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## Notes

### THE MODERN TREATY-EXECUTING POWER: CONSTITUTIONAL COMPLEXITIES IN CONTEMPORARY GLOBAL GOVERNANCE

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**ABSTRACT**—Treaties have evolved significantly since the ratification of the United States Constitution, leading to uncertainty as to the constitutional limits on their domestic execution. This Note adapts existing constitutional doctrine on treaty execution to two distinct complications arising in the contemporary treaty regime. First, voluntary treaties imposing aspirational obligations on signatories raise the issue of the extent of obligations that Congress may domestically enforce by federal statute. Second, originating treaties which create international organizations and authorize them to adopt rule- and adjudication-type post-treaty pronouncements bring up a question of when, if ever, to incorporate those pronouncements into U.S. law, and at what level of legal precedence. Drawing on historical foundations, constitutional case law, and policy considerations in light of the evolving treaty regime, this Note proposes constitutional tests to address both developments. This Note introduces a two-step reasonableness inquiry for statutes executing voluntary treaties, based on the reasonableness of the statute in light of (1) the language and goals of the treaty, as well as (2) U.S. involvement in the treaty. For post-treaty pronouncements, this Note suggests that such pronouncements should be incorporated into U.S. law if they (1) do not violate a provision of the U.S. Constitution and (2) are valid under the originating treaty's procedural and substantive law. Post-treaty pronouncements that pass this test should be incorporated at the same level of precedence as federal statutes in order to best address concerns regarding the balance between the federal government and states' constitutionally protected powers. The complex methodology proposed in this Note provides a necessary mechanism for navigating an increasingly complex international legal order.

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INTRODUCTION

Perhaps one of the most contentious issues of constitutional law is the role of treaties.<sup>1</sup> Treaties occupy a tenuous position both in the separation of powers between the branches of the federal government and in the balance between the national and state governments. Under the Supremacy Clause of the Constitution, “all Treaties made” are among the categories declared “the supreme Law of the Land.”<sup>2</sup> Article II furnishes the power to enter into treaties in the President, with the advice and consent of the

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<sup>1</sup> There is prolific literature on the subject. See, e.g., William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344 (2010); Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239 (2013); Vincent J. Samar, *The Treaty Power and the Supremacy Clause: Rethinking Reid v. Covert in a Global Context*, 36 OHIO N.U. L. REV. 287 (2010); Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); Steven T. Voigt, *The Divergence of Modern Jurisprudence from the Original Intent for Federalist and Tenth Amendment Limitations on the Treaty Power*, 12 U. N.H. L. REV. 85 (2014).

<sup>2</sup> U.S. CONST. art. VI, cl. 2.

Senate.<sup>3</sup> Finally, the Necessary and Proper Clause of Article I grants Congress the power to enact laws in pursuance of those treaties.<sup>4</sup>

In the centuries since the Constitution's ratification, the United States' participation in multilateral treaties and agreements has skyrocketed.<sup>5</sup> This ever-growing trend—one that shows no signs of stopping—highlights the importance of properly setting limits on Congress's treaty-executing power. Under a republican system, treaties are controversial because their writers are not always persons accountable to the people of the United States.<sup>6</sup> Indeed, treaties are often written in significant part by officials from other countries.<sup>7</sup> This lack of direct accountability should require more stringent constitutional scrutiny on Congress's attempts to apply treaties through legislation.

As a starting point, however, it is essential to define what a treaty is for the purposes of determining the content of the supreme law of the land. Doing so in the contemporary international order is ambiguous in at least two ways. First, treaties and agreements are not static creatures. Not only may they be amended, but especially when they establish organizations to enforce their provisions, they may also generate further pronouncements, including international court decisions and international organization legislation. While these pronouncements are not themselves the treaties, they are made under the procedural and substantive guidelines thereof. Examples include resolutions of the United Nations (U.N.),<sup>8</sup> judgments of

<sup>3</sup> *Id.* art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

<sup>4</sup> *Id.* art. I, § 8, cl. 1, 18 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”). It is, of course, possible that an act of Congress executing a treaty provision may be directly authorized by one of the other enumerated powers in Article I. However, the vast body of case law on treaty execution deals with more complicated scenarios which cannot be shoehorned easily into one of those enumerated powers.

<sup>5</sup> See generally U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2013 (2013 & Supp. 2015), <http://www.state.gov/s/treaty/tif/> [<https://perma.cc/B4HP-VZ4M>].

<sup>6</sup> *E.g.*, Voigt, *supra* note 1, at 85–86.

<sup>7</sup> In many instances, the United States is just one of many countries with a vested interest in the scope of the treaty. For example, the Nuclear Non-Proliferation Treaty involved balancing interests of the United States, its allies in Western Europe, and other countries interested in nuclear weaponry. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT]. As Professor Mallard notes, the NPT is thus the product of intersecting, sometimes conflicting, interests, with U.S. interests being only one source. See generally GRÉGOIRE MALLARD, FALLOUT: NUCLEAR DIPLOMACY IN AN AGE OF GLOBAL FRACTURE (2014).

<sup>8</sup> For example, the Security Council adopts resolutions regarding international peacekeeping and security. *E.g.*, S.C. Res. 2178, ¶¶ 11–13 (Sept. 24, 2014) (calling for international cooperation in engaging and collecting data on terrorist groups); S.C. Res. 2141 (Mar. 5, 2014) (setting agenda and schedules for expert investigations into North Korean nuclear proliferation). The General Assembly

the World Trade Organization's (WTO) Dispute Settlement Board (DSB),<sup>9</sup> and the triggering of Article 5 obligations under the North Atlantic Treaty.<sup>10</sup> Such pronouncements by treaty organizations raise the question of how to determine *if and when these become part of the law of the land* as "treaties," and whether an act of Congress in pursuance of such a pronouncement is constitutional.<sup>11</sup> Moreover, it is unclear what *precedence* within the hierarchy of laws in the United States these pronouncements should take. Should they be equivalent to the originating treaties or should they take lower precedence? If they are given lower precedence, how much lower than the original treaties should they be?

A second ambiguity emerges with the increasing proliferation of voluntary, rather than mandatory, multilateral agreements among nations. Whereas mandatory treaties lay out explicit requirements for signatories, voluntary agreements set goals that are either aspirational, indefinite, or both.<sup>12</sup> One illustrative case is the Kyoto Protocol, which regulates signatory nation-states' carbon emissions through sliding-scale target emissions levels and reductions.<sup>13</sup> The United States signed but did not ratify the Protocol, and thus the Protocol imposes no binding obligations on

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adopts resolutions on a broader spectrum of issues. *E.g.*, G.A. Res. 69/1 (Sept. 19, 2014) (supporting establishment of a U.N. Mission for Ebola Emergency Response, and calling for members' support); G.A. Res. 68/242 (Dec. 27, 2013) (acknowledging rights advances in Myanmar, but calling for further action from the junta government).

<sup>9</sup> The United States has been involved in several trade disputes at the DSB as both complainant and defendant. *See, e.g.*, Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 1, WTO Doc. WT/DS353/AB/R (Mar. 12, 2012) (finding U.S. subsidies for Boeing's aircraft production actionable for European country complainants); Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, ¶¶ 62, 242, WTO Doc. WT/DS396/AB/R (Dec. 21, 2011) (agreeing with the United States' contention that the Philippines' excise tax on certain spirits based on the raw materials used in their production discriminated against foreign spirits).

<sup>10</sup> Under Article 5 of the North Atlantic Treaty, the North Atlantic Treaty Organization's (NATO) founding document, any attack on a member state in Europe or North America is considered an attack on all members, triggering a duty of collective defense. North Atlantic Treaty art. 5, *opened for signature* Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (entered into force Aug. 29, 1949). The first time this Article was invoked occurred immediately after the September 11, 2001 terrorist attacks in the United States. NATO, *NATO Topics – Collective Defence – Article 5*, N. ATL. TREATY ORG. (Dec. 16, 2015), [http://www.nato.int/cps/en/natohq/topics\\_110496.htm?#](http://www.nato.int/cps/en/natohq/topics_110496.htm?#) [<https://perma.cc/F6TH-AVUQ>].

<sup>11</sup> One notable example, the Authorization for Use of Military Force against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) [hereinafter AUMF], initiated U.S. involvement in the Persian Gulf War. The AUMF based its authority in part on a United Nations Security Council Resolution authorizing member states to use "all necessary means" to resolve the Iraq-Kuwait conflict then ongoing. S.C. Res 678 (Nov. 29, 1990).

<sup>12</sup> Carlos Manuel Vazquez, *Missouri v. Holland's Second Holding*, 73 MO. L. REV. 939, 966 (2008).

<sup>13</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

the United States.<sup>14</sup> In a hypothetical world where the United States ratified the Kyoto Protocol, the sliding-scale nature of the obligations it imposes on members raises the question of the strength of carbon emissions laws Congress could enact to reach such targets. Is a law “requiring” the meeting of an “aspirational” or “voluntary” target under penalty a “necessary and proper” exercise of Congress’s treaty-executing power? If a treaty target is wholly voluntary by its own explicit terms, with no real penalties for noncompliance, can Congress pass a strict law with severe criminal or civil penalties to meet that target? The questions of how to interpret the enforceable extent of the targets in voluntary agreements, and whether the targets can be turned into mandatory rather than aspirational, amorphous laws, are thus very real concerns in determining the limits of congressional power.<sup>15</sup>

This Note argues that the two ambiguities pose different, complex problems, and therefore require different, complex solutions. For both voluntary treaties and post-treaty pronouncements, this Note begins with the assumption that a given treaty was ratified within constitutional bounds.<sup>16</sup> For voluntary treaties, the main constitutional concern is whether a proposed implementing statute is reasonable in light of the United States’ commitment to and involvement in the treaty. Voluntary treaties must be executed by statute in light of the vague delineations of the United States’ obligations in the treaty itself—and should thus not be treated as self-executing<sup>17</sup>—but this does not grant Congress unlimited license to “execute” such a treaty. A statute enforcing a voluntary treaty (1) must be a reasonable interpretation of the language and goals of the treaty and (2) must enforce the voluntary target to an extent that is reasonable given two factors: (a) the level of commitment the United States has most recently expressed (prior to the statute’s enactment) and (b) the United States’ ability and willingness to comply with voluntary targets.

For post-treaty pronouncements, the main concerns are the propriety of the pronouncement in light of the treaty from which it was generated, and the overarching limits imposed by the Constitution, which apply to

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<sup>14</sup> *But see* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 307 (2007) (noting that many commentators argue that the United States “is [still] bound to refrain from actions that would defeat the object and purpose of the treaty”).

<sup>15</sup> Concerns about the constitutional limits of treaties in light of their prominence in the federal legal structure were alive and well even during the Framing Era. *See, e.g.*, Laura Moranchek Hussain, Note, *Enforcing the Treaty Rights of Aliens*, 117 YALE L.J. 680, 683–84 (2008) (summarizing four main critiques that began with Thomas Jefferson).

<sup>16</sup> *See supra* notes 2–4 and accompanying text (discussing constitutionality requirements for the treaty itself).

<sup>17</sup> *See infra* notes 74–79 and accompanying text (discussing the self-executing-treaty doctrine).

treaties *and* to post-treaty pronouncements.<sup>18</sup> As such, a post-treaty pronouncement will be incorporated into U.S. law only if (1) it, too, is constitutional and (2) the pronouncement was validly made in pursuance of the treaty's procedural law and the treaty organization's substantive law. However, because the pronouncement is not "the treaty," this Note argues that the pronouncement must occupy a lower level of precedence, specifically at the same level as a federal statute. This allows states to challenge pronouncements on grounds that the pronouncement interferes with states' rights, but creates a rebuttable presumption that the pronouncements preempt state laws. This Note offers solutions to the ambiguities of contemporary treaties and the problems they generate. But given the complexity of the treaty regime, a complex solution is merited.

Part I provides historical background on treaties, focusing on how they were viewed and addressed at the Framing, as well as how they have changed in number, scope, and form over time. Part II then looks at constitutional approaches to the treaty power in case law on the subject, as well as in the scholarly literature to date. Part III articulates the proposed tests and shows how they protect all relevant interests—international, national, and state. Finally, this Note concludes with the importance and implications of a more comprehensive approach to treaties.

## I. THE GROWING COMPLEXITY OF TREATY REGIMES

Understanding the constitutional place of post-treaty pronouncements and voluntary treaties requires examining the treatment of treaties throughout the history of the United States. Section A briefly traces the history of treaties in U.S. law, beginning with the Framers' views on treaties in order to provide an original understanding baseline. Sections B and C then analyze the two ways in which treaties have transformed since the Framing Era. Section B discusses the emergence of explicitly voluntary treaties and treaty provisions, and Section C describes the growth of international institutions and organizations making post-treaty pronouncements.

### A. *Balancing Sovereignty and International Obligations: Treaties in the Framing Era*

According to the Framers, treaties should be entered into by virtuous officeholders under a structure of governmental powers that best serves the

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<sup>18</sup> See *infra* Section III.B.

people of the United States.<sup>19</sup> The Framers acknowledged the tension between establishing a national government to deal with the country's external affairs and with the rights of the states to govern themselves. They believed that the United States had to observe the law of nations with respect to foreign powers, and argued that this was best done through the national government, rather than by the several states or groupings thereof.<sup>20</sup> One reason was that, for treaties to be meaningfully executed in the United States, treaty obligations must be expounded evenly across the states.<sup>21</sup> The Framers' concern for full and even execution was practical; elsewhere in *The Federalist Papers*, they noted that perceived or actual breach by one party to a treaty, even in just a part of the country, essentially relieved the others of their own obligations, undermining the main goal of cooperation underlying the treaty.<sup>22</sup>

In order to support the full enforcement of treaties, the Framers located the treaty power in the federal government. Specifically, they placed it in the concurrent hands of the executive—the President—and the

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<sup>19</sup> See, e.g., THE FEDERALIST NO. 64, at 369 (John Jay) (Kathleen M. Sullivan ed., 2009). (“The power of making treaties is an important one . . . and it should not be delegated but in such a mode . . . as will afford the highest security that it will be exercised by men . . . in the manner most conducive to the public good.”).

<sup>20</sup> These concerns were not novel at the time the Constitution was written. Notably, the Articles of Confederation also allocated the treaty-making power to the federal government, not to the states. ARTICLES OF CONFEDERATION of 1781, art. VI, § 1; see generally William W. Potter, *Judicial Power in the United States*, 27 MICH. L. REV. 285, 285 (1929).

<sup>21</sup> As Madison writes:

The powers to make treaties and to send and receive ambassadors speak their own propriety. Both of them are comprised in the Articles of Confederation, with this difference only, that the former is disembarassed by the plan of the convention, of an exception *under which treaties might be substantially frustrated by regulations of the States*; and that a power of appointing and receiving “other public ministers and consuls” is expressly and very properly added to the former provision concerning ambassadors.

THE FEDERALIST NO. 42, *supra* note 19, at 235 (James Madison) (emphasis added); see also John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT’L L.J. 1209, 1219–20 (2009) (describing John Jay’s pressing for the inclusion of treaties in the Supremacy Clause in light of his experiences negotiating treaties as the Confederation’s Secretary of Foreign Affairs); Potter, *supra* note 20, at 309 (In drafting the Constitution, the Framers “provided that no state should enter into any treaty or alliance or confederation . . . and in order to remove any doubt about the supremacy of this direct legislation by the people, they declared this [C]onstitution and the laws made in pursuance thereof and all treaties made or which shall be made to be the supreme law of the land.”).

<sup>22</sup> The Framers addressed such reciprocity in their comparison of the governing structure under the Articles of Confederation—perceived as a simple treaty between the several states—with their proposed union:

It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void.

THE FEDERALIST NO. 43, *supra* note 19, at 250 (James Madison).

Senate (or, rather, two-thirds thereof).<sup>23</sup> This divided structure of the treaty power was further motivated by the Framers' fears of a tyrannical all-powerful executive, like the English King.<sup>24</sup> More importantly for the purposes of this Note, the same concern prompted the Framers to rank treaties as among the sources of "the supreme Law of the Land," next to the Constitution itself.<sup>25</sup> That the Framers noted the necessity of giving treaties a paramount place in the structure of federal laws dovetails well with their placing of the primary responsibility to enter into treaties—albeit with the advice and consent of the Senate—in the federal executive.<sup>26</sup>

The Framers had less to say about how treaties were to be interpreted for the purposes of enacting them domestically. This may be because treaties at the time of the Framing were relatively simple agreements.<sup>27</sup> Indeed, the United States did not even enter into any multilateral treaties until 1825.<sup>28</sup> Thus, interpreting treaties could hardly be seen as complicated or contestable; domestic obligations under treaties would have been self-explanatory without much, if any, further legislation.<sup>29</sup> To the extent that the Framers anticipated problems with treaty interpretation, they put final

<sup>23</sup> U.S. CONST. art. II, § 2, cl. 2; THE FEDERALIST NO. 69, *supra* note 19, at 398 (Alexander Hamilton).

<sup>24</sup> THE FEDERALIST NO. 69, *supra* note 19, at 399 (Alexander Hamilton) ("In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature."); *see also* THE FEDERALIST NO. 75, *supra* note 19, at 432 (Alexander Hamilton) ("However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration.")

<sup>25</sup> U.S. CONST. art. VI, cl. 2; *see also* THE FEDERALIST NO. 22, *supra* note 19, at 120 (Alexander Hamilton) ("Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land.")

<sup>26</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>27</sup> The French–American alliance treaties during the revolutionary period illustrate the relative simplicity of early bilateral treaties. *See, e.g.*, Treaty of Alliance Between the United States of America and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1778, 8 Stat. 6 [hereinafter Treaty of Alliance]; Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1778, 8 Stat. 12 [hereinafter Treaty of Amity and Commerce]. Each is written in both English and French, yet the Treaty of Alliance and Treaty of Amity and Commerce span only six and twenty pages respectively (including both language versions), and establish obligations without creating a formal organization or creating much space to expand the scope of their provisions.

<sup>28</sup> 1 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at v (Charles I. Bevans ed., 1968) (table of contents of a leading compilation of early international agreements to which the United States was a signatory, showing that only bilateral agreements existed until 1825).

<sup>29</sup> Hathaway et al., *supra* note 1, at 245 ("The Framers did not delve deeply into the question of implementing legislation. They instead assumed that most treaties would not require it. As a result, the relationship they intended between the Treaty Clause and the Necessary and Proper Clause has been the subject of subsequent debate.")



authority of treaty interpretation in the Supreme Court, not in Congress.<sup>30</sup> This was a logical decision in light of the Framers' determination that treaties are federal law and "the supreme Law of the Land," alongside the Constitution.<sup>31</sup> This does not preclude Congress's authority to enforce treaties through statutes, but does subject such statutes to final review by the courts. The explicit move to put final jurisdiction over issues of treaty interpretation in the Supreme Court, rather than the other branches, suggests that the Framers envisioned a strong role for the judiciary in determining treaties as "higher law," rather than applying the same plea for judicial deference as in ordinary statutory interpretation cases.<sup>32</sup>

One limitation to the contemporary applicability of the Framers' assumptions and beliefs regarding the treaty power is that those principles came into being in a time when treaty regimes were relatively simple. Nonetheless, looking to the Framers' original understanding of how treaties operated in the system of divided government they envisioned provides a strong starting point for examining how and to what extent Framing Era treaty principles apply today.

#### *B. Managing Global Order in a Diversifying International Arena: Voluntary Treaties*

In recent years, treaties and treaty organizations have become more complicated, in no small part due to the increasing role of nongovernmental organizations in international law and politics,<sup>33</sup> the increasing number of, and diversity among, nation-states in the international world order,<sup>34</sup> and the wider scope of topics in which international law has become involved

<sup>30</sup> U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."). As Hamilton notes with respect to treaties:

Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves.

THE FEDERALIST NO. 22, *supra* note 19, at 120–21 (Alexander Hamilton).

<sup>31</sup> U.S. CONST. art. VI, cl. 2.

<sup>32</sup> See, e.g., Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 660 (2000) (suggesting courts' deference to the legislature should vary depending on the particular legal issue at hand); Louis J. Virelli III, *Judicial Deference to Congress and the Separation of Powers*, 98 IOWA L. REV. BULL. 28, 30–31 (2013) (linking courts' deference to Congress to areas in which no overlap between the branches' authority is present).

<sup>33</sup> See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2624 (1997).

<sup>34</sup> See, e.g., Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 651 (2006) (noting the quadrupling of member states in the International Labor Organization (ILO) as one backdrop factor behind the changes in the ILO over time).

and intermixed with other complex laws.<sup>35</sup> Because of the wide range of nation-states' resources and abilities to meet international standards, international organizations have had to manage expectations to induce both less-developed and more resistant nation-states to join and comply.<sup>36</sup>

Likewise, as international organizations' mandates extended into ever broader areas of law and regulation, properly managing these expectations increased the willingness of nation-states—developed and developing alike—to comply. Voluntary treaties adjusted to this new reality by setting aspirational targets, rather than mandatory minima or maxima that had to be met at pain of sanction.<sup>37</sup> The flexibility these aspirational targets afford countries fits a new context in which states vary drastically in their abilities to meet certain goals.<sup>38</sup> This is especially the case for international agreements bearing on issues whose resolution would require significant financial investment, human resources, and technological expenditures on the part of member countries.<sup>39</sup> Moreover, for developed and developing countries alike, voluntary targets allow governments some leeway to manage their sometimes conflicting diplomatic obligations to other nations with their domestic obligations to their national electorates.<sup>40</sup> Despite

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<sup>35</sup> Koh, *supra* note 33, at 2614 (“In the wake of . . . World War II, the architects of the postwar system replaced the preexisting loose customary web of state-centric rules with an ambitious positivistic order, built on institutions and constitutions: international institutions governed by multilateral treaties organizing proactive assaults on all manner of global problems.”). For an illustrative description of how international treaties have come to comprehensively regulate investment, see Joost Pauwelyn, *Dealing with the Increasing Complexity of Investment-Related Treaties: A Framework and Some Policy Guidelines*, 3 INV. TREATY NEWS 5 (2012), [http://www.iisd.org/pdf/2012/iisd\\_itn\\_october\\_2012\\_en.pdf](http://www.iisd.org/pdf/2012/iisd_itn_october_2012_en.pdf) [<https://perma.cc/5ZD4-XC62>].

<sup>36</sup> Koh, *supra* note 33, at 2636–38.

<sup>37</sup> For example, Article VI of the Nuclear Non-Proliferation Treaty imposes the following “soft” obligations without penalty of sanction in case of failure: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.” NPT, *supra* note 7, art. VI. Another example, in the form of a post-treaty pronouncement, is the United Nations’ Millennium Development Goals, which set health and education targets for developing countries, which are not explicitly penalized when not met. G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 18, 2000) [hereinafter U.N. MDGs].

<sup>38</sup> The Kyoto Protocol is an instructive example, given the wide variation in signatories’ abilities to implement carbon-reducing technologies. The Protocol sets certain obligations for more advanced Annex I countries, which are not extended to non-Annex I countries. Kyoto Protocol, *supra* note 13, art. 2, § 1.

<sup>39</sup> See, e.g., Randall Lutter, *Developing Countries’ Greenhouse Emissions: Uncertainty and Implications for Participation in the Kyoto Protocol*, 21 ENERGY J. 93, 93–94 (2000) (noting that the Kyoto Protocol gives developing countries the option, but not the obligation, to match developed country signatories’ carbon emissions caps).

<sup>40</sup> The field of international relations construes this dilemma as a “multilevel game,” where different obligations and resources at the international diplomacy level and the domestic political level provide both obstacles and opportunities for government representatives in international negotiations. See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988).

arguments that this flexible structure undermines accountability, and ultimately success, to allow even developing countries this license,<sup>41</sup> voluntary treaties remain an essential part of the international law regime today.

To the extent that treaties with voluntary, aspirational targets still depend on signatory nation-states' voluntary compliance due to the absence of a global sovereign, some scholars have argued that the emergence of voluntary treaties would result in no real divergence from the prior state of international relations.<sup>42</sup> Whatever the ramifications of this development for international politics scholars, voluntary treaties do pose a significant problem for legal scholars trying to determine the boundaries of domestic treaty interpretation and enforcement. This issue is best framed through the Necessary and Proper Clause of the Constitution: given that an international agreement imposes obligations that are not mandatory, and that the United States may face no sanction if it violates those obligations, what, if anything, can Congress enact through statute that is truly "necessary and proper" for the enforcement of and compliance with the treaty?<sup>43</sup> This perplexing question illustrates why voluntary treaties pose a unique constitutional issue that sets them apart from mandatory agreements.

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<sup>41</sup> Not all authors believe flexibility in treaty goals based on level of development is a good thing. See, e.g., Mac Darrow, *The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda*, 15 *YALE HUM. RTS. & DEV. J.* 55, 59–60 (2012) (noting the common argument that the lack of a strong accountability mechanism for U.N. MDGs undermines their enforcement).

<sup>42</sup> Two important lines of scholarship in this area are efficient breach theory and realist international relations. Efficient breach scholarship emphasizes that, regardless of the "hardness" or "softness" of rules, parties will breach an agreement if doing so is more beneficial to them than upholding their obligations. See, e.g., Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 *MICH. L. REV.* 243, 254–55 (2011) (arguing that countries may breach in order to retaliate against other noncompliant countries); Note, *(In)Efficient Breach of International Trade Law: The State of the "Free Pass" After China's Rare Earths Export Embargo*, 125 *HARV. L. REV.* 602, 602–03 (2011) (acknowledging that states may defect from agreements when they can expect a "free pass" from the regulating body). Realist international relations scholars focus on anarchy in international relations: nation-states' decisionmaking is constrained less by formal institutions and more by informal power structures and relative relationships in an international arena without a true ruling sovereign. See, e.g., Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 *INT'L ORG.* 485, 487 (1988) (arguing that nation-states' cooperation depends on concerns about others cheating and their concerns about the relative gains of other states); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 *U. CHI. L. REV.* 469, 478 (2005) (noting that traditional realist theory expects enforcement and compliance to depend on the interests of the most powerful states).

<sup>43</sup> Even recently, the definition of "necessary" in the Necessary and Proper Clause has remained at issue. Compare *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 356, 386–88 (1819) (arguing that "necessary" means "needful and adapted," not "absolutely necessary" or indispensable), with *Nat'l Fed'n of Indep. Bus. v. Sebelius (Sebelius)*, 132 S. Ct. 2566, 2592 (2012) (arguing that "necessary" covers exercises only of "authority derivative of, and in service to, a granted power").

C. *Beyond the Four Corners of the Treaty:  
Post-Treaty Pronouncements*

Another complication emerged when treaties began setting up new institutions and organizations to enforce their directives. The United States has been involved in several such institution-creating treaties, including those that gave rise to the U.N.,<sup>44</sup> NATO,<sup>45</sup> and the WTO.<sup>46</sup> Such institutions were created to centralize the authority needed to expound on the foundational principles in their establishing treaties, as well as to enforce those principles and others that may emerge later.<sup>47</sup> At least in part, treaty institutions hoped to be the missing third-party enforcement mechanisms that made most international politics essentially voluntary for nation-states,<sup>48</sup> though some have argued that, for various reasons, they tend to be rather ineffective at performing this function.<sup>49</sup>

Regardless of international institutions' efficacy, an important consequence of this development is that treaty organizations enact their own law in varying ways, including the adoption of resolutions, which resembles legislative lawmaking, and the resolution of disputes in international judiciary-like institutions.<sup>50</sup> Such post-treaty pronouncements, while helpful in forwarding the goals of the treaty organization itself, pose a conundrum for U.S. constitutional law. The pronouncements are clearly

<sup>44</sup> U.N. Charter.

<sup>45</sup> North Atlantic Treaty, *supra* note 10.

<sup>46</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

<sup>47</sup> See, e.g., Michael N. Barnett & Martha Finnemore, *The Politics, Power and Pathologies of International Organizations*, 53 INT'L ORG. 699, 707 (1999); see generally Michael J. Gilligan & Leslie Johns, *Formal Models of International Institutions*, 15 ANN. REV. OF POL. SCI. 221 (2012) (reviewing literature on forms and functions of international institutions).

<sup>48</sup> See Gilligan & Johns, *supra* note 47, at 225; see also Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 3 (1990) ("In a large community . . . it would be too costly to keep everyone informed about what transpires in all trading relationships, as a simple reputation system might require. So the system of private judges is designed to promote private resolution of disputes and otherwise to transmit *just enough* information . . . to enable the reputation mechanism to function effectively for enforcement.") (emphasis in original).

<sup>49</sup> Some point out treaty organizations' lack of resources as a key problem for enforcement. See, e.g., Indira Carr & Opi Outhwaite, *The Role of Non-Governmental Organizations (NGOs) in Combating Corruption: Theory and Practice*, 44 SUFFOLK UNIV. L. REV. 615, 621 (2011); Kevin Kolben, *The WTO Distraction*, 21 STAN. L. & POL'Y REV. 461, 482 (2010). Others are more concerned that treaty organizations are prone to be captured by certain powerful nation-states, rendering them imperfect enforcement organs against these captor countries. See, e.g., Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 365 (2002) (noting that the WTO has become less effective in regulating powerful nation-states due to organizational capture).

<sup>50</sup> See *supra* notes 8–9 (giving examples of resolutions by different organs of the U.N. and cases at the DSB).

not “treaties,” since the President of the United States did not directly sign these pronouncements with the advice and consent of the Senate.<sup>51</sup> Nor is there necessarily any input by any party directly accountable to the people of the United States in these resolutions and judgments. Finally, at least one commentator has raised the concern that granting authority to treaty bodies to engage in the production of post-treaty pronouncements raises red flags under the nondelegation doctrine.<sup>52</sup>

Yet to refuse enforcing post-treaty pronouncements altogether may undermine the very purpose of the United States in joining the original treaty, which itself is “the supreme Law of the Land.”<sup>53</sup> For treaties generating post-treaty pronouncements, part of the original treaty itself is the creation of an organization whose purpose is to expound on the original treaty. The United States is aware of the creation of the treaty organization upon ratification—and in its ratification, the United States consents to subject itself to the organization’s powers as enshrined in the original treaty. Unless the United States intends to eschew its international obligations—and indeed, its own Constitution—it must find a way to incorporate post-treaty pronouncements into its own laws. But in light of the constitutional conflicts discussed above, it is critical to carefully craft the conditions for and the manner of incorporation of post-treaty pronouncements into federal law. The question is what level of precedence acts in pursuance of those post-treaty pronouncements should receive.

## II. PERSPECTIVES ON THE TREATY POWER

Part II considers existing approaches from the judiciary and legal scholars to modern treaties and whether they adequately address the complications discussed above. Section A first examines leading Supreme Court cases that bear on the constitutional place of treaties. Section B then explores legal scholarship considering the quandaries of contemporary treaty doctrine. Ultimately, this Part demonstrates that both areas of legal thought fall short of adequately addressing the complexity posed by modern treaties.

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<sup>51</sup> See U.S. CONST. art. II, § 2, cl. 2 (granting power to enter into treaties to the President, but only with the advice and consent of the Senate).

<sup>52</sup> Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1569–70 (2003).

<sup>53</sup> U.S. CONST. art. VI, cl. 2.

*A. A Lukewarm Approach: Supreme Court Jurisprudence on Treaty Implementation*

The Supreme Court has addressed the standard for a treaty-enforcing statute's constitutional validity in several cases. The doctrine that has evolved, however, both reaches an unsatisfying conclusion on how domestic and international obligations should constitutionally be balanced, and leaves ambiguous the answers to several legal questions raised earlier in this Note.

In the seminal case *Missouri v. Holland*,<sup>54</sup> the Supreme Court rightly noted that enforcement of a treaty by statute runs into an issue of conflicting dual sovereignties, namely, the conflicting sovereignties of the states and of the federal government.<sup>55</sup> In this case, the U.S. and Canada (then under the dominion of the United Kingdom) entered into a treaty to regulate the hunting of migratory birds.<sup>56</sup> The State of Missouri rejected the congressional act implementing the treaty, and argued it infringed on its Tenth Amendment powers and was therefore unconstitutional.<sup>57</sup>

The primary test the Court imposed on acts of Congress enforcing treaties is whether *the treaty itself* is constitutionally valid; if so, an act of Congress enforcing the provisions of that treaty would clearly be necessary and proper to give legal effect to the treaty within the scope of the Necessary and Proper Clause.<sup>58</sup> The Court noted that, unlike acts of Congress, whose validity depends on whether they were “made in pursuance of the Constitution,” treaties’ validity depends on whether they were “made under the authority of the United States,” which the Court noted ambiguously may or may not refer to the Constitution.<sup>59</sup> Finding no constitutional infringement by the treaty at issue—including no overstep of Missouri’s reserved state powers in violation of the Tenth Amendment—the Court found that the statute supporting a bilateral treaty regulating the

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<sup>54</sup> 252 U.S. 416 (1920).

<sup>55</sup> *Id.* at 420–21, 432–33.

<sup>56</sup> *Id.* at 430–31.

<sup>57</sup> *Id.* at 431.

<sup>58</sup> *Id.* at 432; see U.S. CONST. art. I, § 8, cl. 18.

<sup>59</sup> *Holland*, 252 U.S. at 433; see also *id.* (“It is open to question whether the authority of the United States means more than the formal acts prescribed [in the Constitution] to make the convention.”); Samar, *supra* note 1, at 306 (noting that the “Authority of the United States” in Justice Holmes’s test is distinct from, and broader than, mere constitutionality). Professor Samar argues that, because *Holland* clearly distinguished the “Authority of the United States” test from a simple constitutionality inquiry, courts opining on the validity of a particular treaty must look beyond to general principles “to which Americans are so attached,” including “justice, fairness, due process, and liberty.” Samar, *supra* note 1, at 357.

hunting of migratory birds was valid. Consequently, the statute Congress enacted to enforce it was valid.<sup>60</sup>

The Court elaborated on its *Holland* holding in later cases. In *Reid v. Covert*,<sup>61</sup> the Court appeared to turn away from Justice Holmes's distinction between the underlying validity test for acts of Congress and for treaties in *Holland*,<sup>62</sup> instead finding constitutionality of the act of Congress itself—not just the treaty on which it was based—was the proper test for the validity of treaties and treaty enforcement.<sup>63</sup> The Supreme Court thus found the treaty at issue in *Reid*, which granted jurisdiction over U.S. civilians on military bases abroad to the U.S. military courts, unconstitutional because enforcing it would violate the civilians' Fifth and Sixth Amendment rights.<sup>64</sup>

Later, in *Bond v. United States*,<sup>65</sup> the Court faced a statute interpreting and enforcing the Chemical Weapons Convention.<sup>66</sup> Writing for a 9–0 Court, Chief Justice Roberts resolved the case not on constitutional grounds, but instead dismissed the criminal case against petitioner Ms. Bond based on the Court's judgment that the enforcing statute did not reach her conduct.<sup>67</sup> Three concurring Justices, however, would have preferred to resolve the case through an analysis of the limits of the treaty power in a federal constitutional context. Justice Scalia argued that the statute in question, as in *Reid*, did violate the Bill of Rights by infringing on states' reserved power to regulate local criminal law under the Tenth Amendment.<sup>68</sup> Justices Thomas and Alito, writing separate concurrences, found a different constitutional violation: the statute was an improper

<sup>60</sup> *Holland*, 252 U.S. at 435.

<sup>61</sup> 354 U.S. 1 (1957).

<sup>62</sup> 252 U.S. at 433.

<sup>63</sup> *Reid*, 354 U.S. at 16 (“There is nothing in [the] language [of the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.”).

<sup>64</sup> *Id.* at 19. The Court also considered whether anything else in the Constitution would authorize military court jurisdiction over U.S. civilians on U.S. foreign military bases, and found no such provision. *Id.* at 21 n.40 and accompanying text (holding that Congress's power “to make rules for the government and regulation of the land and naval forces” under Article 1, Section 8, Clause 14 does not permit this jurisdiction); *id.* at 40–41 (holding that the U.S. Constitution only allows courts of law, and not military tribunals, to try civilians for crimes).

<sup>65</sup> 134 S. Ct. 2077 (2014).

<sup>66</sup> Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 103–21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997) [hereinafter Chemical Weapons Convention]. The statute involved in *Bond* implemented the Chemical Weapons Convention by making it a federal crime to knowingly “possess[] or use . . . any chemical weapon.” 18 U.S.C. § 229(a)(1) (2012).

<sup>67</sup> *Bond*, 134 S. Ct. at 2087.

<sup>68</sup> *Id.* at 2101 (Scalia, J., concurring in the judgment).

exercise of the Treaty Power because such an exercise could only be valid if the implementing statute had a sufficient nexus with foreign affairs.<sup>69</sup> For both Justices, a local criminal law certainly could not meet this standard.

The closest the Supreme Court has come to addressing head-on the complex issues raised by voluntary treaties and post-treaty pronouncements was in *Medellin v. Texas*.<sup>70</sup> Mr. Medellin was convicted of murder, sentenced to death, and imprisoned pending execution in Texas.<sup>71</sup> He was one of fifty-one Mexican nationals detained by the United States who were parties to an International Court of Justice (ICJ) case, referred to as *Avena*,<sup>72</sup> which ruled that fifty-one of those detained Mexican nationals had not been properly informed of their rights under the Vienna Convention.<sup>73</sup> Mr. Medellin relied on the ICJ ruling and on a presidential memorandum purporting to give domestic effect to that ruling in order to file a second habeas application in Texas state court challenging his death sentence on the grounds that he was not informed of his Vienna Convention rights.<sup>74</sup> In rejecting Mr. Medellin's habeas petition, the Supreme Court held that the ICJ ruling did not have domestic legal effect.<sup>75</sup> The majority ruled that *any* international obligation only has domestic legal effect if it is either (1) enforced by Congress pursuant to its authority under the Necessary and Proper Clause—not by the President through a memorandum—or (2) if it is self-executing.<sup>76</sup> A treaty is self-executing only if it “operates of itself

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<sup>69</sup> *Id.* at 2103 (Thomas, J., concurring in the judgment); *id.* at 2111 (Alito, J., concurring in the judgment).

<sup>70</sup> 552 U.S. 491 (2008).

<sup>71</sup> *Id.* at 498.

<sup>72</sup> *Id.* at 497–98; Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 15 (Mar. 31).

<sup>73</sup> *Medellin*, 552 U.S. at 497–98; Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 106 (Mar. 31) (citing Vienna Convention on Consular Relations, *opened for signature* Apr. 24 1963, 23 U.S.T. 3227, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967) [hereinafter Vienna Convention]).

<sup>74</sup> *Medellin*, 552 U.S. at 498.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 504–05 (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster v. Neilson*, 27 U.S. 253, 314 (1829), *overruled in part by* *United States v. Percheman*, 32 U.S. 51 (1833); *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (Boudin, C.J.)). The Court explained the self-executing treaty doctrine in an early case:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

*Foster*, 27 U.S. at 314.



without the aid of any legislative provision.”<sup>77</sup> However, the ICJ ruling did not so operate, because the Optional Protocol,<sup>78</sup> which the United States ratified and under which the United States agreed to ICJ jurisdiction over Vienna Convention disputes, granted jurisdiction to the ICJ but lacked any language describing the domestic enforceability of ICJ cases decided under this grant of jurisdiction.<sup>79</sup> Because Congress had not enacted a statute domestically enforcing *Avena* or ICJ rulings generally, the Court held that *Avena* had no domestic enforceability whatsoever.

The *Medellin* rule unsatisfactorily allows the United States to formally subject itself to international organizations and treaties, but to get out of its obligations because Congress was haphazard or devious in failing to implement a ratified treaty with sufficiently strong language. *Medellin* also does not address the strength of language required for a treaty to become self-executing, leaving ambiguity in how its own rule would be enforced in the future. Additionally, *Medellin* does not address the problem of precedence discussed above: if domestically enforceable, would the pronouncements under such treaties also be part of the supreme law of the land, even if these pronouncements technically are not treaties?<sup>80</sup> Finally, to the issue of treaties with language that is more indefinite and aspirational than mandatory, *Medellin* suggests that such treaties simply would be unenforceable due to the softness of the text—certainly an absurd result that runs afoul of U.S. ratification of that treaty. As such, Supreme Court jurisprudence to date leaves U.S. obligations under post-treaty pronouncements and voluntary treaties up in the air.

### B. Too Narrow a Debate: Treaties in Scholarly Literature

Scholarly literature on the treaty power has much to say about what rules govern the kinds of treaties the United States can enter.<sup>81</sup> For the

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<sup>77</sup> *Medellin*, 552 U.S. at 505 (citing *Foster*, 27 U.S. at 314); see also Charles W. Stotter, Comment, *Self-Executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem*, 25 BUFF. L. REV. 773, 773 (1976).

<sup>78</sup> Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (entered into force Mar. 19, 1967) [hereinafter Optional Protocol].

<sup>79</sup> *Medellin*, 552 U.S. at 507–08 (“The Protocol says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment. The Protocol is similarly silent as to any enforcement mechanism.”).

<sup>80</sup> See *supra* Section I.C.

<sup>81</sup> For example, scholars have raised concerns about the constitutionality of executive agreements and presidential memoranda, which fail the “advice and consent of the Senate” requirement. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 391–92 (1998); A. Mark Weisburd, *International Judicial Decisions, Domestic Courts, and the Foreign Affairs Power*, 2005 CATO SUP. CT. REV. 287, 319–20. They have also considered whether treaty obligations involve impermissible commandeering of the states. See Bradley, *supra*, at 409; Hathaway et al., *supra* note 1,

purposes of this Note, however, the more salient question is what limits can or should be imposed on the domestic enforcement of treaties—and the pronouncements that follow them. This Note presumes that a treaty has been properly made, thereby skipping past direct consideration of limits on the treaty-making power.

The existing literature only indirectly addresses the issue of voluntary treaties. The main discussion centers on whether treaties should be presumed to be self-executing,<sup>82</sup> barring language expressly providing otherwise,<sup>83</sup> or whether treaties should presumptively be non-self-executing, unless the language makes clear that the treaty can be enforced without further legislation.<sup>84</sup> Opponents of a presumption that treaties are self-executing claim that this presumption undermines checks on the extent of the federal government's treaty power.<sup>85</sup> In contrast, supporters of a presumption of self-execution base their claim on the language of the Supremacy Clause, which puts treaties alongside the Constitution as the law of the land.<sup>86</sup>

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at 271–74; Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1261 (2000). Still others have considered whether Article I or II grants of power to Congress and the President impose subject matter limitations on what treaties are permissible. See Bradley, *supra*, at 453 (arguing that one way to limit what subjects treaties can cover is to permit them only when an issue “needs” international cooperation); Hathaway et al., *supra* note 1, at 290–99 (finding treaties to be valid only if they are not a pretext for the federal government infringing on the rights of states and if there is a reasonable international purpose for the treaty). Finally, authors have questioned whether federalism bars treaties that interfere impermissibly with states' rights and powers. See Bradley, *supra*, at 411 (arguing that the Framers expected treaties only to cover issues that were truly international—such as war, peace, and commerce—and are therefore inappropriate to regulate state issues); Swaine, *supra*, at 1138, 1142–43, 1146–48 (arguing that “dormant foreign affairs” and “dormant treaty” powers exist, because the Constitution locates both these powers in the federal government, not the states); Benjamin Beiter, Note, *Beyond Medellín: Reconsidering Federalism Limits on the Treaty Power*, 85 NOTRE DAME L. REV. 1163, 1175–76 (2010) (suggesting a presumption that treaties are non-self-executing as a means to rein in the federal government's treaty-making power).

<sup>82</sup> See *supra* note 76 and accompanying text.

<sup>83</sup> See, e.g., Beiter, *supra* note 81, at 1175 (arguing that a non-self-execution presumption imposes proper federalism checks on the federal government); *id.* at 1183 (arguing that *Medellin* created such a presumption). While treaties may be non-self-executing because they are insufficiently emphatic in their language, Professor Damrosch notes that the Senate has also turned treaties non-self-executing by declaring qualified consent to the President that the treaty should not be used as a direct source of law in domestic courts. Lori Fidler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 515 (1991).

<sup>84</sup> See, e.g., Carter, *supra* note 1, at 357 (arguing that the non-self-executing treaty doctrine flies in the face of the Supremacy Clause's clear language); Vazquez, *supra* note 1, at 602 (noting that because the Supremacy Clause puts treaties on parity with the Constitution, it would not make sense to require them to be subject to the self-executing inquiry). Professor Hathaway and colleagues argue that the Framers did not address the self-execution question because they assumed most treaties, if not all, would be. Hathaway et al., *supra* note 1, at 250.

<sup>85</sup> See, e.g., Beiter, *supra* note 81, at 1187–88.

<sup>86</sup> Carter, *supra* note 1, at 345; see also Vazquez, *supra* note 1, at 615–16 (arguing that the Framers wrote the Supremacy Clause explicitly to contravene the British approach, under which treaties were not enforceable as domestic law).

However, the debate about whether treaties are self-executing does not resolve the issue of voluntary treaties.<sup>87</sup> Whether a treaty requires further legislation to enforce its contents is a separate issue from whether its contents suggest voluntary or mandatory targets. The closest the literature comes to addressing voluntary treaties is in Professor Vazquez's discussion of aspirational treaties.<sup>88</sup> However, Professor Vazquez only defines such treaties in the abstract, without discussing the implications of the aspirational or indefinite language or the extent to which they may be executed, by statute or by presumption.<sup>89</sup> As such, we remain in the dark on this topic.

Existing scholarship says even less about post-treaty pronouncements. One viewpoint on this issue argues that a post-treaty pronouncement should be automatically enforceable as domestic law so long as the originating treaty is itself valid, implying that the pronouncement is a simple extension of the treaty and is thus entitled to similar constitutional precedence.<sup>90</sup> The main countervailing opinion argues that simply granting jurisdiction to an international organization on a domestic case regarding issues in a treaty is insufficient; for that organization's judgment to be as effective as domestic law, it would require explicit language in either the jurisdiction-granting treaty or in a separate statute enforcing the judgment domestically.<sup>91</sup> This latter position effectively analogizes post-treaty pronouncements to separate, individual treaties, and applies the self-executing treaty doctrine to them as such.

Discussions regarding the proper level of precedence for international law only directly address whether *treaties* should be considered on par or below the Constitution, thus failing to distinguish the treaty from the post-treaty pronouncement.<sup>92</sup> Implicitly, this discussion touches on the level of

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<sup>87</sup> See also *infra* Section III.A (elaborating on the self-executing treaty doctrine in the test for voluntary treaties).

<sup>88</sup> Vazquez, *supra* note 12, at 966.

<sup>89</sup> *Id.* ("Distinguishing aspirational from obligatory treaties will not always be an easy task. I do not address that issue here beyond noting that the aspirational category I have in mind consists of treaties that would not be violated even if nothing were done to implement them.")

<sup>90</sup> See, e.g., Samar, *supra* note 1, at 345–46. Professor Samar goes even further by arguing that, in cases where the United States has properly submitted itself to the jurisdiction of an international court, such a court, not any U.S. federal or state court (the U.S. Supreme Court included), should be the final arbiter of matters over which the international court has jurisdiction based on its originating treaty. *Id.*

<sup>91</sup> See, e.g., Beiter, *supra* note 81, at 1194–95.

<sup>92</sup> For example, Professor Bradley, who argues against a self-executing presumption, claims that treaties should have a lower rank than the Constitution, equivalent to acts of Congress. Bradley, *supra* note 81, at 456–58. In contrast, other authors argue that the Supremacy Clause is clear in putting treaties—and impliedly, post-treaty pronouncements—on the same level as the Constitution, preempting all other federal or state law. See, e.g., Carter, *supra* note 1, at 349; Vazquez, *supra* note 1, at 602.

precedence, albeit simplistically—either the pronouncement is an extension of the treaty, and is therefore entitled to treaty-level precedence, or it is not, and is therefore entitled to no precedence. In light of the concerns mentioned earlier in this Note, both these answers are unsatisfactory.<sup>93</sup> Thus, the literature to date answers neither of the two questions this Note poses regarding post-treaty pronouncements: (1) under what conditions they should be enforceable as domestic law and (2) whether their departure from the typical treaty procedure means they should be granted lesser precedence in U.S. law. After all, just because acts of Congress are made in pursuance of the Constitution does not grant them equal status to the Constitution; why should post-treaty pronouncements be granted greater deference?

### III. RESOLVING THE GAP: A MORE COMPREHENSIVE APPROACH TO TREATIES

As the preceding Parts demonstrate, academic scholarship and current jurisprudence alike fall short of addressing the complexities of contemporary treaties. On the one hand, these shortcomings stem from an overly simplistic approach to treaty incorporation and enforcement, reducing such questions to surface-level inquiries, such as whether a treaty is self-executing, or whether the treaty itself violates the Tenth Amendment. On the other hand, it is possible that scholarship on treaties simply has not kept up with changes in international treaty regime realities.

This Part attempts to address the complexities of both voluntary treaties and post-treaty pronouncements by proposing separate constitutional inquiries for each, thereby applying necessarily more complex solutions to more complex constitutional quandaries. The assumption at this point in the analysis is that the treaty itself has already been established as constitutionally valid; the remaining inquiry is how it and the post-treaty pronouncements it generates will be incorporated into U.S. law. Section A first proposes a two-step reasonableness inquiry for implementing voluntary treaties by statute. Section B then describes the mechanics and qualifications for incorporating post-treaty pronouncements into the structure of federal law.

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<sup>93</sup> See *supra* Section I.C (arguing that giving post-treaty pronouncements treaty-level precedence is inappropriate given the constitutional requirements for treaty making, but also that giving them no precedence is likewise improper because doing so lets the United States sidestep treaties that grant jurisdiction to an international organization with post-treaty pronouncement-making authority).

*A. A Doubly-Reasonable Interpretive Approach to Voluntary Treaties*

The enforceable substance of voluntary treaties must be interpreted in light of what is “reasonable.” The reasonableness approach to treaties is not without precedent. For example, Professor Hathaway and colleagues argue that, as a limit to the treaty-making power under federalism and separation of powers principles, all treaties and statutes implementing them must pass a “reasonable international purpose” test.<sup>94</sup> Echoing concurrences by Justices Alito<sup>95</sup> and Thomas<sup>96</sup> in *Bond*, they stress that the President’s treaty power must be limited in light of his or her foreign affairs power; likewise, Congress’s power to implement treaties (and the President’s power to execute them) should be constrained to matters with a nonpretextual link to foreign affairs.<sup>97</sup> This nexus is established by demonstrating a “benefit to concluding an international agreement as opposed to enacting domestic legislation.”<sup>98</sup>

A reasonableness approach is particularly important for statutory implementation of voluntary treaties because by definition, the language of such treaties is somewhat vague as to what exactly is demanded of the United States.<sup>99</sup> This inherent vagueness bears important weight on the self-executing presumption as applied to voluntary treaties specifically. As a threshold matter, voluntary treaties as defined in this Note should be treated as presumptively non-self-executing because, regardless of specific language in the text of the treaty authorizing the federal government to enforce a voluntary treaty, what “enforcement” is remains unclear. Consider a hypothetical treaty with the goal of reducing greenhouse gas emissions. If the treaty states that its members should “aspire” to reduce their “emissions” by “50% in the next fifteen years,” can the United States establish a statute cutting federal funding to states that are unable to reduce their emissions following these exact parameters? Can the federal government impose an intermediate target, such as requiring states to reduce their emissions by 25% in the next ten years, by statute? Can the EPA enact a regulation that specifically defines “emissions” for purposes of calculating reductions to include lead and particulates, but not carbon dioxide? This hypothetical illustrates the problem with assuming that a voluntary treaty is clear with respect to its obligations. The threshold

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<sup>94</sup> Hathaway et al., *supra* note 1, at 299.

<sup>95</sup> *Bond v. United States*, 134 S. Ct. 2077, 2111 (2014) (Alito, J., concurring in the judgment).

<sup>96</sup> *Id.* at 2103 (Thomas, J., concurring in the judgment).

<sup>97</sup> Hathaway et al., *supra* note 1, at 303.

<sup>98</sup> *Id.* at 299.

<sup>99</sup> See *supra* Section II.B.

presumption that voluntary treaties are non-self-executing most reasonably reconciles the obligation of the United States to fulfill its duties under international agreements with the necessity that abidance with purposely indefinite terms must be clarified statutorily.<sup>100</sup>

Once Congress codifies a voluntary treaty in an enforcing statute—required for the treaty’s implementation by the threshold presumption prescribed above—a twofold reasonableness inquiry should govern the constitutional analysis. First, the statute must be a reasonable interpretation of the language and goals of the treaty. Second, the extent of the obligation the statute prescribes must be reasonable in light of U.S. involvement in the treaty.

*1. Reasonableness in Light of the Language and Goals of the Treaty.*—The first reasonableness analysis, which considers the language and goals of the treaty, parallels ordinary statutory interpretation. However, this Note prescribes a specifically textualist–originalist approach at this stage unless doing so is impossible.<sup>101</sup> A text-focused analysis is both feasible and advisable in the case of treaty interpretation. Treaties typically begin with a preamble specifically stating the purposes and goals of the treaty; in light of this deliberate clarity and structure, it seems imprudent to impute rationales for the treaty from non-textual sources.<sup>102</sup> Likewise, given the already vague nature of obligations under a voluntary treaty, it seems irrational to impute more to the language stating member states’ obligations than is already on paper. Exceptions to

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<sup>100</sup> See *supra* notes 37–40 and accompanying text.

<sup>101</sup> Textualist–originalist approaches to constitutional interpretation focus on the explicit language of the document, with some looking to the original intent of the Framers or the original public meaning of words used in the Framing Era. See, e.g., Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL’Y 947, 948–49 (2008) (finding no constitutional support for the principle of stare decisis in the text of the Constitution or from Framing Era practice); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1550–51 (2005) (interpreting the text and meaning of the Recess Appointments Clause, U.S. CONST. art. II, § 2, cl. 3, using practice from the Framing Era). An analogous approach for treaties would focus only on the text of the treaty, including the preamble. Critics of textualist–originalist approaches argue that any interpretation of “original meaning” or “original intent” of constitutional text, and analogously here, of treaty text, imports not a true “original meaning or intent,” but rather what the reader wants the original meaning or intent to be. See, e.g., Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative*, 64 FLA. L. REV. 1485, 1489 (2012) (arguing that “originalist jurists are effectively empowered to engage in exactly the type of ideologically driven, outcome-determinative analysis that originalism claims to be designed to prevent”); Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1012–13 (2011) (arguing that judges claiming to apply textualism may be interpreting constitutional provisions based on their desired consequences, rather than based on the actual text).

<sup>102</sup> See, e.g., North Atlantic Treaty, *supra* note 10, pmb1. (NATO members “are resolved,” among other things, “to unite their efforts for collective defense and for the preservation of peace and security.”); Kyoto Protocol, *supra* note 13, pmb1. (noting that parties act “[i]n pursuit of the ultimate objective of the Convention as stated in its Article 2” (emphasis omitted)).

the proposed general rule that interpreting voluntary treaties should begin and end with the text of the treaty—most frequently, its preamble—can and must be made where the text is ineluctably vague. For example, interpreting when U.N. members may authorize the use of armed force against another member requires determining when doing so is, per the language of the preamble, “in the common interest.”<sup>103</sup> A preference for textualist–originalist interpretations of a treaty’s purposes and goals where possible provides a prudent outer limit to interpreting what is reasonable in light of the treaty.

One might argue that this threshold reasonableness test is too narrow. Consequently, courts should defer to Congress’s intent as it might be expressed elsewhere: in the implementing statute, in the congressional record discussing the potential adoption of the treaty, and so forth. However, debates leading up to the adoption of the treaty, where they diverge from the actual treaty, are less dispositive than the actual, final version of the treaty—and rightly so, given the constitutional posture of treaties.<sup>104</sup> Indeed, if there is a difference between pre-ratification documents and the actual content of the treaty, the final version should trump draft discussions and language. Although treaties have changed drastically since the Framing Era, the principle of limiting interpretation to the four corners of the treaty, where possible, remains just as prudent.

2. *Reasonableness in Light of U.S. Involvement in the Treaty.*—If a statute passes the first reasonableness test, the next hurdle is that the extent of the obligation the statute prescribes must be reasonable in light of U.S. involvement in the treaty. As used here, “extent” is a catchall term referring to the scope of the specific statutory interpretation of a treaty’s provisions. Extent may refer, for example, to whether treaty obligations are enforced in a mandatory or aspirational manner, the level of compliance enforced (e.g., the concentration level of environmental pollutants deemed legally acceptable), whether penalties for domestic violations are criminal or civil, and so forth.<sup>105</sup> One inevitably cannot conduct this analysis on a purely textualist–originalist basis, since the language of the treaty itself combines the input of many countries’ representatives without demarcating where U.S. representatives were

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<sup>103</sup> U.N. Charter pmb. (U.N. members aim “to unite [their] strength to maintain international peace and security” in part by “ensur[ing] . . . that armed force shall not be used, save in the common interest.”)

<sup>104</sup> See *supra* Section II.A (discussing the Framers’ intent in giving treaties the status of supreme law of the land).

<sup>105</sup> See *supra* Section II.B.

involved, at least not explicitly in the treaty.<sup>106</sup> Admittedly, then, this second reasonableness test is more fact-specific and has the potential to be more malleable. However, because the goal of this prong is to identify specific U.S. involvement in the treaty, and because the internationally cooperative nature of writing the final text of a treaty makes imprudent a presumption that the plain text of the treaty alone can shed light on U.S. involvement, using a broader test strikes the best balance between the goals of the constitutional test set forth herein and the realities of treaty interpretation.

Reasonableness in light of U.S. involvement requires looking into two factors, based on the two main reasons why nation-states began entering into voluntary treaties in the first place.<sup>107</sup> First, is it reasonable given the level of commitment to the treaty the United States expressed? This requires examining the record of legislative and executive deliberations in deciding to ratify the treaty. This record may reveal what priorities the Senate considered in ratifying the treaty, how the Senate envisioned the United States complying with its aspirational language, what limitations the Senate saw to compliance, and so forth—all of which shed light on the United States' intended commitment at the time of the treaty ratification. As noted earlier, the President may only enter into treaties with the advice and consent of the Senate.<sup>108</sup> For this reason, it is likely that a rich record of at least the Senate's deliberations exist for the purpose of this analysis.<sup>109</sup>

For older treaties, courts have the benefit of looking additionally to the United States' "course of performance," in the same way that courts look to course of performance to interpret contractual obligations.<sup>110</sup> However, where the record and course of performance diverge and ample evidence for both is available, the record should prevail, because later performance is less dispositive regarding what the United States originally intended when it entered the treaty. If anything, divergence between the record and course

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<sup>106</sup> See, e.g., MALLARD, *supra* note 7, at 7–9 (discussing this point in the context of the NPT).

<sup>107</sup> See *supra* Section II.B.

<sup>108</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>109</sup> The legislative history of the statutory incorporation of the pre-WTO Uruguay Round Agreements provides an illustrative example. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501–3624 (2012)) [hereinafter URAA]. The congressional database suggests that the URAA was referred for discussion to at least eight committees in the House of Representatives, two of which wrote official reports. *Committees: H.R. 5110–103<sup>rd</sup> Congress (1993–1994)*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/house-bill/5110/committees?q=%7B%22search%3A%5B%22Pub.+L.+103-465%22%5D%7D> [https://perma.cc/U6PU-6H6B]. This does not even include potential floor discussions in the House, nor does it include potential committee and floor discussions in the Senate.

<sup>110</sup> See, e.g., U.C.C. § 2-208 (AM. LAW INST. & UNIF. LAW COMM'N 2007); RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (AM. LAW INST. 1981).



of performance should indicate that the United States is currently straying from what it originally agreed to—a violation of its original intent in entering the treaty, not a meaningful illustration thereof.<sup>111</sup> Ultimately, “level of commitment” is an intent-based test assessed at the time the treaty was entered into. Hence, the ratification-period record should take precedence over later actions in interpreting the level of commitment.

Second, is the statute reasonable given the ability or willingness of the United States to comply? Voluntary treaty obligations are typically entered into to manage the inability or unwillingness of potential signatories to meet stiffer standards, so this is a prudent factor to consider.<sup>112</sup> As with the first factor, courts may look to the record to assess this factor, though the analysis is more complex. The United States’ ability or willingness to comply may have changed since the inception of the treaty, and treaties with voluntary or sliding-scale obligations usually ratchet up obligations accordingly through a tier-based classification system.<sup>113</sup> Hence, under this factor, ability or willingness at the inception of the treaty does not trump ability or willingness at the time the enacting statute became law (or even at the time the case is before the court). If treaty obligations do change based on ability or willingness over time, it seems prudent to give precedence to more recent ability or willingness in analyzing this factor, not to ability or willingness at the inception of the treaty—as long as the extent of the obligation enshrined in Congress’s implementing statute is within the range of compliance the United States acceded to by ratifying the treaty in the first place.<sup>114</sup>

One possible critique of the commitment and ability–willingness factors under the second reasonableness test is that prior U.S. commitment might very well conflict with current ability or willingness to comply. Indeed, divergence between the two could signify the United States’ backsliding on its treaty obligations. However, a statistical analogy

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<sup>111</sup> Of course, divergence between course of performance and original intent at ratification may indicate a desire to abrogate one’s treaty obligations altogether—that is, to abandon the treaty. This Note presumes that the United States has not expressly rejected, nor evinced an intent to leave, a treaty whose implementation by statute is under consideration.

<sup>112</sup> See *supra* notes 37–40 and accompanying text.

<sup>113</sup> See, e.g., Kyoto Protocol, *supra* note 13, art. 10 (describing the differing obligations between developed member states in the Protocol’s Annex I and developing states not in Annex I). Compare NPT, *supra* note 7, art. I (describing the obligations of “nuclear-weapon State Part[ies]” neither to transfer nuclear weapons to any recipient nor to induce any country to seek nuclear weapons), with *id.* art. II (describing the obligations of “non-nuclear-weapon State Part[ies]” not to receive nuclear weapons in the future).

<sup>114</sup> Of course, if the treaty-executing statute does not fall in the range of compliance the United States accepted under the final version of the treaty, then the statute plainly runs afoul of the treaty and is by definition not within Congress’s treaty-executing power.

illuminates why these two factors complement, rather than contradict, each other. As mentioned above, when the United States agrees to a voluntary treaty, it agrees to a *range* of possibly acceptable obligations.<sup>115</sup> Hence, the intent-based commitment test is best viewed as a means to determine a “confidence interval” within which the United States can choose a variety of policy outcomes and still technically be in compliance with the treaty.<sup>116</sup> The ability–willingness factor, then, specifically places current U.S. compliance along that axis of permissible policy outcomes. First, if the current state of treaty compliance is within the commitment test’s confidence interval, then the United States is formally compliant with the treaty. If it does not fall in that range, the United States is formally violating its obligations. Second, the ability–willingness factor allows the United States to reasonably craft its method for complying with treaties based on its current limitations. After all, the whole point of a voluntary treaty is providing allowance for different levels of compliance, so long as they are within the acceptable range stipulated by the treaty.<sup>117</sup>

The constitutional test proposed for voluntary treaties in this Note is admittedly complex, but necessarily so. The presumption of non-self-execution acknowledges the paradoxically explicit vagueness of voluntary treaties, while the two-step reasonableness analysis provides a boundary for statutory implementation where the text of the treaty is insufficiently specific. This analysis best balances the international and domestic concerns that abound in such treaties.

*B. Not Treaties, But Made Pursuant Thereto: Incorporating  
Post-Treaty Pronouncements*

Once a treaty capable of generating post-treaty pronouncements is properly ratified and executed domestically, courts must grapple with

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<sup>115</sup> See *supra* notes 99–100 and accompanying text.

<sup>116</sup> The “confidence interval” is a critical concept in statistics. A classical statistical conundrum is that one who wishes to study a particular variable or parameter in a population can only study a sample of the population. For example, while data obtained from a sample can identify the mean value—one paradigmatic parameter statisticians measure—in that sample, that data cannot conclusively identify the true mean in the entire population. A statistician can therefore only estimate the true value of that parameter, and he or she must thus indicate the extent to which he or she is certain that this estimated value is the parameter’s true value. The confidence interval is calculated based on sample data to estimate a range within which a statistician can be somewhat sure the true parameter value for the entire population is, and the degree of confidence is denoted by a probability between zero and one. For example, based on sample observations and a calculated sample mean, a statistician can be 95% sure that the true mean value for the population is within the estimated 95% confidence interval range. The classical article that introduced this now-omnipresent statistical concept is J. Neyman, *Outline of a Theory of Statistical Estimation Based on the Classical Theory of Probability*, 236 PHIL. TRANSACTIONS OF THE ROYAL SOC’Y OF LONDON SERIES A 333 (1937).

<sup>117</sup> See *supra* notes 33–41 and accompanying text.

incorporating the pronouncements that follow. At the onset, there is one area in which post-treaty pronouncements must be treated equivalently with originating treaties: both pronouncements and the treaties giving rise to them may not violate the Constitution.<sup>118</sup> However, post-treaty pronouncements should not be treated exactly like treaties themselves, because they do not undergo the constitutional procedural requirements for treaties.<sup>119</sup> As a consequence, incorporating post-treaty pronouncements requires interpreting documents—the treaty and the Constitution—and then fitting the pronouncement into the structure of federal law if it passes those interpretive inquiries. A proper constitutional test for post-treaty pronouncements must address both tasks in order to provide a sufficiently comprehensive approach.

*1. Threshold Inquiry: Does the Pronouncement Violate a Constitutional Provision?*—The threshold interpretation test involves a twofold constitutional inquiry. First, courts must examine whether the pronouncement—not just the treaty that originated it—violates some provision of the Constitution.<sup>120</sup> Like the original treaty itself, no post-treaty pronouncement should be incorporated if doing so would violate parts of the Constitution. A specific pronouncement could be entirely valid within the procedures prescribed by its originating treaty—and its originating treaty may be constitutional—yet the pronouncement itself could theoretically fail a constitutionality test.<sup>121</sup> This first inquiry precludes the incorporation of such a pronouncement.

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<sup>118</sup> Hathaway et al., *supra* note 1, at 266 (“Constitutional text and doctrine pose a set of affirmative constitutional commands that necessarily limit the exercise of power by the federal government. Such affirmative guarantees are set forth explicitly in the Bill of Rights’ recognition and guarantee of individual rights and in the Constitution’s provisions prescribing the structure of the national government.”); Leonie W. Huang, Note, *Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties*, 79 FORDHAM L. REV. 2211, 2226 (2011) (“Today it is well settled that all treaties are subject to the Constitution.” (citing *Reid v. Covert*, 354 U.S. 1, 16–18 (1957))).

<sup>119</sup> See *supra* note 51 and accompanying text.

<sup>120</sup> *Cf.*, e.g., *Reid*, 354 U.S. at 19 (finding unconstitutional a treaty, not a post-treaty pronouncement, in violation of the Fifth and Sixth Amendments); *Missouri v. Holland*, 252 U.S. 416, 429–30, 435 (1920) (noting that a treaty would be unconstitutional if it impermissibly infringed on states’ rights under the Tenth Amendment, but finding the treaty in question constitutional because no such violation was present).

<sup>121</sup> Hypothetically, for example, the U.N. Economic and Social Council, whose areas of concern include environmental protection, could recommend to the General Assembly a resolution that purports to grant protected status to an endangered species which exists in the United States as a wholly intrastate, noncommercial species. Under current commerce clause doctrine, such a resolution would be unconstitutional if adopted by the U.S. Senate because it reaches purely intrastate commerce, *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824), and bears no substantial relation to interstate commerce, *United States v. Lopez*, 514 U.S. 549, 567 (1995). If the federal government’s imposition of this restriction would violate states’ reserved powers under the Tenth Amendment, U.S. CONST. amend. X, and exceed its

2. *Procedural and Substantive Compliance with the Originating Treaty.*—Second, courts should examine whether the post-treaty pronouncement is valid under the treaty itself. This inquiry involves determining whether the pronouncement meets procedural requirements of the treaty<sup>122</sup> and aligns with the substantive law governing the pronouncement. Both procedural adequacy and substantive adequacy are, in effect, reasonableness tests. In order to determine if a pronouncement is reasonable within the scope of its originating treaty, courts must look both to the text of the treaties that a pronouncement claims to interpret and to the relevant existing elaboration—case law, resolutions, “legislative history,” and so on—that may bear on the procedural and substantive elements of the treaty. Even if a post-treaty pronouncement is constitutional on its own, it cannot be incorporated into U.S. law if it nonetheless substantively or procedurally violates the treaty that gave rise to it in the first place.

The analysis is thus similar to courts’ assessment of whether an agency’s regulation is a valid interpretation of a federal statute,<sup>123</sup> or whether an act of Congress is properly based in one of Congress’s constitutional powers.<sup>124</sup> In reviewing whether regulations are valid interpretations, courts assess whether the statute is one that the agency “administers”<sup>125</sup> and whether the statute is ambiguous or silent on the point to which the regulation refers.<sup>126</sup> If both those prerequisites are met, courts assess whether the regulation is a reasonable interpretation of the statute,

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own enumerated powers, *id.* art. I, § 8, a foreign body to which the United States is party via a treaty likely cannot pass such a resolution.

<sup>122</sup> See, e.g., Rome Statute of the International Criminal Court arts. 5, 11, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (defining the crimes that may be litigated at the International Criminal Court and the temporal jurisdiction of the court); RULES OF PROCEDURE OF THE GENERAL ASSEMBLY, at 34–36, U.N. Doc. A/520/Rev.17, U.N. Sales No. E.08.I.9 (2007) (describing the voting rules for resolutions at the U.N. General Assembly).

<sup>123</sup> E.g., *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

<sup>124</sup> E.g., *Sebelius*, 132 S. Ct. 2566 (2012) (addressing whether the Affordable Care Act is a valid exercise of Congress’s powers under the Taxing and Spending, Commerce, and Necessary and Proper Clauses).

<sup>125</sup> Whether an agency “administers” a statute turns on whether the agency has exclusive authority to enforce it or whether it shares that authority with other agencies. For example, in *Rapaport v. U.S. Dep’t of the Treasury, Office of Thrift Supervision*, 59 F.3d 212 (D.C. Cir. 1995), the D.C. Circuit held that the Office of Thrift Supervision did not deserve *Chevron* deference because it shared authority to administer the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101–73 § 401(a), 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.), with two other agencies. *Rapaport*, 59 F.3d at 216–17 (“[W]e owe no such deference to the OTS’s interpretation of § 1818 because that agency shares responsibility for the administration of the statute with at least three other agencies. The alternative would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all.” (internal citations omitted)).

<sup>126</sup> *Chevron*, 467 U.S. at 843.

and if so, courts accord agency interpretations maximal deference.<sup>127</sup> Likewise, in reviewing whether statutes are valid exercises of constitutional congressional power, courts look to whether one or more grants of power to Congress authorize the specific statute in question. If an act of Congress does not derive from one of those grants, the statute is unconstitutional.<sup>128</sup> The analytical process courts would have to undergo to assess the validity of post-treaty pronouncements, therefore, is hardly novel in comparison to their typical domestic law work.

Admittedly, treaty interpretation may be a somewhat complex inquiry, since courts must interpret substantive and procedural law from non-U.S. jurisdictions. However, two points regarding courts' existing tasks make courts' interpretive analyses for treaties less worrisome. First, courts already interpret law from other jurisdictions, including the various states,<sup>129</sup> and occasionally even the laws of other countries and international organizations.<sup>130</sup> It is true that the interpretation this test requires of courts may be more extensive than the analytical depth of treaties most U.S. courts are used to. However, courts already conduct similar analyses on domestic legal documents such as regulations and the Constitution.<sup>131</sup> Thus, even if courts were conducting more extensive inquiries into international law documents than before, it is sufficiently similar to other interpretive tasks they typically do in the domestic arena. Courts have the tools for analyzing international organizations' law and can build up this expertise over time. Second, international bodies issuing post-treaty pronouncements tend to have structures, procedures, and outcomes familiar to federal courts. For example, the U.N. General Assembly and the WTO's main body both operate similarly to U.S. federal and state legislatures.<sup>132</sup> Likewise,

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<sup>127</sup> *Id.* at 844.

<sup>128</sup> *Sebelius*, 132 S. Ct. at 2577.

<sup>129</sup> For example, courts consider whether state laws are procedural or substantive in conducting analyses under the *Erie* doctrine, and as a result may apply state rather than federal substantive law. *See generally* RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN & JAMES E. PFANDER, *CIVIL PROCEDURE: A MODERN APPROACH* 1013–110 (6th ed. 2013) (discussing choice of law in diversity suits at federal courts and the *Erie* doctrine).

<sup>130</sup> For example, where courts are asked to dismiss cases to foreign courts under the *forum non conveniens* doctrine, they may occasionally consider whether the law of a foreign jurisdiction is sufficient to promote the interests of justice, the parties, and the courts themselves. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254–55 (1981) (noting that inadequacy of legal remedies in a foreign jurisdiction would justify not removing a case to it under the *forum non conveniens* doctrine, but finding adequate legal remedies available to the plaintiff-respondent in the alternative forum).

<sup>131</sup> *See supra* notes 123–28 and accompanying text.

<sup>132</sup> RULES OF PROCEDURE OF THE GENERAL ASSEMBLY, at 34–36, U.N. Doc. A/520/Rev.17, U.N. Sales No. E.08.I.9 (2007) (describing voting rules for U.N. General Assembly resolutions); DSB, *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*, at 11, WTO Doc. WT/L/161 (July 25, 1996) (describing voting rules in the WTO General Council).

international courts use common law reasoning similar to that used by U.S. courts.<sup>133</sup> Finally, international organizations that perform legislative or judicial functions amass helpful guidance U.S. courts may use to aid their interpretive tasks: legislative histories, case law, and so forth. Thus, the threshold interpretation inquiry is more manageable than it may appear at first.

3. *The Issue of Precedence for Constitutional Post-Treaty Pronouncements.*—If a post-treaty pronouncement survives the two-step constitutional inquiry above, this Note argues that it should be incorporated into federal law, but not at a level equivalent to the treaty as the supreme law of the land. Rather, it should be incorporated with the same level of precedence as a federal substantive (i.e., not procedural) statute.<sup>134</sup> This argument parallels Professor Bradley's claim that treaties themselves should be on parity with federal statutes.<sup>135</sup> While Professor Bradley's argument as applied to treaties themselves is specious based on the very text of the Constitution,<sup>136</sup> applying his proposed level of precedence to post-treaty pronouncements creates a desirable balance between the interests of the international treaty regime and the constitutional interests of the national government and of state governments. Incorporating the post-treaty pronouncement fulfills the purposes of the treaty, because not doing so is effectively equivalent to refusing to follow a procedurally and substantively valid extrapolation of the original treaty.

Moreover, incorporating the pronouncement at the specific level of a federal statute matches constitutional logic based on the nature of federal statutes and of post-treaty pronouncements. Post-treaty pronouncements may take the form of rules, akin to legislative statutes,<sup>137</sup> or adjudications, akin to court cases.<sup>138</sup> Rule-type pronouncements are functionally analogous to federal statutes implementing non-self-executing treaties—voluntary or otherwise—because they interpret the meaning of the treaty's provisions and surrounding laws.<sup>139</sup> Federal statutes likewise draw on the

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<sup>133</sup> See, e.g., Harlan Grant Cohen, *International Law's Erie Moment*, 34 MICH. J. INT'L LAW 249, 280 (2013) (noting examples of cases in which international courts have used common law reasoning).

<sup>134</sup> Recall that the interpretation inquiry already requires the post-treaty pronouncement not to violate any provision of the Constitution. See *supra* Section III.B.1.

<sup>135</sup> Bradley, *supra* note 81, at 456.

<sup>136</sup> See *supra* note 92 and accompanying text.

<sup>137</sup> E.g., *supra* note 8.

<sup>138</sup> E.g., *supra* note 9.

<sup>139</sup> E.g., S.C. Res. 678, pmb. (Nov. 29, 1990) (noting that the U.N. Security Council was acting pursuant to Article VII of the U.N. Charter in authorizing, through this resolution, collective military action against Iraq at the beginning of the Persian Gulf War); Case Concerning Avena and Other

authority allocated to Congress through its enumerated powers in the Constitution.<sup>140</sup> It is therefore constitutionally logical to apply the same level of precedence to treaty-interpreting rules as is applied against Constitution-interpreting federal statutes.<sup>141</sup>

Adjudication-type pronouncements pose a more complicated conundrum, but one that is nonetheless best resolved by granting the same level of precedence as is proposed for rule-type pronouncements. They are analogous to case law interpreting the Constitution; they interpret treaties, which are also “the supreme Law of the Land,” in specific factual scenarios, but they are not the “treaties” themselves.<sup>142</sup> Likewise, Supreme Court constitutional case law precludes contrary statutes, but is not “the Constitution” itself. In a similar way to constitutional case law, then, adjudication-type pronouncements interpreting a treaty ought to take lower precedence than the treaty (or the Constitution). However, the Supreme Court has held that constitutional case law supersedes statutory interpretation of the Constitution, suggesting that, at least in constitutional law matters, case law has higher precedence than federal statutes.<sup>143</sup> These opposing approaches suggest alternatively that pronouncements based on treaties should receive treaty-level or below-treaty-level (i.e., federal statute level) precedence.

There is reason to resolve this conflicted position for adjudication-type pronouncements by granting them federal statutory precedence, lower than constitutional case law. Although the Constitution and treaties are both the supreme law of the land, the Constitution takes precedence over treaties.<sup>144</sup> Thus, generally speaking, interpretations of treaties should take lower constitutional precedence than interpretations of the Constitution. Moreover, adjudication-type pronouncements pose a much greater anti-democratic danger than constitutional case law, because they are frequently enacted by agents not beholden to the people of the United States through

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Mexican Nationals (*Mex. v. U.S.*), Judgment, 2004 I.C.J. 12, ¶ 63 (Mar. 31) (interpreting Article 36 of the Vienna Convention, *supra* note 73).

<sup>140</sup> *Sebelius*, 132 S. Ct. 2566, 2577 (2012).

<sup>141</sup> Functional analogousness of statutes and rule-type pronouncements aside, one may counter that, unlike members of Congress, who are held accountable to the people of the United States by electoral processes, the persons in charge of making post-treaty pronouncements are not held accountable to the people of the United States by any analogous mechanism. *See supra* Section I.C. However, this concern bears more directly on substantive and procedural limitations on the treaty-making power, which is beyond the scope of this Note. As acknowledged at the introduction to this Section, this Note presumes that the originating treaty itself and all bodies and mechanisms created directly under its provisions are constitutional.

<sup>142</sup> U.S. CONST. art. VI, cl. 2.

<sup>143</sup> *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

<sup>144</sup> *See supra* note 118 and accompanying text.

either appointment or election.<sup>145</sup> The balance struck here best reconciles concerns raised in the preceding paragraph.

A second reason that federal statute precedence is appropriate for rule- or adjudication-type post-treaty pronouncements is that the Constitution places the foreign affairs power in the federal government and not in the states.<sup>146</sup> Post-treaty pronouncements, which interpret treaties entered into under the foreign affairs power, should take higher precedence over state laws in the legal hierarchy. In light of (1) the foreign affairs nature of treaties, (2) concerns over both the higher position of the Constitution over treaties and, (3) the nature of post-treaty pronouncements as not being equivalent to the treaty itself, the best precedential position is that of federal statutes.

Finally, while granting pronouncements a status equivalent to federal statutes rightly establishes a presumption that they preempt state law,<sup>147</sup> states still have room to challenge them on the grounds that they interfere impermissibly with states' constitutional rights.<sup>148</sup> Where treaties are ambiguous as to their specific obligations or are open to further interpretation through post-treaty pronouncements, post-treaty pronouncements will likely elaborate on the meaning of the treaty long after the treaty was first entered into. In light of that reality, post-treaty pronouncements will likely be more common and more important sources of domestic obligations under the treaty than the originating treaties themselves. Allowing states to challenge the validity of pronouncements will become ever more essential to maintaining the proper balance of power between states, the federal government, and international

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<sup>145</sup> See *supra* notes 8–11 and accompanying text.

<sup>146</sup> The Constitution affirmatively grants the treaty-making power to the President, with the advice and consent of the Senate, U.S. CONST. art. II, § 2, cl. 2, and grants power to Congress to make laws as are “necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States.” *Id.* art. I, § 8, cl. 18. It also explicitly bars states from “enter[ing] into any Treaty, Alliance, or Confederation,” thus removing the treaty power for states, and by negation, placing it in the federal government. *Id.* art. I, § 10, cl. 1.

<sup>147</sup> Cf. *Hillman v. Maretta*, 133 S. Ct. 1943, 1955 (2013) (holding that provisions in the Federal Employees’ Group Life Insurance Act of 1954 preempted a state law); *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (holding that federal immigration law preempted a state law); *Ridgway v. Ridgway*, 454 U.S. 46, 56–57 (1981) (holding that provisions in the Servicemen’s Group Life Insurance Act preempted a state court’s conflicting decree).

<sup>148</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 907–08 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act which unconstitutionally commandeered state executive agents in violation of states’ rights under the Tenth Amendment); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (holding that the Indian Gaming Regulatory Act could not allow tribes to bring states before federal court, because doing so violated state sovereign immunity under the Eleventh Amendment); *New York v. United States*, 505 U.S. 144, 175–76 (1992) (invalidating the take title provision of the Low-Level Radioactive Waste Policy Amendments Act as a violation of the Tenth Amendment due to unconstitutional commandeering of state legislatures).



organizations. In light of Supreme Court case law authorizing states to challenge federal statutes where they infringe on states' constitutionally protected powers,<sup>149</sup> treating valid pronouncements as akin to federal statutes best satisfies the constitutional balance between states and the federal government.

As with voluntary treaties, courts need to grapple with a more complex constitutional framework when addressing and incorporating post-treaty pronouncements. The threshold interpretation inquiry is complicated, but analogous to reasonableness inquiries into statutes, regulations, and common law rules that courts typically undertake. While there are certainly potential issues regarding whether the proposed analysis is prudent or possible, this Note has shown that any such problems can be resolved with reference to other types of domestic law cases courts ordinarily take. The issue of what precedence post-treaty pronouncements would take, if valid, adds a layer of controversy. This Note provides a solution based on the structure and internal logic of the Constitution that best resolves competing international, federal, and state interests.

#### CONCLUSION

To stay relevant, constitutional theories regarding treaty making and treaty execution must engage with changes in the international treaty regime. This Note identifies two evolutions—voluntary treaties and post-treaty pronouncements—that neither case law nor academic research to date has adequately addressed. Both evolutions involve an intricate balance of interests between the international community, the federal government, and the state governments. Because both voluntary treaties and post-treaty pronouncements are likely to grow ever more frequent and complicated in the future, scholars and judges alike must reconcile those complexities with the logic of federal law and the Constitution.

The constitutional tests proposed are rooted in policy concerns as well as in the text, structure, and logic of the Constitution. Voluntary treaties raise the issue of what constitutes valid interpretation given their ambiguous obligations. It is therefore prudent to begin with a presumption that such treaties are non-self-executing, and then require implementing statutes to surpass a twofold reasonableness inquiry based on the treaty itself as well as U.S. interests in entering into it. And because post-treaty pronouncements are made in pursuance of a treaty, but are not the treaty itself, this Note begins with an interpretive reasonableness inquiry in light of the Constitution and the treaty organization's body of law. This Note

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<sup>149</sup> See *supra* note 148 and accompanying text.

then incorporates a pronouncement that survives that threshold inquiry at the level of federal substantive law.

Because treaties raise unique concerns unlike those that arise when interpreting statutes, regulations, or the Constitution, this Note proposes multistep reasonableness tests in order to allay concerns that a simpler rational basis test would be too lenient.<sup>150</sup> Using an approach that applies constitutional principles in light of the special needs and circumstances that emerge from voluntary treaties and post-treaty pronouncements, this Note provides a vital methodology to navigate an increasingly complicated international, legal, and constitutional order.

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<sup>150</sup> See, e.g., Virginia H. Johnson, Note, *Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review*, 23 CARDOZO L. REV. 347, 392 (2001).