743, 1744 (1985) ("[T]he President has concluded that continuation of our acceptance of the Court's compulsory jurisdiction would be contrary to our commitment to the principle of equal application of the law . . . .").

233. The United States promptly withdrew from an optional jurisdictional protocol to the Vienna Convention on Consular Relations following an adverse decision by the ICJ. *See* Letter from Condoleezza Rice, U.S. Sec'y of State, to Kofi Annan, UN Sec'y-Gen. (Mar. 7, 2005), *reprinted in* 2308 U.N.T.S. 71, 71 (2005) ("[T]he United States will no longer recognize the jurisdiction of the International Court of Justice reflected in [the protocol].").

234. Medellín v. Texas, 128 S. Ct. 1346 (2008).

235. *Id.* at 1367 ("Nothing . . . suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections.'" (quoting Sanchez-Llamas v. Oregon, 548 U.S. 331, 360 (2006))).

All that remains to settle the law are the disparate domestic courts of the states that compose the international system. But these courts are not integrated in any structural way, and certainly not hierarchically so. The process of interpretation and application in this realm is instead multipolar,[236] with authority dispersed among the various judicial players in the system, as well as among a variety of other international, governmental, and nongovernmental institutions that seek to influence the content of the law. The problem is particularly acute for the unwritten rules of customary international law, founded as they are on evolving evidence of generalized state practice.[237] With only a disaggregated judicial system, the development of precedent on such matters is a process, not an event. Systemic stare decisis makes no sense here. Systemic cohesion instead exists only through cooperation driven by good faith adherence to the rule of law among the participants.[238]

The U.S. Supreme Court is, therefore, only one player in a multipolar field that admits of no binding precedent. The Court's extensive review of treaty opinions by foreign courts in *Abbott v. Abbott*[239] provided a positive illustration of this point.[240] To be sure, the Court remains supreme in its own realm and thus may create domestic precedent in cases and controversies properly before it. In matters of international law, however, it lacks the legal authority, practical ability, and definitive expertise to secure compliance beyond its domestic mandate. Courts and similar institutions in other states are free, therefore, to reexamine, undermine, or even flatly reject a "final" decision by the U.S. Supreme Court. In short, such a final decision will not control in the very system that provides the content for the law and in which sanctions would be assessed.

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236. I use this term in contradistinction to "polycentric" law. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 238–97 (1998) (describing a polycentric constitutional system). International law is not a lawless cloud of facts merely awaiting some indiscriminate form of seeding. It remains essentially state-centered and requires consent as reflected in the sovereign conduct of states. Though decentralized, the determination of international law thus proceeds on the foundation of accepted legal rules and through formalized judicial processes.

237. *See supra* note 216 and accompanying text.

238. For a broader and more hopeful examination of the interaction among courts around the world, see Martinez, *supra* note 5, at 460–523.

239. Abbott v. Abbott, 130 S. Ct. 1983 (2010).

240. *See id.* at 1993–94 (2010) (surveying divergent sovereign interpretations of *ne exeat* rights under the Hague Convention on the Civil Aspects of International Child Abduction).

The result is that judicial precedent in matters of foreign affairs cannot bring the systemic "calm" that stare decisis is designed to secure. In this multipolar system, a judgment by any one court cannot control future developments in the system. Contrary to the jurisdictional premises of stare decisis, in other words, an international-law decision by a domestic court is subject to immediate and potentially destructive forces of change exogenous to the domestic polity.

Moreover, the vast majority of states that compose the international system do not follow stare decisis.[241] Prudential considerations continue to hold some sway, as comparative studies of judicial practice have demonstrated.[242] But the prevailing foreign practice of elevating the law over a mere initial judicial impression of it demonstrates that immediate adherence to precedent is neither axiomatic nor "indispensable" to the rule of law.[243] Moreover, the willingness of foreign courts to reassess initial impressions based on a higher quality of information highlights the inability of any domestic judicial precedent to introduce stability into the content of international law.

In any event, careful reflection reveals that existing stare decisis doctrine already contains the flexibility to recognize—although the courts themselves have not yet explicitly recognized—that evolving evidence of international law may immediately undermine a precedent. I have shown in the area of treaty law, for example, that the identification of the definitive "shared expectations" of the treaty partners requires an examination of those partners' "subsequent course[s] of conduct," as well as an analysis of the views of their own domestic courts.[244] Even a Supreme Court treaty decision will not

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241. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 22 (2d ed. 1987) ("[*S*]*tare decisis* . . . is . . . rejected by the civil law tradition."). The ICJ likewise does not follow a formal doctrine of precedent. *See* Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 1062, 3 Bevans 1179, 1190 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

242. *See* MERRYMAN, *supra* note 241, at 47 ("Although there is no formal rule of *stare decisis*, the practice is for judges to be influenced by prior decisions."). For a comprehensive treatment of the subject, see generally INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997).

243. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[I]t is common wisdom that the rule of *stare decisis* is not an 'inexorable command.'" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting))).

244. *See supra* notes 209–13 and accompanying text.

control future developments of either of these important interpretive sources.

This discussion demonstrates that the foundations of judicial decisions involving international legal norms are particularly susceptible to immediate destabilization. To be sure, even a purely domestic-law precedent may be affected by subsequent legal and societal developments. But stare decisis works as a serious constraint on such endogenous forces and, except at the margins and over a significant period of time, almost completely prevents them within the judicial system. In international-law matters, however, exogenous forces of change may have an immediate and direct influence on precedent. And, significantly, the absence of an integrated judicial system means that a principal catalyst for such change actually may be later courts called upon to address the same subject.

Unfortunately, as noted in the Introduction of this Article,[245] the Supreme Court has missed two prime opportunities to recognize this point. In *Sanchez-Llamas* in 2006, the Court examined the force of subsequent ICJ rulings on an original treaty-interpretation decision.[246] Regrettably, however, the majority's opinion focused only on the direct precedential effect of the ICJ rulings.[247] Only Justice Breyer, writing in dissent, recognized—properly, although only briefly—that the ICJ decisions in fact reflected the kind of subsequent developments that are relevant for stare decisis analysis.[248] Four years later, the Court returned to the same subject in *Medellín* after a definitive decision by the ICJ that expressly rejected the Court's earlier decision in *Sanchez-Llamas*.[249] But the Supreme Court again

245. *See supra* notes 17–21 and accompanying text.

246. Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–57 (2006).

247. *See id*. at 355 (observing that ICJ decisions are entitled only to "respectful consideration" (quoting Breard v. Greene, 523 U.S. 371, 375 (1998)) (internal quotation marks omitted)).

248. *See id.* at 389–90 (Breyer, J., dissenting) (observing that although the Court's earlier decisions are "entitled to full *stare decisis* effect," the later decisions of the ICJ "amount to a 'significant . . . subsequent development' of the law sufficient to lead to a reconsideration of past precedent" (omission in original) (quoting Agostini v. Felton, 521 U.S. 203, 236 (1997))); Medellín v. Dretke, 544 U.S. 660, 689 (2005) (O'Connor, J., dissenting) ("In the past the Court has revisited its interpretation of a treaty when new international law has come to light.").

249. *See* Medellín v. Texas, 128 S. Ct. 1346, 1348 (2008) (holding that *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), was not "enforceable federal law"); *Avena and Other Mexican Nationals*, 2004 I.C.J. 12, ¶¶ 34, 63 ("[T]he court is unable to uphold the contention of the United States that . . . it [is] without jurisdiction to order [specific remedies] . . . ."); *supra* notes 17–21.

analyzed only the binding effect of the ICJ's holding;[250] no Justice saw the ruling as an additional, subsequent fact that permitted the Supreme Court *itself* to reexamine its original analysis.

The point is not that the conclusions in *Sanchez-Llamas* and *Medellín* necessarily were wrongheaded. It is that the Court missed serious opportunities to refine the proper understanding of stare decisis in relation to the international legal obligations of the United States. This failure is especially regrettable for the practice of stare decisis in the federal courts of appeals. I have much more to say about that dynamic in the remainder of this Section and in the Sections to follow.[251] The point of emphasis at this stage is that nearly all final declarations of international law in the United States come from the federal courts of appeals, not from the Supreme Court.[252] Unfortunately, however, the rigid rules of vertical stare decisis that govern in those courts effectively prohibit consideration of the exogenous forces that distinctively affect the continuing validity of judicial precedents on such matters.

2. *Expertise and the Risks of Error.* The task of a federal court in interpreting even a purely domestic statute is not an easy one. Language often is ambiguous, and the lawmaker's intent often is unclear. Congress also may default to empty linguistic compromises to avoid difficult political choices. Some implications of legislation may not be foreseeable in any event. As a result, even though the lawmaker and the law applier may share a common legal, political, and linguistic culture, the proper judicial role in applying statutory law has spawned spirited scholarly debates.[253]

The judicial responsibility to declare the law is substantially more difficult when the subject is international law. By their nature, international legal norms result from processes and substantive compromises that cross legal, political, and cultural divides.

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250. *See Medellín*, 128 S. Ct. at 1359 ("ICJ judgments were not meant to be enforceable in domestic courts.").

251. *See infra* Part IV.B.

252. *See infra* notes 380–85 and accompanying text.

253. For an introduction to the voluminous literature on this subject, see generally William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001); and Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

Specialized practices, usages, and conventions also provide a framework for specialized understandings. Even shared legal concepts often require translation—linguistic, cultural, or otherwise.[254] For any particular domestic court, therefore, the legal product of an international lawmaking process is, quite literally, foreign.

This characterization is accurate even for conventional law in the form of treaties and executive agreements. As I have analyzed in another article, the negotiation and drafting process for treaties—in particular the inability of the majority to impose its will on objectors—contrasts starkly from that for domestic statutes.[255] With the overlay of heterogeneity among the negotiators, the result is often broad linguistic compromises of complicated, multilateral origins.[256] Participant diversity likewise often requires adoption of texts in multiple languages, all of which are equally authoritative.[257] Treaties may also contain "false friends," both linguistic and conceptual, and may otherwise settle only uncomfortably in America's distinctive legal culture. Even plain meanings thus may not be so plain.

Customary international law is fraught with the bulk of these challenges and more. Customary international law arises through a cooperative, multipolar process whose results are not distilled in any authoritative text, much less in a coherent, comprehensive compilation.[258] Domestic courts called upon to enforce such rules, therefore, must examine the results of a fluid process with multiple players from widely divergent cultural, legal, political, and linguistic

254. *See, e.g.*, Alex Glashauser, *What We Must Never Forget when It Is* a Treaty *We Are Expounding*, 73 U. CIN. L. REV. 1243, 1294 (2005) (examining the special challenges in interpreting international treaties); Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611, 615 (1997) (focusing on the challenges that arise in the common case of treaties with multiple authoritative-language texts).

255. *See* Van Alstine, *supra* note 223, at 1923–24 ("The very process of negotiating and drafting treaties . . . means that the legal product may be fundamentally different than other forms of law . . . .").

256. *See* Bradley, *supra* note 205, at 157 (discussing the linguistic idiosyncrasies of multilateral treaties); Van Alstine, *supra* note 223, at 1923–24 (highlighting the difficulties inherent in composing complex agreements among multiple sovereigns).

257. *See generally* Shelton, *supra* note 254, at 613–18 (providing background information on the use of multiple languages in various treaties).

258. *See* Aziz v. Alcolac, Inc., 658 F.3d 388, 400 (4th Cir. 2011) ("[C]ustomary international law—as the term itself implies—is created by the general customs and practice of nations and therefore does not stem from any single, definitive, readily-identifiable source." (quoting Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1015 (7th Cir. 2011))).

traditions.[259] This diversity may obscure the significance of any particular state action, expression, or practice. Strikingly uneven levels of development and international participation further complicate the picture. Simply gathering reliable information thus represents an enormous undertaking for the courts,[260] especially if they are to take seriously the requirement of a real "general and consistent" practice of states throughout the international system.[261] American courts, too, approach the problem schooled in a distinctive legal system and with their own distinctive cultural assumptions.

The special challenges courts face when they inquire into foreign affairs already have found expression in Supreme Court opinions. In particular, I demonstrated in Part II.B how concerns about judicial expertise, access to reliable information, and the uncertain implications of judicial precedents have informed analyses of foreign affairs abstention doctrines.[262] Ultimately, these considerations reflect ex ante admonitions to the courts about the risks of improvident action based on insufficient or unreliable information. The message, in short, is that the risks of error in first judicial impressions of international law are simply greater than with prosaic domestic law.

These combined considerations retain their force even after a court has created a precedent in the field. That is, the insights about the need for ex ante judicial modesty in foreign affairs generally do not lose their relevance simply because a court has taken a stab at resolving a particular legal issue. Thus, a generic notion of stare decisis, for all its important functions in any rule-bound system, runs contrary to the array of prudential cautions against ill-advised judicial

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259. *See id.* ("The determination of what offenses violate customary international law . . . is no simple task. Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas." (omission in original) (quoting *Flomo*, 643 F.3d at 1015)); *Flomo*, 643 F.3d at 1016 ("[A] custom cannot be identified with the same confidence as a provision in a legally authoritative text, such as a statute or a treaty.").

260. *See Aziz*, 658 F.3d at 400 ("[T]he relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges." (quoting *Flomo*, 643 F.3d at 1015)); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 194 (2d Cir. 2009) (using the same description of the "relevant evidence of customary international law" (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 247–48 (2d Cir. 2003))).

261. *See supra* note 216 and accompanying text.

262. *See* RAMSEY, *supra* note 135, at 326–27 ("[I]t is surely true that, especially in international matters, courts sometimes lack access to factual information needed to resolve cases."); Charney, *supra* note 5, at 102–04 (examining, as factors in political question analysis in foreign affairs, such considerations as "expertise in the law," "access to facts," that "international law is alien," "important and uncertain effects," and the need for a "sole voice"); *supra* Part II.B.

leadership in international law—unless one is comfortable with the conceit that judges nearly always get the answer right the first time.

There is every reason to believe, however, that judicial misjudgments are more common in the identification of international law.[263] This observation is no slight. The unfamiliar and unstable terrain simply makes the judicial task more challenging in this field. In short, an increased likelihood exists that a particular precedent will not be "well reasoned"[264] in the first place. This likelihood does not mean that courts should abdicate their duty to resolve disputes properly before them. It is, however, further evidence that rigid stare decisis norms are inappropriate when, in the context of resolving these disputes, courts create precedents in the sensitive realm of international law.

C. Separation of Powers, Stare Decisis, and Judicially Enforceable International Law

A deeper appreciation of the relationship between precedent and separation of powers also counsels in favor of a reassessment of stare decisis as to questions of international law. In foreign affairs matters, in particular those that touch on international law, the Supreme Court has repeatedly cautioned that the judiciary should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches."[265] To reiterate one of my major themes, this concern—grounded in the separation-of-powers relationships between the judiciary and the political branches—does not dissolve merely because a court has created a precedent.

1. *Legitimacy of the Judicial Branch and the Blurring of Law-Finding with Lawmaking.* In the American constitutional system, the federal judicial branch, "purposefully insulated from democratic pressures," fundamentally is not a lawmaker.[266] This general principle deserves special emphasis in the field of foreign affairs. The Court's occasional statements that the actions of the political branches in foreign affairs are "largely immune from judicial inquiry or

263. *See supra* notes 258–60 and accompanying text.

264. *See supra* note 59 and accompanying text.

265. Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964) (highlighting the need "to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs").

266. Boyle v. United Tech. Corp., 487 U.S. 500, 518 (1988).

interference,"[267] though jolting when taken out of context, merely reflect a basic insight: that the province of the judicial branch does not extend to supervising questions of foreign relations that are unhinged from Article III cases or controversies.[268] As I have shown, however, the cases or controversies that nonetheless compel judicial engagement with international legal relations are broad and numerous indeed.[269]

The judiciary's position in such engagements differs from its position with respect to purely domestic law as a matter of kind, not merely of degree. This point has been woven through much of my analysis in this Article. Here, I explore the institutional implications. Recall, first, that a judicial decision on international law by its nature involves a formal definition of the rights or obligations that govern the nation's legal relations with foreign states. At its most consequential, this task involves the identification of the sovereign legal obligations of the United States, whether owed to other states or owed to private entities.[270] International law also may address relations solely between private parties;[271] but even in that event, judicial action is premised on the right or obligation of the United States to enforce norms that arise out of legal relations with other sovereign states.[272]

This functional sense of agency alone is uncharacteristic of the judicial station within the American constitutional system. It becomes especially problematic, however, in light of the nature and the extent

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267. Regan v. Wald, 468 U.S. 222, 242 (1984) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)) (internal quotation mark omitted).

268. *See, e.g.*, Barker v. Harvey, 181 U.S. 481, 488 (1901) (noting that the Supreme Court "has no power" to enforce international-treaty obligations denounced by the United States); The Head Money Cases, 112 U.S. 580, 598 (1884) (observing that when a treaty does not of its own force create judicially enforceable domestic law, "its infraction becomes the subject of international negotiations and reclamations, ... [with which] the judicial courts have nothing to do and [for which they] can give no redress"); United States v. Ferreira, 54 U.S. (13 How.) 40, 48 (1851) (declaring that whether the United States had complied with its executory promises under a treaty "is a question . . . with which the judicial branch has no concern").

269. *See supra* Part II.C.

270. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987).

271. For a prominent example, see the U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 (1988).

272. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. VII intro. note ("[C]ustomary international law and numerous international agreements have created obligations for states in relation to persons, both natural and juridical.").

of the value judgments that inhere in the identification and enforcement of international law. As a general matter, uncertainty in the articulation of legal rules often requires value judgments as courts fulfill their duty to "expound and interpret" the law.[273] As Judge Jerome Frank observes, the risk in such cases is that "interpretation is inescapably a kind of legislation."[274]

The problem is particularly acute in the fluid world of international law. The Supreme Court stated this point directly in *Sosa*: "[A] judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision."[275] By whatever term one prefers, discretion in the identification of binding legal norms inevitably involves lawmaking.

Concerns about freelance lawmaking are greatest with respect to the identification of customary international law. By their nature, the voluminous domestic incorporations of international law[276] create a moving target for the judiciary. That is, open-ended references to "international law" or "the law of nations" require the judiciary to identify the content of international norms as those norms find acceptance and evolve through state practice and dialogue over time. For common-lawmaking of this type, moreover, modern realism has long since dispatched the fiction that courts merely "find" the law. Instead, as the Supreme Court aptly observed in *Sosa*, in most such matters, "there is a general understanding that the law is not so much found or discovered as it is either made or created."[277] The absence of an authoritative text; the complicated and unfamiliar lawmaking processes; and the linguistic, cultural, and legal differences among the participants[278] combine to increase substantially the "open texture"[279] of this form of judicially enforceable law. In many cases, the

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

274. Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1269 (1947).

275. Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004).

276. *See supra* notes 183–88 and accompanying text.

277. *Sosa*, 542 U.S. at 725; *see also id.* at 729 ("[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice.").

278. *See supra* Part III.B.2.

279. The famous scholar of jurisprudence Professor H.L.A. Hart employed this term to describe the indeterminacy in the law. *See* H.L.A. HART, THE CONCEPT OF LAW 124–25 (1961) ("Whichever device, precedent or legislation, is chosen . . . will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.").

ambiguous mixture of law and policy that pervades international relations fosters doubt over the very existence of legal rules. The disordered, fluid process for addressing these consequent doubts through judicial interpretation only deepens and prolongs the indeterminacy.[280] Even the evidentiary standards are unclear, for international law sanctions resorting to "any relevant material or source" in identifying the content of the law.[281]

The difficulty of this enterprise is richly illustrated by two federal court opinions that thoroughly analyzed the international law of piracy but came to diametrically opposed conclusions.[282] At issue in both cases was an 1819 statute that mandates life in prison for "the crime of piracy, as defined by the law of nations."[283] When first analyzing the statute in 1820, the Supreme Court looked to a wide range of interpretive sources on the law of nations: scholarly treatises, "the general usage and practice of nations," and judicial decisions.[284] When reassessing the issue in 2010 in *United States v. Said*,[285] a district court judge relied heavily on principles of stare decisis and specifically limited construction of the statute to the Supreme Court's 1820 interpretation.[286] The judge concluded, moreover, that this nearly 200-year-old Supreme Court precedent "[wa]s the only clear, undisputed precedent that interprets the statute at issue" and that modern international-law sources on the definition of piracy "[we]re unsettled."[287] In *United States v. Hasan*,[288] however, a federal judge from the same district concluded, after extensive analysis, that the statutory incorporation of "the law of nations" embraced an evolving standard of piracy informed by modern norms of customary

280. *Cf*. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 434–35 (1964) (describing as "quite unpersuasive" the argument that the Court should recognize a rule of international law on the act-of-state doctrine merely because "United States courts could make a significant contribution to the growth of international law").

281. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 113 (1987) (stating that, in such inquiries, "[c]ourts may in their discretion consider any relevant material or source, including expert testimony").

282. United States v. Said, 757 F. Supp. 2d 554 (E.D. Va. 2010); United States v. Hasan, 747 F. Supp. 2d 599 (E.D. Va. 2010).

283. Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (codified as amended at 18 U.S.C. § 1651 (2006)).

284. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820).

285. United States v. Said, 757 F. Supp. 2d 554 (E.D. Va. 2010).

286. *Id.* at 559–60.

287. *Id*. at 564–66.

288. United States v. Hasan, 747 F. Supp. 2d 599 (E.D. Va. 2010).

international law.[289] The judge in *Hasan* went on to hold that, far from being unsettled as the judge in *Said* had claimed, modern customary international law defining piracy was clear.[290]

Judicial action in this field also is subject to special sensitivities not present in purely domestic law, whether embodied in statutes, regulations, or federal common law. Concerns about the democracy deficit that surround judicial discretion in general are especially pronounced in the international realm.[291] Moreover, episodic and interstitial judicial lawmaking involving international law does not occur within a cohesive domestic legal system like the one familiar to the courts. This circumstance further exposes the judiciary's inability to provide the "flexibility, completeness, and comprehensive coherence"[292] that are especially important in delicate matters of foreign relations.

To be sure, the Constitution expressly contemplates judicial enforcement of treaties.[293] On this basis, federal courts properly have applied treaties throughout constitutional history.[294] Furthermore, a treaty's text provides a substantially more secure foundation for faithful interpretation. Nonetheless, the identification of treaty obligations also raises concerns about the nature and extent of independent judicial value judgments. The special legal, cultural, and linguistic challenges that complicate the interpretation of treaties also increase the open texture of the law and thus the space for judicial discretion. In addition, the evolving, cooperative process of treaty interpretation in the international realm means that courts shape the

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289. *See id.* at 623 ("[T]he Court concludes that both the language of 18 U.S.C. § 1651 and Supreme Court precedent indicate that the 'law of nations' connotes a changing body of law, and that the definition of piracy in 18 U.S.C. § 1651 must therefore be assessed according to the international consensus definition at the time of the alleged offense."); *id.* at 623–30 (analyzing the issue in more detail).

290. *See id.* at 632 ("Defendants point to the writings of several scholars in arguing that there is no consensus definition of piracy under modern international law. The Court finds that the evidence supports a conclusion to the contrary.").

291. *See, e.g.*, McGinnis & Somin, *supra* note 164, at 1193–1224 (examining the democracy deficit in the creation and identification of customary international law).

292. *See* HENKIN, *supra* note 116, at 140 ("Judge-made law, the courts must recognize, can serve foreign policy only interstitially, grossly, and spasmodically . . . .").

293. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made, under the[] Authority [of the United States].").

294. *See generally* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (comprehensively examining the history of Supreme Court treaty jurisprudence).

content of the law whenever they purport to interpret it.[295] This practical constraint on the discretion of future decisionmakers highlights a phenomenon that Professor Frederick Schauer terms "the forward-looking aspect of precedent."[296] As a result of this epistemic force of precedent, judge-found law for treaties functions as a close cousin of judge-made law.

The consequences of precedent involving international law, as I have argued, can also be substantially more significant than the consequences of precedent involving purely domestic law. The Supreme Court itself has highlighted the "risks of adverse foreign policy consequences" that attend judicial forays into international law.[297] Granted, not all such matters will touch "national nerves" to the same extent.[298] Nonetheless, even judicial interpretations of purely private-law treaties can trigger significant international friction. The recurrent controversies over the proper scope of custodial rights under the Hague Convention on the Civil Aspects of International Child Abduction[299] provide a good example. Although litigants under the treaty are private parties, perceived judicial infidelity to this treaty's obligations has led to recriminations at the highest levels of government.[300] Indeed, controversies have flared even between the United States and its close ally Germany over whether German courts have faithfully fulfilled their obligation under the treaty to return children abducted from the United States.[301] And as the Supreme Court long ago observed, "[E]xperience has shown that

295. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2)(b) (1987) (declaring that, in determining the content of international law, the "judgments and opinions of national judicial tribunals" are accorded "substantial weight").

296. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572–73 (1987).

297. Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004).

298. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("It is also evident that some aspects of international law touch much more sharply on national nerves than do others . . . .").

299. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 172.

300. *See, e.g.*, Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010) (highlighting "the diplomatic consequences resulting from this Court's interpretation of 'rights of custody'" under the Convention, "including the likely reaction of other contracting states and the impact on the State Department's ability to reclaim children abducted from [the United States]" (quoting Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 172, art. 5(a), T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99)).

301. For a review of this controversy in the early 2000s, see generally Dagmar Coester-Waltjen, *The Future of the Hague Child Abduction Convention: The Rise of Domestic and International Tensions—The European Perspective*, 33 N.Y.U. J. INT'L L. & POL. 59 (2000).

international controversies of the gravest moment . . . may arise from real or imagined wrongs to [another nation's] subjects inflicted, or permitted, by a government."[302]

The message here is not that judicial precedent on matters of international law is, in a formal sense, "illegitimate," as Justice Scalia asserted in *Sosa v. Alvarez-Machain*.[303] Courts may and should decide such matters. Increased indeterminacy in the production of international law, however, entails increased discretion in its application. This dynamic, in turn, creates the appearance and often the effect of judicial leadership in the very definition of legal relations with foreign states. An overwhelming international consensus on a particular issue—say, on torture or genocide[304]—may diminish the impression of judicial innovation.[305] But as courts participate in the identification of the law itself, they approach the outer edges of their legitimate judicial function. In doing so, they run a greater risk of undermining the perception of a principled, law-bound judiciary.[306]

Finally, in this field with unclear guideposts, the implications of a given precedent may be particularly difficult to gauge. Here again, jurisprudence has addressed the risks of judicial leadership with an ex ante admonition about untutored ventures into sensitive matters of foreign relations.[307] And here again, the insights of this admonition do not disappear simply because a court has in fact assumed such leadership in the form of precedent.

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302. Hines v. Davidowitz, 312 U.S. 52, 64 (1941).

303. Sosa v. Alvarez-Machain, 542 U.S. 692, 750–51 (2004) (Scalia, J., concurring in part and concurring in the judgment).

304. *See* Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 120 (2d Cir. 2010) ("[C]ustomary international law imposes individual liability for . . . war crimes, crimes against humanity (such as genocide), and torture . . . ."), *cert. granted*, 132 S. Ct. 472 (2011); Kadic v. Karadžic, 70 F.3d 232, 239–41 (2d Cir. 1995) ("[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.").

305. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . .").

306. *See supra* notes 53–64 and accompanying text.

307. *See Sosa*, 542 U.S. at 728 (stating that because of the "risks of adverse foreign policy consequences," attempts by courts to create remedies for violations of international law "should be undertaken, if at all, with great caution"); *id.* at 726 (observing that on such matters, "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law").

2. *The Uneasy Role of Congress and the Availability of Legislative Override.* The most obvious and potentially significant response to my analysis thus far is that Congress is available to correct judicial misadventures on matters of international law just as it can correct misadventures on matters of domestic law. As discussed, the possibility of congressional override has led to a "super-strong" version of stare decisis for statutory-interpretation precedents, as contrasted with constitutional ones.[308] One might reason from this premise that similar logic should apply to judicial decisions founded on international law. Careful analysis reveals, however, that proper respect for Congress's constitutional role as the substantive lawmaker in fact counsels in favor of judicial modesty when courts have created precedents on such matters.

Little doubt exists that Congress has the authority, as a matter of domestic law, to modify or nullify judicial action interpreting customary international law.[309] Established doctrine also permits Congress to abrogate a treaty.[310] In the Military Commissions Act of 2006,[311] however, Congress purported to go further by reversing the Supreme Court's pure interpretation of the Geneva Convention Relative to Treatment of Prisoners of War[312] in *Hamdan v. Rumsfeld*.[313] One could well construct a compelling argument that

308. *See supra* notes 66–79 and accompanying text.

309. *See Sosa*, 542 U.S. at 731 (declaring that Congress "may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987) (stating that "[a]n act of Congress supersedes an earlier rule of international law . . . as law of the United States").

310. *See* Medellín v. Texas, 128 S. Ct. 1346, 1359 n.5 (2008) ("[A] later-in-time federal statute supersedes inconsistent treaty provisions."); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899) ("It has been adjudged that Congress by legislation . . . could abrogate a treaty . . . ."); The Head Money Cases, 112 U.S. 580, 599 (1884) ("[A treaty] is subject to such acts as Congress may pass for its enforcement, modification, or repeal."). Congress may not, however, strip vested treaty rights. *See* Jones v. Meehan, 175 U.S. 1, 32 (1899) (observing that "Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself"); Wilson v. Wall, 73 U.S. (6 Wall.) 83, 89 (1867) ("Congress has no constitutional power to settle the rights under treaties except in cases purely political.").

311. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

312. Geneva Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (1950).

313. Hamdan v. Rumsfeld, 548 U.S. 557 (2006); *see also* Military Commissions Act of 2006 § 6(a)(2), 120 Stat. at 1632 (defining "grave breaches" of Article 3 of the Geneva Convention and declaring that this definition "fully satisf[ies]" the obligations of the United States under the convention).

Congress did not have the authority to do so, despite the Necessary and Proper Clause.[314] That is, whether Congress may arrogate to itself the purely judicial task of treaty interpretation if it otherwise leaves a treaty fully in effect is at least open to question.[315]

In any event, the animating force for the different treatment of constitutional and statutory precedents is not found in the simple possibility of congressional override. The special force of stare decisis on statutory matters instead arises from respect for the policymaking authority of Congress within the realm of its own legislative products.[316] When Congress itself establishes the content of the law, the proper role of the judiciary is to implement the value choices made by the people's representatives during that process. And once a court has faithfully done so, deferring to Congress for subsequent correction of a law of the legislature's own creation is entirely appropriate.

On this score, precedents founded on international law differ fundamentally from those arising from the interpretation of purely domestic statutes. Congress is the lawmaking source for neither customary international law nor treaties. Indeed, the rules of customary international law arise without formal sanction by any domestic legislative institutions.[317] As a result, enforcement of these

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314. U.S. CONST. art. I, § 8, cl. 18; *see also* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271–72 (1993) (discussing the "propriety" requirements of the Necessary and Proper Clause).

315. The distinction here is between abrogating a treaty and compelling the courts to interpret it in a particular way. The former is clearly a legislative power; the latter shades much closer to a judicial power reserved to Article III courts. As the Supreme Court observed in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), Congress may not "indirectly control the action of the courts, by requiring of them a construction of the law according to its own views," *id.* at 225 (quoting THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 94–95 (Boston, Little, Brown & Co. 1868)). The quoted scholar also observes in the same work that a legislature may not "compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force." COOLEY, *supra*, at 94. Several Supreme Court Justices, however, in other circumstances has indicated otherwise. *See* United States v. Stuart, 489 U.S. 353, 375 (1989) (Scalia, J., concurring) ("[I]f Congress does not like the interpretation that a treaty has been given by the courts or by the President, it may abrogate or amend it as a matter of internal law by simply enacting inconsistent legislation."); Chew Heong v. United States, 112 U.S. 536, 562–63 (1884) (Field, J., dissenting) (observing that "Congress may, as with an ordinary statute, modify [a treaty's] provisions, or supersede them altogether").

316. *See supra* notes 76–78 and accompanying text.

317. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004) (observing that the courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations"); *supra* note 258.

rules in the courts—whether founded on delegated or autonomous authority[318]—requires independent judicial assessment of the content and even the existence of the law.[319] Whatever limited evidence may be available concerning the formal value judgments that were at play during the creation of the law, the relevant source is not Congress, but rather the complicated, fluid, and multipolar lawmaking processes examined in Part III.B, which are almost entirely external to the American polity.[320]

Though Article II treaties are different in nuance, the same principle applies. In that context, the value judgments distilled into law arise through external negotiations with foreign treaty partners within the specialized framework of international law.[321] Moreover, under Article II, the Senate—not Congress as a whole—is the formal source of legislative approval of treaties.[322] And neither the Senate alone nor even the Senate in cooperation with the president[323] has the power to override a judicial treaty precedent.[324]

This situation substantially complicates the dialogue between lawmakers and law interpreters that Professor William Eskridge highlights in the context of domestic statutory interpretation.[325] For matters of international law, the lawmaking process commonly is unstructured, multipolar, and considerably more opaque. It likewise involves a continuing and fluid relationship with foreign sovereigns, managed by the executive branch. The interpretive process itself is a multipolar enterprise that includes cooperation among systemically

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318. *See supra* notes 175–88 and accompanying text.

319. *See supra* notes 273–95 and accompanying text.

320. *See supra* notes 277–91 and accompanying text.

321. The same is true for "treaty-statutes," by which Congress incorporates the substance of a treaty into domestic law through an Article I lawmaking process. *See supra* notes 171–74 and accompanying text.

322. *See* U.S. CONST. art. II, § 2, cl. 2 (granting the president the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

323. Professor John Yoo advances the extreme—and, in my view, misguided—opinion that the president has a "unilateral" power to interpret and reinterpret treaties. John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 868 (2001). *But see* Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263, 1275–80 (2002) (responding to Professor Yoo's argument).

324. *See* Pepke v. United States (*In re* Fourteen Diamond Rings), 183 U.S. 176, 180 (1901) ("The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it.").

325. *See* Eskridge, *supra* note 66, at 353–90 (modeling the interactions among the Court, Congress, and the president in statutory interpretation).

unconnected domestic courts and nonjudicial international institutions.[326] The instrumental argument that correction of judicial precedents should be left to Congress as the original source of law thus loses its essential justification in this context.

A skeptic would likely respond to this functional point with the formal argument that Congress nonetheless has the technical authority to correct judicial precedents on international law as a matter of domestic law.[327] Although valid for purely domestic statutes, this formalistic point is unconvincing in the context of international law for three interrelated reasons. The first is a reminder that the subject of precedent on such matters is distinctly significant and sensitive: interpretation in these cases involves a declaration of the rights or obligations that govern the nation's legal relations with foreign states.[328] When one further considers the courts' comparative lack of competence,[329] judicial leadership that has been fortified by stare decisis is problematic in any event.

Second, and more important, the formal argument relies on a problematic inversion of the standard lawmaking sequence prescribed by the Constitution—Congress creates; the courts apply. When the courts instead first find and declare the law, the burden falls on Congress to overcome the Constitution's procedural hurdles for the creation of federal statutory law.[330] The "complex set of procedures that Congress and the president must follow to enact 'Laws of the United States'"[331] are substantial, time-consuming, and politically costly. And this process must occur amid the crowded agenda that generally strains the attention of the nation's legislators.

For purposes of importing norms from customary international law, admittedly, the Constitution expressly authorizes action by Congress as a whole.[332] This reality, however, only serves to reinforce the point. By its nature, a precedent on such a matter involves judicial

326. *See supra* notes 237–38 and accompanying text.

327. Professor Eskridge has suggested that political considerations sometimes make Congress attentive to judicial decisions, but that many actual "overrides" involve the modernization of a law by a later Congress, not the correction of judicial error. *See* Eskridge, *supra* note 66, at 335–53 (reviewing congressional overrides from 1967 through 1990).

328. *See supra* Part III.A.

329. *See supra* notes 147–54 and accompanying text.

330. *See* Clinton v. City of New York, 524 U.S. 417, 439–40 (1998) ("[T]he power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" (quoting INS v. Chadha, 462 U.S. 919, 951 (1983))).

331. Wyeth v. Levine, 129 S. Ct. 1187, 1206–07 (2009) (quoting *Chadha*, 462 U.S. at 945–46).

332. U.S. CONST. art. I, § 8, cl. 10; *see also supra* notes 109–15 and accompanying text.

leadership to identify the very existence of the law.[333] A robust version of stare decisis would then impose on Congress the burden of overcoming the Constitution's substantial procedural hurdles simply to reassert its rightful place as the preeminent lawmaker.

The lawmaking sequence for Article II treaties, to be sure, includes the original involvement of both the president and the Senate. Even in this context, however, to say that Congress formally is available to correct misguided judicial precedents does not mean that such a constitutional arrangement is preferable. The interpretation of a treaty, in its essence, is a judicial act.[334] Congress may, by statute, fully abrogate a treaty, but for Congress to leave a treaty in place and use legislative processes to perform the judicial act of reinterpreting the treaty to fit legislative preferences is entirely different.

Moreover, the considerable obstacles to the creation of federal law are amplified in matters of international law. For purposes of domestic law, a judicial precedent in the field represents a formal declaration of the state of international law. Any congressional attempt to convey displeasure with such a precedent will run into the dense web of clear-statement rules that protect international law from implicit legislative override.[335] Even the limited openings the Supreme Court has allowed for acknowledging informal expressions of congressional preferences in statutory interpretation,[336] therefore, presumably would not be available in the case of a precedent interpreting international law. To the contrary, congressional inaction may be construed as supportive, as the Court indicated in *Sosa*.[337]

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333. *See supra* notes 273–96 and accompanying text.

334. *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) (stating that "courts interpret treaties for themselves"); Jones v. Meehan, 175 U.S. 1, 32 (1899) ("The construction of treaties is the peculiar province of the judiciary . . . .").

335. *See supra* notes 194–96 and accompanying text.

336. Existing jurisprudence points in opposite directions regarding the influence of informal expressions of intent by a subsequent Congress. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) ("The 'classic judicial task of reconciling many laws enacted over time . . . necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" (quoting United States v. Fausto, 484 U.S. 439, 453 (1988))). *But see* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117–18 (1980) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (quoting United States v. Price, 361 U.S. 304, 313 (1960)) (internal quotation marks omitted)).

337. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 730–31 (2004) (stating that federal courts need not "shut the door to the law of nations entirely" because Congress has "expressed no disagreement" with the courts' past practice of consulting "international norm[s]").

Third, no effective mechanism exists with which to return questions to the lawmaking source to correct judicial decisions on international law. The creation or revision of customary international law, treaties, and executive agreements requires the cooperation of sovereign entities beyond the reach of the American polity. This cooperation, moreover, is purely discretionary. As a result, readjustment of a bilateral treaty or executive agreement at the sole instigation of the United States can be delicate, and it is practically impossible in the case of multilateral treaties and customary international law.[338]

In short, the institutional relationship between Congress and the courts counsels for judicial modesty regarding the force of precedents on international law. In practical effect, unthinking adherence to stare decisis locks in problematic judicial leadership against both judicial reexamination and—even if available in principle—subsequent congressional override. And as I have shown, in the unfamiliar terrain of international law, both the consequences and the likelihood of judicial error are substantially greater in the first place.

3. *Accommodating the Executive Branch's Special Responsibilities in Foreign Affairs.* A coherent doctrine of stare decisis should also accommodate, but should not be overawed by, the special responsibilities of the executive branch in foreign affairs. I noted in Part II.B that the executive branch's comparative institutional advantages commend a general judicial modesty in foreign affairs matters.[339] These expressions of respect for the executive branch's superior expertise have distilled into formal doctrines with a direct impact on the province of the courts. Modern doctrine holds that, although not conclusive, the executive branch's views on the interpretation of treaties are entitled to "great weight."[340]

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338. *See* Vienna Convention on the Law of Treaties, *supra* note 197, art. 40(4), 1155 U.N.T.S. at 342 (providing that state parties to multilateral treaties cannot be bound to amendments without their consent); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (observing that the creation of a norm of customary international law requires a "general and consistent practice of states"); *supra* notes 258–61 and accompanying text.

339. *See supra* notes 150–54 and accompanying text.

340. *E.g.,* Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010) (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982)) (internal quotation mark omitted); Medellín v. Texas, 128 S. Ct. 1346, 1349 (2008) (quoting *Avagliano*, 457 U.S. at 185) (internal quotation mark omitted); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (stating that courts "will give great weight" to executive treaty interpretations).

Although the quality of precedent on the question is less impressive, similar sentiments should apply in situations involving customary international law[341] and, presumably, sole executive agreements as well.[342]

Ultimately, these doctrines result in substantial deference to executive-branch views on the content of international law. Scholars have even variously described the proposition as "super-strong deference"[343] or as being reflective of a constitutional scheme of "shared" interpretive authority.[344] The historical record of actual outcomes is uneven, although the weight of evidence points to considerable deference to executive views, in particular on the interpretation of treaties.[345]

In spite of these protections, judicial precedent involving international law has the potential to create tensions not present in purely domestic law. If the subject matter is properly within the judiciary's Article III authority, a final precedent determining the force of international law is binding on the executive branch, just as it is on all other domestic institutions.[346] This fact alone carries

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341. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 112 cmt. c (stating that courts will give "substantial respect" to the views of the executive branch on questions of international law).

342. *See* Air Can. v. U.S. Dep't of Transp., 843 F.2d 1483, 1486–87 (D.C. Cir. 1988) (observing that an executive-branch interpretation of an executive agreement is likewise entitled to deference); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (extending the deference doctrine to all "international agreement[s]" concluded by the executive branch).

343. *E.g.*, Eskridge & Baer, *supra* note 253, at 1100–02.

344. Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1793–94 (2009). *See generally* Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327 (2006) (examining the increasing role of the executive branch in enforcing federalism constraints on the treaty power).

345. *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 975–1019 (1994) (canvassing the treaty-interpretation cases of the Rehnquist Court at the time and concluding that "*in all but one* the holding followed the express wishes of the executive branch of the government"); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1737–52 (2007) (reviewing the rise of such deference in the early twentieth century). The historical foundations for such deference, however, are suspect, to say the least. *See* David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 505–22 (2007) (demonstrating that in the first fifty years of the Constitution's history, the Supreme Court afforded little or no deference to executive-branch treaty interpretations).

346. *See* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (declaring that judgments within the authority of federal courts "may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); Hayburn's

important "collateral consequences,"[347] for judicial missteps may wrongly constrain, or at least embarrass, the executive branch in its conduct of the nation's foreign relations. Moreover, correction of such missteps at the international level is difficult, if not impossible. The executive branch cannot compel a renegotiation of a treaty or executive agreement in the wake of a misguided precedent, and it certainly cannot unilaterally change customary international law.[348] The executive branch nonetheless has a continuing obligation to manage America's relations with foreign states within the bounds of the law. The consequence is that a judicial ruling on the nation's obligations under international law—or on the reciprocal obligations of foreign states—entails distinct risks of compromising the special need for a "single-voiced statement" in foreign affairs.[349]

But here again, I return to a familiar theme: the concerns that animate ex ante deference to the executive branch on matters of international law do not evaporate once a court has in fact created a precedent. Indeed, the executive branch's continuing conduct of foreign relations—including the practical performance of treaty obligations[350] and of practices relevant for customary international law[351]—may have a direct influence on the content of the law notwithstanding a "final" precedent on international law. These

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Case, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (noting that under the Constitution, executive officers are not authorized to sit on courts or to render judicial opinions).

347. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (emphasizing that the "collateral consequences" of recognizing domestically enforceable torts for violations of international law "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432–33 (1964) (noting the special role of the executive branch "as an advocate of standards it believes desirable for the community of nations and protective of national concerns").

348. Substantial scholarly controversy exists over whether the president is bound by customary international law at all. For an introduction to these debates, compare Michael J. Glennon, *Raising* The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985), and Jordan J. Paust, *The President* Is *Bound by International Law*, 81 AM. J. INT'L L. 377 (1987), with Bradley & Goldsmith, *supra* note 4, and Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988). *See also* Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 936–37 (1986) (arguing that the president may disregard customary international law for purposes of American law only within his exclusive constitutional powers).

349. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) ("[Q]uestions touching foreign relations are political questions. . . . [S]uch questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case . . . lies beyond judicial cognizance." (footnote omitted)).

350. *See supra* note 211 and accompanying text.

351. *See supra* note 216 and accompanying text.

legitimate executive-branch actions in the external realm represent a further exogenous force of change that may work to erode the foundations of a precedent. Adherence to the traditionally rigid version of stare decisis would prevent ex post consideration of all of these distinctive factors in foreign affairs.

By contrast, there is nothing unusual or particularly problematic about judicial flexibility in a field of special executive authority. The Supreme Court's even more extreme approach in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[352] illustrates the point. At issue in that case was the status of an administrative agency's interpretation of a statute subsequent to a contrary decision by a federal court of appeals.[353] The Supreme Court held, in applying the *Chevron*[354] doctrine,[355] that stare decisis principles do not preclude the recognition of a later agency interpretation, as long as the interpretation is reasonable and is within the scope of the delegated authority.[356]

A similar perspective should inform the courts' approach to judicial precedents on international law. Some scholars advocate a robust version of the *Chevron* doctrine for foreign affairs matters in general.[357] Whatever the merit of this broad proposition, nothing about the judicial station in general or about the values served by stare decisis precludes recognition of the continuing executive influence in a particular field of law. And in no field is executive authority more pervasive than in foreign affairs.

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352. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

353. *Id.* at 982.

354. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

355. *See Brand X*, 545 U.S. at 980 ("In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."). For recent examinations of the *Chevron* doctrine, see generally Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007); and Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004).

356. *Brand X*, 545 U.S. at 983 ("Neither *Chevron* nor the doctrine of *stare decisis* . . . . preclud[es] agencies from revising unwise judicial constructions of ambiguous statutes.").

357. *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 653 (2000) (explaining "why *Chevron* deference [to the executive branch's interpretation of international law] is not appropriate today"); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1176 (2007) ("Drawing an analogy to the administrative law doctrine of [*Chevron*], . . . courts should generally defer to the executive[,] . . . . [and any] exceptions here are the standard exceptions to *Chevron* itself . . . ."). *But see* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1236–45 (2007) (broadly rejecting enhanced judicial deference in foreign affairs).

My analysis here is not a plea for judicial abdication. To the contrary, the very existence of stare decisis fuels a pernicious feedback loop of judicial reasoning on matters of international law. Precisely because of inflated concerns about the lock-in effect of precedent, the courts may defer to executive-branch desires as a matter of ex ante routine. The executive branch, however, is a political branch and is thus subject to shifting political preferences.[358] The strikingly different views of the Clinton and George W. Bush administrations regarding the executive branch's power to compel compliance with a non-self-executing treaty prove this point starkly.[359] Unthinking acceptance of executive preferences also tilts the lawmaking field decisively against Congress, for any attempt—even by majorities in both houses—to displace a particular act of inflated judicial deference would face a probable presidential veto and the near-impossibility of an override by the required two-thirds majority.

For matters within the Article III mandate, the "province and duty"[360] of the federal courts to identify and enforce the law also extends to international legal norms. The proper response to the courts' unease about treading on presidential prerogatives in foreign affairs is not to surrender this essential judicial function to the executive branch. The solution, as I explain in Part IV, is a more accommodating understanding of stare decisis. The flexibility inherent in this approach is fully consistent with the values that animate the doctrine, but it is also appropriately sensitive to the

358. Even the Office of Legal Counsel has felt pressure from the executive branch to depart from its own past legal opinions. *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1483 (2010) (offering the example of the U.S. Postal Service's "attempt to persuade" the Office of Legal Counsel to "reconsider and rescind" a prior opinion).

359. Reasoning that the treaty at issue, the Vienna Convention on Consular Relations, was not self-executing, the Clinton administration informed the Supreme Court that the executive branch did not have the authority to compel domestic enforcement. *See* Brief for the United States as Amicus Curiae at 51, Breard v. Greene, 523 U.S. 371 (1998) (No. 97-8214) ("The 'measures at [the United States'] disposal' under our Constitution may in some cases include only persuasion . . . and not legal compulsion through the judicial system." (alteration in original) (quoting Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248, 258 (Apr. 9))). The administration of President George W. Bush took the directly contrary view. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 51–53, Medellín v. Dretke, 544 U.S. 660 (2006) (No. 04-5928) (asserting that the decision to enforce international-law obligations through domestic law is within the unilateral discretion of the executive).

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

judiciary's special institutional station in the domestic enforcement of international law.

IV. THE ANALYSIS DISTILLED: INTEGRATING STARE DECISIS AND FOREIGN AFFAIRS

This final Part pulls together the various themes I have explored to advance an argument for enhanced judicial modesty when reviewing international-law precedents. Specifically, Section A demonstrates that the distinctive considerations that attend judicial action involving international law should function as additional "special justifications"[361] for revisiting the original and continuing validity of a precedent in the field. Section B then explains why the argument for increased flexibility toward precedents on international law is especially compelling for the stare decisis practice of the federal courts of appeals.

A. "Special Justifications" and Judicially Enforceable International Law

Stare decisis does not admit of clean categories. It is a prudential doctrine animated by pragmatic impulses about stability and system integrity. Discerning the force of a given precedent involves weighing these systemic values against situation-specific countervalues that focus on the precedent's original and continuing validity. In the end, stare decisis functions as a simple preference for finality.

Extant stare decisis principles remain appropriate for purely domestic statutes, as well as for derivative administrative regulations.[362] When a purely domestic legal norm defines the content of the law without reference to international sources, faithful judicial enforcement of the value judgments made by domestic authorities avoids the fact, and should even avoid the appearance, of independent judicial agency in foreign affairs lawmaking. Moreover, the task of interpretation in such cases involves traditional and familiar domestic source materials and institutional relationships. Finally, as a matter of purely domestic law, all forces of subsequent legal change are endogenous to the system and thus are within the final judicial authority of the Supreme Court. In this context, it is entirely appropriate for the courts to respect their own precedents

361. Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

362. *See supra* notes 66–67 and accompanying text.

and to leave future adjustments to the original source of the law: Congress.[363]

In matters of international law, by contrast, these special considerations compel a more nuanced understanding of the proper force of precedent. To be sure, the benefits of stability, predictability, and judicial legitimacy support a prima facie respect for precedent in international law as well as in domestic law. My analysis demonstrates, however, that on questions of international law, the justifications for adhering to judicial first impressions are inherently weaker, and the potential grounds for reexamination are inherently stronger. Specifically, I have argued that both the likelihood and the consequences of judicial error are greater, that judicial precedents are particularly susceptible to rapid erosion by exogenous forces of change, and that institutional considerations make judicial leadership particularly problematic.

Nevertheless, the special considerations that affect international-law precedents by no means constitute an all-purpose trump card. That is, they do not represent an open-ended invitation to the courts to engage their own predilections and pursue situational justice free from concerns about the implications of precedent. Rather, these special considerations should function as one significant weight on the scale—one additional argument in the nature of a stare decisis antivalue.[364] To use the vernacular of the doctrine, they may alone constitute a "special justification" for reexamining a precedent.[365]

Even with this new "special justification," the requirement of actual, demonstrated justifications will remain for deviations from international-law precedents. For one thing, not all matters of international law are infected with uncertainty. One might think here of an unambiguous provision in a bilateral treaty that finds consistent support in secondary interpretive materials. In such a case, the values of stability, predictability, and judicial legitimacy would continue to support adherence to precedent.

In general, newly discovered information and evidence of developments exogenous to America's domestic system will present

363. Under *Brand X*, an administrative agency also may have a limited power to reinterpret a statute within the scope of the authority delegated by Congress. *See supra* notes 352–56 and accompanying text.

364. *See supra* Part I.C.

365. *See* Randall v. Sorrell, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.) ("Departure from precedent is exceptional, and requires 'special justification.'" (quoting *Rumsey*, 467 U.S. at 212)); *supra* notes 55–57 and accompanying text.

the most compelling grounds for revisiting a precedent. Some judicial decisions in the field, however, will tread on the prerogatives of the political branches more directly.[366] As a result, reexamination will be especially appropriate for precedents that define the nation's formal, sovereign obligations under international law. By contrast, for international law governing purely private legal relations—such as private-law treaties[367]—courts may properly demand convincing evidence of subsequent developments to justify revisiting a precedent, especially if counterbalanced by significant private reliance interests.[368] More generally, a consensus may coalesce, even around delicate and ambiguous issues, through the accumulation of experience and consistent judicial interpretation over time.

This analysis suggests as a guide the civil-law notion of *jurisprudence constante*[369]—or its cousin in German law, *ständige Rechtsprechung*.[370] The idea in this Article is that even without a formal doctrine of stare decisis, the attractive force of a particular precedent increases as courts consistently accept and apply it in later cases. The parallel to American law's own notion of stare decisis is apparent. The significant difference, however, is that formal respect for precedent does not attach to the first judicial intuition on a subject; rather, it arises through consistent reaffirmation after reflective reexamination over time. And, significantly, this approach is decisively informed by a respect for the lawmaking prerogatives of

366. *See supra* notes 298–302 and accompanying text.

367. An example is the growing class of commercial-law treaties, such as the U.N. Convention on Contracts for the International Sale of Goods. For a broad examination of the interpretive approach of these private-law treaties, see generally Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998).

368. *See supra* notes 49–51 and accompanying text. Private reliance interests, however, may become less convincing as divergences create jurisdictional uncertainty and, thus, the opportunity for forum shopping.

369. *See* SongByrd, Inc. v. Bearsville Records, Inc., 104 F.3d 773, 776–77 (5th Cir. 1997) (describing "*jurisprudence constante*" in Louisiana civil law); Fid. & Deposit Co. of Md. v. FitzGerald Contractors, Inc. (*In re* Whitaker Constr. Co.), 439 F.3d 212, 224–25 & n.12 (5th Cir. 2006) (same).

370. *See* Robert Alexy & Ralf Dreier, *Precedent in the Federal Republic of Germany*, *in* INTERPRETING PRECEDENTS, *supra* note 242, at 17, 50 ("A line of precedent has a much greater weight than a single case. A line of precedent that has been established for some time is called 'permanent adjudication' (*ständige Rechtsprechung*).").

the legislature, and thus by the principle that judges fundamentally are law finders, not lawmakers.[371]

Similar sentiments are appropriate in America's federal courts when they create precedents on international law. The spirit of stare decisis should remain. It simply must be calibrated in light of the special contextual and institutional considerations that obtain in the field.[372]

Control over the reexamination of a particular precedent, however, should remain solely with the Supreme Court, or with a later panel of the same appellate court, as described in more detail in Section B.[373] In other words, the flexibility advocated in this Article would affect only horizontal stare decisis. Vertical stare decisis would continue to require adherence to precedent by lower courts to the full extent of the existing law.[374] This dimension thus would continue to secure the values of stability and predictability advanced by a hierarchically integrated judicial system.

Careful reflection also reveals that this perspective echoes certain threads of existing stare decisis doctrine. Extant jurisprudence recognizes that subsequent factual and legal events may undermine a precedent.[375] What courts and scholars have not fully appreciated, however, is that in matters of international law, change of this nature—perhaps rapid and significant change—is baked into the system.[376] In a separate vein, some persuasive observations of the Supreme Court suggest that a less rigorous standard should apply when the courts take the lead in lawmaking, such as with "judge-made" procedural rules[377] or federal common law created pursuant to

371. *See* Zenon Bankowski, D. Neil MacCormick, Lech Morawski & Alfonso Ruiz Miguel, *Rationales for Precedent*, *in* INTERPRETING PRECEDENTS, *supra* note 242, at 481, 482–85 (examining this foundation for the civil-law approach to precedent).

372. Of course, the flexibility I advocate in this Article would not affect the normal res judicata principles that apply to a final decision in a specific case.

373. *See infra* Part IV.B.

374. *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) (declaring that if a Supreme Court precedent applies, "the Court of Appeals should follow the case which directly controls, leaving to th[e] Court the prerogative of overruling its own decisions").

375. *See supra* notes 60–64 and accompanying text.

376. For the rare instances in which scholars have recognized that the special attributes of international law might affect the force of stare decisis in the field, see *supra* note 5.

377. *See, e.g.*, Pearson v. Callahan, 129 S. Ct. 808, 816–17 (2009) (rejecting application of "the general presumption that legislative changes should be left to Congress" with respect to "judge made" procedural rules); Payne v. Tennessee, 501 U.S. 808, 828 (1991) (contrasting the strong stare decisis effect for property and contract-rights cases with its effect for cases "involving procedural and evidentiary rules," for which "the opposite is true").

delegated authority from Congress.[378] The argument for flexibility is even more compelling in matters of international law, an area in which judicial leadership propelled by enhanced discretion is both more pervasive and more consequential.

In light of these considerations, the lock-in effects of precedent involving international law are particularly problematic. Judicial error involves impermissibly enlarging or narrowing the rights or obligations that govern the nation's legal relations with foreign states. And as I have shown, the practical hurdles to override by the political branches are considerable. The one recognized categorical distinction in stare decisis jurisprudence justifies a weaker version of the doctrine for constitutional matters precisely because of the difficulty of override by other constitutional institutions.[379] A more relaxed understanding of precedent on international law would accommodate these special institutional considerations. That understanding would enable—but not require—the courts to reexamine the original and continued propriety of their leadership and also to consider even informal expressions of intent from Congress and the president in the future.

Finally, an enhanced openness to reexamining international-law precedents would strengthen the institutional position of the judiciary. A nuanced form of stare decisis frees the courts from the binary trap of supine deference to the executive ex ante or inflexible adherence to precedent ex post. The executive branch indeed has special responsibilities in foreign affairs. But demanding consistency across administrations when the executive makes claims to judicial deference, at least in the absence of compelling reasons for change, is no affront to the executive's status in this field. The first administration to weigh in should not have the final word on the content of the law.

Modesty and flexibility in this sense are thus empowering. An express recognition of the special considerations that affect the authority of international-law precedents would empower the courts

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378. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2720 (2007) (stating that "[*s*]*tare decisis* is not as significant" for the Sherman Act, 15 U.S.C. §§ 1–7 (2006), because "[f]rom the beginning the Court has treated the Sherman Act as a common-law statute"). As Professor Eskridge explains, the rationale for this approach is that when Congress delegates lawmaking discretion through such statutes, the courts "should also be given the leeway to experiment and overrule prior interpretations in a common law fashion." Eskridge, *supra* note 67, at 1378.

379. *See* Martinez, *supra* note 5, at 486 (suggesting a similar point).

to make independent decisions with a flexibility that would permit, but would not require, reexamination of the foundations and consequences of their actions in such an important field. In short, the flexibility advocated in this Article reserves to the courts their field of institutional expertise, leaves room for appropriate executive-branch influence, and does not force on the legislative branch a task of pure interpretation for which it is ill suited.

B. Local Courts, International Obligations: The Special Demands for Stare Decisis Modesty in the Federal Courts of Appeals

It is curious that the Framers structured the Constitution to protect against divergent interpretations of the nation's international legal obligations by the disparate state courts[380] but that, in practice, the vast bulk of this work is done by independent and geographically segmented lower federal courts.[381] The Supreme Court has repeatedly

380. The leading case on this point is *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). In that case, a treaty case, the Supreme Court warned that if it lacked final judicial authority to review divergent judgments and "harmonize them into uniformity," federal law "would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states." *Id.* at 348.

381. The original conception was strikingly different. In the founding era, international-law matters that could affect national authority—especially treaties—were under the mandatory, final control of the Supreme Court. Until 1875, the federal district courts did not have general federal question jurisdiction. *See* Act of Mar. 3, 1875, ch. 127, § 1, 18 Stat. 470, 470 (granting general federal question jurisdiction). Until that time, state courts did the bulk of the work on treaty matters and related federal matters. The Judiciary Act of 1789 thus provided for direct appeal as of right to the Supreme Court from final state court judgments. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87. The same statute granted final control to the Supreme Court on nearly all matters relating to foreign ambassadors or public ministers and to admiralty, the other principal international-law issues of the day. *See id.* § 9, 1 Stat. at 76–77 (granting district courts jurisdiction over admiralty cases); *id.* § 13, 1 Stat. at 80–81 ("[T]he Supreme Court . . . shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers . . . ."). Through a series of statutes enacted between 1868 and 1925, however, the unifying force of this control declined dramatically. *See* Judiciary Act of 1869, ch. 22, 16 Stat. 44 (requiring Supreme Court Justices to ride circuit); Act of Mar. 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826 (creating circuit courts of appeals); Judiciary Act of 1914, ch. 2, 38 Stat. 790 (instituting discretionary Supreme Court review of treaty cases); Act of Sept. 6, 1916, ch. 448, 39 Stat. 726 (limiting the Supreme Court's appellate authority to cases in which a state high court declared a treaty invalid); Judiciary Act of 1925, ch. 229, 43 Stat. 936 (giving appellate jurisdiction to the Supreme Court (1) as of right, in cases in which a state high court declared a treaty invalid, and (2) via petition for certiorari, in cases in which a state high court questioned a treaty's validity). Upon the creation of the circuit courts of appeal in 1891, Congress removed the right of direct appeal from district courts to the Supreme Court for treaty issues. Evarts Act § 5, 26 Stat. at 827–28.

emphasized the demand for national uniformity in this field.[382] But as Justice Scalia caustically observed in 2004 in specific reference to international law, "[T]he lower federal courts [are] the principal actors; we review but a tiny fraction of their decisions."[383] The facts richly bear out this observation: Over 99 percent of the appellate treaty cases in the first decade of the 2000s were decided by the federal circuit courts.[384] A broader study by Professor David Sloss finds a similar percentage in the period from 1970 through 2006.[385]

The principal cause of this phenomenon is the fact that in nearly all matters of federal law, litigants have an appeal as of right to the federal circuits.[386] By contrast, since the Judiciary Act of 1925[387] eliminated appeals as of right from the circuit courts, even on treaty issues,[388] effectively all appellate judgments are subject only to discretionary review by the Supreme Court.[389] The practical effect of this system is that the independent, geographically dispersed courts of appeals provide the final judicial voice on nearly all matters of international law.[390]

Few would argue that these regional appellate courts represent an effective medium for ensuring uniform fidelity to the international

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382. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) (observing that "federal uniformity is essential" in foreign commerce); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (declaring that national interests "imperatively require[] that federal power in the field affecting foreign relations be left entirely free from local interference").

383. Sosa v. Alvarez-Machain, 542 U.S. 692, 750–51 (2004) (Scalia, J., concurring).

384. A search of the Westlaw database reveals that of 1380 appellate opinions on the interpretation of treaties in the first decade of the twenty-first century, only 6 were from the Supreme Court.

385. This survey revealed only thirty-eight Supreme Court treaty cases between 1970 and 2006. During the same time period, over 3200 lower court opinions referenced treaties. David Sloss, *United States*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT, *supra* note 205, at 504, 514–17.

386. *See* 28 U.S.C. § 1291 (2006) (providing for this right, except in matters within the jurisdiction of the U.S. Court of Appeals for the Federal Circuit and in the rare case in which "direct review may be had in the Supreme Court").

387. Judiciary Act of 1925, ch. 229, 43 Stat. 936.

388. *See id.* sec. 1, §§ 237, 240, 43 Stat. at 937–39 (defining the scope of review for circuit courts). For a comprehensive review of the growth of discretionary Supreme Court review since this statute, see generally Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1649–1704 (2000).

389. *See* 28 U.S.C. § 1254 (providing that decisions of the courts of appeals may be reviewed by a writ of certiorari or by certification).

390. To be sure, a split in the circuits is one ground for discretionary Supreme Court review. SUP. CT. R. 10(a). But the evidence cited in this Section, *see supra* notes 384–85, amply demonstrates that even on the important subject of international treaties, the Court grants certiorari in only about 1 percent of cases.

legal obligations of the United States. The problem, however, is even more acute than it might seem. Nearly all of the precedents in the federal circuit courts come from panels—not from the entire circuit court sitting en banc. The reason for this fact is the so-called law-of-the-circuit doctrine.[391] Under this doctrine, which controls in every federal circuit,[392] a precedent created by a single, randomly assigned three-judge panel is immediately and absolutely binding throughout the circuit. In the rare case in which a subsequent panel misses the message, later panels are obligated to follow the first precedent.[393]

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391. For an analysis of stare decisis doctrine at the appellate court level, see generally Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005).

392. The Fifth Circuit's summary in 2009 aptly captured the general approach. *See* United States v. Jasso, 587 F.3d 706, 709 n.3 (5th Cir. 2009) ("One panel of this Court may not overrule the decision of a prior panel in the absence of en banc consideration or a superseding Supreme Court decision."); *see also, e.g.*, United States v. Sneed, 600 F.3d 1326, 1332 (11th Cir. 2010) (acknowledging that "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*"); State Bar of Cal. v. Findley (*In re* Findley), 593 F.3d 1048, 1050 (9th Cir. 2010) ("[T]hree judge panels of our Circuit are bound by prior panel opinions 'unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.'" (quoting Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441 (9th Cir. 1994))); Mendiola v. Holder, 585 F.3d 1303, 1310 (10th Cir. 2009) ("We may not overrule another panel of this court."); United States v. Zuniga, 579 F.3d 845, 848 (8th Cir. 2009) ("Only the court en banc may overrule circuit precedent, subject to a limited exception in the case of an intervening Supreme Court decision that is inconsistent with circuit precedent."); United States v. Jass, 569 F.3d 47, 58 (2d Cir. 2009) ("[T]his panel is bound by prior decisions of this court unless and until the precedents established therein are reversed *en banc* or by the Supreme Court."); Peralta v. Holder, 567 F.3d 31, 35 (1st Cir. 2009) ("[P]rior panel decisions are binding upon newly constituted panels in the absence of supervening authority sufficient to warrant disregard of established precedent." (quoting Muskat v. United States, 554 F.3d 183, 189 (1st Cir. 2009)) (internal quotation mark omitted)); Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009) ("A panel of this court is under another constraint: we must adhere to the law of our circuit unless that law conflicts with a decision of the Supreme Court."); Bonner v. Perry, 564 F.3d 424, 430 (6th Cir. 2009) ("The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."); Jones v. Calvert Grp., Ltd., 551 F.3d 297, 303 (4th Cir. 2009) (rejecting an argument because the present determination was bound by an earlier decision); Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d. 694, 704–05 (3d Cir. 2005) ("It is well settled in this Circuit that a three-judge panel may not overrule a decision by an earlier panel."); *In re* Skupniewitz, 73 F.3d 702, 705 (7th Cir. 1996) ("A panel decision is binding on another court panel unless overruled with the approval of the en banc court.").

393. *See* McMellon v. United States, 387 F. 3d 329, 334 (4th Cir. 2004) (holding that "when there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed"); Darrah v. City of Oak Park, 255 F.3d 301, 310 (6th Cir. 2001) (noting that "when a later decision of th[e] court conflicts with one of [its] prior published decisions, [it is] still bound by the holding of the earlier case"); Ryan v. Johnson, 115 F.3d 193, 198–99 (3d Cir. 1997) ("[W]hen two decisions of this court conflict, we are bound by the earlier decision.").

This doctrine is severe indeed. It prohibits reexamination of the first panel's precedent even in light of subsequent insights from other circuits.[394] The Eleventh Circuit declared this point bluntly in 2000: "The fact that other circuits disagree with [our] analysis is irrelevant."[395] To be sure, the possibility of en banc review remains; but even this option by rule is "not favored and ordinarily will not be ordered."[396]

To present the point starkly, consider a hypothetical case in the Ninth Circuit. A panel majority may create a precedent on the international legal obligations of the United States that is binding on the entire circuit. This scenario would mean that a decision by two judges would control a circuit of over sixty million people—nearly 20 percent of the country's entire population. The precedent would be

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394. *See* United States v. Coffey, 350 Fed. App'x 85, 86 (8th Cir. 2009) (per curiam) (rejecting the appellant's argument because, "notwithstanding any reasoning that the prior panel may not have considered and holdings from other circuits to the contrary, th[e] panel [wa]s bound by [the prior panel's] holding"); E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 542 n.32 (3d Cir. 2006) ("[A]lthough another Circuit's views are entitled to due weight by our Court, they are not 'intervening authority' that would justify our reconsideration of our precedents without *en banc* review."), *vacated on other grounds*, 551 U.S. 1129 (2007); *In re* Yates, 287 F.3d 521, 525 (6th Cir. 2001) ("[T]he three judge panel before which this appeal is currently pending has no authority to overrule [a previous case]."), *rev'd on other grounds*, 541 U.S. 1 (2004); United States v. Thompson, 234 F.3d 74, 78 n.5 (1st Cir. 2000) (providing that an earlier decision may not be modified by a panel, even in light of subsequent developments); Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 203 F.3d 291, 305 (4th Cir. 2000) ("[W]e do not believe that the circumstances exist for a panel to change the decision of the previous panel and that that subject is better addressed by an en banc court."); Bell v. Hill, 190 F.3d 1089, 1093 (9th Cir. 1999) (applying a holding rejected by other circuits because "a prior decision from [the Ninth Circuit could] only be revisited by a three-judge panel if it ha[d] been undermined by an intervening Supreme Court decision"); United States v. Napoli, 179 F.3d 1, 16 n.16 (2d Cir. 1999) ("We are bound, however, as a panel of this court to follow the clear precedent of our circuit."); Garcia v. United States, 22 F.3d 609, 612 n.11 (5th Cir. 1994) (providing that a panel may not overrule previous panel decisions); United States v. Splawn, 963 F.2d 295, 295–96 (10th Cir. 1992) (noting that "a three-judge panel cannot overrule circuit precedent"). Only the Seventh Circuit has suggested a bit more flexibility. *See* United States v. Carlos-Colmenares, 253 F.3d 276, 277–78 (7th Cir. 2001) (overruling a panel precedent after circulating the opinion to all active members of the court on the basis that all other circuits had arrived at a contrary conclusion).

395. *In re* USA, 624 F.3d 1368, 1374 (11th Cir. 2010) (alteration in original) (quoting EEOC v. W&O, Inc., 213 F.3d 600, 623 n.15 (11th Cir. 2000)) (internal quotation marks omitted).

396. FED. R. APP. P. 35(a). As Professor Amy Sloan observes, the rigidity of the law-of-the-circuit principle has spawned a variety of procedures for "informal en banc review." Amy E. Sloan, *The Dog that Didn't Bark: Stealth Procedures and the Erosion of* Stare Decisis *in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713 *passim* (2009). Even these procedures are rare, however, and ultimately might have problematic consequences for the rule-of-law principles at the foundation of stare decisis. *See generally id.* (exploring the relationship between stare decisis and informal en banc review).

impervious to subsequent review within the circuit—except through en banc review—and impervious to subsequent analyses by other circuits. The law-of-the-circuit doctrine thus effectively precludes the resolution of intercircuit conflicts on international law except in the rare circumstance of en banc review or the even rarer event of Supreme Court review.

The result is a very real possibility of a localized patchwork of judicial declarations on the nation's rights or obligations under international law. The drama of the directly conflicting pronouncements of the federal circuit courts over whether corporations may be held liable for international human-rights violations bluntly proves this point.[397] To put it mildly, such a system is discordant with 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."[398]

The rigid stare decisis practice of the federal circuit courts also precludes consideration of the exogenous forces of change that are of special significance for international-law precedents.[399] And the overlay of divergent decisions of other appellate courts may make these forces even more potent. In spite of this difficulty, the law-of-the-circuit principle operates as a nearly absolute bar to examination of subsequent developments in fact and law, the factors that the Supreme Court deems to be "[o]f most relevance"[400] for reexamining a precedent.

Moreover, the great bulk of lower court precedent is generated without the expertise of, and beyond the attention of, national institutions. It is no slight to observe that with their large, mandatory dockets, these courts may lack the necessary resources, expertise, and

397. *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1019 (7th Cir. 2011) (declaring that "if the board of directors of a corporation directs the corporation's managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable" under customary international law); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) (holding that corporations are not immune from liability under customary international law). *But see* Doe v. Exxon Mobil Corp., 654 F.3d 11, 88 (D.C. Cir. 2011) ("[C]ustomary international law does not impose liability against corporations . . . ."); Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 120 (2d Cir. 2010) (holding that corporations cannot be held liable for human-rights violations under customary international law).

398. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964)).

399. *See supra* notes 231–43 and accompanying text.

400. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2721 (2007).

international perspectives to appreciate fully their special responsibilities when they first confront a difficult issue of international law.[401] Unlike the Supreme Court, the sheer volume of cases in the circuit courts constrains access to executive-branch expertise, except on rare issues of national significance.[402] And unlike the certiorari filter for the Supreme Court, the federal courts of appeals may not defer decisions on sensitive issues to await higher-quality information, better lawyers, or increased attention by national experts.[403] These challenges counsel against overconfidence in a first judicial attempt at a solution and thus recommend an increased openness to reexamining the factual and legal foundations of initial judicial impressions on matters of international law. And given the significance of judicial declarations on the international legal obligations of the United States, lower federal courts should not content themselves with the quality of arguments, factual and legal, presented by the lawyers who happen to appear before them the first time.

Unfortunately, ample evidence suggests that the federal appellate courts in fact are not fully sensitive to the "responsibility of [their] stations"[404] on such matters. As I have explained elsewhere, for example, it is not uncommon for lower courts to retreat to familiar local—and often idiosyncratic—interpretive techniques and substantive concepts to construe international treaties.[405] This categorical error has led to the misguided observation by some circuit courts that "[t]reaties are construed in much the same manner as statutes."[406] Another example comes from the courts' widespread

401. *See supra* notes 254–63.

402. As a matter of simple volume, a search of the Westlaw database for the first decade of the 2000s reveals that, as compared to 110 Supreme Court opinions, over 10,000 lower federal court opinions mention the words "treaty" or "international law." Of those lower court opinions, only approximately 150 refer to an amicus brief by the "United States" or the "executive branch."

403. *Compare* 28 U.S.C. § 1254(1) (2006) (providing that in nearly all matters, the Supreme Court reviews lower court decisions only by deciding to grant a petition for writ of certiorari), *with* 28 U.S.C. § 1291 (providing that the federal courts of appeals "shall have jurisdiction of appeals from *all* final decisions" of the district courts (emphasis added)).

404. *Cf.* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 68 (1821) (observing that the Justices felt "the responsibility of [their] stations" in the enforcement of treaties).

405. *See* Van Alstine, *supra* note 223, at 1936–42 (using, as an example, a Seventh Circuit case that "retreated from" international precedent in favor of "the domestic law of the State of Illinois," ultimately reaching a conclusion contrary to international precedent).

406. Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 186 F.3d 210, 215 (2d Cir. 1999); *see also* Sacirbey v. Guccione, 589 F.3d 52, 66 (2d Cir. 2009) (approving this statement); Collins v. Nat'l

failure to honor the Supreme Court's directive that domestic courts should give "considerable weight" to the judicial opinions of treaty partners.[407] Of the nearly 1400 appellate treaty cases in the first decade of the twenty-first century, only 12 even mentioned the views of the courts of "sister signatories."[408]

Nonetheless, the consequences of regional precedents on international law may be as significant as a Supreme Court decision would be; the consequences are certainly as significant within the affected circuit itself. And whether it recognizes or rejects a binding norm of international law, an appellate court is formally participating in the definition of international law. For this reason, the constitutions of some countries have reserved the power to make binding declarations on such subjects to a supreme court. A special jurisdictional provision in the German *Grundgesetz*, for example, requires lower courts to refer issues of customary international law to the German Constitutional Court if they are unsure about the legal issues.[409]

In short, the case for judicial modesty on the force of stare decisis with respect to matters of international law is even more compelling for the federal courts of appeals.[410] For such matters, the federal circuits should explicitly relax the law-of-the-circuit doctrine to permit later panels to consider subsequent legal and factual

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Transp. Safety Bd., 351 F.3d 1246, 1251 (D.C. Cir. 2003) (declaring that similar principles apply for interpreting treaties and statutes). As noted, the Supreme Court's loose rhetoric in *Sanchez-Llamas v. Oregon* seems to support this point. *See supra* note 227. For both a treaty and a statute, interpretation "begins with [the] text." Abbott v. Abbott, 130 S. Ct. 1983, 1990 (2010) (quoting Medellín v. Texas, 128 S. Ct. 1346, 1357 (2008)) (internal quotation mark omitted). Beyond this obvious point, however, the Supreme Court throughout its history has emphasized that fundamentally different principles apply to the interpretation of international treaties. *See supra* Part III.A.

407. *See supra* note 213 and accompanying text.

408. Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010). The parameters of the corresponding search of the Westlaw database are available from the *Duke Law Journal*. For a positive counterexample involving customary international law, see United States v. Hasan, 747 F. Supp. 2d 599, 635–36 (E.D. Va. 2010).

409. *See* Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I, art. 100(2) (Ger.) (providing that if doubt arises over whether a rule of international law is part of federal law or over whether it directly creates rights and obligations for individuals, a lower court must refer the matter to the Federal Constitutional Court).

410. State supreme courts should adopt the same policy in the relatively rare cases in which they create international-law precedents for lower state courts. *See, e.g.*, State v. Sanchez-Llamas, 108 P.3d 573 (Or. 2005) (applying a treaty in a state criminal proceeding), *aff'd*, 548 U.S. 331 (2006).

developments, the views of later courts, and the input of the executive branch.[411] The result, granted, will be more numerous expressions of agreement or division among appellate panels. But on particularly sensitive issues, this dialogue will also more rapidly attract attention at the national level, whether from the executive branch or from the Supreme Court, and will at least create pressure for regional uniformity through en banc review.

Again, however, vertical stare decisis should remain. To secure the essential benefits of stability and predictability, the power to reexamine precedent should remain solely with later appellate panels, not with the district courts.[412] Nonetheless, by relaxing horizontal stare decisis, the courts of appeals will enhance the quality of their precedents by permitting reexamination founded on improved information and insight. At the same time, this empowering flexibility would limit the unavoidable consequence of fragmented, localized judicial leadership in the identification of the nation's legal obligations under international law.

CONCLUSION

The field of foreign affairs, with its "important, complicated, delicate and manifold problems,"[413] fundamentally is not the province of the judicial branch. Yet by express provision and structural implication, the Constitution nonetheless requires the courts to enforce a variety of legal norms that have direct implications for foreign relations. For these matters as well—to return to the foundational pronouncement of Chief Justice Marshall in *Marbury v. Madison*—it remains "emphatically the province and duty of the judicial department to say what the law is"[414] and, by extension, to create precedent in the process. This immense judicial responsibility is only expanding as international legal norms assume increasing significance for the law and policy of the United States.

Unfortunately, the traditional stone-carving tools of stare decisis are ill suited to the dynamics of this modern reality. In the expanding field of domestically enforceable international law, the unavoidable

411. The First Circuit has left the door ajar, albeit only slightly. *See* United States v. Chhien, 266 F.3d 1, 11 (1st Cir. 2001) (indicating that a panel precedent may yield "in extremely rare circumstances, where non-controlling but persuasive case law suggests such a course").

412. *See supra* notes 95–98 and accompanying text.

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

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

consequence of increased judicial discretion is increased judicial leadership on issues at the core of the nation's formal legal relations with foreign states. Moreover, the unfamiliar and evolving environment both increases the risk of initial error and compromises the power of a precedent to secure finality. The message of the analysis in this Article is that the courts should take to heart their own ex ante admonitions about improvident judicial action as they assess the ex post force of their initial impressions in this sensitive and dynamic field of law.