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### The Improvised Implementation of Executive Agreements

Kathleen Claussen

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# The Improvised Implementation of Executive Agreements

*Kathleen Claussen*<sup>†</sup>

*Implementation is at the core of lawmaking in our divided government. A rich literature covers the waterfront with respect to agencies' implementation of legislative mandates, and another equally robust line of scholarship considers Congress's implementation of treaties. Missing from those discussions, however, is another area of implementation central to U.S. foreign relations: the implementation of transnational regulatory agreements.*

*This Article examines how federal agencies have harnessed far-reaching discretion from Congress on whether and how to implement thousands of international agreements. Agencies regularly implement agreements by relying on a self-developed menu of options, much like they do in the domestic regulatory context—only without the checks and balances that those processes provide. This analysis of the operation of agreements presents a set of extemporized means through which the executive maintains control of these agreements and their regulation of the rights of private actors without legislative intervention or administrative law constraints. These revelations stand in contrast with conventional understandings of implementation as well as to prior accounts of how “international law [is] part of our law.”*

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<sup>†</sup> Professor, University of Miami School of Law. Thanks to Pam Bookman, Curt Bradley, Elena Chachko, Nathan Cortez, John Coyle, Evan Criddle, Rebecca Crootof, Bill Dodge, Michael Froomkin, Jean Galbraith, Harlan Cohen, Ben Johnson, Ron Levin, Tim Meyer, David Moore, Sean Murphy, Lisa Ouellette, Steve Ratner, Ryan Sakoda, Matthew Schaefer, Gabriel Scheffler, David Sloss, Brian Soucek, Jim Speta, Matt Spitzer, Paul Stephan, David Super, Ed Swaine, Pierre-Hugues Verdier, Dan Walters, and David Zaring for their feedback on this project. Thanks also to the participants in the ASIL International Law in Domestic Courts Interest Group Workshop, the BYU Law Faculty Workshop, the Columbia Law International Law Colloquium, the George Washington Law Faculty Workshop, the Georgetown Institute of International Economic Law Colloquium, the Junior International Law Scholars Association Annual Meeting, the Miami/FIU Law School Joint Workshop, the New Voices in Administrative Law Scholarship Workshop, and the Richmond Law Junior Scholars Workshop for their comments. I'm grateful to Bianca Anderson, Pam Lucken, and Zachary Tayler for their very helpful research assistance and to the several current and former government officials who spoke with me about this project.

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## INTRODUCTION

There is a strange omission in the longstanding debates over the mechanics of legal implementation. Courts, as well as scholars from multiple fields of law, have engaged in discussions for many decades about how *statutes* are implemented by agencies.<sup>1</sup> A different collection of courts and scholars has considered how *treaties* are implemented by Congress.<sup>2</sup> But almost no work has examined these questions as applied to our thousands of *executive agreements*: agreements with foreign governments concluded by the executive branch pursuant to a congressional delegation of authority.<sup>3</sup> We have neither an account of agreement implementation—the processes through which agencies establish

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<sup>1</sup> See generally, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576 (2000); *Yakus v. United States*, 321 U.S. 414 (1944); Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003 (2015); Kristen E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

<sup>2</sup> See generally, e.g., *Medellín v. Texas*, 552 U.S. 491 (2008); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); Ernest A. Young, *Treaties as “Part of Our Law,”* 88 TEX. L. REV. 91 (2009); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131 (2008); Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51 (2012); David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228 (2010); David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT’L L.J. 135 (2012).

<sup>3</sup> I use the shorthand term “executive agreement” to refer to these ex ante congressional-executive agreements as other scholars have done. These agreements stand in contrast to agreements that are approved by Congress after their negotiation (ex post

cross-border programs and develop new domestic rules that are derived from foreign relations—nor a sense of how those choices alter the roles of the branches in domestic and international law-making.

This Article begins that work, first, by identifying the phenomenon of agreement implementation. It is here that the black box of implementation may be its most obscure. Although Congress frequently delegates authority to agencies to negotiate international agreements, those delegations are almost always silent as to implementation. Drawing from a review of agency records and a collection of communications with government officials, this Article elucidates how agencies are inventing ways to give effect to the more than three thousand international agreements into which they have entered.<sup>4</sup>

The story of how our foreign relations bureaucracy implements agreements has practical, policy, and legal dimensions. It involves the practical operationalization of transnational commitments across the administrative state. In carrying out that work, agencies make policy choices that often result in the regulation of private action in accordance with those agreements. At the core of that exercise is a determination about the domestic legal force of obligations agreed upon with foreign governments. That determination is made and applied by agencies often without the opportunity for review. In sum, uncertainties as to whether an international agreement is binding on private actors and enforceable by agencies as a matter of U.S. law are regularly addressed by those agencies in quiet, unstudied, and—as this Article shows—inconsistent ways.

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congressional-executive agreements) and to executive agreements made pursuant to inherent presidential authority. For a thorough review of the types of international agreements into which the United States enters, see generally Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008) [hereinafter *Treaties' End*]. The lines become fuzzier when we get away from government-to-government written agreements and toward international standards agreed to in international organizations or like circumstances. I am focused here on the former, not on situations like those faced in *National Resources Defense Council v. Environmental Protection Agency*, 464 F.3d 1, 7–10 (D.C. Cir. 2006) (considering the legal status of a rule promulgated by the EPA in furtherance of a term that governments agreed upon in connection with the Montreal Protocol, a treaty), or those involving implementation of standards that were agreed upon directly pursuant to delegation such as in 19 U.S.C. § 2578 (referring to international standard setting by the executive branch and requiring notice and comment in the making of the standards).

<sup>4</sup> Professor Oona A. Hathaway catalogued more than 2,700 in 2008. See *Treaties' End*, *supra* note 3, at 1260. In previous work, I identified around one thousand additional agreements related to trade alone. Kathleen Claussen, *Trade's Mini-Deals*, 62 VA. J. INT'L L. 315, 324–37 (2022).

Thinking about implementation beyond statutes and treaties is long past due. Executive agreements are the primary instrument of U.S. lawmaking in international relations.<sup>5</sup> These agreements govern and guide our transnational regulatory encounters.<sup>6</sup> Consider a tomato coming into the United States from Mexico. Agreements concluded between the United States and Mexico cover countless aspects of the tomato's preparation and transport.<sup>7</sup> These types of agreements address not just your sandwich fixings, but nearly all products, natural resources, and services entering and exiting the United States.<sup>8</sup>

In recent years, scholars have analyzed the constitutional foundations of these agreements, asking whether the executive has the right to agree to an international commitment and verifying the integrity of the procedural steps taken to conclude the agreement.<sup>9</sup> While that *ex ante* review is important for our conceptions of the separation of powers, we have many fewer answers about the *ex post* transposition of these executive agreements into U.S. law. The agreement life cycle has multiple parts: Congress delegates, the agency negotiates, and then the agency brings the agreement home. This Article is focused on the homecoming.

Take the following sample scenarios:

- Congress delegates authority to the U.S. Department of Agriculture (USDA) to enter into agreements with other governments concerning common or equivalent standards for organic products. USDA officials negotiate an agreement with Taiwan concerning the approval of Taiwan's organic labelling certification as equivalent to U.S. domestic

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<sup>5</sup> The growth in the application and scope of executive agreements has been well studied in empirical terms. Nearly all the agreements entered into by the United States in recent years fall into this category. See *Treaties' End*, *supra* note 3, at 1286–88.

<sup>6</sup> Cf. Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 321, 349–52 (2011).

<sup>7</sup> See, e.g., Memorandum of Understanding Regarding the Exchange of Data on Exports of Fresh Tomatoes Between the Secretariat of Economy of the United Mexican States and the Department of Commerce of the United States of America, Mex.-U.S., Aug. 19–23, 2013, <https://perma.cc/FK48-CUDN>.

<sup>8</sup> See, e.g., Agreement Concerning Trade in Women's and Girls' Wool Trousers, Arg.-U.S., May 14–31, 1991, Hein's No. KAV 2937; Agreement on Reduction of Export Duties on Ferrous and Non-Ferrous Scrap Products, Ukr.-U.S., Feb. 22, 2006, T.I.A.S. 06-222; Understanding Concerning the Procurement Procedures for Telecommunications Equipment in Korea, S. Kor.-U.S., Mar. 29–Apr. 10, 1995, Hein's No. KAV 5190.

<sup>9</sup> See generally, e.g., Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629 (2020); Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT'L L. 885 (2016); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009) [hereinafter *Presidential Power*].

standards.<sup>10</sup> The USDA posts a copy of the agreement on its website and issues an internal memorandum regarding the operation of its content.<sup>11</sup> U.S. agricultural specialists working at the border then begin to confirm the validity of the Taiwanese organic label on products imported by U.S. companies that are then sold throughout the United States.

- Congress authorizes the Treasury Department to regulate the intellectual property protection of product names.<sup>12</sup> The United States subsequently enters into an agreement with the European Union concerning the protection of the name “Brandy de Jerez,” which is to be reserved for brandy from Spain.<sup>13</sup> The Treasury Department then prepares a formal ruling regarding this commitment.<sup>14</sup>
- Congress directs the Secretary of State to enter into “negotiations . . . as may be necessary and appropriate” to achieve specified fisheries goals.<sup>15</sup> The State Department negotiates an agreement with Canada that says that the United States will “ensure that sufficient coho salmon enter [a certain river] to meet the agreed spawning objective” (among other commitments).<sup>16</sup> Thereafter, the National Marine Fisheries Service, which is part of the Department of Commerce, carries out a notice-and-comment rulemaking to address the overfished coho salmon stock along the U.S.-Canada border.<sup>17</sup>

In each instance, an agency decided how it would subsequently treat, as a matter of law and as a matter of mechanics,

<sup>10</sup> See Letter from Stanley Kao, Rep., Taipei Econ. & Cultural Rep. Off., to Ingrid Larson, Managing Dir., Am. Inst. in Taiwan (undated), <https://perma.cc/H8CD-KM8K> [hereinafter Taiwan Organics Agreement].

<sup>11</sup> See *International Trade Policies: Taiwan*, USDA, <https://perma.cc/Q8EU-264A>.

<sup>12</sup> 27 U.S.C. § 205.

<sup>13</sup> Recognition of Certain Distilled Spirits/Spirit Drinks, European Union-U.S., Mar. 25, 1994, Temp. State Dep’t No. 94-129.

<sup>14</sup> *ATF Ruling 94-5*, TTB, <https://perma.cc/UG8T-XKJG>.

<sup>15</sup> 16 U.S.C. §§ 1822(e)(2), 1822(h).

<sup>16</sup> Agreement Between the United States of America and Canada Relating to and Amending Annexes I and IV of the Treaty of January 28, 1985, as Amended Annex IV ch 1, Can.-U.S., June 30, 1999, T.I.A.S. 99-630 [hereinafter Salmon Agreement]. Agreements tend to use similar language to this, such as “agrees to restrict” or “shall permit.”

<sup>17</sup> See, e.g., Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; 2004 Management Measures, 69 Fed. Reg. 25,026 (May 5, 2004) (issuing a final rule to address the overfished coho salmon stock, referring to the U.S.-Canada border).

the commitments to which it agreed. As these three distinct examples demonstrate, this final step of implementation can take a variety of legal and administrative forms.

None of these scenarios would appear to pose any great risk to democracy nor any major concern about executive overreach. And yet, none of these followed a traditional administrative law procedure from start to finish. In fact, none of them followed any clearly prescribed procedure at all. Rather, agencies are developing means of implementing agreements extemporaneously—and wholly apart from any preexisting domestic regulatory power they may or may not have on the agreement topic. Thus, one aim of this Article is to chronicle how foreign relations come home through these ad hoc approaches.

Improvised implementation appears to be a common feature across the executive branch. Agencies regularly deploy improvised “implementation mechanisms”<sup>18</sup>—means of giving the commitments they have negotiated the force of U.S. law (or not). This Article provides an overview of two principal types of improvised implementation mechanisms: those in which the agency relies on additional procedural steps for enforceability and those in which the agency acts without undertaking any additional formal initiatives. It examines the qualities of each as well as their positive and normative payoffs.

Perhaps unexpectedly, improvised implementation has certain virtues. These ad hoc mechanisms deployed by the executive hold promise for their enhancement of administrative efficiency and for achieving foreign-policy aims. I argue that agencies’ heightened discretion sometimes creates unanticipated space for innovation, public participation, and flexibility, and that those assets are worth preserving even at the danger of compromising certain other rule of law values.

Improvised implementation’s most unsettling feature is the confusion it creates as to the legal status of executive agreements. In a conflict between a preexisting rule and a new agreement, it is unclear which preempts the other. We lack a well-defined understanding as to the conditions under which an agreement or a

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<sup>18</sup> Professor Edward Rubin has used the expression “implementation mechanisms” to refer to agencies themselves. See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 373 (1989). I redeploy it here to refer to the approaches of agencies to negotiated agreements. Further, the word “improvised” here is intended to mean that the mechanisms are devised without any specific, consistent procedure and are often crafted as needed when agreements are signed.

rule made pursuant to an agreement carries the force of law, including preemption authority.<sup>19</sup> How are courts to manage the domestic and international fault lines?<sup>20</sup> Resolving these issues is not just a retrospective sorting exercise. Rather, it helps us deconstruct pervasive transnational cross-border activity occurring throughout our regulatory ecosystem both now and in the future.

The Article considers the implications of three possible approaches, centered around familiar doctrinal norms, for answering these challenging questions and for thinking about agency choices in improvised implementation. One model underscores statutory implementation principles vested in ordinary rulemaking and adjudication as part of agencies' domestic regulatory work. A second emphasizes foreign relations rules about treaties but applies them loosely to executive agreements, seeking to integrate concepts of treaty law into agency practice. Both of these models create problems for practice and for doctrine when applied to executive agreements, however: the former by overclaiming and the latter by eliding some of the distinctive features of the cross-border environment. Path dependence and various blind spots in our conceptualization of implementation have obscured the question of how the law should manage executive agreements. A third alternative accepts neither statute nor treaty rules, regarding agency implementation absent express congressional delegation as *ultra vires*. Each of the three approaches lends itself to a different set of legal outcomes. And, since none of the three benefits from commanding support, the consequence is a degree of dissonance in just what work the implementation mechanisms are doing.

Fortunately, we need not choose between the rewards of executive autonomy and the risks of uncertain legal status and unpredictability under these frameworks. Improvised implementation of executive agreements suffers from these problems pri-

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<sup>19</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 115 cmt. c (AM. L. INST. 1987) (warning that "Congressional authorization to make an executive agreement that would supersede federal law is not to be inferred lightly" and acknowledging that "[t]he effect in domestic law of an executive agreement made by the President under his own constitutional authority (§ 303(4)) in respect of an earlier treaty or federal statute has not been established").

<sup>20</sup> Professor John Coyle, addressing this issue, has noted that when a rule of international law is written into a domestic statute, for example, courts may fail to recognize that the rule in question has international origins. See John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 481–82 (2015). The same may be true for future lawmakers.



marily because of its extemporized approach, not because our international agreements ought not be implemented by the executive branch or ought not be implemented at all. The executive's implementation of agreements is not just necessary; it is the principal way that our international commitments become part of U.S. law and legal practice.

The Article suggests instead that lawmakers provide greater guidance to the executive branch for agreement implementation. By writing implementation guidance for agencies into its negotiating delegations, Congress may better delineate agency responsibilities in a way that enhances intra- and inter-branch cooperation in the mediation of our domestic and international legal regimes. I map out a future that accommodates these special features and incorporates elements from the treaty and statute landscapes.

Regardless of whether our institutional actors are willing to undertake this retail-level reform, understanding the executive's improvised implementation mechanisms provides useful lessons for the lenses through which scholars and courts think about both agreements and agency behavior. First, treaty-centered myopia in foreign relations has meant that the prevailing theories about implementation of international agreements are based on just a small and differently situated share of those agreements.<sup>21</sup> The agreement-implementation experience demonstrates that foreign relations scholarship may be overly entrenched in its binary approach to international agreements of dividing the universe into "self-executing" and "non-self-executing" treaties.<sup>22</sup> The field's near-exclusive concentration on the treatment of treaties in the federal courts is part of the problem. The executive's improvised implementation mechanisms challenge the field's resistance to alternatives beyond judicial pronouncements on "self-execution."

Second, administrative law's concentration on statutes causes it to miss other inputs and dialogues occurring in less visible practices. Its principal emphasis on how agencies make law leaves ample space for a consideration of the ways through which agencies use executive agreements as swords and shields in these subconstitutional domains. Because administrative agencies are

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<sup>21</sup> See Hathaway et al., *supra* note 9, at 632. That is only an estimate given how many cross-border agreements remain unknown. See, e.g., Claussen, *supra* note 4, at 7 (describing issues with agreement recordkeeping for trade-related agreements).

<sup>22</sup> See Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 578–80 (2007) (describing theories of self-execution pre-Medellin); see also *supra* note 2 (collecting sources).

doing the heavy lifting, agreement implementation also has consequences for the broader literature about choices among agency lawmaking tools. These agencies' experiences cast doubt on assumptions about the limits of agency action in the face of legislative delegation. They also reveal a further layer of the agency lawmaking exercise: implementation by one agency of commitments made by a sibling agency.

The two fields' adherence to formulaic paradigms has prevented greater cross-pollination between them.<sup>23</sup> In fact, the opposite has occurred. Both administrative law and foreign relations law leave the conceptualization of the agreement-implementation process to the other. Regulatory law scholarship tends to treat as exceptional foreign instruments and foreign-facing lawmaking, leaving those matters to foreign relations law,<sup>24</sup> and the foreign relations law literature tends to focus on the implementation of treaties alone, leaving the domestic to regulatory scholars.<sup>25</sup> The lack of crossover between the two disciplines has led to a disjunction of explanations as to what agencies are doing while even a cursory examination of the implementation of executive agreements confirms that these bodies of law are fully coincidental in that important space. These agreement-implementation practices raise issues both of appropriate agency

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<sup>23</sup> A slender literature has started to push back on the foreign relations side. Recent work has discussed how courts could apply the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, 553–559, 701–706, to agency actions that might be considered foreign relations; how the APA could be applied to the way treaties and other agreements are made; and how treaty implementation could be more like statutory implementation. *See, e.g.*, Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 493 (2015) (“As a matter of separation of powers goals and statutory design, foreign and domestic affairs are far more similar than is often assumed.”); David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 84 (2013) (arguing that there is no role for the process requirements of the APA where agencies negotiate rules with foreign counterparts); Jean Galbraith, *Make Treaty Implementation More Like Statutory Implementation*, 115 MICH. L. REV. 1309, 1349–63 (2017) (proposing that agencies implement treaties).

<sup>24</sup> The absence of executive-agreement implementation in statutory implementation discussions is curious given that those discussions are transsubstantive, just as administrative law is general rather than specific. *See, e.g.*, David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1201 (2013) (discussing administrative law as transsubstantive). But there is a noticeable jurisprudential exception for foreign-facing administrative practices and perhaps an even more significant perceived exception as discussed further below. Regulatory scholarship is concerned with how the metaphorical sausage gets made, but it is reasonably unconcerned with those same processes if the sausage comes from abroad. Cross-border sausages, or rather cross-border sources of law, that form the bases for agency action do not feature readily in administrative law despite the field typically not discriminating.

<sup>25</sup> *See supra* note 2 (collecting sources).

supervision and of enforceability of our foreign commitments—issues that remain at the heart of both disciplines.

To be sure, the gap between the two fields is not just academic or theoretical. It is also a doctrinal disparity, created in part by the limitations on judicial review that are baked into both areas.<sup>26</sup> Agencies are deploying traditional regulatory tools in implementing agreements and conducting foreign relations, but we lack jurisprudential principles to guide that work. All of this suggests that the moment is ripe to study how executive agreements are implemented.

The Article's argument unfolds in four parts. Part I introduces the executive branch's mechanisms for implementing agreements as seen in the work of our foreign relations bureaucracy. It substantiates my claim that implementation of executive agreements occurs through a set of ad hoc practices that have been heretofore overlooked. I rely on information from agency records as well as from officials engaged in implementation and decision-making surrounding implementation to elaborate these activities.<sup>27</sup> Two categories of implementation mechanisms emerge: what I call "procedural implementation" and "automatic implementation." The first refers to circumstances in which agencies take additional lawmaking steps to convert the agreement commitments into domestic law or operation whereas the second refers to instances in which the agency acts on the commitment without undertaking any further administrative steps.

Part II evaluates the executive's improvised deployment of these implementation mechanisms. I identify both the salutary

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<sup>26</sup> The longstanding political-question doctrine may be one such obstacle to challenging agreements, although the Court may have altered prior understandings of the doctrine's contours with its decision in *Zivotofsky v. Kerry*, 576 U.S. 1 (2015). For important discussions pre-*Zivotofsky*, see Bradford Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1594 (2007) (discussing how courts may find constitutional challenges to executive agreements to involve "nonjusticiable political questions") and Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 975–99 (2004) (arguing for a broad application of the political question doctrine in foreign affairs). For more recent scholarship, see generally Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1 (2016).

<sup>27</sup> The information developed here is drawn from communications (email exchanges as well as semistructured and unstructured interviews) with current and former officials from the USDA, Department of Commerce, Department of Homeland Security, Department of Justice, Department of State, Treasury Department, and the USTR. I asked these officials about processes within their agencies for implementation, the personnel involved, interagency communications, and their evaluation of strengths and weaknesses of the agency's management of agreement implementation. Many requested anonymity to speak frankly; I have honored that request.

aspects and potential problems. The present arrangement promotes some traditional tenets that we associate with managerial liberalism and good governance like efficacy and efficiency. Where it falls short, however, is with respect to competing values like accountability, transparency, and reliability. Most concerning about the executive's experimental implementation is the uncertainty it creates for the enforceability of the rules that agencies are negotiating.

Part III considers the implications of applying any of three potential doctrinal frames that have guided the traditional thinking on implementation. Each frame leads to distinct conclusions regarding the force of law that should be afforded to agency activities surrounding agreements as well as the agreements themselves. And each frame provides agencies with variable degrees of empowerment, redistributing the burdens of implementation across the branches. I maintain that these competing paradigms pay too limited attention to the special qualities of agreement implementation.

Part IV seeks to reconcile some of the functional benefits of improvised implementation with some of its drawbacks. I advocate for greater congressional guidance on the front end—what I call “prescriptive implementation”—a fix that would capitalize on the potential for executive implementation to preserve and maximize rule of law values while avoiding some of the bureaucratic incoherence and legal unpredictability that results from present practices. Congress could set out the contours of a path forward for agencies' operationalization of the agreements. This approach provides an institutional solution for constitutional formalists and a pragmatic compromise for the competing domestic and international frames. Part IV also looks beyond doctrine to consider the lessons and ramifications of the executive's improvised implementation of agreements.

A brief word on terminology is important here: The Article uses the term “implementation” to refer to the integration or transposition into U.S. law, and the corresponding operationalization by agencies, of executive-agreement commitments.<sup>28</sup> It

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<sup>28</sup> To be sure, the U.S. government's implementation of any one of its international commitments is not a singular moment or action. Rather, it may require several moves over a long period of time. Nevertheless, I would distinguish implementation from the later administration, modifications, monitoring, enforcement, and ongoing diplomatic engagements that agreements may precipitate. In a separate work, I examine the longer life of agreements beyond the immediate and more formalistic questions posed in this Article. See Kathleen Claussen, *The Domestic Life of International Agreements* (2022) (unpublished manuscript) (on file with author).

chooses this term for consistency with the statute and treaty discussions that occupy the administrative law and foreign relations law fields—even if the term has very different genealogies in those fields.<sup>29</sup> I use this term here to demonstrate both similarities and differences among these literatures, even if imperfect. “Incorporation” is often employed in a like way;<sup>30</sup> the demarcation as to what constitutes incorporation and what constitutes implementation merits additional investigation. Still, I leave any further excavation of these nuances for another day and limit myself to “implementation” for purposes of unearthing this phenomenon.<sup>31</sup>

## I. THE EXECUTIVE’S IMPROVISED IMPLEMENTATION MECHANISMS

The scenario is common: Congress delegates authority to an agency to negotiate an international agreement.<sup>32</sup> The delegation provides the agency with the power to make a deal with another government about a certain subject. Consider the examples above concerning standards for organic products, intellectual-property protection of spirits, and protection of coho salmon. In each instance, the United States entered into an agreement that is binding on the United States as a matter of international law. What happens next is implementation.<sup>33</sup> Unless the United States already has a system in place to guarantee the outcome to which it has committed, it now ought to take steps to meet this obligation.

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<sup>29</sup> Implementation is one of regulatory and treaty law’s leading preoccupations, and a rich literature covers this waterfront. The use of “implementation” to refer to statutory execution by agencies finds its primary scholarly and political origins in the 1970s. See generally EUGENE BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* (1977); ERWIN C. HARGROVE, *THE MISSING LINK: THE STUDY OF THE IMPLEMENTATION OF SOCIAL POLICY* (1975); JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION* (2d ed. 1979).

<sup>30</sup> See, e.g., DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* 295–318 (2016) (describing a range of ways in which treaty self-execution has been conceptualized). See also generally John Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT’L L. 655 (2010) [hereinafter *Incorporative Statutes*].

<sup>31</sup> For more on the confusion, see S.I. Strong, *Beyond the Self-Execution Analysis*, 53 VA. J. INT’L L. 499, 540 (2013) (discussing incorporation and implementation when considering the New York Convention); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310, 314–15 (contrasting implementation with an “act of transformation,” “adoption,” or “reception”).

<sup>32</sup> See, e.g., 16 U.S.C. §§ 1801, 1822; 22 U.S.C. § 2656; 33 U.S.C. § 988(a); 43 U.S.C. § 31(b); 50 U.S.C. § 2402; 18 U.S.C. § 2523. Most of these are permissive delegations; some are directive.

<sup>33</sup> I note that sometimes executive agreements, such as the fish-related example discussed here, are themselves implementations of programs anticipated by prior treaties. The 1999 Exchange of Notes followed upon the 1985 U.S.-Canada Pacific Salmon Treaty,

The precise steps taken by the agency after negotiating the agreement are dictated not by the agreement nor by the original statute.<sup>34</sup> There are often several options that the executive branch could pursue to implement the agreement. As seen above, the agency may choose to pursue legislative actions such as congressional approval and legislative change, notice-and-comment rulemaking, or other actions with force-of-law effect for private actors. Alternatively, the agency may deploy a procedural action—an action without force of law.<sup>35</sup> For example, in the case of the salmon agreement, rather than execute a notice-and-comment rulemaking, the State Department or other agencies might have chosen to develop interagency working groups for monitoring salmon stocks.<sup>36</sup> The Department could also choose to take an action that has both interpretive and legislative elements such as prompting changes in Coast Guard practices that might help address the salmon problem.<sup>37</sup>

Sometimes agencies enter agreements that are based not on specifically delegated authority to negotiate but rather on statutes outlining the agency's general mission. Consider a statute that states that the U.S. Trade Representative (USTR) shall "have primary responsibility for developing . . . [U.S.] international trade policy."<sup>38</sup> The USTR enters into an agreement with Japan that creates a rule about what types of pencils may enter the United States at a reduced border-tax rate.<sup>39</sup> In this instance,

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as noted to me by Professor Sean Murphy. One can observe multiple layers of implementation in situations such as this: treaties that provide for the possibility of additional agreements (non-treaties) with the foreign partner. Then those agreements must be implemented by the agency.

<sup>34</sup> In some instances, these delegations to negotiate may cover topic areas already within the regulatory authority of the agency for domestic administration; in others, they may cover new territory. I return to the relevance of coincidental domestic authority in Part II.

<sup>35</sup> See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 476–81 (2002) (explaining the differences between procedural actions and actions with force of law).

<sup>36</sup> For example, the recently created U.S. Interagency Working Group on Illegal, Unreported, and Unregulated Fishing might undertake that work. That group was created pursuant to statute, see the Maritime SAFE Act, Pub. L. No. 116-92, § 3551 (2020), though that would not prohibit the State Department from creating a salmon-specific group.

<sup>37</sup> The Coast Guard maintains interagency cooperation as part of its mission to secure U.S. borders, for example. See U.S. Coast Guard, *Partnerships and Stakeholders*, <https://perma.cc/47RF-D6QG>.

<sup>38</sup> 19 U.S.C. § 2171(c)(1)(A).

<sup>39</sup> U.S.-Japan Trade Agreement, Oct. 7, 2019, Annex II, <https://perma.cc/9L23-4WMH> (setting out rules of origin and tariff rates on products from Japan, including pencils). At the time of this negotiation, USTR told members of Congress that this deal was

while the statute did not provide for negotiating authority, the agency used an agreement to achieve an objective under its enabling act.<sup>40</sup> There, the agreement was a tool in the agency toolkit negotiated under general authority.

In practical terms, Congress regularly gives the executive broad statutory directives to enter into executive agreements. But it neither (1) prescribes how to translate those agreements into U.S. law nor (2) reviews any such agreement after its conclusion.<sup>41</sup> Congress has largely ceded its *ex post* role in the international sphere. Rather, it asks the executive branch for receipts. Congress has required the executive branch to report to it about and provide it with a copy of those agreements.<sup>42</sup> Only in some areas of law, such as in treaties and in the conclusion of some major trade deals, is Congress engaged in the approval, adoption, and implementation after an agreement is negotiated.<sup>43</sup> Most often, the executive branch decides for itself how or whether to incorporate the agreement into U.S. law through its own mechanisms. And it turns out that each agency develops its own *ad hoc* approach for agreements it signs.

Simply put, every time Congress expressly or implicitly delegates authority to the executive authority to negotiate an agreement, and the agency negotiates the agreement, that agency often may undertake nearly any strategy it chooses to implement the

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negotiated pursuant to 19 U.S.C. § 4202(a), which permits the negotiation of trade agreements and proclamation of reduction in duties but does not authorize the president to design rules of origin.

<sup>40</sup> This scenario sets up a situation that could call into question the elasticity of organic and enabling acts and the range of instruments available to agencies to carry out those missions, but I leave that for another day.

<sup>41</sup> Sitaraman, *supra* note 23, at 557 (commenting that “[d]elegations of negotiation power are broad, usually have no time limits, and limit ongoing congressional oversight because the Executive can negotiate and commit the nation to agreements without disclosing its activities to Congress or the public”).

<sup>42</sup> See Hathaway et al., *supra* note 9, at 656–57.

<sup>43</sup> See, e.g., North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in scattered sections of 19 U.S.C.). For some treaties and trade agreements, Congress often passes legislation concurrent with or after the entry into force to operationalize, elaborate, or execute the commitments of the agreement. See CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 31–75 (2d ed. 2015). The most familiar mechanism for treaty implementation is what is popularly known as “implementing legislation.” See *generally Incorporative Statutes*, *supra* note 30. Occasionally, Congress may also delegate in that legislation to the executive branch to take regulatory action in the operationalization of the treaty or agreement. See *generally*, e.g., CONG. RSCH. SERV., S. PRT. 106-71, *Treaties and Other International Agreements: The Role of the United States Senate* (2001), <https://perma.cc/8EU7-2ESQ> [hereinafter Senate Report 2001] (also noting that implementation legislation occurs also when funds are needed, which could be yearly).

agreement and incorporate it into U.S. law. Alternatively, the agency may take no further action at all. Agencies select the “how”: the mechanics of the articulated and unarticulated parts of the bargain manifest in the text. Sometimes they do so with an opportunity for participation in determining the details and sometimes they do not.

This Part investigates and presents the implementation mechanisms that the executive branch uses when given a blank check from Congress. In some cases, agency choice depends on the nature and content of the agreement. Sometimes it turns on agency custom. Sometimes it turns on who else is at or behind the table: strong interest groups or other advocates.<sup>44</sup> On other occasions, it depends on the individual lawyer in the bureaucratic decision-making chain.

Getting at this information requires overcoming various obstacles surrounding the limited visibility into the inner workings of agencies negotiating these agreements and a lack of transparency in the existence of these agreements.<sup>45</sup> Some of these agreements as well as the measures taken thereafter are known only to government officials. For these reasons, I reached out to bureaucrats across a wide range of agencies to ask about their practices.

I identify two primary groups of mechanisms by which the executive branch implements these agreements—one in which it undertakes additional lawmaking and the other in which it treats the agreement as binding on the agency and private parties. The first puts an administrative process into motion. The second considers the agreement to be part of U.S. law without any further action. Although I lump many different specific agency moves into these two groups, that is not to suggest these are not diverse when disaggregated into specific instances of implementation. Differentiating the two groups is the number of steps required to give the

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<sup>44</sup> Having a separate implementation moment drives home the power of two-level games in international lawmaking captured in the political science literature. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988):

The politics of many international negotiations can usefully be conceived as a two-level game. At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments.

<sup>45</sup> See Hathaway et al., *supra* note 9, at 633 (describing transparency difficulties and limited visibility surrounding executive agreements).



commitment the force of law: at least one in the case of procedural implementation and none in the case of automatic implementation. What follows is the undernoticed story of how international agreements get pushed through the paper grinder of the administrative state.

### A. Procedural Implementation

A first set of implementation mechanisms used by agencies comprises those that depend on additional agency lawmaking. Some agencies make new law, such as through ordinary domestic rulemaking to assure that an agreement commitment is made part of U.S. law. I call this “procedural implementation.” The term refers to situations when the executive branch applies a further regulatory procedure as a means of bringing executive-agreement commitments into domestic law, either because the agreement says to do so or because the agency so chooses.<sup>46</sup> That additional procedure may be internal to a single agency or may involve another entity with overlapping jurisdiction. This was the implementation mechanism used by the State Department with respect to the salmon agreement noted above.<sup>47</sup> The agreement negotiated by the State Department precipitated a Commerce Department rulemaking exercise to bring the commitments into force for U.S. private actors.

Procedural implementation was likewise the approach undertaken by the Treasury Department in its protection of “Brandy de Jerez.”<sup>48</sup> The United States protects the names of distilled spirits from distinctive geographic locations by refusing entry to foreign liquors that use the same name but do not come from a pre-approved country. For instance, a product cannot come in from anywhere other than France and be labeled as “Cognac.”<sup>49</sup> The Department of the Treasury maintains regulations surrounding

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<sup>46</sup> I intend to refer here to procedure that leads to the development of legislative rules as well as nonlegislative rules with de facto binding effect. For additional explanation on these distinctions and the importance of each, see Nicholas Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165 (2019); Ronald M. Levin, *The Binding Effect of Interpretive Rules*, YALE J. ON REG.: NOTICE & COMMENT (May 9, 2019), <https://perma.cc/W3EH-VEV2>.

<sup>47</sup> See generally, e.g., Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; 2004 Management Measures, 69 Fed. Reg. 25,026 (May 5, 2004).

<sup>48</sup> See *supra* text accompanying note 13.

<sup>49</sup> Standards of Identity for Pisco and Cognac, 78 Fed. Reg. 28,739, 28,742 (May 16, 2013).

these foreign spirits. In 1994, the USTR entered into an agreement with what is now the European Union regarding the name “Brandy de Jerez” which originates in Spain.<sup>50</sup> In the agreement, the United States committed to recognize “Brandy de Jerez” as limited to products made a specific way and originating in Spain. Several months later, the Treasury issued an administrative ruling expressing its recognition of “Brandy de Jerez” as a product from Spain.<sup>51</sup> The agency and private parties rely on the ruling for enforcement purposes rather than the agreement.

Procedural implementation need not involve public participation, though it often does. In some instances, agencies have issued rules that implement the agreement without opportunity for notice-and-comment, for example. This is the mechanism used by the Department of Transportation as a way of announcing and enacting into U.S. law the toll adjustments on the St. Lawrence Seaway.<sup>52</sup> Those toll rates are agreed yearly with Canada using an executive agreement and then implemented into U.S. law by final rule without any opportunity for comment.<sup>53</sup>

Most agencies that rely on procedural implementation choose from among traditional agency means to bring those commitments into law such as through regulatory promulgation and notice-and-comment rulemaking. The international commitment becomes an input in that process. The commitment is not necessarily transposed directly into U.S. law; rather, the agency can select which commitments to transpose, when it wishes to do so, and how to carry out that transformation.

A related type of arrangement is one in which the executive branch agrees with a foreign partner to begin a regulatory process. The agreement does not make any commitments on behalf of the United States apart from stating that it will initiate a regulatory process or “take final action” on rulemakings that would meet an objective of a foreign partner.<sup>54</sup> An example of this type

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<sup>50</sup> Recognition of Certain Distilled Spirits/Spirit Drinks, *supra* note 13.

<sup>51</sup> The agency published a notice in the Federal Register regarding the ruling. Agreement Between the United States (US) and the European Union (EU): Geographical Designations, 59 Fed. Reg. 35,623 (July 13, 1994).

<sup>52</sup> See, e.g., Tariff of Tolls, 86 Fed. Reg. 15,585 (Mar. 24, 2021). The rule notes that, because it involves foreign affairs, it is not subject to the Department’s ordinary rulemaking procedures. *Id.* at 15,585–86.

<sup>53</sup> See, e.g., Exchange of Notes Constituting an Agreement Between the Government of Canada and the Government of the United States of America Amending the Agreement Concerning the Application of Tolls for the St-Lawrence Seaway, U.S.-Can. (Mar. 30, 1989), <https://perma.cc/EWJ6-QRUE>.

<sup>54</sup> Exchange of Letters, U.S.-Bol. (Jan. 6, 2020) (on file with author); Side Letter on Distilled Spirits, U.S.-Mex. (Nov. 30, 2018), <https://perma.cc/2JGE-A69N>.

of procedural implementation now in progress is an October 2019 agreement between the United States and Japan concerning the elimination or liberalization of “standards of fill” for wine.<sup>55</sup> In that instance, the agreement commitment is to continue ongoing efforts to reach a final rule regarding the shape and size of wine bottles. In December 2020, the Alcohol and Tobacco Tax and Trade Bureau issued a final rule on the subject although it did not therein approve the new size and shape as anticipated by the 2019 agreement; rather, it indicated that it would undertake another rulemaking on those proposed sizes and shapes.<sup>56</sup> No further rulemaking had occurred as of the time of writing.

Another example of the latter type is the U.S.-Canada Potato Agreement of 2007, which provides that “the United States of America intends to initiate, as soon as practicable, rule-making to modify its import requirements to provide for the importation of: [ ] potatoes of any color . . . .”<sup>57</sup> In March 2008, the Agricultural Marketing Service within the USDA issued a final rule modifying potato standards.<sup>58</sup> These promises to begin a process have grown in popularity in recent years.<sup>59</sup>

Both types of procedural implementation have the same effect. They use domestic rulemaking in cooperation with an international agreement to effectuate regulatory change and incorporate an international commitment into U.S. law. They also involve some form of agency deliberation as to form and substance, often requiring more than one agency to effectuate the negotiated commitments. They sometimes include an opportunity for public input. As can be seen, procedural implementation can

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<sup>55</sup> Exchange of Letters, U.S.-Japan (Oct. 7, 2019), <https://perma.cc/DUW3-FNBA>.

<sup>56</sup> Addition of New Standards of Fill for Wine and Distilled Spirits; Amendment of Distilled Spirits and Malt Beverage Net Contents Labeling Regulations, 85 Fed. Reg. 85,514 (Dec. 29, 2020). The final rule cites 27 U.S.C. § 205(e) as its basis for authority, which authorizes the Secretary to prescribe regulations relating to the “packaging, marking, branding, and labeling and size and fill” of alcohol beverage containers.

<sup>57</sup> Technical Arrangement Between the United States and Canada Concerning Trade in Potatoes art. V, U.S.-Can., KAV 8287, <https://perma.cc/272Q-DCZT>.

<sup>58</sup> Potatoes; Grade Standards, 73 Fed. Reg. 15,052 (Mar. 21, 2008). As an aside, I note that the final rule curiously cites 7 U.S.C. § 1621–1627 as its source of authority, which, at best, gives the Secretary the authority to take steps to pursue new markets for U.S. agricultural goods. See 7 U.S.C. § 1622. The agreement was never transmitted by the State Department to the Congress, so we do not have any indication of what authority the branch relied upon to make the agreement.

<sup>59</sup> Government officials could not confirm that this was a conscious choice on their part, but they agreed that they shared this perception. It is most easily visible in the distilled-spirits context. See Kathleen Claussen, *Regulating Foreign Commerce Through Multiple Pathways: A Case Study*, 130 YALE L.J. F. 266, 271–72 (2020) [hereinafter *Multiple Pathways*].

take some time, unlike automatic implementation as discussed in the next Section.

## B. Automatic Implementation

Some agencies have treated executive agreements as part of U.S. law without doing more. I call this “automatic implementation.”<sup>60</sup> With automatic implementation, agencies see the executive agreement as creating binding commitments and act directly upon those commitments. They grant the terms of the agreement the force of law *sua sponte*, on par with regulations, without any further lawmaking steps. Further, with automatic implementation, agencies interpret executive agreements as having direct effect on individuals, substituting them for domestic rules—and they do so even if another agency negotiated the agreement. This concept of automatic implementation is similar to what Professor John Jackson described as “direct application.”<sup>61</sup> Under Jackson’s definition, direct application is “the notion that the international [ ] instrument has a ‘direct’ statutelike [sic] role in the domestic legal system.”<sup>62</sup> In instances of automatic implementation, like Jackson’s use of direct application, the government relies upon the agreement as part of its domestic law, and private actors may likewise be able to do so.<sup>63</sup>

The organics equivalency agreement with Taiwan noted above, for example, has been automatically implemented. In that exchange of letters, which mirrors other exchanges related to organics with other foreign partners, the USDA agreed that products handled in accordance with Taiwan’s organic regime “may be sold, labeled, or represented in the United States as organically produced, including by display of the USDA organic seal.”<sup>64</sup> That commitment was not subject to additional lawmaking. Organic

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<sup>60</sup> Professor David Sloss has used the term “automatic incorporation” to refer to a type of self-execution in the treaty context. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *YALE J. INT’L L.* 129, 146 (1999). I find it useful here to draw from Sloss’s term with some modifications.

<sup>61</sup> Jackson, *supra* note 31, at 310.

<sup>62</sup> *Id.* at 310 n.1.

<sup>63</sup> Unlike Jackson, however, I do not take a position here on the justiciability of agreements that are automatically implemented. His term does more work here than “automatic implementation.” I note only how government agencies have treated them: acting upon them as having the force of law.

<sup>64</sup> Letter from Ingrid D. Larson, Managing Dir., American Institute in Taiwan, to Stanley Kao, Rep., Taipei Economic and Cultural Rep. Office, (undated), <https://perma.cc/GD2E-RWKA>.

products from Taiwan are now sold throughout the United States.<sup>65</sup>

Another automatically implemented agreement is a 2016 agreement between the United States and Chile concerning a Chilean distilled spirit. In contrast with the Brandy de Jerez agreement noted above, the Treasury has treated this agreement with Chile as part of U.S. law without issuing a ruling, conducting a rulemaking, or taking any other action. The agreement, concluded by the USTR, commits to protecting the intellectual property rights of a Chilean spirit called “Pajarete.”<sup>66</sup> But rather than add Pajarete to the list of protected spirits in its regulations, the Treasury has begun treating Pajarete as protected in its work without any further regulatory action.<sup>67</sup> In contrast, in the Brandy de Jerez example above, the Treasury undertook the additional process of making an internal ruling. In fact, this treatment of Pajarete was not the first instance of the Treasury’s automatic implementation approach. In 1971, the United States entered into an agreement to protect the French spirits of “Armagnac” and “Calvados.”<sup>68</sup> For more than twenty years, the Treasury has treated those spirits as having been incorporated into the regulations without more.<sup>69</sup>

What does this mean in practical terms? While we do not have records of sellers of offending spirits attempting to use forbidden names, government officials have indicated that there may have been such products and that, if they were identified, these products would have been rejected.<sup>70</sup> The agency has implemented these agreements into its practice without any additional lawmaking exercise.

With automatic implementation, there is typically no public information as to the agency’s treatment of the agreement. If the

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<sup>65</sup> See GLOBAL ORGANIC TRADE GUIDE, QUICK STATS: TAIWAN <https://perma.cc/DH3M-B78A>.

<sup>66</sup> Letter from Hon. Michael B. G. Froman, Ambassador, Off. of the U.S. Trade Representative, to Hon. Andres Rebolledo, Vice Minister for Trade, Chilean Ministry of Foreign Affs. (Feb. 4, 2016), <https://perma.cc/R2XL-PYND>; Letter from Hon. Michael B. G. Froman, Ambassador, Off. of the U.S. Trade Rep., to Hon. Magali Silva Velarde-Álvarez, Minister of Foreign Trade & Tourism, Peruvian Ministry of Foreign Trade & Tourism (Feb. 4, 2016), <https://perma.cc/KP7A-NQN5>.

<sup>67</sup> Email from Karen B. Welch, Dir. of Int’l Affs., Alcohol & Tobacco Tax & Trade Bureau, to Kathleen Claussen, Prof., Univ. of Miami Sch. of L. (July 9, 2020, 10:44 AM EDT) (on file with author) [hereinafter Email from Karen B. Welch].

<sup>68</sup> Protection of Names of Bourbon Whiskey and Certain French Brandies, U.S.-Fr., Mar. 20, 1971, 22 U.S.T. 36.

<sup>69</sup> Email from Karen B. Welch, *supra* note 67.

<sup>70</sup> *Id.*

agreement is public (which is not always the case) there may be a press release from an agency announcing its conclusion, but the agency neither takes any further lawmaking steps nor makes any public justification nor issues any statement as to its applicability to relevant actors.

Some agencies follow this practice for agreements that they, or another agency, call “side letters.” Side letters are agreements between the United States and another government with whom the United States already shares an agreement on a broadly related topic. When pressed, agencies have occasionally justified their automatic implementation through association with the other agreement—often one to which the letter is said to be “side” that Congress has implemented with legislation.<sup>71</sup> For example, a 2012 “side letter” to the U.S.-Colombia Trade Promotion Agreement addressed standards for food safety related to rice between the two countries.<sup>72</sup> The agreement modifies the U.S.

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<sup>71</sup> Occasionally exchanges of letters or other “side agreements” specify that they are intended to be an “integral part” of another agreement. Surprisingly little work has been done to investigate the significance of such phrasing, in contrast to some of the literature and case law on the parallel question in contract law. See, e.g., Letter Exchange on Article 9.15 (Domestic Review of Supplier Challenges) of the United States–Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007. See also generally Royce de R. Barondes, *Side Letters, Implementation by Reference and Construction of Contractual Relationships Memorialized in Multiple Writings*, 64 BAYLOR L. REV. 651 (2012). What is the domestic legal significance of an agreement in the form of a side letter that says on its face that it is to be considered an integral part of another agreement? It may mean, for example, that the side letter contains obligations that now become subject to dispute resolution clauses found in the other agreement. Or it may subject the side letter to a sunset clause or exit-and-withdrawal provisions, among other conditions. But most letters do not include such language and have little or no connection to the agreement to which they are said to be “side,” apart from the common parties. They may be negotiated years after the original agreement, like the Letter Exchange on Certification Requirements for U.S. Beef and Beef Products, U.S.-Peru, Mar. 14, 2016, <https://perma.cc/7AHD-AZ94>, which was concluded seven years after the U.S.-Peru trade agreement was negotiated. Perhaps more surprisingly, they may also be negotiated years before the original agreement. See, e.g., Letter from Robert E. Lighthizer, U.S. Trade Rep., to Ildefonso Guajardo Villarreal, Sec. of Econ., Mex. (Nov. 30, 2018), <https://perma.cc/892T-3YXY> (entering into force on Nov. 30, 2018, two years before the relevant trade agreement (the United States-Mexico-Canada Agreement) entered into force on July 1, 2020). It is not uncommon that the agreement to which a side letter is side may never materialize or may materialize much later. The United States is a party to side letters with countries that were involved in the Trans-Pacific Partnership Agreement (TPP) negotiations even though the TPP is not in force. There are no records of attempts to amend the implementing legislation or separately implement these letters. Agencies are applying their terms, claiming their implicit implementation by association, without more. See, e.g., Ian Fergusson & Christopher Davis, *Trade Promotion Authority (TPA): Frequently Asked Questions*, CONG. RSCH. SERV. 1, 15–16 (June 21, 2019).

<sup>72</sup> Agreement on Phytosanitary Measures for Importation of U.S. Paddy Rice, Col.-U.S., Apr. 15, 2012, T.I.A.S. 12-415.2.

Animal and Plant Health Inspection Service phytosanitary certificate and requires USDA inspectors to verify the moisture content of paddy rice at the time of fumigation.<sup>73</sup> The USDA treats the agreement as part of the Trade Promotion Agreement and implements it automatically without more.<sup>74</sup> In some situations involving a side letter, the agency may announce that it is incorporating the side letter by reference to the earlier agreement such that whatever force of law was given to the earlier agreement applies to the side-letter agreement.<sup>75</sup>

As these examples demonstrate, some agencies consider executive agreements as having been implemented through their direct use and application by both the agencies themselves and agency stakeholders, including other agencies. Through automatic implementation, executive agreements perform the role of ordinary regulations—not just functionally but also legally. They provide an additional direct means for regulators, businesses, and foreign governments not just to influence or execute but also to make law and policy.

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What is driving agencies' implementation practices? Two features stand out. First, individual government workers are “choosing their own adventure.”<sup>76</sup> Agencies are inconsistent about how they approach executive agreements, even those that seek to achieve the same outcomes. Government officials interviewed for this project expressed concern about the irregularities that they knew had occurred within their respective agencies.<sup>77</sup> Others could not provide specific information about their implementation programs, suggesting that at the very least there is no organized

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<sup>73</sup> Letter from Juan Camilo Restrepo Salazar, Minister of Agric. and Rural Dev., & Sergio Diaz-Granados, Minister of Trade, Indus. and Tourism, to Ron Kirk, U.S. Trade Rep. (Apr. 15, 2012), <https://perma.cc/C6RM-MTFL>.

<sup>74</sup> See Off. of the U.S. Trade Rep., Colombia TPA Final Text, <https://perma.cc/53A3-N3TE>.

<sup>75</sup> On occasion, Congress has debated the incorporation of side letters through this method. See, e.g., H.R. REP. NO. 108-627, at 31, 39–40 (2004), as reprinted in 2004 U.S.C.C.A.N. 976, 1005, 1012–13.

<sup>76</sup> “Choose Your Own Adventure” was a series of children’s gamebooks published from 1979 to 1998 where each story is written from a second-person point of view with the reader assuming the role of the protagonist and making choices that determine the main character’s actions and the plot’s outcome. They can still be found at <https://perma.cc/FY8F-QZA5>.

<sup>77</sup> Telephone Interview with Former Government Official #1 (July 1, 2020) (on file with author).

implementation plan within certain agencies.<sup>78</sup> Some suggested that the agency will do whatever is necessary to operationalize the agreement and that this was a priority for some members of Congress.<sup>79</sup> Some officials made it clear that the personal approaches of leadership within the agency may influence outcomes, complicating any formal model that we might seek to identify in agency practice. Agencies are ad-libbing from agreement to agreement.

Second, agencies are involved in a mix and match method. A closer look at the negotiation delegations at work in this study does not provide any clear clues as to which types of issue areas lend themselves to which types of implementations.<sup>80</sup> Procedural mechanisms are not any more or less common in certain areas of regulation, including, surprisingly, areas where the executive has additional latitude to promulgate rules. The areas where an agency actor has adopted one mechanism or the other do not appear to be based on any legal analysis carried out by the agency.<sup>81</sup> Further, it is not clear that procedural implementation is required in any sector or for any agency. Government bureaucrats suggested that the agency operationalizes its commitments in the way that the current leadership suggests, or agency custom dictates, which is often informal and not reduced to writing.<sup>82</sup>

It is difficult to draw patterns among agencies from a limited set. Each agency official with whom I corresponded acknowledged challenges; no single agency implements agreements any better than any other given each agency's different institutional difficulties. Likewise, there is no pattern linking automatic implementation to certain types of delegations (broad or specific).

We might further ask why agencies are taking the path that appears to be the path of greater resistance—or at least greater work—when they have the flexibility to choose. In other words,

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<sup>78</sup> Interview with Former Government Official #2, Washington, D.C. (Nov. 12, 2020) (on file with author).

<sup>79</sup> Telephone Interview with Former Government Official #3 (June 30, 2020) (on file with author).

<sup>80</sup> Cf. Amichai Cohen, *Bureaucratic Internalization: Domestic Governmental Agencies and the Legitimization of International Law*, 36 GEO. J. INT'L L. 1079, 1092 (2005) (claiming, without empirical support, that "congressional attitudes towards incorporating international law into domestic law differ across issue areas").

<sup>81</sup> To be sure, the State Department has a procedure (the Circular 175 process discussed in detail in Part IV.A.2) intended to confirm that agencies have the authority to conclude the agreements into which they enter, which ought to also cover some aspects of implementation, but we lack information about how agencies manage those commitments once finalized.

<sup>82</sup> Interview with Former Government Official #2, *supra* note 78.



why undertake procedural implementation at all? But it is not entirely clear that automatic implementation is the more efficient choice, even if it might produce less paperwork. Officials still face the burden of piecemeal application, which may require increased internal deliberation at a later stage. Here again, no clear patterns emerged to suggest that agencies use more procedure when they are lobbied in a specific way, when facing congressional oversight, or when they are more worried about enforcement, as we might expect.<sup>83</sup>

The next Part carries out a deeper assessment of which aspects (if any) of improvised implementation—whether procedural or automatic—are worth preserving, according to a set of prudential values, managerial-liberalism principles, and rule of law ideals.

## II. VIRTUES AND VICIES OF AGENCY AD-LIBBING

One goal of this Article is to shift the debate about agency cross-border activities away from some of the predominant delegation interrogations to matters of actor, structure, and force after the fact: Who within the branch decides what happens with an executive agreement once concluded? Through what mechanisms? And to what effect? With these issues in focus, we can better assess the ability of agencies to manage these processes, to which this Part turns. Rather than evaluate which of the two types of implementation mechanisms the executive ought to adopt, I consider whether leaving the choice to the executive branch to make these critical decisions is the best way to manage these delicate transnational compromises.

On one hand, the agreement-implementation story may be a model for those who argue against heavy-handed, stipulated process. Agencies do not appear to be abusing their broad licenses. In this sense, agreement implementation could prove a counterfactual to traditional policymaking—a successful experiment for evaluating agency behavior without process. On the other hand, we do not yet have enough information about the political economy of agreement implementation to reach such a rosy conclusion. It could be that powerful actors are manipulating agency outcomes through these processes.

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<sup>83</sup> Individual officials could not share that level of information in our exchanges, but there may be other ways to trace those trends with additional research and public records investigation.

Agreement-implementation choices are not costless or normatively neutral. The implementation process is, just like other implementation activities in which agencies are engaged, an institutionally embedded process through which international commitments that affect private actors and government resources are made, and it should be evaluated as such.<sup>84</sup> This Part reviews what is, on the one hand, enhanced flexibility through the ad hoc nature of executive implementation. On the other hand, the same flexibility and modularity likewise create inconsistency and uncertainty.

### A. Functional Gains

Perhaps surprisingly, the executive's improvised application of its implementation mechanisms carries some significant benefits. Under several good-governance metrics, improvised implementation fares reasonably well. It is less obvious how agreement implementation also promotes, as a value, "form-shopping"—the ability of agencies to choose among a set of tools including some that may be subject to lesser scrutiny—and with that, innovation in agency work.<sup>85</sup>

The first advantage of the executive's improvised implementation is efficacy—a premium in statutory implementation that also attaches with respect to executive agreements. Improvised implementation, whether through procedural or automatic implementation, gets the job done. As various executive-branch officials have noted, some of these moves are necessary to effectuate broader congressional and executive aims.<sup>86</sup> Without agency action, the agreements would be dead letters. They would undermine the delegations that motivated and mandated them. Agencies are achieving goals set out for them by Congress, at least within certain bounds. If the outcomes were widely undesirable, private stakeholders and members of Congress might raise more criticism about the structural frames through which these practices are carried out.

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<sup>84</sup> See Rubin, *supra* note 18, at 426.

<sup>85</sup> This is obviously a play on words of "forum shop," but unlike that term (which often has negative connotation), I use the term here positively, like the way Professor Pamela Bookman does in her extensive litigation analysis. Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2017).

<sup>86</sup> See generally The President's 2020 Trade Policy Agenda: Hearing Before the H. Comm. on Ways and Means, 116th Cong. (2020) (testimony of Robert Lighthizer, U.S. Trade Rep.) [hereinafter Lighthizer Testimony 2020].

Improvised implementation also often helps facilitate transnational regulation more efficiently. It responds, often promptly, to the international needs that called for an agreement in the first place. It avoids congressional interference that could prove problematic in our foreign affairs relationships and complicate U.S. compliance with the binding international commitments made to foreign partners.<sup>87</sup> If the executive branch entered into an agreement that Congress could easily dismantle, foreign partners would have little incentive to take U.S. negotiators seriously.<sup>88</sup> Permitting the executive widespread latitude to implement international commitments generally strengthens international law: having negotiated the agreement, the executive is more likely to be invested in taking steps to implement it than other actors might be.

Expertise is another key feature of the executive's improvised implementation methods. Relying on its broad reach and collaboration across the administrative state, the executive can choose how to make use of its expertise in manners for which the executive is uniquely suited. Agencies may draw from the executive's community of experts to apply those experts' specialized knowledge at the implementation stage just as they do at the negotiation stage.

Somewhat ironically, improvised implementation also can reinforce democratic principles through its public-participation opportunities. On the whole, public participation in implementation is better than it is at the agreement-negotiation stage, at least where procedural implementation mechanisms are used. If there will be any formal collection of public comment, it is likely to be during the transposition of the agreement into regulations. Thus, improvised implementation may have enriched accountability in the life cycles of our international agreements.<sup>89</sup> By engaging the public in the implementation of the agreement, international law-making activities may be fortified where they matter most—as part of U.S. law. To be sure, for scholars who advocate for public

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<sup>87</sup> This argument resonates with those surrounding the legislative veto that once accompanied some of these delegations, even if at a high bar. See, e.g., Harold Koh, *Congressional Controls on Presidential Trade Policymaking after I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1201 (1986).

<sup>88</sup> This is one of the arguments for fast-track legislation for free-trade agreements. See, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 803 (1995) ("The Trade Act of 1974 made a comprehensive effort to restructure the modern two-House procedure to suit the needs of economic diplomacy.").

<sup>89</sup> See Sitaraman, *supra* note 23, at 557 (commenting on the work of others).

participation throughout the international-lawmaking process,<sup>90</sup> participation in implementation would be only a second-best outcome to collecting public input at the negotiation stage. Still, our present implementation mechanisms at least permit engagement on *how* those commitments are given force—a space where the agency has the flexibility to pick and choose and where the public could influence those choices.

Perhaps the greatest benefit of executive implementation is its flexibility and the space it creates for innovation.<sup>91</sup> The present constructive ambiguity permits agencies both to make new law that might not be available through ordinary domestic channels and to operationalize those agreements in ways that fall off the beaten path. One official recounted that the bureaucrats in their agency were able to craft their own customized way forward with a deal in light of these liberties.<sup>92</sup> Other officials described informal strategies and plans that their agencies developed that were not publicly known but that put an agreement into effect.<sup>93</sup> While agencies are not developing expansive new constructs to manage executive agreements or inventing unusual and exceptional devices, some of them are developing more unorthodox agency tools, consistent with what Professors Abbe Gluck, Anne Joseph O'Connell, and Rosa Po have described in the domestic space.<sup>94</sup> Some agency solutions have been bespoke, capitalizing on the creativity of agency experts and the innovation space left to them by the statute.<sup>95</sup>

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<sup>90</sup> See generally, e.g., *Presidential Power*, *supra* note 9.

<sup>91</sup> Certainly, while we sometimes value flexibility as a means of giving agency to actors to tailor their approaches in problem-solving, as discussed further below, the virtues of flexibilities themselves are limited to the extent they contribute to delayed decision-making or interference. See David Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1382–98 (2011).

<sup>92</sup> Telephone Interview with Former Government Official #2, *supra* note 78 (describing the USTR's strategy for implementing a trade-related executive agreement).

<sup>93</sup> Telephone Interview with Former Government Official #1, *supra* note 77.

<sup>94</sup> See generally Abbe Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

<sup>95</sup> Agreement implementation is not the only space in which agencies have pushed the boundaries of their institutional constraints and developed their own procedures. In the early days of the APA, agencies "were forced to develop supplementary fact-gathering procedures," leading to courts adding extra procedural requirements to rulemaking until *Vermont Yankee Nuclear Reactor Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 257 (1986). Those supplementary procedures were quickly policed by the courts and by Congress to ensure their consistency with delegated and constitutional intent. By contrast, in the agreement-implementation space, without judicial policing, these innovations are rarely curtailed and more often embraced.

Improvised implementation without more also permits the branch an opportunity to “form shop.” Occasionally, an agency or group of agencies may be empowered to address a substantive issue through multiple avenues: through ordinary administrative law tools as directed by Congress or through agreement. This opportunity to choose makes executive agreements somewhat unique among bi-branch international lawmaking tools which involve the Senate or both houses of Congress in approval and implementation, but not entirely unique among domestic lawmaking tools.<sup>96</sup> Not all domestic statutory directives to agencies include specific instruction on agencies’ choice of form for implementation so in that sense agreement implementation is not particularly distinctive. Agencies often have broad leeway as to the format for statutory implementation, such as choosing between notice-and-comment rulemaking or some other executive-branch tool, like a presidential proclamation or agency ruling, to put these obligations into effect.<sup>97</sup> The “choice of form” privilege affords agencies multiple mechanisms for implementation that are often informal and distinct from the traditionally regulated groups including published guidance, handbooks, and even websites.<sup>98</sup> While legal scholars have wrestled with the payoffs and perils of form shopping,<sup>99</sup> it may have an underestimated benefit: choice of form may permit increased space for collaboration, for

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<sup>96</sup> See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1403–05 (2004). See also Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 241 (1987) (“Many significant federal administrative decisions are not subject to any great procedural constraint as to their timing, origination, or format. To the extent administrative decisions are limited by congressionally imposed substantive criteria, those criteria frequently leave broad leeway for ultimate implementation.”).

<sup>97</sup> See, e.g., Magill, *supra* note 96; see also Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466 (1992) (“Although commonly we speak of ‘rulemaking’ as synonymous with the notice-and-comment procedures of informal legislative rulemaking under section 553, careful attention to the APA reveals four different species of activity that can produce an outcome that fits the definition of ‘rule.’”).

<sup>98</sup> See William N. Eskridge Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 419 (2013).

<sup>99</sup> See David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT’L L. 563, 566 (2008) (“Ronald Coase claimed that economic actors were faced with a choice between creating relationships through firms or through contracts, and Yochai Benkler posited that the choice between open source and other legal arrangements is a signal feature of cyberlaw.”)

originality, and for supporting international arrangements.<sup>100</sup> If, in deploying that duty, agencies are in a position to enhance U.S. foreign commitments, form shopping may become a greater asset than previously anticipated, at least to international legal positivists. In fact, it may be necessary to accommodate this unusual intersection of responsibilities that has resulted from disparate delegations to the executive over the last several decades, even as it may be beyond the capacity or interest of courts to review.<sup>101</sup>

The implementation mechanisms also may achieve aims that other tools do not permit. That includes implementations in the absence of an express delegation to make an agreement, although there is some uncertainty on this question. The expansive space for agreement implementation may suggest that when Congress provides a blanket delegation to, say, the Environmental Protection Agency (EPA) to provide guidance on foreign-facing clean-air technology, the EPA may enter into an agreement on that basis. Agencies now count international agreements among their available tools when choosing from the toolkit. The lax oversight in implementation may incentivize and enable them to negotiate where they otherwise would not have done so, further strengthening international partnerships.

Unexpectedly, the present approach to agreement implementation facilitates opportunities for execution and administration. It also helps to identify prospects for implementation without the need for congressional direction. For these reasons, this improvised, off-the-cuff activity among agencies may be prudentially appropriate. Much like in the domestic regulatory context, the bureaucrats and interest groups that are able to make use of the executive branch are among the winners in the current institutional arrangement. Likewise, some international partners benefit. But these advantages come at a cost. Just as the executive's ad hoc agreement implementation can be a salutary means by which to address transnational regulatory needs in a globalized environment, it also has drawbacks to which the next Section turns.

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<sup>100</sup> Professor Evan Criddle has suggested that agencies still have a fiduciary duty of care and loyalty in choosing among the tools that they are provided. Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLAL. REV. 117, 157–59 (2006); see also John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 945 (2004).

<sup>101</sup> See Shane, *supra* note 96, at 241–42 (describing the limits on judicial action).

## B. Institutional Risks

Although the opportunities laid out above provide some good reasons to permit agencies to choose from a wide range of mechanisms, including on a case-by-case basis, there are downsides for private actors and foreign partners. Indeed, some of the same features identified as benefits themselves pose difficulties.

First, whether in circumstances of procedural implementation or automatic implementation, both private and government actors face substantial uncertainty.<sup>102</sup> There is no predictability in mechanism, in outcome, or in force of law.<sup>103</sup> The executive gets to pick the commitment, the strength and length of the commitment as a matter of U.S. law, and the oversight of the commitment. While the legal community widely accepts a degree of agency discretion with respect to these areas of executive expertise (as discussed above), that discretion is subject to administrative safeguards that are missing here, given that judicial supervision remains spotty at best. Agencies can drop practices more easily with more informal means of implementation and often can drop practices more easily overall. The potential fickleness of executive implementation prompts concerns regarding the international commitments' uncertain durability. These arrangements have the potential to create discrepancies at the domestic and international levels.<sup>104</sup>

Second, the present use of diverse ad hoc mechanisms risks inter- and intra-agency conflicts. There is no clear reason that agencies need to adopt a singular mechanism, but there may be an issue where two or more agencies are involved in implementation. A close examination of such executive agreements demonstrates that international commitments often have multiple agency homes. As discussed above in the context of form shopping, several agencies may have the authority to regulate or negotiate on a particular subject. Leaving the agreement's implementation to an interagency debate may mean more controversy over not just form but also substance.

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<sup>102</sup> *Medellin v. Texas*, 552 U.S. 491, 515–16 (2008) (“This uncertainty could hobble the United States’ efforts to negotiate and sign international agreements.”).

<sup>103</sup> Part III reviews the enforceability issues posed by improvised implementation.

<sup>104</sup> For example, in the distilled-spirits examples, on some occasions, the U.S. government and its trading partners have pursued additional agreements as to the same product—perhaps for the avoidance of doubt or to resolve any lingering questions about their effect. See *Multiple Pathways*, *supra* note 59, at 282 (listing several spirits that have been the subject of more than one agreement).

The interagency relationships create both vertical and horizontal complexity. Both within individual agencies and among them, bureaucrats report differences of opinion on implementation. These are the consequences of conflicting or at best indeterminate authority over the same federal statutory terrain. It is not difficult to envision how this uncertainty could unfold. With such blurry procedural norms, improvised implementation runs the risk that one agency commits to a set of rules that the other refuses to execute—with concomitant questions as to what law prevails at the border.<sup>105</sup> The executive must sort out those conflicts since Congress rarely does so. We lack guidance on how to mediate between and among agencies when Congress provides concurrent authority to regulate but is ambiguous as to how that authority ought to be allocated when it comes to agreement implementation.

Third, process scholars likewise ought to view improvised implementation with suspicion. In ordinary domestic lawmaking, an agency does not have to explain, when challenged, why it chose a particular policymaking form.<sup>106</sup> But that freedom “does not mean that the agency is free to *design* its policymaking tools.”<sup>107</sup> While agencies can often choose among statutory mandates and select their executory tools among a closed set, they do so subject to procedural constraints.<sup>108</sup> That is how Congress ensures some degree of oversight or public participation consistent with the primary values of administrative law.

Executive implementation of executive agreements, however, does not benefit from the checks and balances built into our administrative procedures except when the executive selects to use them.<sup>109</sup> This absence sets up conditions ripe for one agency to

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<sup>105</sup> One official put it this way: “USTR usually looks to [another agency] to ask, ‘Can you guys deliver?’ and [the other agency] would consider what was required under existing regulations.” Telephone Interview with Former Agency Official (June 24, 2020) (on file with author).

<sup>106</sup> See Magill, *supra* note 96, at 1403–05; see also *Chenery II*, 332 U.S. 194, 201–03:

[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule . . . the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.

<sup>107</sup> Magill, *supra* note 96, at 1404–05 (emphasis in original).

<sup>108</sup> *Id.*

<sup>109</sup> Cf. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751 (2007) (“Administrative procedures are the mechanism that, together with judicial review, facilitates such congressional involvement.”). As noted



drift into the regulatory space of another, enabled by the open-endedness of agreements and their expansive implementation space. In drift, it is not that agencies share concurrent regulatory jurisdiction but rather some other combination (or lack) of delegation to achieve transnational aims. For example, in the distilled-spirits examples, the USTR is empowered to make trade policy while the Treasury has notice-and-comment authority to approve foreign distilled spirits. But in recent years, the USTR has been negotiating protections as part of its trade policy and asking the Treasury to implement those protections through other administrative means.

Under the present application and executive-branch interpretation, the executive can choose executive agreements to reach an intended outcome even when Congress has provided that determinations in that area are to be made through notice-and-comment rulemaking as seen in the distilled-spirits example.<sup>110</sup> Agencies can then use automatic-implementation strategies to shield themselves from scrutiny when it comes to the original delegation.

Fourth, another consequence of indiscriminate diversity among agencies in incorporating international agreement commitments is that not all international commitments are implemented equally. Different agencies have treated executive agreements in different ways: Some have undertaken to integrate them into agency rules and regulations. Others have treated them as directly applicable to private actors from their inception. Even within individual agencies, officials have not treated executive agreements uniformly. Some commitments and agreements get memorialized in domestic statutes, while others are relegated to executive actions, and still others remain wholly outside the system. The process is selective and unequal.

Foreign actors are unlikely to miss these differences. The institutional costs of these amorphous arrangements for implementation are only compounded by their complications for our foreign affairs. With courts largely out of the picture, agencies encounter still greater pressure to manage not just their subsequent interactions with private parties but also their foreign relationships.

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above, courts have either confirmed the existence of an original delegation, or they have otherwise avoided the question. These decisions offer few meaningful principles for more recent executive agreements that do not share the same features as those agreements.

<sup>110</sup> As noted in Part I.A, Congress has delegated authority to the executive to promulgate regulations on distilled spirits even though the executive has used agreements that are automatically implemented in lieu of regulations. Telephone Interview with Former U.S. Treasury Official (June 24, 2020) (on file with author).

Fifth, any benefits of flexibility are mitigated by the fact that the executive's flexibility is partly enabled by a lack of transparency. This metric poses additional challenges for agreement implementation. With only occasional public participation and almost no transparency required in their implementation work, agencies appear to perform poorly on administrative law's common currency of accountability.<sup>111</sup> Acting beneath the surface of the public eye may mean that the risk of self-aggrandizement is greater than in other areas of regulation.

Apart from these rather practical institutional weaknesses in improvised implementation, there is also the question of whether improvised implementation's functional strengths justify its questionable legitimacy. For instance, procedural implementation struggles with its predetermined outcomes, making the administrative lawmaking process moot and possibly violating the Administrative Procedure Act (APA).<sup>112</sup> Automatic implementation, while successful in giving force to our international commitments, lacks any principled criteria. In the absence of *ex ante* designs, the justification for agency functionalism in improvised implementation is that it may be necessary and can help our domestic-international system do the work it needs to do in the absence of an ordinary process of law. That results in significant pressure from the executive's choose-your-own-adventure approach on the original delegation from Congress that we submit to virtually no scrutiny. These are tradeoffs to consider: between effectuating agreements, realizing an implied vision of Congress, and wasting resources; and between problem-solving and reliability.

Apart from these prudential issues and the risks of creating losers of different varieties in improvised implementation, one primary legal difficulty comes to light: enforceability. The uncertainties surrounding agreement implementation may mean that the obligations found in these agreements, their enforceability, and their preemptive authority will come under question. The next Part takes up these thorny issues in detail.

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<sup>111</sup> See Gluck et al., *supra* note 94, at 1839 (noting that the "legitimacy values that are common currency for courts in this field" are "public participation, transparency, and accountability").

<sup>112</sup> See Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). The two bodies of law appear to clash. Congress does not provide a workaround, for example, to reconcile the implementation of agreement commitments with the delegation to an agency to prescribe regulations to achieve the same.

## III. THE THREE LEGAL FRAMEWORKS FOR IMPLEMENTATION

This Part sketches three possible approaches to explaining how executive agreements become part of U.S. law. Each approach developed in this Part analogizes the executive-agreement experience to another body of implementation law. Identifying these competing approaches helps demonstrate that the disciplinary and jurisprudential lens through which we view the executive's implementation of agreements dictates their substantive law, procedure, and policy. While each seeks to explain the same agency activity, the choice of applicable theoretical model has legal consequences.

When the Department of Commerce's National Institute of Standards and Technology agrees with its Mexican counterpart that it "shall grant applications for equipment certification" in relation to certain technologies from Mexico, for example, is that enforceable as a matter of U.S. law?<sup>113</sup> Can U.S. importers enforce that commitment in a U.S. court? Does it matter whether the agency acted as part of the Department of Commerce's general authority to "develop, maintain, and retain custody of the national standards of measurement"?<sup>114</sup> Or if Congress instructed the Department of Commerce specifically to negotiate agreements on certifications and applications? What if the Department of Commerce engages in some administrative lawmaking regarding that commitment? What if these obligations conflict with a statute or regulation?

Note that this is a modern variant of the prototypical case that initially gave rise to controversies over treaty self-execution in the eighteenth and nineteenth centuries. In those situations, there was a conflict between a statute and a treaty: a statute directed a customs official to charge a tariff of a certain number of dollars on a particular import; however, a treaty directed that same customs official to charge a lower (or zero) tariff on that same import.<sup>115</sup> The resolution of that conflict was that whichever was later in time controls, between the statute or the treaty.<sup>116</sup>

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<sup>113</sup> See, e.g., Mutual Recognition Agreement Between the Government of the United States of America and the Government of the United Mexican States for Conformity Assessment of Telecommunications Equipment, U.S.-Mex., app. B, May 26, 2011, TIAS 11-610. There are many similar agreements, especially with our close trading partners, regarding recognition of facilities and standards on topics from avocados to tires. See generally *Mini-Deals*, *supra* note 4, at 337-52 (describing the hundreds of executive agreements related to foreign commerce into which the United States has entered).

<sup>114</sup> 15 U.S.C. § 272(b)(2) (2015).

<sup>115</sup> See SLOSS, *supra* note 30, at 107-28.

<sup>116</sup> See, e.g., *id.* at 107.

The primary justification for the later-in-time rule was that treaties and statutes have equal rank within the U.S. legal system.<sup>117</sup> That argument is hard to square here, but the practices suggest that some agencies may consider executive agreements to have equal rank, even if only on instinct.<sup>118</sup>

These are meaty and meaningful legal questions that one might expect to be litigated. But agreement-implementation issues have not been litigated in their modern manifestations.<sup>119</sup> There are almost no examples of challenges to implementation or cases concerning these agreements' legal status. Courts have avoided the issue either through express application of an exception or disclaimed institutional competence.<sup>120</sup> As a result, power

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<sup>117</sup> See *id.*

<sup>118</sup> There is no evidence that agency personnel are thinking about force-of-law impacts in their improvised implementation calculus, even if observers see those impacts as a guiding issue to such a determination.

<sup>119</sup> Nearly all the discussion in this literary and judicial conversation examines treaties, but some courts have briefly addressed the self-executing status of sole executive agreements. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981); *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937); see also *De Archibold v. United States*, 499 F.3d 1310, 1314 (Fed. Cir. 2007) ("If Congress had intended to confer jurisdiction on the federal courts for claims arising under treaties and executive agreements *carte blanche*, Congress would have clearly stated so.").

<sup>120</sup> In one case, the Court of International Trade avoided addressing an implementation challenge indirectly. *Almond Brothers v. United States*, 34 C.I.T. 370, 371 (2010). That case involved several executive agreements between Canada and the United States that were intended to resolve ongoing disputes between the two countries relating to the softwood-lumber trade. See *Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America*, U.S.-Can., Sept. 12, 2006, <https://perma.cc/K66E-JA9C>. U.S. producers of softwood-lumber products brought the case regarding, among other topics, a provision in one of the agreements that provided for Canada to distribute \$500 million to certain U.S. producers who were members of a particular coalition. *Almond Brothers*, 34 C.I.T. at 371. An underlying difficulty on which the court's jurisdiction partly turned was the status in U.S. law of the 1996 Softwood Lumber Agreement. The court considered briefly whether that agreement was a product of a 1991 agency investigation on the same topic but did not reach a determination. *Id.* at 381–82. See also Clark, *supra* note 26, at 1595 ("[A] real or perceived lack of institutional competence might lead [courts] to accord substantial deference to the political branches' decision to make an agreement rather than a treaty.").

The absence of judicial guidance here is made more surprising by the fact that, as Professor Harlan Cohen has noted, the Supreme Court has focused its attention on domestic implementation and implementation matters when dealing with international instruments. See Harlan G. Cohen, *The Death of Deference and the Domestication of Treaty Law*, 2015 B.Y.U. L. REV. 1467, 1468–69 (2015) ("Rather than focusing on the treaty and what its terms might mean in relations between the United States and others, the Court has been turning the question inward, focusing on implementing legislation, congressional intent, and ordinary methods of statutory interpretation.").

has shifted precisely to those entities that the law currently does not have established ways to hold accountable.<sup>121</sup>

Any of the frameworks for thinking about agreement implementation that are analyzed in this Part could inform the way that courts manage these challenges as they arise. As this analysis of the frameworks shows, some of our existing canons are reasonably suited to address the interpretive questions raised by executive implementation, but ultimately, they are insufficient for the complexities and idiosyncrasies of executive agreements.

#### A. Domestic Administration

The first of the three frameworks for thinking about agreement implementation is founded on principles of domestic administration. This approach to theorizing agreement implementation imports administrative law concepts to understand and explain agency actions. It relies on analogies to the way agencies implement statutes and sees procedural and automatic implementation as typical agency work, just with a foreign element.

A champion of this approach sees procedural implementation as another form of informal rulemaking. An agency acts upon a delegation to it to negotiate an agreement. The agency then takes an additional lawmaking step to give those commitments force of law. In the case of the salmon agreement above, the Commerce Department carried out a notice-and-comment rulemaking; in the case of the Brandy de Jerez agreement, the Treasury issued a formal ruling; in the case of the St. Lawrence Seaway toll agreement, the Department of Transportation issued a rule.<sup>122</sup> As in domestic regulation, the agency has executed the congressional mandate, just through an additional step.

Likewise, this domestic-administration model sees automatic implementation as a form of ordinary agency adjudication. An

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<sup>121</sup> Whether agreement commitments have the “force of law” is not always in doubt. Some agreements on their face do not claim to make any commitments for anyone—they are non-binding agreements or expressions of policy supported by the government. For example, Trade and Investment Framework Agreements (TIFAs) fall into this category. See, e.g., Agreement Between the Government of the United States of America and the Government of the Federal Republic of Nigeria Concerning the Development of Trade and Investment Relations, U.S.-Nig., Feb. 16, 2000, <https://perma.cc/FHB2-7NBF>. These sorts of agreements establish U.S. influence, capacity building, and dialogue. No further lawmaking is required to put them into effect. Non-binding agreements need not occupy much space in this discussion, although some agencies build institutional structures around non-binding executive agreements that may give rise to later binding rules that the agency must implement. Moreover, debates surrounding bindingness often divide agencies and branches with implications for their implementation.

<sup>122</sup> See *supra* Introduction.

agency decides a case on an individualized basis in the shadow of the executive agreement. For example, in the case of the organics agreement with Taiwan, the agency agreed to admit foods from Taiwan with the Taiwanese organic seal.<sup>123</sup> The decision by the official at the border to allow the marked food to enter in light of the commitment in the agreement is, on this view, an adjudication—just like the USDA’s treatment of U.S. organic products. In other words, in both scenarios the federal agency makes a decision on a particular group of organic products premised on some other guiding document: in the former, it is the agreement; in the latter, it may be a statute or regulation.

The domestic administrative framework domesticates the agreement experience, fitting the agreement and its implementation into familiar boxes of the agency’s work at home.<sup>124</sup> The agency is simply doing what it does in ordinary agency practice. Procedural implementation often leads to rules or rule-like pronouncements, and automatic implementation generally involves case-by-case action on the basis of a preexisting directive.

Adopting this perspective on agency implementation behavior also means interpreting the original delegation to negotiate as one that implicitly permits implementation. The domestic-administration proponent views the agency as acting in response to an implied delegation of authority to implement the agreement, not just to negotiate it, consistent with leading administrative law thinking on purposivism in delegation.<sup>125</sup> The agency discerns that the purpose of the delegation is to not only negotiate but to give effect to the commitments it negotiates and implements consistent with those congressional aims and principles. Congress is using the executive branch as its agent here and deploying one of its many process controls by giving the agency broad berth on implementation.<sup>126</sup>

Analogizing to domestic regulatory processes carries legal consequences for enforceability. Under this view, the agreement

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<sup>123</sup> See *supra* note 10.

<sup>124</sup> I use “domesticate” rather than “normalize” purposely. Cf. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1968–70 (2015) (discussing normalization’s unfinished business as relevant to executive agreements).

<sup>125</sup> See Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 875–76 (2015) (explaining how agencies seek to discern the purpose of the statute as part of their interpretation).

<sup>126</sup> This could be an additional control to the ones Professor Rebecca Ingber identified in her recent important work. See Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 412–37 (2020).

itself has no force of law. Rather, the commitments within the agreement become enforceable through agency action—action that the agency may or may not choose to take. Further, insofar as agencies execute a process consistent with the APA that results in the issuance of a rule or the conventional outcome of an adjudication, the APA may apply to agency implementation activities. That premise does not clearly resolve the question as to whether the agency may then invoke an APA foreign relations exception should its actions be challenged, but at least arbitrary-and-capricious review would apply.<sup>127</sup> Thus, under the domestic-administration model, the agreement has no legal force; its content acquires legal force through its implementation, and those processes are subject to review. Although there are very few judicial challenges to executive agreements, one could imagine that this domestic-administration approach to conceiving of agreement implementation might appeal to judges or courts accustomed to administrative law models, like the U.S. District Court for the District of Columbia.

The domestic-administration model normalizes executive agreement implementation as ordinary agency activity and does little to acknowledge the transnational features.<sup>128</sup> Under this approach, agreement implementation is not particularly distinctive in outcome or in output. But this is not the only view.

## B. International Affairs

A second approach to explaining and understanding agreement implementation is what I term the “international-affairs approach.” An internationalist is likely to mediate the agreement experience through the prism of treaties. Where the domestic-administration model analogizes to statutes, the international-affairs model analogizes the executive agreement situation to treaty doctrine.<sup>129</sup>

The longstanding treaty implementation debate is about the status of treaties in U.S. law—that is, whether they are automat-

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<sup>127</sup> Sitaraman, *supra* note 23, at 494.

<sup>128</sup> This framework relies on a formalist conceptualization of administrative law. There may be alternative domestication theories that are less rigid, but for now this offers a reasonable proxy.

<sup>129</sup> Treaties, as the term is used here, are international agreements that the United States has joined in accordance with the U.S. Constitution’s Treaty Clause. U.S. CONST. art. II, § 2, cl. 2.

ically enforceable in U.S. courts (self-executing) or whether an additional implementation step is required (non-self-executing).<sup>130</sup> Treaty doctrine, in contrast to domestic doctrines on statutes, determines the force of law of a treaty and its implementation based on standards considered to be objective and determinable through courts. Federal courts have frequently reviewed and occasionally refined the analysis as to the indicators and proper interpretation of self-executing and non-self-executing treaties.<sup>131</sup>

The international-affairs approach to executive agreement implementation tries to track and apply those same principles and terms to executive agreements. Thus, it interprets procedural implementation as action in service of a non-self-executing agreement and automatic implementation as the operation of a self-executing agreement.

Seeing procedural implementation as akin to implementing a non-self-executing treaty means that the agreement itself does not have the force of law; rather, the subsequent lawmaking steps create binding law. One can again see this best through a comparative example. In 1997, the United States entered into the Chemical Weapons Convention, which provides that “[e]ach State Party shall . . . adopt the necessary measures to implement its obligations under this Convention.”<sup>132</sup> That Convention is not self-executing, but it creates binding obligations on the United States. For example, each party to the Convention must “designate or establish a National Authority to serve as the national focal point for effective liaison . . . with other States Parties.”<sup>133</sup> Subsequently, Congress implemented the relevant provisions of the

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<sup>130</sup> See Carlos Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 695 (1995) (“A distinction has become entrenched in United States law between treaties that are ‘self-executing’ and those that are not. The precise nature of this distinction—indeed, its very existence—is a matter of some controversy and much confusion.”); *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979) (“The self-execution question is perhaps one of the most confounding in treaty law.”). The treaty implementation debate has raged for several decades, spurred most recently by the Supreme Court’s decision in *Medellín v. Texas*, 552 U.S. 491 (2009) (holding that even if an international treaty may constitute an international commitment, it is not binding domestic law unless either Congress has enacted statutes implementing the treaty or the treaty is self-executing); see also STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 15–23 (2018). *But see* Rebecca Crootof, *Judicial Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784 (2011) (arguing that those distinctions are less important than some suggest).

<sup>131</sup> See Jackson, *supra* note 31, at 318 (commenting that “[h]ierarchy of norms refers to the questions that arise when a directly applicable and invocable treaty norm is unavoidably inconsistent with other norms in the national legal system”).

<sup>132</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. VII(1), Jan. 13, 1993.

<sup>133</sup> *Id.* at art. VII(4).



Convention by passing legislation undertaking those obligations.<sup>134</sup>

Compare that experience to those set out above as instances of procedural implementation. An agency enters into an executive agreement with another government that features a similar provision (for example, that each party will adopt certain measures to prevent the development and use of chemical weapons).<sup>135</sup> After the agreement's entry into force, the agency would issue regulations that adopt that provision.

As this example shows, applying a treaty model to agreements requires seeing both the partnerships and the players as having shifted. In the context of treaties, it is widely accepted that the legislature decides and constructs the implementation mechanism.<sup>136</sup> Indeed, treaty formalists might reject this interpretation and extension to executive-agreement practice by agencies on that basis. From a formalist perspective, Congress is the only branch that is entitled to transform those international commitments into domestic commitments.<sup>137</sup> But other scholars tend to

<sup>134</sup> Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-856 (1998). This practice is longstanding. *See, e.g.*, Migratory Bird Treaty Act, c. 128, 40 Stat. 755 (1918). Sometimes the Senate confirms that no implementing legislation was needed. S. EXEC. REPT. 109-6, at 6 (2005). Implementing legislation may include various types of provisions: changes to U.S. law, institutional creation, and often some further delegation. Such legislation need neither follow immediately after the entry into force of the agreement nor name the agreement. For an example, see Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat*, 25 MICH. J. INT'L L. 265 (2004) (arguing that the International Convention on Civil and Political Rights was implemented into U.S. law through the Violence Against Women Act).

<sup>135</sup> For illustrative purposes, I am assuming agency authority to enter into such an agreement. Sample agreements with corresponding delegations are set out in Part I.

<sup>136</sup> *Medellin*, 552 U.S. at 494 ("[T]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress, not the Executive."); *see also* Galbraith, *supra* note 23, 1316-20 (describing how Congress implements treaties).

<sup>137</sup> *But see* Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 11, 23 (2009) (arguing that the president should be able to implement non-self-executing treaties); Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 353 (2008) (arguing that the Take Care Clause ought to be read to permit the president to implement some non-self-executing treaties). Professor Jean Galbraith does not rule out that the executive could implement a treaty, but she argues that the text of the treaty should contain such a delegation or the Senate's resolution of advice and consent should specify such a delegation. *See* Galbraith, *supra* note 23, at 1355. Some commentators have explored other prospects for executive implementation of a treaty. David A. Koplow, *When Is an Amendment Not an Amendment?: Modification of Arms Control Agreements without the Senate*, 59 U. CHI. L. REV. 981, 1008-14 (1992) (discussing implementation of a treaty via executive agreement, among other tools, and the congressional debates surrounding those questions). As for implementing legislation that gives the executive regulatory authority as part of a treaty's implementation, the Clean Air Act Amendments of 1990 give the EPA authority to implement a treaty: the Montreal Protocol on Substances that Deplete the

freely apply these ideas to agency action, concluding that with executive agreements, agencies assume this legislative role on their own.<sup>138</sup> That agencies are in this alone, apart from the other branches, is an element absent from the treaty experience, but the concepts track otherwise.

Seeing automatic implementation as akin to self-execution means that no further steps are needed to give the agreement commitment the force of law. The terms of such treaties apply directly in U.S. courts.<sup>139</sup> In the same way, agencies directly apply the terms of executive agreements that they consider to be automatically implemented.

Looking at agreement implementation through this lens, as compared to the domestic administration lens, is not just a matter of terminology. Rather than reviewing the procedural integrity of the agency action, as would be the emphasis in the domestic administration model, a court adopting this approach would instead review the agreement and interrogate the agency's interpretation of it to determine whether the automatic implementation was appropriate and the agreement enforceable.<sup>140</sup>

The international-affairs framework may be particularly attractive to courts and advocates that either are accustomed to international activities, like the U.S. Court of International Trade, or are readily engaged with treaties. The international-affairs model is likely to resonate with experienced foreign relations and treaty practitioners. In fact, some commentators have simply assumed that executive agreements and treaties go together—that they are treated the same way with respect to enforceability.<sup>141</sup> That view is supported by indiscriminate lumping by the judiciary.<sup>142</sup> Courts have sometimes drafted opinions in catchall terms using the wording “international obligations” but actually only

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Ozone Layer. See Clean Air Act Amendments of 1990, Pub L. No. 101-549, 104 Stat 2399 (1990).

<sup>138</sup> See, e.g., *Treaties' End*, *supra* note 3, at 1321.

<sup>139</sup> See Andrew Solomon and Katherine Brantingham, *When Can an Individual Enforce a Right Set Forth in an International Treaty?*, ASIL SIDEBAR (July 2006), <https://perma.cc/T8SL-8ND7>; cf. *Bond v. United States*, 564 U.S. 211, 215 (2014) (noting that the Chemical Weapons Convention is not self-executing).

<sup>140</sup> The Court in *Medellín* describes its textual review of treaties. 552 U.S. at 514–15.

<sup>141</sup> Others have independently suggested that there is a norm among congressional-executive agreements that they are self-executing, see *Treaties' End*, *supra* note 3, at 1321, but agency practice suggests otherwise.

<sup>142</sup> See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1956 (1999) (collecting cases); Senate Report 2001, *supra* note 43, at 86 (assuming, without explanation, extension to executive agreements).

drawing from treaty or treaty-styled examples in their discussion.<sup>143</sup>

Some internationalists find additional support for this approach in long-standing doctrine concerning sole executive agreements: agreements negotiated pursuant to the president's inherent powers. The Supreme Court has held that those types of agreements are self-executing.<sup>144</sup> Internationalists contend that the case for considering other executive agreements to be self-executing, or automatically implemented, is even stronger than the case made for sole executive agreements. Those proponents suggest that because Congress has provided a delegation to support the executive's work, there is an even stronger basis for seeing them as automatically implemented with the force of domestic law.<sup>145</sup>

This model also carries with it a nuanced understanding of the underlying negotiating delegation to the agency. According to this view, Congress makes two types of delegations: one according to which the agency is tasked with negotiating a non-self-executing agreement and another according to which the agency may enter into a self-executing agreement.<sup>146</sup> Various criteria may be identified that help the agency discern under which of the two delegations it acts, even if they are not expressly elaborated by Congress or the agency.<sup>147</sup>

This reading serves the same purpose as the domestic-administration model's view of an implicit delegation to implement, but it carries different conclusions. For one, a self-executing agreement is not necessarily subject to the same administrative law protections as the adjudication activities of the agency would be. Seeing the agreement as self-executing treats it as statute rather than subjecting the agency's action under it to scrutiny. For

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<sup>143</sup> See, e.g., *Medellin*, 552 U.S. at 525–26 (referring to international obligations without further distinction in a case about a treaty).

<sup>144</sup> See *Pink*, 315 U.S. at 229; *Belmont*, 301 U.S. at 330.

<sup>145</sup> E-mail from Former State Department Official #4 to Kathleen Claussen, Prof., Univ. of Miami Sch. of L. (Dec. 7, 2020) (on file with author).

<sup>146</sup> See MULLIGAN, *supra* note 130, at 15–16 (finding that international agreements that would require the United States to exercise authority that the Constitution exclusively assigns to Congress must be deemed non-self-executing and that implementing legislation is required to give such provisions domestic legal effect).

<sup>147</sup> Identifying the distinction in the original delegation is not something that any government official said was part of his or her typical exercise. Indeed, a comparison of a handful of delegations and the resulting agreements does not suggest any common features among the first group as compared to the second.

another, it may mean that the agreement supersedes agency action or earlier-in-time legislative action.<sup>148</sup> Thus, choosing between the domestic and international frameworks means choosing between different force-of-law outcomes.

### C. Constitutional Incapacity

Not all observers accept improvised implementation as appropriate or legal. Another view disputes the application of statutes or treaty doctrines in this context. I call this view the “constitutional-incapacity framework.” The incapacity proponent takes issue with agencies’ treatment of the underlying delegations and finds that the executive branch lacks authority to undertake any type of implementation without additional, express delegation. On that basis, the incapacity advocate rejects the legal soundness of the implementation mechanisms entirely.

This position contests the domestic-administration model’s suggestion that Congress is implicitly permitting the executive to incorporate agreements into U.S. law as it sees fit; it also rejects the international-affairs model’s position that Congress is implicitly delegating decisions about execution. The incapacity advocate maintains that such a *carte blanche* approach would be surprising if true, given how much Congress has rebuked the executive in the treaty context where the executive proposed to delegate to itself.<sup>149</sup> Treaties and statutes can and do give power to executive-branch officers in certain circumstances because they are subject to additional congressional engagement or judicial review.<sup>150</sup> But executive agreements do not benefit from that arrangement and cannot be treated as if they do, according to the incapacity model. Viewing executive agreements as interchangeable with treaties or statutes raises concerns under the Supremacy Clause, which recognizes the Constitution, laws, and treaties as the “supreme law of the land.”<sup>151</sup>

For the same reason, the incapacity framework rejects the internationalists’ argument that executive-agreement commitments could have the force of law domestically on the basis that their self-executing status claims are stronger than the case for

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<sup>148</sup> It would give it the force of the law of the land. See SLOSS, *supra* note 30, at 107–28 (discussing the widely accepted doctrinal rules).

<sup>149</sup> See, e.g., Galbraith, *supra* note 23, at 1357 (providing an example).

<sup>150</sup> See *Holden v. Joy*, 84 U.S. 211, 225 (1872) (describing the further review).

<sup>151</sup> U.S. CONST. art. V, cl. 2. The interchangeability thesis is well-known. See, e.g., Clark, *supra* note 26, at 1598 (explaining the constitutional hierarchy); Galbraith, *supra* note 23, at 1350 (same); Ackerman & Golove, *supra* note 88, at 829 (same).

sole executive agreements.<sup>152</sup> Unless an executive agreement is considered a “treaty” or a “law,” the Supremacy Clause does not permit it to override federal law. Under this view, the Constitution provides political safeguards over agency activity but denies any one federal actor the power to make federal law alone.<sup>153</sup>

The incapacity framework rebuffs the insinuation made by domestic-administration proponents that Congress is treating the executive as its agent, with wide discretion. According to the incapacity view, it takes an extreme reading of these delegations to see them as allowing the agency to change law without more. Most of the executive agreements studied here would falter on a constitutional basis if implemented by the executive under some claim of inherent authority.<sup>154</sup> Any conclusion to the contrary would diverge from the way Congress operates in the foreign-commercial context as well as in other areas of law where it does provide such guidance.<sup>155</sup>

The incapacity framework also contests the view that Congress has acquiesced to improvised implementation and accepted the executive’s wide interpretation of the negotiating delegations. Scholars have effectively shown that Congress does not know the extent of the executive’s agreement activity.<sup>156</sup> In the eyes of the incapacity advocate, concerns about transparency issues temper any claim that Congress approves of the executive’s implementation, just as the dates of these delegations do. Most of Congress’s delegations to the executive branch that invite the branch to negotiate agreements originated in the second half of the twentieth century.<sup>157</sup> They coincide with the development of

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<sup>152</sup> As noted above, sole executive agreements made pursuant to the president’s inherent authority may be self-executing. *Pink*, 315 U.S. at 229; *Belmont*, 301 U.S. at 330.

<sup>153</sup> Clark, *supra* note 26, at 1604.

<sup>154</sup> It is not the purpose of this Article to scrutinize the delegations surrounding individual implementation actions or their underlying agreements. Still, it is noteworthy that, where known, the statutes on which agencies purport to rely for implementation often diverge from their negotiating authority as stated in the congressional delegation. With respect to the St. Lawrence Seaway agreement and implementation noted above, the State Department refers to 33 U.S.C. § 988(a) as authorization for the agreement. The Department of Transportation likewise relies on that delegation for its rulemaking. See 33 U.S.C. §§ 983(a), 984(a)(4), 988; *see also, e.g., Tariff of Tolls*, 86 Fed. Reg. 15,585. But in the case of the distilled-spirits agreements, the USTR has relied on its organic act where the Treasury necessarily cites 27 U.S.C. § 205(e).

<sup>155</sup> *See, e.g.*, 19 U.S.C. § 1862 (describing in detail the policy tools available to the executive when certain foreign commercial and national security conditions are met).

<sup>156</sup> *See, e.g.*, Hathaway et al., *supra* note 9, at 694–97.

<sup>157</sup> Nearly all of the more than forty delegations studied for this project date to this period.

the Case-Zablocki Act,<sup>158</sup> a transparency regime created at a time when there were many fewer executive agreements. There has been an unanticipated explosion of international legal development in the intervening years. Some of these delegations also preceded the end of the legislative veto, which could have provided additional congressional involvement and checks on the execution of these delegations.<sup>159</sup>

The constitutional-incapacity model is especially concerned with instances where an agency uses an executive agreement to carry out work that it could not have done without an executive agreement. This is not conjecture: some agencies have used executive agreements to achieve both goals not clearly in their purview and outcomes that they could not have reached through regulation. For instance, an agreement with Mexico regarding steel and aluminum negotiated in 2019 by its terms appears to give the U.S. president more authority than was available under the delegating statute.<sup>160</sup> Similarly, some executive agreements rely on other executive agreements for their constitutional authority.<sup>161</sup> In such instances, agencies bootstrap multiple agreements from one congressional delegation. Staff have noted that some agencies will intentionally choose to negotiate agreements in areas where congressional approval is not needed and build on them progressively over time.<sup>162</sup>

This model raises alarm as to how the executive may be co-opting the legislative role by deciding, without direction from Congress, the strength of any executive-agreement commitment. Further, the executive can use that authority to take additional regulatory action and displace statutes. This sort of behavior is

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<sup>158</sup> Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b).

<sup>159</sup> Many predate *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), in which the Court declared legislative vetoes to be unconstitutional, and they originally included legislative-veto provisions. Such provisions would have required the executive branch to send the agreement to Congress prior to its entry into force. Post-*Chadha*, Congress tended to leave the delegations without taking further steps or installing greater oversight. *Presidential Power*, *supra* note 9, at 201.

<sup>160</sup> See Joint Statement by the United States and Mexico on Section 232 Duties on Steel and Aluminum, U.S.-Mex., <https://perma.cc/UUB5-ED4J> (providing license to either party to impose duties on steel and aluminum products coming from the other party). Although the agreement provides for this arrangement between the two countries, the president is likely not authorized under U.S. law to impose such tariffs. See, e.g., Simon Lester (@snlester), TWITTER (June 23, 2020), <https://perma.cc/WLB6-LAVE>.

<sup>161</sup> See *USTR Statement on Successful Conclusion of Steel Negotiations with Mexico*, OFF. OF THE U.S. TRADE REP. (Nov. 5, 2020), <https://perma.cc/DN2M-5Z82> (relying entirely on an earlier agreement as a legal foundation for additional rulemaking).

<sup>162</sup> Interview with USTR Official via Zoom (Nov. 4, 2020) (on file with author).

not conventional executive overreach.<sup>163</sup> Rather, executive agreements provide an additional means for regulators, businesses, and foreign governments not just to influence or execute but also to box out legislative authorities.<sup>164</sup> The executive has used its limited delegation authority to control the narrative as well as the future direction of the law, pushing Congress (and sometimes agencies) farther back from foreign relations decision-making.

The incapacity framework finds all these implied delegations to be insufficient to support agency work, which it considers *ultra vires* and illegitimate. By this view, in contrast to the positions of the other two frameworks, neither the agreements themselves nor the subsequent agency implementation actions have the force of law. It maintains that agencies are empowered only to negotiate agreements, and like the treaty formalists might conclude, implementation ought to be left to Congress.

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Viewing executive-agreement implementation according to these preexisting boxes and categories, none of which is fully representative of the agreement experience, is imperfect. Each of these frameworks seeks to rationalize and explain agency practice based on prevailing ideas designed for other areas of law. In both our scholarly and doctrinal dialogues about statutes and treaties, as well as in our constitutional separation of powers debates, executive agreements are either absent or viewed as exceptions to mainstream activities. That oversight is a result of disciplinary pathologies that are premised on erroneous notions about the roles of the executive and the legislature in transnational regulation. None of these approaches proves reliable for analyzing the enforceability and implementation of agreements.

Perhaps most importantly, the pliability of these approaches permits agencies and their advocates to try to have it both ways: they can claim foreign relations exceptionalism when convenient to achieve agency aims without scrutiny, and they can claim domestic administrative privilege when it suits them to shield

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<sup>163</sup> See generally OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006).

<sup>164</sup> In basketball, a player wishing to protect her place under the basket, in seeking to recover a rebound from a failed shot, “boxes out” her opponent. She lines up in front of her opponent and then pushes back so that she occupies the closer spot to the basket and her opponent cannot reach the ball—no matter who took the original shot or whose side of the court the players are on.

themselves from congressional oversight or other forms of interference.

The developments surrounding implementation of executive agreements are not just relevant to the statute and treaty duopoly in the implementation literature; rather, those debates have an additional set of applications with different stakes and features. The divergent outcomes among these approaches suggest that some reconciliation may be needed. That reconciliation could take place after the fact, acknowledging that improvised implementation in its present incarnation is here to stay, or it could mean revisiting the present practices and considering structural reforms on the front end. The next Part charts a way forward.

#### IV. RECONCILIATIONS AND REFORM

This Part considers institutional responses to the normative appraisal carried out above. The best response, I contend, is not prioritizing one of the three positive frameworks. Rather, agreement implementation is better managed through changes to the design of statutory programs that give rise to the agreements. I begin from the premise that implementation is largely in Congress's hands. Congress can alleviate the need for guesswork in implementation while preserving some executive autonomy. I recommend a way forward that I call "prescriptive implementation." Prescriptive implementation better accounts for the pitfalls and the profits of the present approach. This Part then turns to lessons and implications. The entire agreement-implementation process has takeaways for the intersection of foreign relations and separation of powers, as well as for administrative law.

##### A. Finding a Practical Way Forward

We return to the critical normative question of how these types of obligations *ought* to be implemented. Executive agreement implementation does not have to promote some rule of law values at the expense of others. Much of the uncertainty can be alleviated, and therefore many of these problems addressed, if Congress could take a slightly heavier hand and write more into the original delegation. Revising the present approaches to address these democratic deficits would go a long way to creating a stable and legitimate regulatory landscape. There is a way both to appease separation of powers formalists and to maintain the functional benefits of executive-agreement implementation.



I offer an alternative to assuage some of the uncertainty. Although it requires some statutory heavy lifting, prescriptive implementation is already a feature of some delegations, and there is room for more. Congress just needs to provide moderately more direction. This approach would sustain some degree of flexibility while also resolving unknowns both for the public and for the bureaucrats who face the difficulty of making these legal and institutional decisions on the fly.

### 1. Prescriptive implementation.

As noted from the outset of this study, the legal community tends to look at the relationship between Congress and the executive regarding agreements in terms of the presence or absence of a delegation.<sup>165</sup> Yet, rarely do we scrutinize whether Congress is writing enough into its delegations.<sup>166</sup> Rather, scholars have tried to resolve the question largely by dissolving it. Prior works have dismissed the question of whether Congress needs to write in more based on two rationales: first, by contending that some executive agreements are not changing U.S. law and are therefore inconsequential, and second, by observing that there is a regulatory process with checks and balances built in for executive-branch activity that applies likewise to agreement implementation.<sup>167</sup> As the examples above indicate, those explanations are overly limited. First, many executive agreements do make or force changes to U.S. law in some way. The perceptions among some lawmakers that these agreements are just clarifying devices that do not contain obligations or carry legal weight have been shown

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<sup>165</sup> See, e.g., Hathaway et al., *supra* note 9, at 634, 682; *Presidential Power*, *supra* note 9, at 145.

<sup>166</sup> Such oversight is sometimes assumed. See, e.g., Young, *supra* note 2, at 130. (“Delegations to agencies have been accepted in our legal culture primarily because both the courts and Congress retain significant control over the exercise of delegated authority.”); *Treaties’ End*, *supra* note 3, at 1321 (“The legislation creating [congressional-executive agreements] can include any necessary implementing language . . . the same act that provides the authority to accede to the international agreement can also make the necessary statutory changes to implement the obligation incurred.”).

<sup>167</sup> Others have noted that most delegations do not include the power to make or interpret law that is binding within the U.S. legal system. See CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 1–31 (2d ed. 2015). Professor Galbraith adds another consideration: preexisting domestic authority. She argues that “to ensure that the United States can implement an international commitment, the executive branch will generally need . . . [presidential authority or congressional legislation].” Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1707 (2017).

to be problematic.<sup>168</sup> It is simply a matter of fact that agreements frequently create new commitments; they are not just part of or amendments to other instruments.<sup>169</sup>

Second, and more importantly for this study, while some executive agreements may not themselves purport to change the law, they are being operationalized in ways that do. Through formal and informal agency actions, executive agreements become embedded in U.S. law. Thus, it is insufficient to conclude that a particular agreement does not conflict with U.S. law so as to require a change. That executive agreement creates a binding commitment on the United States that may require maintaining course, may require a new course of action, and may change the course of executive-branch activity. Further, that agreement may entrench certain practices that precipitate still additional law-making. Often, more directly, that agreement may mean the agency develops an instrument with direct effect on private parties. And, as we have seen, that agreement is not subject to regulatory or judicial oversight in the way that domestic agency work is.

Our current thinking is overly constrained by debates in foreign relations law that have adhered to questions of text and structure, as well as by the administrative law debates on process, checks, and balances. Even though the legal vehicles that agencies use to drive implementation are parallel to run-of-the-mill domestic-policymaking processes governed by administrative law, the foreign element tends to bring discussions back to separation of powers concerns, crowding out more creative solutions. What is needed here is empowerment through circumscribed direction, not greater domestication, internationalization, or constitutional brakes.

One way forward could be for Congress to articulate how agencies should go about implementation in its original delegation. Congress exercises control over the bureaucracy through

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<sup>168</sup> See IAN FERGUSSON & CHRISTOPHER DAVIS, CONG. RSCH. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 15 (2019); see also Lighthizer Testimony 2020, *supra* note 86 (question from Senator Chuck Grassley concerning integrating geographical indicators into the agreement with the United Kingdom rather than putting them in a side letter).

<sup>169</sup> See, e.g., Exchange of Letters, Pan.-U.S., June 28, 2007 (concerning domestic suppliers) (on file with author); Exchange of Letters, Kor.-U.S., June 30, 2007 (concerning copyright and distribution of works) (on file with author); Exchange of Letters, Bahr.-U.S., Sept. 14, 2004 (concerning gambling regulations) (on file with author).

agency design, including in foreign relations.<sup>170</sup> Improvised implementation calls into question the reliability and sufficiency of those initial structural bargains. Instead, Congress could build in parameters as to implementation in its delegations to negotiate. Prescriptive implementation involves an explicit allocation of congressional authority to the agency for implementation. It could go further still by setting up the establishment of appropriate procedures or bureaucratic structures to support effective implementation.

This move would provide guidance to executive-branch officials who sometimes struggle with the operationalization of various commitments, and it would resolve outstanding legal questions about the separation of powers. It would alleviate the need for a guessing game between and within the domestic-administration or internationalist frames, and it would resolve the preoccupations of the incapacity advocates.<sup>171</sup> Congress could establish in advance of negotiation any parameters needed to address the agreement's ultimate force of law and enforceability. And it need not be one-size-fits-all. Congress could choose to give the executive discretion in that process as Congress sees fit. For example, Congress might choose to give the executive increased discretion to adopt the implementation method in areas that require more expertise or flexibility and responsiveness. In areas more likely to be compromised by capture, Congress could direct the executive to undertake a variety of public engagements, and in areas of broad public concern, it could direct agencies to seek more input through rulemaking processes.

The implementation mechanism may likewise depend on the breadth of the substantive delegation—how much license the executive has on the content of the agreement, for instance. Prescriptive implementation preserves greater bicameralism by shifting the preliminary decision-making to Congress to determine what type of rule it wishes the executive to pursue.<sup>172</sup> It also allows Congress to let agencies choose where it believes they are ultimately well positioned to manage these legal questions, mediating among the institutional competencies of the branches.

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<sup>170</sup> See Ingber, *supra* note 126, at 412–37.

<sup>171</sup> It would likewise eliminate reliance on any preexisting domestic authority or the president's inherent authority. See, e.g., Galbraith, *supra* note 167, at 1708–09.

<sup>172</sup> Professor John McGinnis has made similar arguments in the context of clear statements of self-execution. See John O. McGinnis, Medellín and the Future of International Delegation, 118 YALE L.J. 1712, 1715 (2009) (calling for heightened standards for self-execution “to assure that legislative consent to the delegation is actual, deliberative, and transparent”).

Providing implementation guidance to agencies would put the foreign relations bureaucracy on stronger footing in its management of transnational regulation.

On rare occasions, Congress has provided such a path for implementation, directing the president or the agency as to how to convert agreement commitments to domestic law. Take § 103(a) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.<sup>173</sup> This section permits the president to enter into trade agreements with foreign countries “[w]henver the President determines that one or more existing duties or other import restrictions on any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States.”<sup>174</sup> Upon entering into such agreements, the president may proclaim corresponding changes to U.S. tariff rates.<sup>175</sup> More than two dozen agreements have entered into force under these terms.<sup>176</sup> In these instances, Congress prescribed authorization (tariff-modification delegation), method (agreement), and mode of implementation (presidential proclamation). In the few test cases of such provisions in the early part of the twentieth century, courts widely permitted prescriptive implementation.<sup>177</sup>

Such prescriptions are uncommon. I examined more than forty different delegations from Congress to the executive to negotiate or conclude an international agreement, and in only three did Congress indicate how the executive branch ought to change or make U.S. law on the basis of its agreement or provide for any

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<sup>173</sup> 19 U.S.C. 4201 § 103(a).

<sup>174</sup> § 103(a).

<sup>175</sup> § 103(a).

<sup>176</sup> I was able to identify only three such agreements from 1995 to 2019, although the 2019 trade agreement with Japan was justified to Congress as a § 103(a) agreement. See CHRISTOPHER A. CASEY & BRANDON J. MURRILL, CONG. RSCH. SERV., IF11400, PRESIDENTIAL AUTHORITY TO ADDRESS TARIFF BARRIERS IN TRADE AGREEMENTS UNDER SECTION 103(A) (2020); BROCK R. WILLIAMS, CATHLEEN D. CIMINO-ISAACS & ANITA REGMI, CONG. RSCH. SERV., R46140, “STAGE ONE” U.S.-JAPAN TRADE AGREEMENTS 18 (2019). Whether that agreement satisfies the statutory criteria is a matter of debate. See *Ways & Means Members Press USTR for Answers on U.S.-Japan Trade Agreement in Letter to Lighthizer*, INSIDE U.S. TRADE, Nov. 27, 2019. The low number of agreements after 1995 can be explained by the creation of the World Trade Organization and the development of major congressional-executive free trade agreements as the primary instrument of trade policy.

<sup>177</sup> See, e.g., *La Manna, Azema & Farnan v. United States*, 144 F. 683 (2d Cir. 1906) (per curiam) (concluding that an agreement with France, implemented into U.S. law by proclamation as called for by the statute, was valid); *Mihalovitch, Fletcher & Co. v. United States*, 160 F. 988, 988 (C.C.S.D. Ohio 1908) (same).

further congressional direction or supervision.<sup>178</sup> Clearer pathways such as these, even if diverse, would alleviate some of the legally risky improvisation by the executive branch that this study highlights.

Supplying implementation guidance would also help protect against executive underreach, which is a problem in other areas of administrative law.<sup>179</sup> Where an agency fulfills a statutory mandate to negotiate an agreement but then refuses to act on it, including language regarding implementation can ensure that the legislative purpose is fully realized. Implementation then completes the work through which agencies lay out the requirements of a statute.<sup>180</sup>

Prescriptive implementation likewise complements efforts to enhance transparency in executive agreements. With further guidance from Congress as to implementation, more of what the agency develops is likely to become a matter of public record—not only because Congress could require that but also in the course of the ordinary procedural activities that Congress is likely to prescribe. Directing agencies to use administrative law mechanisms in the implementation phase advances prior arguments calling for the application of the APA in the agreement context.<sup>181</sup> Even where agencies rebuff efforts to require the APA in the *making* of agreements, lawmakers may find greater receptivity in applying the APA to *implementation* once an agreement has been negotiated.

This alternative mechanism is one way to direct the thinking for legal architects seeking to maximize the domestic-administration proponent's commitments to expertise, efficiency, and flexibility while embracing the internationalist's prioritization of an outside actor calling some of the shots. It avoids the

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<sup>178</sup> I selected these statutory provisions based on the delegations cited by the executive branch in its reports to Congress on executive agreements. These are available in the Case Act memoranda provided to Congress, many of which have been collected by way of a Freedom of Information Act request conducted by Professors Oona A. Hathaway, Curtis A. Bradley, and Jack L. Goldsmith. See Hathaway et al., *supra* note 9, at 635. As Professors Hathaway, Bradley, and Goldsmith's data reveal, the executive relies on only a few dozen statutes as the foundation for its executive-agreement negotiations, and few of them include any clear delegation to negotiate an agreement at all. *Id.* at 683–84. My team also considered delegations surrounding the primary negotiating delegation to ensure that further instruction was not located elsewhere in the same chapter of the U.S. Code.

<sup>179</sup> I use the term “executive underreach” here to refer to occasions when Congress delegates and the executive does not act. Cf. David Pozen & Kim L. Scheppelle, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. 608 (2020).

<sup>180</sup> See Stack, *supra* note 125, at 876.

<sup>181</sup> See *Presidential Power*, *supra* note 9, at 241–59.

more drastic interventions, such as sending agreements back to Congress for implementation, while also sidestepping wholesale judicial review. It rejects the internationalist's blurring of the line between treaty and agreement. And, it clearly delineates responsibility between Congress and administrative agencies in a way that ameliorates the concerns of the incapacity framework through its explicit delegation of authority.

At present, there is no clear correlation between how independent an agency is and how it implements these sorts of agreements. Prescriptive implementation would serve as a loose-fitting managerial device and would take account of those important distinctions. Prescriptive implementation credits agency implementation choices within a congressionally directed foreign relations administrative state.

Accordingly, prescriptive implementation could have benefits for all three branches. The more tailored response that prescriptive implementation would provide could create a balance that would avoid overly restrictive congressional intervention while also giving the executive a clear path to move from international to U.S. law. It would mean providing the mechanism that the executive ought to use without telling the executive what the resulting content ought to entail: a specification of means as compared to a specification of rules. Some executive-branch lawyers have suggested that further implementation-oriented guidance would simplify and streamline their work, relieving some of the legal speculation of improvised implementation.<sup>182</sup> This customized approach would also create legal safeguards against congressional interference in the outcome of negotiations by setting the guidance prospectively without regard to the content of the agreement. Prescriptive implementation recognizes the agency's law-making power in administrative governance and the limitations of existing delegations. It seeks to ensure that at least one other branch can play a supervisory role in securing the rule of law in that domain.

## 2. Discontents and their alternatives.

Prescriptive implementation is not the only way to alleviate some of the concerns about improvised implementation. It has its limitations, especially where Congress is unable to make such moves, where it is ill-prepared to do so, or where doing so would

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<sup>182</sup> Telephone Interview with Former Government Officials (July 7, 2021) (on file with author).

exacerbate process concerns. Still, it holds more promise than the alternatives. For example, another institutional solution could be to rely upon centralized instruction from the White House as to the organization and conversion of international commitments. Top-down guidance from within the executive branch could better address competing or complimentary legislative authorities and seek to reconcile their areas of overlap. The limited political valence of some of these authorities could create space for a lasting White House–led organization and workplan. But such an approach would require extensive legal support to be effective and comprehensive, which makes it both less attractive and less likely to be adopted.

Another option would be for the State Department, as primary keeper of international agreements on the part of the U.S. government, to create requirements for other agencies that would help manage implementation processes and streamline them based on a legal analysis rather than through improvised methods. The State Department maintains a similar process called the Circular-175 process (C-175) for agreement negotiations.<sup>183</sup> Under that regime, agencies wishing to enter into an agreement with a foreign partner must engage with the State Department and its lawyers regarding the authority for such a negotiation and the drafting that follows.<sup>184</sup> Adopting a C-175 process for implementation could create some consistency and reliability across the foreign-facing administrative state. It would create additional responsibilities for the State Department that would likely require financial resources, however. The State Department has shown in other contexts that it may not be best suited for such a role—and that playing such a role has the potential to strengthen interagency discord.<sup>185</sup> A compromise option could be for Congress to require that agencies also outline their implementation plans and authorities when they report their agreements to the State Department for its reporting to Congress;<sup>186</sup> such a step would at least create some transparency and opportunity for tracking where there is none at present.

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<sup>183</sup> 1 U.S.C. § 112b(c); U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL 720, <https://perma.cc/7296-VEAT> (2006).

<sup>184</sup> See U.S. DEP'T OF STATE, SUPPLEMENTAL HANDBOOK ON THE C-175 PROCESS: ROUTINE SCIENCE AND TECHNOLOGY AGREEMENTS, <https://perma.cc/DPE3-5QYA>; 22 C.F.R. § 181.4.

<sup>185</sup> See, e.g., Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845, 871 (2021). See generally Hathaway et. al, *supra* note 9 (discussing areas where the State Department has fallen short on agreement reporting and publishing).

<sup>186</sup> See *supra* text accompanying notes 157–159 (discussing the Case-Zablocki Act).

Still another option would be to have the Administrative Conference of the United States (ACUS), an independent federal agency within the executive branch charged with recommending improvements to administrative process and procedure, lead a process of information gathering and analysis that would then lead to guidelines for agencies on how to carry out agreement implementation. Although ACUS does not typically work in the foreign relations space, moving it in that direction would help bridge the divides discussed in this Article. The final output—a recommendation and a report of best practices—would not be binding on any agency, but it could lead to some informal harmonization among agency approaches.

Agreement implementation could also be an opportunity for hybrid lawmaking through which federal agencies solicit views from the public or other agencies before entering into commitments, similar to the way public comment is sought on trade agreements.<sup>187</sup> Both Congress and the executive could develop more elaborate consultation requirements and public hearings to receive and incorporate views throughout the implementation process, essentially clarifying and fortifying procedural implementation mechanisms prospectively.

Agencies could unroll their own alternative strategies for implementation much as has occurred to integrate private standards into regulatory work.<sup>188</sup> Agency reliance on private standards exhibits many of the same transparency issues and even graver access problems than do executive agreements.<sup>189</sup> Some of the issues in the private standards context were alleviated by the Office of the Federal Register's rule requiring agencies attempting to incorporate private standards by reference to add more information about those standards to their rules, including full summaries and the steps taken to make the relevant materials "reasonably available."<sup>190</sup> Even a simple requirement of asking agencies to publish their agreements along with the implementation or treat-

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<sup>187</sup> See Fergusson & Davis, *supra* note 168, at 3.

<sup>188</sup> I thank Professor Gabriel Scheffler for this point.

<sup>189</sup> At earlier points in history, owners of such standards charged exorbitant fees for access to private standards that agencies had imposed. See, e.g., Daniel Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1424 (2017) (providing examples). See generally Nina A. Mendelson, *Private Control Over Access to Public Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497 (2013).

<sup>190</sup> Incorporation by Reference, 79 Fed. Reg. 66,267 (Nov. 7, 2014).



ment of those agreements, much like has been proposed to increase accountability as to the making of executive agreements,<sup>191</sup> could be democratically meaningful and enhance congressional awareness as well as public awareness as to just what tools agencies are using for this purpose.

Finally, a question remains as to whether the courts can do the necessary sorting on these critical questions of the enforceability of the resulting domestic or international commitments as created by agencies. To date, courts have either shied away from the question or focused on matters of delegatory sufficiency. Several legal canons, such as ripeness and justiciability, make these cases unattractive if not prohibitive.<sup>192</sup> Foreign relations exceptionalism in administrative law allows courts to punt in the face of an APA challenge, for instance.<sup>193</sup> The invisibility of these agreements, their often-limited product or service markets, and the option of agency-level solutions have limited interest in judicial resolution. Courts are handicapped by these limitations and underequipped to do the necessary sorting. Instead, private sector actors are lobbying agencies privately to undertake various implementation mechanisms.<sup>194</sup>

In fact, where clarification is most needed is less with respect to demarcating the fringes of statutory delegations as courts have tended to do but more with respect to agreement facilitation. That is not to diminish the importance of questions of delegation, but given the present landscape, its far reach, and the practical difficulties of unwinding it, the weightiest legal issues to be sorted out as they relate to executive agreements are far more about their performance than their promise. The reality is that courts may not be the best suited to do that work, but they may be faced nevertheless with some of executive agreements' practical manifestations before too long.

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<sup>191</sup> See, e.g., Hathaway et. al., *supra* note 9, at 697–709 (recommending legislative reform to the State Department's system for agreement transparency); Kathleen Claussen, *Trade Transparency: A Call for Surfacing Unseen Deals*, 122 COLUM L. REV. F. 1, 7–9 (recommending a stronger regime for agreement publication).

<sup>192</sup> See, e.g., *Regan v. Wald*, 468 U.S. 222, 242 (1984) (referring to the “classical deference to the political branches in matters of foreign policy”).

<sup>193</sup> 5 U.S.C. § 553(a)(1); see also Sitaraman, *supra* note 23 (elaborating and cabining the exception).

<sup>194</sup> Email from Former Department of Commerce Official to Kathleen Claussen, Prof., Univ. of Miami Sch. of L. (July 15, 2021) (on file with author).

## B. A New Disciplinary and Doctrinal Frontier

Agency implementation of international commitments poses a new frontier for both foreign relations and administrative law scholars.<sup>195</sup> Its features fit uncomfortably into existing frameworks, which is why a new mechanism and a corresponding framework that follows congressional prescription is needed. Just as the domestic administrative and regulatory landscape looks different than it did when our traditional administrative law tools were crafted,<sup>196</sup> demanding fresh thinking, those differences are compounded when it comes to executive agreements. There are far more agreements than when the conventional models developed; those agreements are increasingly unmoored from clear delegations of authority and less transparent. Most importantly, and likely unexpected by drafters, they are directly applied by agencies to meet the political and regulatory challenges of the globalized economy. The structures traditionally associated with foreign agreements remain a publication and reporting chain of command that does not work, rather than instruments or institutions that we associate with domestic rulemaking.<sup>197</sup>

Given what this research has laid bare as to agency behavior and how agreement implementation provides a powerful counterparadigm to our mainstream understandings, multiple lessons surface for those priors and for the fields across which this work occurs.

First is a recognition of the significant areas of practice where foreign relations and administrative law ideas coincide. One would expect the difficulty in the epistemological landscape to be one of overlap, rather than oversight, but that has not been the case. Their complementary features lend themselves to more scholarly cross-pollination than has occurred. Executive agreements are underappreciated as key instruments in the domestic and international regulatory project. It is not just that foreign relations law covers substance and administrative law covers procedure. More directly, executive-agreement implementation is a product of both subfields, and this recognition reveals the need for a theoretical reconceptualization of existing silos. One difficulty in doing so is that both literatures bring baggage. The fields

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<sup>195</sup> Still another frontier not taken up here are foreign compacts at the state level concerning transboundary roads, bridges, and waterways. There is more work to be done on whether states are implementing those in ways consistent with the intent of their legislatures, for example.

<sup>196</sup> See Gluck et al., *supra* note 94, at 1792.

<sup>197</sup> See Hathaway et. al., *supra* note 9, at 633.

have shared values but different institutional and intellectual pedigrees that inform them.

Few see foreign relations law as belonging to or working with administrative law.<sup>198</sup> This Article joins other recent studies that suggest that foreign relations scholars ought to confront additional questions of administrative law.<sup>199</sup> It seeks to shift the focus of the central question of foreign relations law (how and to what extent do international commitments become part of U.S. law)<sup>200</sup> from courts, constitutional law, and treaties to agencies, administrative law, and executive agreements.

Further, in foreign relations, the mainstream works thoroughly review the separation of powers issues in the making and authorization of executive agreements,<sup>201</sup> while a second strain of scholarship covers the separation of powers in exiting agreements.<sup>202</sup> Both the entrance and the exit are well covered. But almost no work has been done on the in-between. This is a perplexing shortcoming of foreign relations law: there is widespread acceptance of executive agreements as the primary tool of U.S. international lawmaking, but the available analytical work on them only looks at how they are created or destroyed.<sup>203</sup>

Similarly, our intellectual inheritance in foreign relations law also carries with it a long-standing and well-entrenched distinction between monism and dualism, two different schools of thought on the relationship between international and domestic law. Monism posits that there is no distinction between the two. As Professor John Coyle explains, “[t]he monist view is simply that international law and domestic law are part of the same legal

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<sup>198</sup> Professors Ganesh Sitaraman and Ingrid Wuerth make the point that foreign relations law flirts with administrative law but never fully embraces it. See Sitaraman & Wuerth, *supra* note 124, at 1949–51.

<sup>199</sup> See Sitaraman, *supra* note 23, at 492 (noting that they “raise precisely the same set of competing constitutional and functional values”); William S. Dodge, *Chevron Deference and Extraterritorial Regulation*, 95 N.C. L. REV. 911 (2017) (discussing the intersection between presumptions against extraterritoriality and the steps of *Chevron*).

<sup>200</sup> See BRADLEY, *supra* note 43, at 1–31 (defining foreign relations law as the domestic law of each nation that governs how that nation interacts with the rest of the world).

<sup>201</sup> See *Presidential Power*, *supra* note 9, at 145 (discussing the separation of powers in the *making*, or “power to conclude”).

<sup>202</sup> See, e.g., Joost Pauwelyn & Rebecca J. Hamilton, *Exit from International Tribunals*, 2018 J. INT’L DISP. SETTLEMENT 1. See also generally Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 118 YALE L.J.F. 432 (2018); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

<sup>203</sup> Some scholars have discussed when they can be deployed. See, e.g., Bodansky & Spiro, *supra* note 9, at 927 (“[A] key feature of [executive agreements plus] is that they must not only be consistent with, and capable of implementation on the basis of existing law, but also be complementary to existing law by addressing the transnational aspects of a problem.”).

system and that domestic courts may, whenever necessary, draw upon international law as a rule of decision.”<sup>204</sup> Dualism posits that international law and domestic law exist in two separate spheres and that the relationship between the two spheres is mediated by domestic actors. Coyle writes, “[i]n a dualist system, domestic actors may choose to incorporate elements of international law into domestic law, but they are likewise free to reject those elements if they so choose.”<sup>205</sup> The majority view among U.S. foreign relations scholars has been that the U.S. system is primarily dualist though the lines are not entirely solid between the camps.<sup>206</sup> This traditional understanding can be seen in the treaty debates. Under a dualist analysis, apart from self-executing treaties that automatically become part of U.S. law, all other international instruments require some further step to be considered U.S. law and to be eligible for enforcement in U.S. courts.

This review of improvised implementation by agencies shows that there is far more happening on the monist side than was previously understood or appreciated. The prevalence of automatic implementation is not just an instantiation of creeping monism but rather may be reflective of dualism’s gradual dissipation.<sup>207</sup> Our improvised implementation mechanisms move the needle of U.S. experience closer to monism than prior encounters have suggested.

Likewise, our typical administrative law accounts do not readily consider agreements as ordinary instruments in the administrative orchestra. Indeed, they specifically exclude foreign

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<sup>204</sup> See *Incorporative Statutes*, *supra* note 30, at 434 n.1.

<sup>205</sup> *Id.*

<sup>206</sup> Compare Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 531 (1999) (“Notwithstanding academic claims to the contrary, the U.S. approach to international law has been and continues to be fundamentally dualist.”), and John O. McGinnis & Ilya Somin, *Should International Law be Part of Our Law?*, 59 STAN. L. REV. 1175, 1180 (2007) (“[S]trict dualism is particularly suitable for the legal regime of a modern democratic superpower.”), with Jackson, *supra* note 31, at 320 (suggesting that the United States is a hybrid monist-dualist system), and Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2169–71 (1999) (seeing monism as the framers’ preference). Some scholars have identified nonetheless a “creeping monism” seen in the way that courts increasingly rely on international law to inform their decision-making in certain areas of law. See Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 639 (2007) (“Despite its historical hybrid approach to treaty incorporation, by the latter half of the twentieth century the American legal system shared with its common law counterparts a fairly strict dualist approach to human rights treaties.”).

<sup>207</sup> See *Incorporative Statutes*, *supra* note 30, at 434 n.1 (citing Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 231 (1993)).

relations instruments from their purview.<sup>208</sup> Thus, one lesson of this study is that administrative law scholarship may take an overly limited internal view. If, instead, we think of executive implementation as expanding the scope of the field, we could appreciate how improvised implementation creates opportunities for agencies to execute legislative mandates in alternative ways—and ways that might actually enhance administrative law values.<sup>209</sup> Bringing executive agreements more expressly into administrative law discussions may inform the processes for implementation in ways that further administrative law principles such as by creating more space in negotiation or by limiting the means of implementation to those democratically driven processes.

On the other hand, there may be space for rules to be negotiated with foreign partners in a way that preserves agency autonomy and administrative rule of law values while also facilitating foreign engagement. The ways that agencies reconcile what is effectively a Venn diagram of delegations in foreign relations law is opportunity enhancing if not opportunity creating.<sup>210</sup>

The idea that agreements form the foundation for transnational regulatory activity is nothing new,<sup>211</sup> but what becomes clear from this investigation is that agencies treat these agreements more like domestic instruments than like international instruments in their application and implementation mechanisms. This phenomenon is one that we may have anticipated but had never confirmed until now. Implementation also brings back into focus the limits of the APA and its exceptions. That approach reinforces the distinctions between the field that may have been an accurate depiction in the middle of the twentieth century, but which today does a disservice to analyses such as these. It is not

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<sup>208</sup> As discussed above, the APA provides an exception for foreign affairs. *See supra* text accompanying note 120.

<sup>209</sup> *Iowa Leagues of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013) (“Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules.”).

<sup>210</sup> That Venn diagram has legislative, regulatory, and negotiation pieces to it. The literature on implementation is overly concerned with the legislative piece to the detriment of the regulatory, but all three of these could work together at the center.

<sup>211</sup> *See, e.g.*, Cogan, *supra* note 6, at 344–45. *See also generally* Elizabeth Trujillo, *Regulatory Cooperation in International Trade and Its Transformative Effects on Executive Power*, 25 *IND. J. GLOB. L. STUD.* 365 (2018); David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 *CHI J. INT’L L.* 547 (2005); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE J. INT’L L.* 113 (2009).

simply that there is convergence between the fields that might overtake the exception. Rather, foreign relations administration requires more.

This engagement with agency implementation revisits long-standing debates about legislative versus interpretive rules on the part of agencies and places them once more in stark relief.<sup>212</sup> Whatever the form, agreements are not only rule-like; they are rules, just in different than usual clothes. Seeing them this way helps us determine to what extent the executive branch is bound by or should accept the “constraints of procedural regularity.”<sup>213</sup> Historically, those queries were often driven by administrative law’s guiding principles of accountability and public participation. Although participation values are often treated as less important in foreign relations, that may not be true when foreign relations come home, as here.

Through its implementation of these agreements, the executive reconfigures administration from within. That the executive can box out Congress on these areas within congressional control disrupts our dominant models of shared authority between the branches. Prescriptive implementation delivers an opportunity to take advantage of the ad hoc work underway, channel it, and build upon it. Rather than think of these mechanisms as circumventing legislative silence or overexerting bureaucratic control, we might see pieces worth fostering, even if rough around the edges.

Finally, this study bears important lessons not just for the intersections of administrative law and foreign relations law as fields of study and work but also for the elasticity of the features within both. This Article has sought to defeat the duopolies on the surface of these issues—between the fields and between statutes and treaties. But it also demonstrates that implementation is far more nuanced, textured, and complex than just a distinction between rulemaking and adjudication or between self-executing and non-self-executing instruments. The rise of executive-agreement implementation teaches us to look beyond the binary categories on which scholars and practitioners rely and instead consider questions of agreement enforceability as falling along a spectrum. Many of these mechanisms land in contested middle ground. Agencies are capitalizing on the middle-grounding effect to be able to operationalize the commitments

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<sup>212</sup> See Merrill & Watts, *supra* note 35, at 477.

<sup>213</sup> Galbraith, *supra* note 23, at 1361.

they have negotiated. The use of these mechanisms in practice suggests multitiered engagement with delegations, with implementation, and with the agreements themselves. Embracing the middle ground provides more room for creative thinking on all aspects of implementation.

Until now, we have barely had a sense of this new frontier, unaware of what types of obligations the executive has been making or how those obligations might intersect with regulatory space.<sup>214</sup> Seeing agreement implementation and incorporation along a spectrum that can be facilitated by prescriptive implementation provides a powerful contrast to the dualistic mechanics that have long befuddled courts and commentators.<sup>215</sup> If we discard those analogies in favor of seeing agreement implementation as somewhat *sui generis* and judge it on its own merit, deploying prescriptive implementation as a sorting mechanism, we can identify other ways in which to understand agency behavior.

In sum, this way of thinking requires rearranging the pieces of the puzzle in new ways. It means reevaluating the terrain of the issues, not just relying on familiar formulations or terms that may get traction with different lawmakers and legal thinkers.

#### CONCLUSION

Congress as architect regularly shapes and controls the making of international commitments through its delegations to the executive branch, but it says almost nothing on the flip side of those negotiations as to the status of such agreements in U.S. law with respect to either process or legal status. The agencies decide upon, develop, and deploy their own means by which to transpose international agreements into U.S. law. And they do so in a way that is shielded from the judicial review and application that occurs both in the treaty context and in administrative law.

With the lesser reliance on treaties and the great prevalence of executive agreements operating in a grey zone, these questions as to how agreements are part of our law form a new frontier for

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<sup>214</sup> See Galbraith, *supra* note 23, at 1314 (arguing that “executive branch actors can have the constitutional authority to act as the intermediary between otherwise unenforceable treaty provisions and the courts through administrative action” and that “the assumption that Congress must implement non-self-executing treaty provisions had become widespread and remains so, even as the sharp uptick in regulatory treaties in the years since the end of the Cold War has made this assumption increasingly cumbersome”).

<sup>215</sup> See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 540 (2008) (noting the befuddlement).

foreign-facing administration. They are not like other forms of international agreements with either judicial or congressional pronouncements as to their status nor are they entirely akin to statutes and regulations. With the above excavation, we can better understand how agencies are managing these commitments, identify how this activity might transform our prior understandings across multiple fields, and envisage a way forward to harness the potential of executive-agreement implementation.



