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Non-Self-Executing Treaties: Exposing a Constitutional Fallacy

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INTRODUCTION

As the world's nations become increasingly interdependent, they conclude a greater number of treaties that regulate matters previously thought to be domestic in nature. In recent years, the United States has become a party to treaties addressing such diverse topics as unsafe working conditions, adoption of children, and racial discrimination.[1] Private litigants have asked U.S. courts to enforce provisions of treaties that regulate matters such as intellectual property protection, enforcement of arbitration awards, and capital punishment.[2]

In the United States, the increasing use of treaties to regulate "domestic" conduct exacerbates the tension between two conflicting policy goals. On the one hand, the political branches have a legitimate desire to preserve their flexibility to manage the domestic implementation of treaties. This policy goal finds support in constitutional provisions that allocate power over the conduct of U.S. foreign relations to the political branches. Any approach to constitutional interpretation that gives the judiciary too much control over treaty enforcement would conflict with fundamental separation of powers principles.[3] On the other hand, the United States has an important national interest in ensuring compliance with its treaty obligations, absent an unambiguous decision at the highest levels of government that noncompliance with a specific treaty is warranted in a particular case. This policy goal finds support in our commitment to the rule of law. Any approach to constitutional interpretation that gives the judiciary too little control over treaty enforcement undermines the rule of law.[4]

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[1] *See* Convention (No. 176) Concerning Safety and Health in Mines, June 22, 1995, S. TREATY DOC. NO. 106-8 (1999); Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51 (1998); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (ratified by U.S. in 1994).

[2] *See, e.g.*, Int'l Cafe, S.A.L. v. Hard Rock Cafe Int'l (U.S.A.), Inc., 252 F.3d 1274 (11th Cir. 2001) (determining jurisdiction to hear foreign plaintiff's claim under international trademark treaty); Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995) (deciding that Convention on Recognition and Enforcement of Foreign Arbitral Awards does not compel arbitration); Domingues v. State, 961 P.2d 1279 (Nev. 1998) (rejecting defense against capital punishment based on human rights treaty).

[3] Professor Yoo's writings in this area have emphasized this point. *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism*]; John C. Yoo, *Rejoinder, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Rejoinder*].

[4] Professor Paust's scholarship has highlighted this issue. *See* Jordan J. Paust,

The doctrine of non-self-executing treaties, as developed by the Supreme Court in the nineteenth century, struck an appropriate balance between competing rule of law and separation of powers principles. However, the modern doctrine of non-self-executing treaties, created by courts and commentators in the latter half of the twentieth century, distorts that balance. The root of the problem is the "intent thesis."

The intent thesis holds that the intent of the treaty makers determines whether a treaty is self-executing or non-self-executing.[5] This proposition is widely accepted among courts and commentators. The Restatement of Foreign Relations Law,[6] key U.S. government publications,[7] and the leading treatise on U.S. foreign relations law[8] all endorse the intent thesis. Several leading international law casebooks[9] and law review articles[10] also support the intent thesis. Judicial opinions frequently invoke the intent thesis as a point of departure for their analysis in treaty cases.[11] Unfortunately, the intent thesis has rarely been

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Customary International Law and Human Rights Treaties are Law of the United States, 20 MICH. J. INT'L L. 301 (1999) [hereinafter Paust, *Customary International Law*]; Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993) [hereinafter Paust, *Fraudulent Executive Policy*]; Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) [hereinafter Paust, *Self-Executing Treaties*].

[5] *See* LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 206-07 (4th ed. 2001).

[6] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987) [hereinafter RESTATEMENT (THIRD)] (stating that treaty is non-self-executing "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation").

[7] *See* CONGRESSIONAL RESEARCH SERV., 103d CONG., 1ST SESS., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 47-49 (Comm. Print 1993); 14 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 29, 310-11 (1970) (published by the U.S. Dept. of State) (hereinafter Whiteman DIGEST).

[8] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 201 (2d ed. 1996) (stating that "whether a treaty is to be self-executing or not depends on . . . what the parties intended . . . ").

[9] *See, e.g.*, BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 180-83 (2d ed. 1995); DAMROSCH, *supra* note 5, at 206-07 (4th ed. 2001); HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT 556 n.1 (4th ed. 1994). *But see* JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 172-79 (2000) [hereinafter PAUST, LAW AND LITIGATION] (critiquing doctrine of non-self-executing treaties).

[10] *See, e.g.*, John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 328 (1992); Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 700-10 (1995) [hereinafter Vázquez, *Four Doctrines*]; Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757, 761 (2002); Yoo, *Rejoinder*, *supra* note 3, at 2254-56.

[11] *See, e.g.*, Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001); Lidas, Inc. v. United States, 238 F.3d 1076, 1080 (9th Cir. 2001); Barapind v. Reno, 225 F.3d 1100, 1107 (9th Cir.

the subject of critical analysis.[12]

The intent thesis, as applied by courts and commentators, conflates four very different assumptions about the distribution of constitutional power over treaties:

(1) the *Foster* doctrine of non-self-execution assumes that there are prudential and/or constitutional limits on the judiciary's power to enforce treaties;[13]

(2) the *Whitney* doctrine of non-self-execution assumes that there are constitutional limits on the treaty makers' power to create primary domestic law by means of treaties;[14]

(3) the Carter doctrine assumes that the treaty makers have an *unlimited* power to prevent the judiciary from enforcing a treaty after it is ratified, irrespective of the nature of the international obligation embodied in that treaty;[15] and

(4) the Restatement doctrine assumes that the treaty makers have an *unlimited* power to prevent a treaty from becoming primary domestic law after it is ratified, irrespective of the nature of the international obligation embodied in that treaty.[16]

2000); United States v. Li, 206 F.3d 56, 71 (1st Cir. 2000) (Torruella, C.J., concurring/dissenting); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992); More v. Intelcom Support Services, Inc., 960 F.2d 466, 469 (5th Cir. 1992); Haitian Refugee Center v. Baker, 953 F.2d 1498, 1522-23 (11th Cir. 1992).

[12] There are some notable exceptions. *See* Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 654-70 (1986) (distinguishing among several different ways in which intent allegedly affects self-execution, and discriminating between helpful and unhelpful intent tests); Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal: *Win at Any Price?*, 74 AM J. INT'L L. 892, 895-96 (1980) (distinguishing between international and domestic constitutional aspects of self-execution issue, and contending that intent is relevant only to international aspect); Vázquez, *Four Doctrines*, *supra* note 10, at 704-10 (discussing application of intent thesis in lower courts).

[13] The *Foster* doctrine can be traced to the Supreme Court's decision in Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829). *See infra* Part II.

[14] The *Whitney* doctrine, in some sense, predates the Supreme Court's decision in Whitney v. Robertson, 124 U.S. 190 (1888). However, that decision was crucial because it was the first to apply the "self-execution" label to the concept that this article calls the *Whitney* doctrine. *See infra* Part III.

[15] The "Carter doctrine" is associated with the treaty makers' practice of attaching non-self-executing declarations to treaties, a practice that originated in 1978 when President Carter submitted four human rights treaties to the Senate. *See infra* Part IV.

[16] Although there were precursors of the Restatement doctrine prior to publication of the Second Restatement in 1965, courts did not generally apply the doctrine until after the

The modern doctrine of non-self-executing treaties combines these four assumptions into a single doctrine without distinguishing among them.[17] Consequently, it generates confused judicial analyses and undermines the rule of law.

This Article critically examines the four assumptions noted above, attempting to strike an appropriate balance between conflicting rule of law and separation of powers principles. The Article contends that the *Whitney* and *Foster* doctrines make sense because they are consistent with the structure of the constitution, which endows each branch of government with only limited powers. In contrast, the Carter doctrine is problematic. The treaty makers do have a broad power to limit judicial enforcement of ratified treaties. However, the proposition that they have an unlimited power to preclude judicial enforcement altogether is at odds with fundamental precepts concerning the role of an independent judiciary in preserving the rule of law.

Concerns about the Carter doctrine aside, this Article's central thesis is that the Restatement doctrine should be abandoned because it subverts both rule of law and separation of powers values without advancing any important policy goal. When a court holds that a treaty is non-self-executing, that holding, if it matters at all, typically means that the court denies a party a remedy for a treaty violation.[18] In terms of rule of law principles, the denial of a judicial remedy for a treaty violation must be counted as a cost.[19] When courts apply the *Whitney* or *Foster* doctrines, that cost is offset by a separation of powers benefit. In particular, separation of powers limits on the treaty making power (*Whitney*) or the judicial power (*Foster*) justify the denial of a remedy. In contrast, there are no separation of powers benefits associated with the Restatement doctrine.[20] Moreover, judicial application of the Restatement doctrine sometimes triggers a U.S. violation of its treaty obligations without any

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Second Restatement endorsed the Restatement doctrine. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 141 (1965) [hereinafter RESTATEMENT (SECOND)]. For an analysis of the Second Restatement and its impact on the evolution of non-self-execution doctrine, *see infra* notes 332-349 and accompanying text.

[17] Professor Vázquez has also identified four distinct doctrines of non-self-executing treaties. *See* Vázquez, *Four Doctrines*, *supra* note 10; *see also* Carlos M. Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2176-83 (1999) [hereinafter Vázquez, *Laughing*] (outlining four doctrines of self-executing treaties). For a comparison of his fourfold division to mine, *see infra* notes 102 and 127.

[18] *See infra* notes 61-71.

[19] *See, e.g.*, Richard H. Fallon, Jr., The "Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 9 (1997) (noting that one key element of rule of law ideal is that "[c]ourts should be available to enforce the law").

[20] *See infra* notes 255-264 and 296-308 and accompanying text.

authorization from the political branches.[21] That outcome is manifestly inconsistent with separation of powers principles because the decision whether to violate a treaty obligation is constitutionally committed to the political branches, not the judiciary.

Although many lower court opinions and scholarly writings endorse the Restatement doctrine, either implicitly or explicitly,[22] that doctrine cannot be reconciled with the text and structure of the United States Constitution. The Supreme Court has never endorsed the view that the treaty makers have an unlimited power to prevent a ratified treaty from becoming domestic law.[23] Moreover, the treaty makers have never purported to exercise such a power.[24] When the United States ratifies a treaty that creates primary international legal duties, the Supremacy Clause mandates automatic conversion of those international duties into primary domestic law, except insofar as constitutional constraints preclude automatic conversion of a particular duty.[25] Whether the treaty makers intended to create primary domestic law is irrelevant, because constitutional rules determine whether a particular provision of a ratified treaty creates primary domestic law; and the treaty makers do not have the power to alter those constitutional rules.[26]

Several commentators have critically examined non-self-execution doctrine, but this Article's approach is unique. Professors Yoo and Woolhandler generally defend non-self-execution doctrine, without distinguishing among the different variants of the doctrine.[27] Professor Paust generally repudiates non-self-execution doctrine, also without distinguishing among the different versions.[28] Professor Vázquez

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[21] *See infra* notes 65-70 and accompanying text.

[22] Courts and commentators generally avoid explicit endorsement of the proposition that the treaty makers have an unlimited power to preclude treaties from becoming domestic law. Even so, that assumption is implicit in numerous judicial opinions and other writings. *See infra* notes 332-349 and accompanying text. Because the assumption is implicit, it has remained largely unexamined. *But see* Vázquez, *Laughing*, *supra* note 17, at 2186-88 (defending thesis that treaty makers have power to countermand Supremacy Clause).

[23] *See infra* notes 309-318 and accompanying text.

[24] *See infra* notes 296-308 and accompanying text.

[25] U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land."). *See infra* notes 203-241 and accompanying text (analyzing Supremacy Clause and defending interpretation of that Clause in accordance with "qualified automatic conversion rule").

[26] *Accord*, Riesenfeld, *supra* note 12, at 895-96.

[27] *See* Woolhandler, *supra* note 10; Yoo, *Globalism*, *supra* note 3; Yoo, *Rejoinder*, *supra* note 3.

[28] *See* Paust, *Fraudulent Executive Policy*, *supra* note 4; Paust, *Self-Executing Treaties*, *supra* note 4.

distinguishes among four different versions of the doctrine, but fails to discriminate between valid and invalid versions, treating all four as equally valid.[29] Professor Iwasawa distinguishes among different versions of self-execution doctrine, accepting some and rejecting others, but fails to expose the erroneous, unstated constitutional assumption underlying the Restatement doctrine.[30] Professor Riesenfeld challenges the constitutional underpinnings of the Restatement doctrine, but his analysis is quite brief and his work is now somewhat dated.[31] This Article is the first to present a detailed defense of the thesis that the Restatement doctrine is founded upon a mistaken constitutional assumption.

Part I examines the "intent thesis." It demonstrates that the intent thesis is the root cause of confusion surrounding the doctrine of non-self-executing treaties because courts and commentators fail to distinguish among four different versions of the intent thesis, each of which is founded upon a different assumption about the distribution of constitutional power over treaty making and/or treaty enforcement. Parts II through V, respectively, analyze the *Foster* doctrine, the *Whitney* doctrine, the Carter doctrine, and the Restatement doctrine. Part VI, the concluding section of this Article, sketches an analytic framework for courts to utilize in cases where litigants raise treaty-based claims or defenses. In place of the current doctrinal approach, where courts pursue a generalized inquiry as to whether the treaty makers intended a particular treaty provision to be self-executing, Part VI recommends a step-by-step approach that divides the self-execution inquiry into its component parts. The key insight underlying this step-by-step approach is this: where power is lacking, intent is irrelevant. Therefore, the discrete steps in the analysis focus on the treaty makers' intent only insofar as the treaty makers have the constitutional power to accomplish a specified purpose.

I. THE INTENT THESIS

Part I analyzes the intent thesis, thereby exposing the four different constitutional assumptions that are hidden beneath the surface of non-self-execution doctrine. The first section of Part I briefly discusses the relationship between domestic and international law, and the distinction

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[29] *See* Vázquez, *Four Doctrines*, *supra* note 10; Vázquez, *Laughing*, *supra* note 17.

[30] *See* Iwasawa, *supra* note 12.

[31] *See* Riesenfeld, *supra* note 12.

between primary and remedial law. This lays the conceptual groundwork for a detailed analysis of the intent thesis, which follows in the second section.

A. Two Key Concepts

1. The Relationship Between Domestic and International Law

Professor Bradley defines the "monist" view of the relationship between international and domestic law as a view "that international and domestic law are part of the same legal order, . . . and international law is supreme over domestic law."[32] He contrasts this with the "dualist" view, which holds that "international and domestic law are distinct, . . . and the status of international law in the domestic system is determined by domestic law."[33] This Article assumes that the dualist view, as defined herein, better describes the relationship between international and domestic law. In short, domestic law, not international law, determines the domestic legal effects of treaty ratification.

The preceding definitions of the terms "monist" and "dualist" must be distinguished from a different usage of the terms that differentiate between monist and dualist domestic legal systems. In this sense of the terms, a country has a "monist" legal system if international treaty provisions are automatically converted into domestic law without the need for implementing legislation.[34] In contrast, a country has a "dualist" legal system if its law requires implementing legislation to convert international treaty obligations into domestic law.[35] The dualist view of the relationship between international and domestic law insists that domestic law, not international law, determines whether treaties have domestic legal force in the absence of implementing legislation.

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[32] Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530 (1999).

[33] *Id.* For a slightly different presentation of the distinction between monism and dualism, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32-34 (4th ed. 1990).

[34] The term "monist" might also be used to signify that customary international law is automatically incorporated into domestic law. Since this article focuses on treaties, not customary international law, I define the term with respect to treaties.

[35] The United Kingdom has a dualist legal system in this sense. *See* Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 467-69 (1991). The Netherlands, though, has a monist legal system. Pieter van Dijk & Bahiyyih G. Tahzib, *Parliamentary Participation in the Treaty-Making Process of the Netherlands*, 67 CHI.-KENT L. REV. 413, 418 (1991).

However, the dualist view of the relationship between international and domestic law is entirely consistent with the proposition that some domestic legal systems are partially or wholly monist.

Although this Article accepts the dualist view of the relationship between domestic and international law, the Article contends that the United States' domestic legal system is largely (but not entirely) monist in the sense that most treaty provisions are automatically converted into domestic law at the time of treaty ratification, without the need for implementing legislation. The Article does not contend that international law requires automatic incorporation of treaties; that argument would be inconsistent with the dualist view of the relationship between domestic and international law. Rather, the Article contends that U.S. domestic law, specifically the Supremacy Clause,[36] mandates automatic conversion of treaties in most (but not all) cases.[37]

2. Primary Law and Remedial Law

Primary legal rules describe the type of conduct that is legally permitted or prohibited. In contrast, a remedial legal rule describes "what happens in the event of noncompliance or other deviation" from the primary rules.[38] Thus, for example, the rule that murder is prohibited is a primary legal rule. In contrast, the rule that the surviving spouse of a murder victim may file a lawsuit to seek compensation from the murderer is a remedial legal rule.

Not every individual who is harmed by a violation of a primary law is entitled to a judicial remedy.[39] Therefore, the statement that a treaty provision establishes a primary domestic legal rule does not necessarily mean that an individual is entitled to a judicial remedy for every violation of that treaty provision. Similarly, the statement that an individual cannot obtain a judicial remedy for a treaty violation does not necessarily mean that the treaty lacks the status of primary domestic law. In short, the question whether a treaty provision creates primary domestic law is different from the question whether, and in what circumstances, an individual can obtain a judicial remedy for a violation

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[36] U.S. CONST. art. VI, cl. 2.

[37] *See infra* notes 203-241 and accompanying text (defending interpretation of Supremacy Clause in accordance with qualified automatic conversion rule).

[38] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 122 (1994) [hereinafter HART & SACKS].

[39] *See id.* at 136.

of that treaty provision.[40]

Many courts and commentators have contended that if there is no possible judicial remedy for a violation of a primary law, then the ostensible law is not a primary law at all.[41] In treaty cases, in particular, courts often resort to a mode of analysis that can be summarized in the following syllogism: "If there is no remedy, there is no primary law; since the treaty does not provide a remedy, the treaty lacks the status of primary law."[42] Hart and Sacks criticize this mode of analysis because it confuses the distinction "between a primary claim to a performance and a remedial capacity to invoke a sanction for nonperformance. . . ."[43] "It is the essence of clear analysis," they say, "to see that [this approach] is backwards, and instead to think frontwards."[44] To think "frontwards" in treaty cases, courts should first ask whether a treaty provision has the status of primary domestic law and then, if the first question is answered affirmatively, consider the availability of judicial remedies for a violation of that treaty provision.

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[40] *Accord*, Iwasawa, *supra* note 12, at 643-46 (distinguishing between domestic validity, which is primary law concept, and direct applicability, which is remedial law concept).

[41] *See, e.g.*, Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (claiming that it puts "the cart before the horse . . . to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. . . . [A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court.").

[42] For example, in *Jama v INS*, 22 F. Supp. 2d 353 (D.N.J. 1998), the court held that the Alien Tort Claims Act (ATCA) "provides both jurisdiction and a cause of action for claims under customary international law." *Id.* at 362. If the ATCA provides a cause of action for torts committed in violation of the law of nations, then the statute must also provide a cause of action for treaty violations because the statute, by its terms, applies equally to treaties. *See* 28 U.S.C. § 1350 (1994) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). Yet the court in *Jama* held that plaintiffs could not bring suit under the ATCA for violations of non-self-executing treaties because such treaties do not "give rise to a private right of action." *Jama*, 22 F. Supp. 2d at 362. This reasoning makes sense only if one assumes that a treaty that does not "give rise to a private right of action" is not a "treaty" within the meaning of the ATCA — that is, it lacks the status of primary law.

[43] HART & SACKS, *supra* note 38, at 136. The discussion in HART & SACKS is not focused on treaties, as such. Their point is more general, but it applies equally to treaties.

[44] *Id. See also* Henry M. Hart, Jr., *Holmes' Positivism — An Addendum*, 64 HARV. L. REV. 929, 935 (1951) ("Holmes' 'cart' is the horse and his 'horse' is the cart. . . . The remedial parts of law — rights of action and other sanctions — are subsidiary. To the primary parts they have the relation of means to ends. They come second not first.").

B. The Four Versions of the Intent Thesis

The intent thesis holds that the intent of the treaty makers determines whether a treaty is self-executing or non-self-executing. Implicit in this proposition is the assumption that the treaty makers have the power to render a treaty non-self-executing. If the treaty makers lacked that power, their intent to make a treaty non-self-executing would be irrelevant. Thus, the question arises, "Do the treaty makers have the power to render a treaty non-self-executing?"

The answer to that question depends upon what it means to claim that the treaty makers have such a power. The term "non-self-executing" could mean either: (a) that a treaty lacks the status of *primary* domestic law (a "primary law" concept of non-self-execution),[45] or (b) that courts are not authorized to provide judicial *remedies* for treaty violations (a "remedial law" concept of non-self-execution).[46] Moreover, the statement that the treaty makers have the power to render a treaty non-self-executing might mean either: (a) that they have the power to control the domestic legal effects of treaty ratification by and through the international law they create (an "indirect version" of the intent thesis); or (b) that they have the power to control the domestic legal effects of treaty ratification without modifying the international legal obligations embodied in the treaty (a "direct version" of the intent thesis).[47] In light of these two distinctions, there are four different versions of the intent thesis, which are presented in the following table.

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[45] *See infra* note 337 (citing cases that manifest primary law concept of self-execution).

[46] *See, e.g.*, United States v. Duarte-Acero, 208 F.3d 1282, 1284 n.8 (11th Cir. 2000) (stating that although treaty is "the supreme law of the land," "treaties that are not self-executing require implementing legislation before individuals can rely on their provisions in U.S. courts"); Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (self-executing treaty is one that "provides rights to individuals rather than merely setting out the obligations of signatories"); More v. Intelcom, 960 F.2d 466, 469 (5th Cir. 1992) (stating that treaties "are the law of the land . . . but if not implemented by appropriate legislation they do not provide the basis for a private lawsuit unless they are intended to be self-executing").

[47] Other scholars have highlighted the importance of the distinction between "primary law" and "remedial law" versions of self-execution doctrine. *See, e.g.*, Iwasawa, *supra* note 12, at 635-45; Vázquez, *Laughing*, *supra* note 17, at 2176-83; Vázquez, *Four Doctrines*, *supra* note 10; Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1117-23 (1992) [hereinafter Vázquez, *Treaty-Based Rights*]. However, scholars have generally failed to recognize the crucial distinction between "direct" and "indirect" versions of the intent thesis.

	Remedial Law Concept of Self-Execution	**Primary Law Concept of Self-Execution**
Treaty Makers Shape Domestic Law Indirectly (through international law)	*Foster* doctrine — treaty makers' intent determines international obligation, which affects availability of judicial remedies	*Whitney* doctrine — treaty makers' intent determines international obligation, which affects treaty's status as primary domestic law
Treaty Makers Shape Domestic Law Directly (without affecting international law)	Carter doctrine — treaty makers' intent directly controls the availability of judicial remedies	Restatement doctrine — treaty makers' intent directly controls treaty's status as primary domestic law

Under the *Foster* doctrine, the statement that a treaty provision is non-self-executing means that, even though the provision has the status of primary domestic law, courts are not authorized to provide judicial remedies for treaty violations because the provision at issue is not the type of law that the judiciary is competent to enforce.[48] Thus, the *Foster* doctrine presupposes that there are constitutional and/or prudential limits on the judiciary's power to enforce treaties.[49] Under the *Foster* doctrine, the treaty makers have an affirmative power to craft a non-self-executing treaty provision, but they can exercise that power only *indirectly*, by crafting an international legal obligation that, when converted into domestic law, gives rise to the type of domestic duty that is not judicially enforceable because of limitations on the judicial power. Thus, when courts apply the *Foster* doctrine, the relevant inquiry is not whether the treaty makers intended to create a non-self-executing treaty. Instead, the relevant inquiries are: (1) what type of international legal obligation did they intend to create? and (2) is that the type of international legal obligation that is not judicially enforceable because the domestic legal duty that arises from automatic conversion is beyond the scope of judicial competence?

Under the *Whitney* doctrine, the statement that a treaty provision is non-self-executing means that the provision lacks the status of primary domestic law because it is outside the scope of the treaty makers'

[48] *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). For a defense of this interpretation of *Foster*, *see infra* notes 73-101 and accompanying text.

[49] For analysis of the limits on the judiciary's power to enforce treaties, *see infra* notes 102-125 and accompanying text.

domestic lawmaking powers.[50] Thus, the *Whitney* doctrine presupposes that there are constitutional limits on automatic conversion of treaties into primary domestic law.[51] Under the *Whitney* doctrine, the treaty makers do have an affirmative power to craft a non-self-executing treaty provision. However, they can exercise that power only *indirectly*, by crafting an international legal obligation that cannot be automatically converted into domestic law because of constitutional limitations on automatic conversion. Thus, when courts apply the *Whitney* doctrine, the relevant inquiry is not whether the treaty makers intended to create a non-self-executing treaty. Rather, the relevant inquiries are: (1) what type of international legal obligation did they intend to create? and (2) is that the type of international legal obligation that cannot be automatically converted into primary domestic law because it is beyond the scope of the treaty makers' domestic lawmaking powers?

Under the Carter doctrine, the statement that a treaty provision is non-self-executing means that, even though the provision has the status of primary domestic law, courts are not authorized to provide judicial remedies for treaty violations because the treaty makers intended to preclude judicial remedies for treaty violations.[52] Because the treaty makers' intent is relevant only insofar as they have the power to execute that intent, the Carter doctrine presupposes that the treaty makers have an unlimited power to prevent the judiciary from enforcing a treaty after it is ratified, irrespective of the nature of the international obligation embodied in that treaty. Insofar as the Carter doctrine is valid, the treaty makers have an affirmative power to preclude judicial enforcement of treaty provisions that *do* have the status of primary domestic law and that *are* within the scope of judicial competence. Moreover, the treaty makers can exercise that power directly, without modifying the international legal obligations embodied in the treaty.

Under the Restatement doctrine, the statement that a treaty provision is non-self-executing means that the provision lacks the status of primary domestic law because the treaty makers did not intend for it to become primary domestic law.[53] Given that the treaty makers' intent is relevant only insofar as they have the power to carry out that intent, the

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[50] *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888). For a defense of this interpretation of *Whitney*, *see infra* notes 135-155 and accompanying text.

[51] *See infra* notes 127-134.

[52] For discussion of the relationship between the Carter doctrine and non-self-executing declarations, see *infra* notes 156-164 and accompanying text.

[53] *See* RESTATEMENT (SECOND) § 141, *supra* note 16. *See also infra* notes 332-333 and accompanying text.

Restatement doctrine presupposes that the treaty makers have an unlimited power to prevent a treaty from becoming primary domestic law after it is ratified, irrespective of the nature of the international obligation embodied in the treaty. Notwithstanding the Supremacy Clause, which states explicitly that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land,"[54] the Restatement doctrine holds that the treaty makers have an affirmative power to decide that a ratified treaty will not be converted into primary domestic law, even though there are no constitutional impediments to automatic conversion. Moreover, under the Restatement doctrine, the treaty makers can exercise that power directly, without modifying the international legal obligations embodied in the treaty.

The two indirect versions of the intent thesis (*Foster* and *Whitney* doctrines) both presuppose that the treaty makers have the power to shape domestic law *indirectly*. That assumption is unassailable. Because Article II of the Constitution gives the treaty makers the power to create international law,[55] and the Supremacy Clause accords treaties the status of primary domestic law,[56] the combination of the two provisions gives the treaty makers the power to shape domestic law by and through the international legal obligations they create. However, it is unclear whether either provision, alone or in combination, gives the treaty makers the power to shape domestic law directly — that is, independently of the international legal obligations they create. The two direct versions of the intent thesis (Carter and Restatement doctrines) focus on the manner in which the treaty makers' intent directly shapes domestic law. If the treaty makers lacked the power to shape domestic law directly, then the two direct versions of the intent thesis would be ill conceived, because the treaty makers' intent to shape domestic law directly would be irrelevant. This Article contends that the Constitution does not give the treaty makers a power to shape primary domestic law directly. Therefore, the Restatement doctrine is flawed because it is founded upon an erroneous assumption about the treaty makers' constitutional powers.[57] In contrast, the Carter doctrine is valid insofar as it assumes that the treaty makers have a *limited* power to shape domestic remedies directly. However, the Carter doctrine is invalid insofar as it assumes that the treaty makers have an unlimited power to

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[54] U.S. CONST. art VI, cl. 2.

[55] U.S. CONST. art. II, § 2, cl. 2.

[56] *See infra* notes 220-228 and accompanying text.

[57] *See infra* Part V.

preclude judicial remedies for treaty violations.[58]

Other scholars have argued that the treaty makers have the power to shape domestic law through bilateral or multilateral agreement, but not through unilateral conditions that do not modify that international agreement.[59] In contrast, this Article contends that the distinction between bilateral and unilateral intent is unimportant, but the distinction between direct and indirect versions of the intent thesis is crucial.[60] Hence, this Article makes the following three contentions. First, the treaty makers have the power to shape domestic law *indirectly* and they can do so either unilaterally by reservation, or bilaterally or multilaterally by agreement. Second, the treaty makers have a limited power to shape domestic remedies *directly* and they can do so either unilaterally, bilaterally, or multilaterally. Finally, the treaty makers lack the power to shape primary domestic law directly, regardless of whether they attempt to do so unilaterally, bilaterally, or multilaterally. Therefore, the treaty makers cannot, even by mutual agreement, preclude a treaty from becoming primary domestic law at the time it becomes internationally binding.

The distinctions highlighted above are not mere academic hairsplitting: they have substantive policy content. The Framers included treaties in the Supremacy Clause to help promote U.S. compliance with its treaty obligations.[61] Whenever a court holds that a treaty is non-self-executing, that holding, if it matters at all,[62] yields one

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[58] *See infra* Part IV.

[59] *See, e.g.*, John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555, 582-85 (1998); Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293, 296-97 (1991).

[60] The distinction between direct and indirect versions of the intent thesis is *not* the same as the distinction between unilateral and bilateral manifestations of intent. The treaty makers might agree bilaterally to a treaty provision that affects domestic law, but does not affect international law. *See infra* notes 247-248 and accompanying text. That would be a bilateral effort to control domestic law directly. Alternatively, the United States can control domestic law indirectly by adopting a unilateral reservation that modifies its international obligations. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, 1155 U.N.T.S. 331.

[61] *See infra* note 225 and accompanying text.

[62] There are three kinds of cases where a non-self-execution holding does not matter. First, if there is no treaty violation, then the self-execution issue is inconsequential. Second, if there is an independent rationale for denying judicial relief, then the non-self-execution holding has no effect. Finally, there are some cases where a court might grant judicial relief despite a non-self-execution holding. For discussion of the last point, see David Sloss, *Ex parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH L. REV. 1103, 1122-23 (2000).

of two results: (a) the court refuses to provide a remedy for an acknowledged treaty violation;[63] or (b) the court refuses to decide whether the treaty has been violated.[64] In the former case, the refusal to provide a remedy undermines the goal of treaty compliance by signaling relevant individuals and organizations that they can violate treaty norms without fear of domestic judicial sanctions.

In the latter case, the court's refusal to decide the issue may itself constitute a treaty violation.[65] For example, under the International Covenant on Civil and Political Rights (ICCPR)[66] the United States has an international legal obligation to provide an individual hearing before an impartial tribunal for persons who claim that their treaty rights have been violated.[67] Nevertheless, in a state court criminal trial where the defendant raised the ICCPR as a defense to imposition of capital punishment, the trial judge relied on the Restatement doctrine of non-self-execution as a justification for his refusal to decide whether imposition of the death penalty would violate the ICCPR.[68] By refusing

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[63] *See, e.g.*, United States v. Postal, 589 F.2d 862, 872-73 (5th Cir. 1979) (holding that boarding of a ship by Coast Guard violated article 6 of High Seas Convention) and 873-84 (nevertheless denying ship's captain judicial remedy on grounds that Convention was not self-executing).

[64] Professor Moore makes a similar argument in the context of his critique of the "dual theory" of treaty interpretation. *See* JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW 28 (2001) ("Whenever . . . the 'Senate intent' differs from the correct international meaning [of a treaty], then [the dual theory] will always either require the United States to violate its solemn treaty obligations internationally or to be held to obligations not binding on the other party or at least not bargained for.").

[65] In cases where a treaty does not obligate the United States to provide individual judicial remedies for treaty violations, a court's refusal to decide the merits of an individual claim would not constitute a treaty violation. However, in cases where a treaty does obligate the United States to provide individual judicial remedies for treaty violations, a court's refusal to decide the merits of an individual claim is itself a treaty violation. *See* LaGrand Case (Germany v. United States), ¶¶ 79-91 (June 27, 2001) *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.

[66] International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

[67] *See id.*, art. 2, para. 3(a). *See also* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 143 (1999) (contending that human rights treaties ratified by United States impose duty on United States "to ensure that any person who raises a non-frivolous allegation that his or her treaty rights have been violated obtains an individual hearing before an impartial tribunal" that is authorized to adjudicate the merits of the claim).

[68] People v. Krebs, Case No. F 283378, Superior Court of the State of California for the County of San Luis Obispo (unpublished disposition, on file with author). *Krebs* is distinguishable from cases in which defendants have invoked the ICCPR to challenge capital punishment of juveniles. *See infra* notes 181-182 and accompanying text. Defendants have consistently lost those cases on the merits because the United States adopted an explicit reservation exempting itself from the ICCPR obligation not to impose

to address the merits of defendant's treaty-based defense, the court violated the United States' international legal obligation to provide an individual hearing on the merits of that defense. The state court's violation of the United States' international treaty obligation directly contravened the federal political branches' oft-expressed intent to comply with U.S. obligations under the ICCPR,[69] including the obligation to provide an individual hearing before an impartial tribunal.[70] Inasmuch as the state court's decision contravened the federal political branches' intent, the treaty violation was manifestly incompatible with both federalism and separation of powers principles, which give the federal political branches primary responsibility for deciding whether to violate U.S. treaty obligations.

When courts apply the *Whitney* or *Foster* doctrine of non-self-execution, competing constitutional values, in particular, limits on the treaty makers' domestic lawmaking powers (*Whitney*), or on the judiciary's enforcement powers (*Foster*), justify the decision to deny a judicial remedy. But when courts apply the Restatement doctrine, there are no competing constitutional values. Judicial application of the Restatement doctrine is simply a bald exercise of the power to undermine U.S. compliance with its treaty obligations; it does not promote any legitimate policy objective.[71] Therefore, the Restatement doctrine should be rejected on policy grounds because it subverts U.S. compliance with its treaty obligations without advancing any important policy goal.

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capital punishment for crimes committed by minors. In contrast, Mr. Krebs contended that capital punishment would violate the obligation not to deprive him of his life "arbitrarily," ICCPR, *supra* note 66, art. 6, para. 1, an obligation that is binding on the United States because the United States did not adopt a reservation to that provision.

[69] *See* Sloss, *supra* note 67, at 178-83 (documenting fact that political branches have consistently affirmed their intent to comply with United States obligations under ICCPR and other human rights treaties).

[70] When the United States ratified the ICCPR, it adopted reservations limiting the scope of its international legal obligation to comply with specific treaty articles. *See id.* at 175-77. However, the United States did not adopt a reservation limiting its article 2, paragraph 3, obligation to provide domestic judicial remedies for treaty violations. The decision not to adopt a reservation is evidence of the political branches' intent to comply with that obligation.

[71] For more detailed elaboration of this point, see *infra* notes 255-264, 296-308 and accompanying text.

II. THE *FOSTER* DOCTRINE

Under the *Foster* doctrine, ratification of a treaty automatically converts the treaty provisions into primary domestic law. However, non-self-executing provisions are not judicially enforceable, at least not at the behest of private individuals. The *Foster* doctrine differs from the *Whitney* doctrine in that *Foster* embodies a remedial law concept of non-self-execution, whereas *Whitney* reflects a primary law concept. The *Foster* doctrine differs from the Carter doctrine because *Foster* limits judicial enforcement only of certain types of international legal obligations: those that, by their nature, are beyond the judiciary's competence to enforce. In contrast, the Carter doctrine limits judicial enforcement of all types of international legal obligations, including those within the scope of judicial competence, provided that the treaty makers have manifested an intent to preclude judicial enforcement.

Part II has two sections. The first section addresses Chief Justice Marshall's opinion in *Foster v. Neilson*[72] and the nineteenth century concept of executory treaty provisions. The second section discusses the types of international legal obligations that are beyond the judiciary's competence to enforce.

A. Foster *and the Nineteenth Century Concept of Executory Treaty Provisions*

The first Supreme Court decision that distinguished between "executory" and "executed" treaty provisions was in 1796.[73] The distinction between executory and executed treaty provisions had its origins in a contract law doctrine that distinguished between executory and executed contracts. Blackstone described the distinction as follows: "A contract may also be either executed, as if A agrees to change horses with B, and they do it immediately . . . or it may be executory, as if they agree to change next week. . . ."[74] In short, a contract is executed if it promises immediate performance. A contract is executory if it promises future performance.

1. *Foster* and *Percheman*

The distinction between contracts (or treaties) that promise immediate performance and contracts (or treaties) that promise future performance

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[72] 27 U.S. (2 Pet.) 253 (1829).

[73] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 271-72 (1796) (Iredell, J., dissenting in part).

[74] 2 WILLIAM BLACKSTONE, COMMENTARIES * 443.

is precisely the distinction that Chief Justice Marshall recognized in *Foster*.[75] In *Foster*, the Court interpreted an 1819 treaty by which the United States acquired Florida from Spain. Article 8 stated:

> All the grants of land made before the 24th of January 1818, by his catholic majesty [i.e., Spain], or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his catholic majesty."[76]

Chief Justice Marshall noted that the treaty "does not say, that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject . . . ."[77] Thus, in Marshall's view, treaty language specifying that grants "are hereby confirmed" would be executed, not executory, because such language creates an international legal obligation to convey land immediately, not in the future.

However, the treaty said that land grants "shall be ratified and confirmed."[78] The Court construed this as a promise of future action, not a present operative grant.[79] Hence, the Court concluded that, as a matter of international law, the treaty was executory, not executed, because it created an international legal obligation to convey property in the future; it did not create an international legal obligation to convey property immediately upon ratification.[80]

Four years later, in *United States v. Percheman*,[81] the Court revised its interpretation of article 8. The appellee in *Percheman* alerted the Court to a difference between the Spanish and English versions of article 8: "The English side of the treaty leaves the ratification of the grants executory — they shall be ratified; the Spanish, executed — they shall continue acknowledged and confirmed."[82] Based on the Spanish text, Chief Justice Marshall overruled his own decision in *Foster*, holding that article 8 of

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[75] Although Chief Justice Marshall did not use the terms "executed" and "executory" in *Foster*, later 19th century cases used these terms to describe the holding of *Foster*. *See infra* notes 86-95 and accompanying text.

[76] *Foster*, 27 U.S. at 310.

[77] *Id.* at 314-15.

[78] *Id.* at 310 (quoting Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, U.S.-Spain, art. 8).

[79] *Id.* at 314 (stating that these words "pledge the faith of the United States to pass acts which shall ratify and confirm" the land grants in the future).

[80] *Id.* at 314-15.

[81] 32 U.S. (7 Pet.) 51 (1833).

[82] *Id.* at 69.

the 1819 treaty was executed, not executory.

> No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words "shall be ratified and confirmed," are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they "shall be ratified and confirmed" by force of the instrument itself. When we observe, that in the counterpart of the same treaty, executed at the same time, by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.[83]

In short, under the English version of the treaty the provision appears to be executory, because it seems to promise future performance. However, when viewed together with the Spanish version, it is clear that article 8 is executed, not executory, because it promises immediate performance.

It bears emphasis that, in Chief Justice Marshall's view, as articulated in *Foster* and *Percheman*, the classification of a treaty provision as executed or executory turns exclusively on the nature of the international legal obligation embodied in the treaty. Marshall assumed that different domestic legal consequences would flow from different types of treaty obligations. Thus, for example, an executed treaty provision "operates of itself without the aid of any legislative provision."[84] In contrast, "the legislature must execute" an executory treaty provision "before it can become a rule for the Court."[85] However, the sole criterion for distinguishing between executory and executed treaty provisions is the nature of the international legal obligation. If the treaty requires immediate performance, as a matter of international law, it is executed. A treaty provision is executory if, as a matter of international law, it obligates a party to accomplish a result in the future, some time after entry into force of the treaty, but neither requires nor prohibits any particular action immediately upon entry into force.

2. Subsequent Nineteenth Century Decisions

Commentators have generally understood *Foster* and *Percheman* to distinguish between treaty provisions that have no domestic legal effect in the absence of implementing legislation (non-self-executing) and

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[83] *Id.* at 89.

[84] *Foster*, 27 U.S. at 314-15.

[85] *Id.* at 314.

provisions that do have domestic legal effect, even without implementing legislation (self-executing).[86] In contrast, the preceding analysis emphasizes the distinction between a treaty provision that promises to convey property in the future (executory) and a treaty provision that itself conveys property (executed). This analysis is supported by subsequent nineteenth century Supreme Court decisions that construed *Foster* and *Percheman* in accordance with the executory/executed distinction.

For example, in *Rhode Island v. Massachusetts*,[87] Justice Baldwin stated that the Court in *Foster* "distinctly recognized the distinction between an executory treaty . . . and an executed treaty."[88] Justice Baldwin described an executory treaty as "a mere stipulation for the future confirmation of previous grants . . . ."[89] In contrast, an executed treaty is "a present confirmation, absolute and final by the mere force of the treaty itself."[90] In Justice Baldwin's view, the key holding of *Percheman* was that article 8 of the 1819 treaty with Spain "was an executed treaty [provision]" because it "operated as a perfect, present, and absolute confirmation of . . . [land] grants."[91] Thus, according to Justice Baldwin, the key distinction recognized in *Foster* and *Percheman* is the distinction between a treaty provision that promises to convey property in the future (executory) and a treaty provision that itself conveys property (executed).

Similarly, in *Guitard v. Stoddard*, plaintiff's counsel noted that "the English version of the Florida treaty . . . was construed to be executory" in *Foster*, but "the Spanish version of the same clause of the same treaty . . . [was] held to be a present ratification and confirmation" in *Percheman*.[92] *Guitard* is particularly noteworthy because a key issue in that case was whether an 1812 Act of Congress was executory or executed.[93] The fact that the court distinguished between executory and

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[86] *See, e.g.*, HENKIN, *supra* note 8, at 198-200; Paust, *Self-Executing Treaties*, *supra* note 4, at 767; Vázquez, *Four Doctrines*, *supra* note 10, at 700-02.

[87] 37 U.S. (12 Pet.) 657 (1838).

[88] *Id.* at 746.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 747. Justice Baldwin actually thought that *United States v. Arredondo*, 31 U.S. (6 Pet.) 691 (1832), which was decided after *Foster* and before *Percheman*, had implicitly held that article 8 of the 1819 treaty with Spain was executed, not executory. *Percheman*, he said, "on considering the necessary effect of this construction [in *Arredondo*], repudiated that which had been given" in *Foster*. *Rhode Island*, 37 U.S. (12 Pet.) at 747.

[92] Guitard v. Stoddard, 57 U.S. (16 How.) 494, 501 (1853).

[93] *See id.* at 508-11.

executed statutes shows that the executory/executed distinction, as conceived in the nineteenth century, did not turn on whether legislation was required for a treaty (or statute) to become law.[94] Rather, the distinction turned on whether a particular law was a "present operative grant."[95]

3. *Foster* and The Intent Thesis

Marshall's distinction between executory and executed treaty provisions turned entirely on the nature of the international legal obligation. Nowhere in *Foster* or *Percheman* did Chief Justice Marshall state or imply that the parties' intentions have a direct effect, independent of the nature of the international legal obligation imposed by the treaty, on the domestic legal consequences of treaty ratification. Therefore, *Foster* and *Percheman* do not support either direct version of the intent thesis.

However, *Foster* does support the indirect remedial version of the intent thesis because it suggests that executory treaty provisions cannot be enforced by the judiciary until they are executed. In Chief Justice Marshall's words: "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."[96] The first part of this sentence refers to treaty provisions that are executory as a matter of international law. The second part describes the domestic legal effects of ratification of an executory provision: such provisions are not judicially enforceable until they are "executed."

Notwithstanding Marshall's statement that the "legislature must execute the contract,"[97] *Foster* should not be construed to mean that all executory provisions must be executed by the legislature. Whether legislation is required depends upon the nature of the obligation.[98] If a

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[94] *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 291 (1821) (distinguishing between "self executed" and "executory" constitutional provisions); Beecher v. Wetherby, 95 U.S. 517, 521 (1877) (noting contention of counsel that 1846 statute "did not constitute a present grant, but was in the nature of an executory agreement").

[95] *Guitard*, 57 U.S. at 508.

[96] *Foster*, 27 U.S. at 314.

[97] *Id.*

[98] *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272-73 (1796) (distinguishing among three classes of executory treaty provisions that require "execution," respectively, by legislative, executive, or judicial branch).

treaty specifies a date certain for future performance, then it is "executed" by passage of time.[99] On the other hand, if a treaty obligates the United States to take unspecified steps toward achieving an agreed objective at an unspecified future time[100] — as in Marshall's construction of article 8 in *Foster* — then action by the political branches is necessary to execute the treaty.[101]

*B. The Indirect Remedial Version of the Intent Thesis (*Foster *Doctrine)*

The indirect remedial version of the intent thesis (*Foster* doctrine) holds that the treaty makers' intent indirectly affects the availability of judicial remedies for treaty violations.[102] Application of the *Foster* doctrine requires a two-step analysis. In step one, the treaty makers' intentions are relevant because the court is construing a question of international law: the nature and scope of the international treaty obligation. In step two, though, the treaty makers' intentions are

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[99] *See infra* notes 107-112 and accompanying text.

[100] *See infra* note 111.

[101] In *Foster*, legislation was required because Congress was the only body with the domestic legal authority to carry out the promise to convey property in the future. Other types of treaty provisions promise future action that can be carried out by the executive branch. Whether an executory provision requires legislative implementation, or executive implementation, depends upon which actor(s) have the requisite authority under domestic law to perform the promised action.

[102] The *Foster* doctrine corresponds roughly to what Professor Vázquez calls the "justiciability" doctrine. *See* Vázquez, *Four Doctrines, supra* note 10, at 710-18. However, there are three significant differences between Vázquez' "justiciability doctrine" and what this article calls the "*Foster* doctrine."

First, Vázquez' interpretation of *Foster* closely resembles the Restatement doctrine, *see id.* at 700-04, whereas this article treats *Foster* as the progenitor of the *Foster* doctrine. For my analysis of Vázquez' interpretation of *Foster* see *infra* notes 279-295 and accompanying text.

Second, Vázquez' justiciability analysis focuses on precatory and indeterminate treaty provisions as exemplars of the types of treaty provisions that are not judicially enforceable. *See id.* at 712-15. This author agrees with Profess Vázquez' discussion of precatory and indeterminate treaty provisions. However, his presentation of the "justiciability doctrine" is underinclusive because it fails to mention executory and horizontal treaty provisions. With respect to executory and horizontal provisions see *infra* notes 107-125 and accompanying text.

Third, and most importantly, Vázquez analogizes the justiciability doctrine to the political question doctrine. *See id.* at 715-16; Vázquez, *Laughing, supra* note 17, at 2180. In doing so, Professor Vázquez blurs the critical distinction between the *Foster* doctrine and the Carter doctrine. The *Foster* doctrine's limits on judicial enforcement are linked to the nature of the international legal obligation. In contrast, the Carter doctrine's limits on judicial enforcement, like some variants of the political question doctrine, derive from the power of the political branches to regulate the exercise of the judicial function. *See infra* Part IV.

irrelevant because the court is making a prudential judgment, in light of the judiciary's role in our constitutional system, as to whether the treaty provision at issue is the type of law that is judicially enforceable. Under the *Foster* doctrine, there are three types of justifications a court could offer for refusing to enforce a particular treaty provision: the provision is indeterminate; it is executory; or it creates only horizontal, not vertical, duties.[103]

1. Indeterminate Treaty Provisions

When courts say that a treaty provision is "not self-executing," they sometimes mean that it is too vague or indeterminate to be judicially enforceable.[104] In federal statutory cases, the Supreme Court has refused to enforce a statute if it is "so 'vague and amorphous' that its enforcement would strain judicial competence."[105] Under the rubric of non-self-execution, numerous courts have refused to enforce treaty provisions for precisely the same reason.[106]

2. Executory Treaty Provisions

A treaty provision is executory if, as a matter of international law, it obligates a party to accomplish a result in the future, some time after entry into force of the treaty, but neither requires nor prohibits any particular action immediately upon entry into force. The distinction between executory and executed provisions can be illustrated by reference to the Intermediate Nuclear Forces (INF) Treaty.[107] Article 6 of the treaty obligates the parties not to "produce or flight-test any

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[103] A fourth justification, which is similar in some respects, is that a treaty provision is precatory, not mandatory. *See* Vázquez, *Four Doctrines, supra* note 10, at 712-13. A precatory provision, by definition, does not create any primary international duty. The Supremacy Clause converts into domestic law only what exists as a matter of international law, and nothing more. Thus, precatory treaty provisions do not create primary domestic duties because they do not create primary international duties. Therefore, precatory treaty provisions differ from indeterminate, executory and horizontal provisions in that they do not create primary domestic law. *See, e.g.*, INS v. Stevic, 467 U.S. 407, 428 n. 22 (1984) (stating that "the language of article 34 [of the Protocol on the Status of Refugees] was precatory and not self-executing").

[104] *See* Vázquez, *Four Doctrines, supra* note 10, at 713-15.

[105] Blessing v. Freestone, 520 U.S. 329, 340-41 (1997). *See also* Wilder v. Va. Hosp. Assoc., 496 U.S. 498, 509 (1990); Webster v. Doe, 486 U.S. 592, 599 (1988).

[106] *See* Vázquez, *Four Doctrines, supra* note 10, at 713-15.

[107] Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., S. TREATY DOC. NO. 100-11 (1988) [hereinafter INF Treaty].

intermediate-range missiles."[108] This provision is "executed," not "executory," because it applies "[u]pon entry into force of this Treaty and thereafter."[109] In contrast, article 4 obligates each party to "eliminate all its intermediate-range missiles . . . so that no later than three years after entry into force of this Treaty and thereafter no such missiles . . . shall be possessed by either Party."[110] Article 4 is executory because it creates an international legal obligation to achieve a result in the future; it does not create an international legal obligation for the parties to perform (or refrain from performing) a specific action immediately upon entry into force of the treaty.

There is a close relationship between executory and indeterminate treaty provisions. Although article 4 states precisely what must be accomplished at the end of three years, it is indeterminate with respect to the specific steps that must be taken during the initial three year period. It is characteristic of executory treaty provisions that they can also be described as indeterminate (or precatory) before the deadline by which the future result is required to be accomplished.[111] This is why courts often link these concepts.[112]

Statutes, like treaties, can also be executory. As the First Circuit noted almost one hundred years ago:

> [T]here is no practical distinction whatever as between a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done . . . . The same may be said with regard to a treaty. Both statutes and treaties become presently effective when

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[108] *Id.*, art. VI, para. 1(a).

[109] *Id.*, art. VI, para. 1. More broadly, treaty provisions that prohibit specified conduct are usually executed, not executory.

[110] *Id.*, art. IV, para. 1.

[111] Some executory treaty provisions do not specify a time period within which the desired result is to be accomplished. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 2, para. 1, 999 U.N.T.S. 3 ("Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . ."). In such cases, the provision remains precatory and indeterminate for the indefinite future. In contrast, provisions like Article IV of the INF Treaty become mandatory and determinate at the end of the specified time period — that is, when executed.

[112] *See, e.g.*, Sei Fujii v. State, 242 P.2d 617, 619-22 (Cal. 1952) (holding that human rights provisions of U.N. Charter are non-self-executing because they are precatory, indeterminate, and executory).

their purposes are expressed as presently effective.[113]

Executory treaty and statutory provisions are not judicially enforceable until they are "executed" because they do not create any determinate duties until they are executed.

However, it is a grave mistake — which courts repeat all too frequently — to conclude that a treaty provision is not immediately effective, and therefore executory, merely because it uses the word "shall."[114] Ordinarily, usage of the word "shall" in treaties should be understood to mean that the provision is mandatory, not executory, unless other language in the treaty clearly indicates that the drafters intended that that particular provision would not be immediately effective (as a matter of international law) upon entry into force of the treaty.

3. Horizontal Treaty Provisions

In the *Head Money Cases*,[115] the Supreme Court distinguished between "horizontal" and "vertical" treaty provisions.[116] A horizontal provision creates a duty that one nation owes to another nation; it "is primarily a compact between independent nations."[117] In contrast, vertical treaty provisions create duties that are owed to private parties.[118]

Vertical treaty provisions "are capable of enforcement as between private parties in the courts of the country."[119] Horizontal treaty provisions, though, are not judicially enforceable at the behest of private parties.[120] Horizontal duties do not create primary rights for individuals,

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[113] United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 155 F. 842, 845 (1st Cir. 1907).

[114] In *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314-16 (1829), Chief Justice Marshall made the mistake of construing the word "shall" to imply that a treaty provision was executory. Four years later, though, he corrected this mistake. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833).

[115] Edye v. Robertson (Head Money Cases), 112 U.S. 580 (1884).

[116] The court in *Head Money Cases* did not actually use the terms "horizontal" and "vertical." My usage of the terms is adapted from an article by Professor Brilmayer. *See* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991).

[117] *Head Money Cases*, 112 U.S. at 598.

[118] *Id.* (referring to treaty provisions that "confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other").

[119] *Id.*

[120] *Id.* (stating that a horizontal provision "depends for [its] enforcement . . . on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.").

because a right is "the mere obverse of" a duty,[121] and horizontal duties are owed to nations, not individuals. If an individual lacks a primary right under a treaty, a court will not enforce the treaty at the behest of that individual. Horizontal treaty provisions are analogous to federal statutes that merely regulate relationships between different Executive Branch agencies but that do not purport to regulate the conduct of private actors.[122] If a statute creates a duty that one government agency owes to another government agency, it is not judicially enforceable at the behest of individuals because it does not create primary rights for individuals.

In some cases, the distinction between horizontal and vertical treaty provisions may be relatively easy to apply. In other cases, the distinction may be much more difficult to apply.[123] In every case, though, the question whether a duty is owed to a private party, or solely to another nation, concerns the nature of the international legal obligation the treaty creates. The fact that courts will enforce vertical, but not horizontal, treaty provisions at the behest of private parties is a domestic legal consequence that results from the nature of the international legal obligation.

Although the Supremacy Clause states that "judges in every State shall be bound" by treaties,[124] the limitations on judicial enforcement of treaties embodied in the *Foster* doctrine are fully consistent with the Supremacy Clause. Those limitations are rooted in separation of powers principles that preclude judges from enforcing laws that, by their nature, are not appropriate for judicial enforcement.[125] The same separation of

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See also Woolhandler, *supra* note 10, at 782-85 (contending that "broad nation-to-nation treaty obligations" should be considered non-justiciable).

[121] HART & SACKS, *supra* note 38, at 153.

[122] For example, a recent statute abolishing three independent agencies and transferring their functions to the Department of State would not be judicially enforceable in an action between private parties because it does not create a duty that is owed to a private party. *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Division G, 112 Stat. 2681-761 (1998) (abolishing United States Arms Control and Disarmament Agency, United States Information Agency, and International Development Cooperation Agency, and transferring their functions to Department of State).

[123] Courts have done very little to develop practical criteria for distinguishing between horizontal and vertical treaty provisions. For scholarly views on this issue, see Brilmayer, *supra* note 116, at 2302-06; *see also* Vázquez, *Treaty-Based Rights*, *supra* note 47, at 1134-41.

[124] U.S. CONST. art. VI, cl. 2.

[125] Horizontal treaty provisions differ from indeterminate and executory provisions in that indeterminate and executory provisions are not judicially enforceable by anyone. In contrast, although horizontal provisions are not judicially enforceable by private parties, they may, in principle, be enforceable by government entities, both domestically and internationally.

powers principles preclude judges from enforcing indeterminate, executory, and horizontal federal statutes. Inasmuch as separation of powers limitations on the judicial enforcement of federal statutes are consistent with the Supremacy Clause, comparable limitations on the judicial enforcement of treaties are equally consistent with the Supremacy Clause.

III. THE *WHITNEY* DOCTRINE

Under the *Whitney* doctrine, non-self-executing treaty provisions are not automatically converted into primary domestic law at the time the treaty is ratified. The *Whitney* doctrine differs from the *Foster* doctrine in that *Whitney* embodies a primary law concept of non-self-execution, whereas *Foster* reflects a remedial law concept. The *Whitney* doctrine differs from the Restatement doctrine because *Whitney* limits automatic conversion only of certain types of international legal obligations: those that, by their nature, are beyond the scope of the treaty makers' domestic lawmaking power. In contrast, the Restatement doctrine limits automatic conversion of all types of international legal obligations, including those within the scope of the treaty makers' domestic lawmaking power, provided that the treaty makers have manifested an intent to preclude automatic conversion.

Part III has two sections. The first section explains the conceptual relationship between the intent thesis, the *Whitney* doctrine and the Supremacy Clause. The second section demonstrates that the concept of self-execution employed by the Supreme Court in *Whitney v. Robertson*[126] is best understood in terms of the *Whitney* doctrine.

*A. The Indirect Primary Version of the Intent Thesis (*Whitney *Doctrine)*

The indirect primary version of the intent thesis (*Whitney* doctrine) holds that the treaty makers' intent indirectly affects the automatic conversion of primary international law into primary domestic law.[127] Application of the *Whitney* doctrine requires a two-step analysis. In step one, the treaty makers' intentions are relevant because the court is construing a question of international law: the nature and scope of the international legal rules embodied in a treaty. In step two, though, the

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[126] 124 U.S. 190 (1888).

[127] The *Whitney* doctrine corresponds roughly to what Professor Vázquez calls the "constitutionality" doctrine of self-execution. *See* Vázquez, *Four Doctrines, supra* note 10, at 718-19.

treaty makers' intentions are irrelevant because the court is construing a question of domestic constitutional law: whether the Constitution precludes automatic conversion of a particular international legal rule into domestic law.

The second step of the analysis presupposes a rule of constitutional law. A treaty that conflicts with the Constitution has no domestic legal force because the Constitution takes precedence over a treaty.[128] Broadly speaking, there are three types of constitutional limitations on the automatic conversion of international treaty law into primary domestic law. First, a treaty cannot deprive a U.S. citizen of his or her constitutionally protected individual rights.[129] Second, the treaty power is subject to federalism limitations.[130] Third, in accordance with separation of powers principles, the Supremacy Clause cannot automatically convert a treaty provision into primary domestic law "if the agreement would achieve what lies within the exclusive law-making power of Congress under the Constitution."[131]

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[128] The Supreme Court stated in dicta at least as early as 1853 that the treaty power cannot be exercised in a manner that violates constitutional rights. *See* Doe v. Braden, 57 U.S. (16 How.) 635, 656 (1853); *see also* The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-21 (1870).

[129] Reid v. Covert, 354 U.S. 1, 16-17 (1957).

[130] In Missouri v. Holland, 252 U.S. 416 (1920), the Supreme Court held, in effect, that the treaty power is not subject to exactly the same federalism limitations as are Congress' legislative powers. The continued vitality of *Missouri* has recently been a subject of extensive academic commentary. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000); Martin S. Flaherty, *Are We to Be a Nation?: Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999); Carlos Manuel Vázquez, *Breard, Printz, and the Treaty Power*, 70 U. COLO. L. REV. 1317 (1999). But even the staunchest defenders of *Missouri* agree that the case did not abolish all federalism limitations on the Treaty Power, and that there is a protected sphere of states' rights into which the treaty power cannot intrude. *See* Golove, *supra*, at 1085 (stating that "treaties are not immune from federalism limitations, and nothing in *Missouri* suggests the contrary"); *see also* HENKIN, *supra* note 8, at 193.

[131] RESTATEMENT (THIRD), *supra* note 6, § 111 cmt. i (1987). Some of Congress' legislative powers are "concurrent" powers; domestic law within the scope of Congress' concurrent powers can be made either by legislation, or by means of the treaty power. In contrast, other Congressional powers are "exclusive" powers. The treaty makers cannot make domestic law within the scope of Congress' exclusive powers; such law can be made only by legislation. *See id.*; *see also infra* notes 215-219 and accompanying text. There is a wide range of scholarly views concerning the proper line of demarcation between concurrent and exclusive powers. At one extreme, Professor Yoo contends (as one of two alternative theses) that all of Congress' Article I powers are exclusive powers. *See* Yoo, *Rejoinder*, *supra* note 3, at 2220. At the other extreme, Professor Paust contends that virtually all of Congress' legislative powers are concurrent powers. *See* JORDAN PAUST,

The *Whitney* doctrine is consistent with the text of the Supremacy Clause. The Clause acknowledges the constitutional limits on the treaty makers' power to create primary domestic law by specifying that treaties are the "supreme Law of the Land" only if they are "made . . . under the authority of the United States."[132] The plain meaning of this phrase is that primary international legal rules embodied in a treaty cannot be automatically converted into domestic law if automatic conversion would be inconsistent with the constitutional limits on the treaty makers' authority to create primary domestic law.[133] Thus, treaty provisions that infringe upon constitutionally protected individual rights or states' rights, or that encroach upon Congress' exclusive lawmaking powers, are not made "under the authority of the United States," at least not for purposes of domestic law.[134]

B. The Supreme Court's Decision in Whitney

Not until 1887, almost sixty years after *Foster*, did the Supreme Court first use the adjective "self-executing" to modify the word "treaty."[135] One year later, in *Whitney v. Robertson*, the Court defined "self-executing" to mean that treaty provisions "require no legislation to make them operative."[136] *Whitney* is an important decision in the evolution of self-execution doctrine because it was the first Supreme Court decision to define the term "self-executing," as applied to treaties.

The Court in *Whitney* clearly employed a primary law concept of self-execution, because the Court said that only self-executing treaties "have the force and effect of a legislative enactment."[137] Although *Whitney* defined "self-executing" to mean that a treaty requires no legislation to make it operative, *Whitney* did not explicitly identify criteria for determining whether a treaty requires legislation. Even so, careful analysis of the Court's decision demonstrates that the Court understood

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INTERNATIONAL LAW AS LAW OF THE UNITED STATES 59-62 (1996). This article does not attempt to resolve that issue.

[132] U.S. CONST. art. VI, cl. 2.

[133] *See infra* notes 210-219 and accompanying text.

[134] As a matter of international law, a state is bound by an agreement if the negotiators had "apparent authority" to conclude the agreement. *See* RESTATEMENT (THIRD), *supra* note 6, § 311 n. 4. Thus, it is possible that a treaty could be binding internationally, but not domestically. Professor Henkin argues that this is unlikely. *See* HENKIN, *supra* note 8, at 187-88.

[135] Bartram v. Robertson, 122 U.S. 116, 120 (1887).

[136] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[137] *Id.*

the self-execution issue in accordance with the *Whitney* doctrine.

In *Whitney*, the plaintiffs brought suit to recover duties paid on sugar imported from the Dominican Republic.[138] The defendant customs collector had imposed duties pursuant to an 1870 tariff statute.[139] Plaintiffs claimed that the goods should have been admitted duty free. Their argument rested on the combined effect of two different treaties: an 1867 treaty between the United States and the Dominican Republic, and an 1876 treaty between the United States and Hawaii.[140] The Dominican treaty provided that the U.S. would not impose higher duties for Dominican imports than for imports of similar articles from other countries.[141] By itself, the Dominican treaty did not entitle plaintiffs to import Dominican sugar duty free because at the time of the Dominican treaty there was no treaty or statute that authorized duty free imports of Hawaiian (or any other) sugar.[142] However, the plaintiffs contended that the 1876 treaty with Hawaii, which provided for duty free imports of Hawaiian sugar,[143] read together with the 1867 treaty with the Dominican Republic, which prohibited higher duties for Dominican sugar than for other sugar, obligated the United States to permit duty free imports of Dominican sugar.[144]

The Court rejected plaintiffs' argument on two grounds. First, the Court held as a matter of international law that the treaty with the Dominican Republic merely obligated the United States to refrain from enacting tariff legislation that discriminated against Dominican imports. It did not obligate the United States to extend automatically to the Dominican Republic special tariff reductions, like the duty free provision in the Hawaiian treaty, granted to other countries in subsequent treaties.[145] In the alternative, the Court held as a matter of domestic law that, under the later-in-time rule, even if the treaties did create an international obligation to permit duty free imports of Dominican sugar, the 1870 tariff statute, which clearly mandated payment of duties, superseded the 1867 treaty with the Dominican Republic as a matter of

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[138] *Id.* at 190-91.

[139] *See id.* at 191; *see also* SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 197 (2d ed. 1916).

[140] *See Whitney*, 124 U.S. at 191-92. The treaty between the United States and Hawaii was signed in 1875, but it did not enter into force until 1876. *See* CRANDALL, *supra* note 139, at 197.

[141] *See Whitney*, 124 U.S. at 192.

[142] *See* CRANDALL, *supra* note 139, at 197.

[143] Bartram v. Robertson, 122 U.S. 116, 118 (1887) (quoting treaty).

[144] *Whitney*, 124 U.S. at 191-92.

[145] *Id.* at 192-93.

domestic law.[146]

At first blush, the Court's later-in-time analysis appears to be seriously flawed, because the plaintiffs claimed a right to duty free imports under the 1876 treaty with Hawaii, which should have trumped the 1870 statute under the later-in-time rule.[147] However, the Court incorporated a self-execution caveat into the later-in-time rule, stating that when a treaty and a statute "are inconsistent, the one last in date will control the other, provided the stipulation of the treaty on the subject is self-executing."[148] Thus, implicit in the Court's later-in-time analysis is the assumption that the 1876 treaty with Hawaii did not trump the 1870 statute because the treaty was not self-executing.

The question arises, though, "why was the Hawaiian treaty non-self-executing?" One possible answer is that the treaty was non-self-executing because the treaty itself stipulated that it "should not take effect until a law had been passed by Congress to carry it into operation."[149] Although this answer initially appears plausible, it is ultimately unpersuasive because Congress did enact legislation, in 1876, to implement the Hawaiian treaty;[150] but the plaintiffs in *Whitney* did not import the subject sugar until 1882.[151] Hence, the *Whitney* Court's unstated assumption that the treaty with Hawaii was non-self-executing could not have been based upon the treaty language requiring legislative implementation because the required legislation had long since been enacted.

However, there is another explanation that does make sense of the *Whitney* Court's implicit assumption that the 1876 Hawaiian treaty was not self-executing. Because the Constitution states explicitly that "[a]ll Bills for raising Revenue shall originate in the House of Representatives,"[152] and because tariff statutes raise revenue, treaties that

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[146] *Id.* at 193-95.

[147] As Crandall points out, the Court seemed to say that it was provisionally accepting plaintiffs' international law argument for purposes of the later-in-time analysis. *See* CRANDALL, *supra* note 139, at 197; *see also* Whitney, 124 U.S. at 193 (stating that, "independently of" international law considerations, "there is another and complete answer to the pretensions of the plaintiffs"). Under plaintiffs' argument, there was no international obligation to permit duty free imports until 1876, when the treaty with Hawaii entered into force. Therefore, insofar as the Court did provisionally accept the plaintiffs' international law argument for purposes of the later-in-time analysis, that argument would support the conclusion that the 1876 treaty trumped the earlier statute.

[148] *Whitney*, 124 U.S. at 194.

[149] Bartram v. Robertson, 122 U.S. 116, 119 (1887).

[150] *Id.*

[151] *Whitney*, 124 U.S. at 190-91.

[152] U.S. CONST. art. I, § 7, cl. 1.

purport to modify tariff statutes by eliminating statutorily created import duties, including the 1876 treaty with Hawaii, are necessarily non-self-executing because they "can [constitutionally] only be enforced pursuant to legislation to carry them into effect."[153] In other words, the Constitution precludes automatic conversion of any treaty provision that purports to modify a tariff statute because tariff statutes raise revenue and the power to raise revenue is an exclusive congressional power.[154] Although the *Whitney* Court did not explicitly hold that the power to set tariffs is an exclusive congressional power, the Court had ample grounds for assuming that Congress has exclusive power over tariffs.[155] Moreover, the Court's later-in-time analysis strongly suggests that the Court did make that assumption, because its later-in-time analysis is otherwise simply unintelligible.

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[153] *Whitney*, 124 U.S. at 194 (explaining term "not self-executing"). One might object that this interpretation of *Whitney* is flawed for the same reason that the previously rejected interpretation was flawed. The preceding paragraph rejected the claim that *Whitney*'s (implicit) non-self-execution holding was based on treaty language requiring legislative implementation, because the requisite legislation had already been enacted. The same argument, one might object, applies to the constitutional analysis: the *Whitney* court's (implicit) non-self-execution holding cannot be based on the constitutional requirement of legislative implementation because the requisite legislation had already been enacted.

This objection misses its mark. The key assumption underlying the Court's later-in-time analysis was the assumption that the treaty with Hawaii, viewed together with the treaty with the Dominican Republic, created an international legal obligation for the United States to admit imports of Dominican sugar duty free. *See supra* notes 138-144 and accompanying text. Given that assumption, the international obligation to admit imports of Dominican sugar duty free would have taken effect on September 9, 1876, the date on which the treaty with Hawaii entered into force. The legislation implementing the treaty took effect three weeks earlier, on August 15, 1876. 19 Stat. 200, ch. 290 (1876). The implementing legislation, on its face, said nothing about Dominican sugar; it referred only to Hawaiian sugar. *Id.* If the treaty language requiring legislative implementation was the only obstacle to conversion of treaty obligations into domestic law, then the presumed international obligation to admit imports of Dominican sugar duty free would have been domestically effective on September 9, 1876, either because the implementing legislation must be construed in harmony with the treaty, or because the September 9 treaty trumps the August 15 statute under the later-in-time rule. However, if there were a constitutional bar to automatic conversion, then the presumed international obligation to admit sugar imports duty free would be domestically effective only to the extent that it was codified in legislation, and as noted above, the August 15 statute was silent with respect to Dominican sugar.

[154] *See supra* note 131 (discussing distinction between concurrent and exclusive powers).

[155] Crandall documents the fact that, through a series of steps over the first half of the nineteenth century, the Senate and House had, at least by 1854, worked out a tacit understanding that treaties involving concessions in tariff duties would not enter into force — either domestically or internationally — until after Congress had enacted implementing legislation. *See* CRANDALL, *supra* note 139, at 183-99. It is likely that the *Whitney* Court was aware of this tacit understanding.

In sum, the best explanation of the Court's decision in *Whitney* is that the Court thought the 1876 Hawaiian treaty was non-self-executing because it created an international obligation to modify U.S. tariff statutes, and the Constitution precludes automatic conversion of a treaty obligation to modify tariff statutes. This explanation is consistent with the *Whitney* doctrine, which focuses on the constitutional limits on the treaty makers' power to create primary domestic law by means of treaties.

IV. THE CARTER DOCTRINE

The direct remedial version of the intent thesis (Carter doctrine) holds that the treaty makers' intent directly controls the availability of domestic judicial remedies for treaty violations. As such, the Carter doctrine presupposes that the treaty makers have the power to limit the availability of domestic judicial remedies without modifying the primary international legal obligations embodied in a treaty. The Carter doctrine differs from the Restatement doctrine in that the Carter doctrine embodies a remedial law concept of non-self-execution, whereas the Restatement doctrine reflects a primary law concept. The Carter doctrine differs from the *Foster* doctrine because the Carter doctrine purports to limit judicial enforcement of all types of international legal obligations, including those that the judiciary is competent to enforce, provided that the treaty makers have manifested an intent to preclude judicial enforcement.

The Carter doctrine relates to the treaty makers' practice of attaching non-self-executing declarations ("NSE declarations") to treaties.[156] That practice originated in 1978 when President Carter submitted four human rights treaties to the Senate.[157] Since that time, the United States has adopted NSE declarations for five treaties.[158] The Senate Foreign

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[156] An NSE declaration is a declaration adopted unilaterally by the United States at the time of treaty ratification, stating that the treaty (or some portion thereof) is not self-executing. In principle, this article's analysis of NSE declarations would apply equally to a bilateral or multilateral treaty provision stating that some or all of the treaty is not self-executing. *See supra* notes 59-60 and accompanying text (contending that distinction between bilateral and unilateral intent is not significant). However, to the best of this author's knowledge, there are no such bilateral or multilateral treaty provisions. Therefore, the analysis in Part IV focuses on the NSE declarations adopted unilaterally by the United States.

[157] *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOCS. C- F, 95-2, at vi (1978) [hereinafter CARTER MESSAGE].

[158] *See* 146 CONG. REC. S8866 (2000) (Senate resolution of ratification for Convention

Relations Committee has recommended an NSE declaration for a sixth treaty that has not yet been approved by the full Senate.[159] The Senate record associated with treaty ratification makes clear that the President and Senate did not intend, by means of the NSE declarations, to modify the United States' international legal obligations under the treaties.[160] Therefore, this Article assumes that the NSE declarations were intended to shape domestic law *directly* — that is, without affecting the United States' international legal obligations.[161]

Several commentators have contended that the NSE declarations adopted by the United States are invalid.[162] Others have defended the

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(No. 176) Concerning Safety and Health in Mines, June 22, 1995, S. TREATY DOC. NO. 106-8 (1999)); 146 CONG. REC. S8867 (2000) (Senate resolution of ratification for Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51 (1998)); 140 CONG. REC. S7634-35 (1994) (Senate resolution of ratification for International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195); 138 CONG. REC. S4783-84 (1992) (Senate resolution of ratification for ICCPR, *supra* note 66); 136 CONG. REC. S17491-92 (1990) (Senate resolution of ratification for Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 23 I.L.M. 1027).

[159] Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13. For the proposed NSE declaration see S. EXEC. REP. NO. 103-38, at 52 (1994). Congress has also included non-self-executing declarations in implementing legislation for treaties. *See, e.g.*, Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2, 102 Stat. 2853, 2853 (1988). In addition, statutes implementing certain trade agreements include language that may be functionally equivalent to NSE declarations, depending upon how those declarations are interpreted. *See, e.g.*, 19 U.S.C. § 3512(c)(1) (relating to Uruguay Round Agreements).

[160] *See, e.g.*, SENATE COMM. ON FOREIGN RELATIONS, REPORT ON INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, S. EXEC. REP. NO. 103-29, at 26 (1994) [hereinafter RACE REPORT] ("Declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law.").

[161] The NSE declarations are intended to limit the availability of judicial remedies for treaty violations, without affecting a treaty's status as primary domestic law. *See infra* notes 166-169 and accompanying text. Hence, those declarations are properly analyzed under the direct remedial version of the intent thesis, not the direct primary version.

[162] *See, e.g.*, Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 221 (1997) (questioning constitutionality of NSE declarations); Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 64-70 (1997) (challenging validity of NSE declarations on constitutional grounds); Paust, *Customary International Law*, *supra* note 4, at 324-25 (claiming that NSE declarations are "unconstitutional and void under the Supremacy Clause"); *see also* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995) (stating that NSE declarations are "against the spirit of the Constitution" and "may be unconstitutional").

NSE declarations.[163] Part IV contends that the validity of the NSE declarations depends upon their meaning. Part IV distinguishes among three possible interpretations of the NSE declarations. First, the declarations might mean that the subject treaties do not create primary domestic law. Second, the declarations might mean that the subject treaties are not judicially enforceable, even though they do create primary domestic law. Third, the declarations might mean only that the treaties do not create a private cause of action.[164] Part IV analyzes the validity of the NSE declarations separately under each interpretation. The analysis sheds light on the scope of the treaty makers' power to control *directly* the availability of domestic judicial remedies for treaty violations.

A. NSE Declarations Mean that Treaties are not Primary Domestic Law

One possible interpretation of the NSE declarations is that the treaties to which they are attached do not create primary domestic law. Under this interpretation, the NSE declarations would be invalid, because the NSE declarations are not intended to have any international legal effect, and the treaty makers lack the power to adopt provisions that deprive a treaty of its constitutional status as primary domestic law without affecting international law.[165]

However, this interpretation of the NSE declarations is plainly incorrect. As noted above, the United States has adopted NSE declarations for only five treaties, and the Senate Foreign Relations Committee has recommended an NSE declaration for one other treaty.[166] A search of the Senate record associated with those six treaties reveals only two rather ambiguous statements by government officials that appear to support this interpretation of the NSE declarations.[167] In contrast, there are many statements by government officials supporting

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[163] *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 419-23, 446-51 (2000).

[164] The distinction here among three possible interpretations of the NSE declarations tracks my analysis in a previous article. *See* Sloss, *supra* note 62, at 1120-23.

[165] *See infra* Part V.

[166] *See supra* notes 158-159.

[167] *See* CARTER MESSAGE, *supra* note 157, at vi ("[D]eclarations that the treaties are not self-executing are recommended. With such declarations, the substantive provisions of the treaties would not of themselves become effective as domestic law."); SENATE COMM. ON FOREIGN RELATIONS, REPORT ON CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30, at 12 (1990) (stating that NSE declaration is "recommended to clarify that the provisions of the Convention would not of themselves become effective as domestic law").

the proposition that the treaties are the Law of the Land, notwithstanding the NSE declarations.[168] Moreover, every U.S. court that has explicitly addressed the issue agrees that the treaties to which NSE declarations are attached are the Law of the Land, notwithstanding the NSE declarations.[169] Therefore, the NSE declarations do not mean that the subject treaties lack the status of primary domestic law.

B. NSE Declarations Mean that Treaties are not Judicially Enforceable

One could construe the NSE declarations to mean that the treaties to which they are attached are not judicially enforceable, regardless of whether the treaty is invoked offensively or defensively, and regardless of whether the case is litigated in state or federal court. Under this interpretation, the NSE declarations manifest the treaty makers' intent to preclude judges in U.S. courts from applying the treaties as a rule of decision[170] in cases where litigants raise treaty-based claims or defenses,

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[168] *See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination: Hearing Before the Comm. On Foreign Relations, U.S. Senate,* 103d Cong. 20 (1994) [hereinafter *Race Hearing*] (stating that Race Convention "has the same status [as a federal statute] under our constitutional scheme" and that "a duly ratified treaty will supercede prior inconsistent federal law"); *id.* at 18 ("Under Article VI, Clause 2 of the Constitution, duly ratified treaties become the supreme law of the land, equivalent to a federal statute."); *International Covenant on Civil and Political Rights: Hearing Before the Comm. on Foreign Relations, U.S. Senate,* 102d Cong. 80 (1992) [hereinafter *ICCPR Hearing*] ("Under the Supremacy Clause, ratified treaties are the law of the land, equivalent to federal statutes.... Consequently, properly ratified treaties can and do supersede inconsistent domestic law."); *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Hearing Before the Comm. On Foreign Relations, U.S. Senate,* 101st Cong. 42 (1990) (stating that, after ratification, treaty "would be part of domestic law. If you adopt this treaty, it is not just international law. The standard becomes part of our law."). For additional analysis of the Senate record, *see* Sloss, *supra* note 67, at 152-71.

[169] *See* United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000) (when the United States became a party to the ICCPR, "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land"); United States v. Duarte-Acero, 132 F. Supp. 2d 1036, 1040 (S.D. Fla. 2001) (stating that ICCPR "is the supreme law of the land"); Maria v. McElroy, 68 F. Supp. 2d 206, 231-32 (E.D.N.Y. 1999) ("Although the ICCPR is not self-executing, it is an international obligation of the United States and constitutes a law of the land."); United States v. Benitez, 28 F. Supp. 2d 1361, 1363 (S.D. Fla. 1998) (stating that ICCPR "is the supreme law of the land"); State v. Carpenter, 69 S.W.3d 568, 578 (Tenn. 2001) (stating that ICCPR "is the supreme law of the land").

[170] In some cases, courts apply treaties as a guide to interpretation of other provisions of law, but they apply those other legal provisions as the rule of decision in the case. *See, e.g.,* Filartiga v. Pena-Irala, 630 F.2d 876, 880-85 (2d Cir. 1980) (examining treaties and other sources to establish existence of rule of customary international law). Under the interpretation suggested here, the NSE declarations would not preclude reliance on treaties

even if the treaty provision at issue is, by its nature, judicially enforceable. There are many statements in the Senate record associated with ratification of the subject treaties that appear to support this interpretation.[171] Additionally, there are some judicial opinions that support the "no judicial remedies" interpretation.[172]

The "no judicial remedies" interpretation raises the question whether, and to what extent, the treaty makers have the power to preclude U.S. courts from applying a treaty provision that is the Law of the Land, and that is, by its nature, judicially enforceable. Detailed analysis of that question is beyond the scope of this Article.[173] However, the following two examples will serve to illustrate the range of possibilities. Both examples assume, for the sake of argument, that the "no judicial remedies" interpretation is the correct interpretation of the NSE declarations.[174]

1. Plaintiffs in Federal Court

Assume that a plaintiff in a federal civil action raises a treaty-based claim and that the court does not have diversity jurisdiction. To invoke the court's federal question jurisdiction,[175] the plaintiff must establish a

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in this manner.

[171] *See, e.g.*, S. TREATY DOC. NO. 106-8, *available in* 1995 WL 1782223, at *20 (stating that Convention (No. 176) concerning Safety and Health in Mines "is a non-self-executing treaty. As such, it would not, if ratified, become directly enforceable as U.S. law in U.S. courts."); ICCPR Hearing, *supra* note 168, at 18 (stating that NSE declaration means "that the ICCPR provisions, when ratified, will not by themselves create private rights enforceable in U.S. courts"); *International Human Rights Treaties: Hearings Before the Comm. on Foreign Relations, U.S. Senate*, 96th Cong. 314-15 (1979) ("A treaty provision that is non-self-executing may not be enforced directly by the courts, but rather requires implementing legislation.").

[172] *See, e.g.*, Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001) (construing NSE declaration attached to ICCPR to mean "that absent any further actions by the Congress to incorporate [treaty] into domestic law, the courts may *not* enforce" it).

[173] Such an analysis would have to address, at a minimum, the following issues: are there significant differences between treaty-based claims raised by plaintiffs in civil actions and treaty-based defenses raised by criminal defendants? Are there significant differences between actions in state courts and federal courts? What is the effect of a treaty provision that creates an international legal obligation to provide domestic judicial remedies for treaty violations? Does it matter whether the Senate condition is intended to modify the United States' international legal obligations under the treaty?

[174] I have argued elsewhere that this interpretation is not correct. *See* Sloss, *supra* note 67; Sloss, *supra* note 62, at 1118-30. For purposes of this section, though, I will assume that this is the correct interpretation.

[175] 28 U.S.C. § 1331 (2002) (granting federal district courts jurisdiction over civil actions "arising under . . . treaties").

federal cause of action.[176] If the treaty does not create an express private right of action,[177] the court should refuse to reach the merits of plaintiff's claim because the NSE declaration is a manifestation of the treaty makers' intent to deny the plaintiff a federal cause of action.[178]

The effectiveness of the NSE declaration, in this context, does not turn on whether the declaration is part of the treaty. Even assuming that the NSE declaration is not part of the treaty,[179] it is a manifestation of the treaty makers' intent to deny the plaintiff a federal cause of action. In cases where private plaintiffs sue to enforce federal statutory rights, the Supreme Court has barred judicial remedies for statutory violations if Congress has manifested its intent to deny plaintiffs a private cause of action.[180] The principle of judicial deference to the legislature requires

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[176] Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804 (1986); *see* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 926-37 (4th ed. 1996) [hereinafter HART & WECHSLER]. There is a narrow exception permitting federal question jurisdiction over some claims based on a state law cause of action. *See* City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 164 (1997). However, that exception does not alter the analysis here.

[177] If the treaty did create an express private right of action, the court would have to consider whether the NSE declaration was, in effect, a reservation that eliminated the private right of action. If the declaration did eliminate the private right of action, it would preclude judicial remedies. If the declaration did not eliminate the private right of action, though, one could argue that the court should ignore the NSE declaration on the grounds that the express private right of action is the Law of the Land under the Supremacy Clause, whereas the domestic legal status of the NSE declaration is less certain. Several scholars have made a similar argument. *See, e.g.*, Quigley, *supra* note 59, at 582-85; Riesenfeld & Abbott, *supra* note 59, at 296-97.

[178] In a different article, I argued that plaintiffs can bring *some* human rights treaty claims in federal court, notwithstanding the NSE declarations. *See* Sloss, *supra* note 62. I defended that conclusion by arguing that the treaty makers did not intend, by means of the NSE declarations attached to human rights treaties, to bar all judicial remedies for human rights treaty violations in all circumstances. For purposes of this section, though, I am assuming that the NSE declarations manifest a clear intent to bar all judicial remedies.

[179] Several scholars have argued that a Senate condition that pertains exclusively to domestic judicial remedies, and that does not modify the United States' international legal obligations under a treaty, has no legal effect because it is not part of the treaty. *See, e.g.*, Quigley, *supra* note 59, at 582-85; Riesenfeld & Abbott, *supra* note 59, at 296-97. I neither agree nor disagree with the proposition that such a condition is not part of the treaty. Rather, I contend that the distinction is irrelevant in the circumstances described herein because courts are bound to give effect to the intent of the political branches, even if that intent is not expressed in a manner that gives it the status of law.

[180] 42 U.S.C. § 1983 provides a private cause of action that is generally available for plaintiffs who allege federal statutory violations by state officers. *See* Sloss, *supra* note 62, at 1142-48. However, plaintiffs cannot obtain a remedy under section 1983 "where Congress has foreclosed such enforcement of the statute." Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423 (1987); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assoc., 453 U.S. 1, 19 (1981). Congressional intent to preclude enforcement under section 1983 need not be explicit; it can be implied from the legislative history. *See* Middlesex

courts to respect a political decision to deny plaintiffs a private cause of action, regardless of whether the legislative intent is embodied in a law, or merely gleaned from legislative history. Similarly, in treaty cases, the principle of judicial deference to the treaty makers requires courts to respect a political decision to deny plaintiffs a private cause of action, regardless of whether the treaty makers' intent is manifested in treaty text, or merely gleaned from the Senate record associated with treaty ratification.

2. Defendants in State Court

Assume that the United States accepts an international treaty obligation to refrain from imposing capital punishment for crimes committed by persons below eighteen years of age.[181] Assume that there is no constitutional bar to automatic conversion of that international duty into a primary domestic duty. The ban on capital punishment for minors is clearly the type of duty that courts are competent to enforce. If state law permits capital punishment for crimes committed by persons age sixteen and older, a state seeks to impose capital punishment on a person who was seventeen when he committed the relevant crime, and the defendant invokes the treaty as a defense to capital punishment, the state court would need to decide whether to enforce the treaty.[182]

The NSE declaration purports to preclude the defendant from invoking the treaty to invalidate the state law that permits capital punishment. Even so, the court should ignore the NSE declaration

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County, 453 U.S. at 19-21.

The Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06 (1994), provides a private cause of action that is generally available for plaintiffs who seek to enjoin federal statutory violations by federal officers. *See* Sloss, *supra* note 62, at 1133-36. However, plaintiffs cannot obtain judicial review under the APA if a statute gives "clear and convincing evidence of an intent to withhold" judicial review. Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 671 (1986) (quoting H.R. REP. NO. 79-1980, at 41 (1946)).

[181] *See* ICCPR, *supra* note 66, art. 6, para. 5 ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . ."). When the United States ratified the ICCPR, it adopted a reservation to exempt itself from this restriction. *See* 58 Fed. Reg. 45934, 45941 (Aug. 31, 1993); *see also* Convention on the Rights of the Child, Nov. 20, 1989, art. 37, 1577 U.N.T.S. 3 ("Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."). The United States has signed, but not ratified, the Convention on the Rights of the Child.

[182] There are several cases in which state criminal defendants have invoked the ICCPR in an attempt to preclude the state from imposing capital punishment. *See, e.g., Ex parte* Pressley, 770 So. 2d 143 (Ala. 2000); Domingues v. State, 961 P.2d 1279 (Nev. 1998). In these cases, the defense hinges on an argument that the U.S. reservation is invalid. Courts have uniformly rejected this argument.

because the state law is invalid by virtue of the Supremacy Clause, and the Due Process Clause prevents the state from relying on an invalid law to impose a criminal sentence.[183] Or, stated somewhat differently, the NSE declaration is itself invalid insofar as it purports to preclude a defendant in a state criminal trial from invoking the treaty defensively to bar the state from meting out punishment pursuant to a state law that conflicts with the treaty.

Professors Bradley and Goldsmith suggest that the treaty makers can, by means of an NSE declaration, prevent a treaty from preempting a conflicting state law.[184] In support of this proposition, they note that "Congress frequently specifies that federal statutes do not preempt state law."[185] But they fail to recognize the distinction between the concepts of "field preemption" and "conflict preemption."[186] Congress' power to preempt state law by "occupying a field" is an affirmative power to displace state laws that do not conflict with federal law.[187] In contrast, "conflict preemption" is a constitutional conflict of laws principle, rooted in the Supremacy Clause, that gives federal law priority over conflicting state laws.[188] When a federal statute specifies that it is not intended to preempt state law, it is simply clarifying that Congress chose not to exercise its power of field preemption.[189] However, the Supremacy Clause, by its terms, gives both statutes and treaties priority over conflicting state laws, and there is no authority for the proposition that Congress, or the treaty makers, can override the conflict of laws rule embodied in the Supremacy Clause. Therefore, the treaty makers cannot, by means of an NSE declaration, prevent a treaty from invalidating a conflicting state law.[190]

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[183] I know of no case holding explicitly that it would violate due process to sentence a defendant pursuant to an invalid law. However, the Constitution does prohibit states from passing any "ex post facto Law." U.S. CONST. art. I, § 10, cl. 1. The Constitutional ban on retroactive application of valid criminal laws would be meaningless if states could circumvent the prohibition by invoking invalid laws as a basis for punishing criminal defendants.

[184] Bradley & Goldsmith, *supra* note 163, at 446-47.

[185] *Id.* at 447.

[186] *See generally*, Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770-73 (1994) (analyzing distinction between "conflict preemption," which he calls "supremacy," and "field preemption," which he calls simply "preemption").

[187] *See id.* at 771 (defining field preemption) and at 782 (contending that power of field preemption derives from Necessary and Proper Clause, not Supremacy Clause).

[188] *Id.* at 770.

[189] Assuming that the treaty makers have a similar power of field preemption, they clearly have the option of choosing not to exercise that power.

[190] Of course, the treaty makers can agree to a treaty provision that incorporates by

In one case involving treaty rights, the United States contended, in the words of one commentator, "that any case implicating a treaty right is, upon the election of the executive branch, capable of being characterized as a political question and thus rendered nonjusticiable."[191] This is essentially a "pure political question" version of the doctrine of non-self-executing treaties.[192] Some lower courts have embraced something like a pure political question version of non-self-execution doctrine.[193] Under that doctrine, the NSE declaration in the preceding hypothetical would preclude the state court from reaching the merits of the defendant's defense against capital sentencing. However, the pure political question version of non-self-execution doctrine is fundamentally at odds with the rule of law.[194] If the United States is to be "a government of laws, and not of men,"[195] then a state court cannot rely on an invalid law to impose a sentence on a criminal defendant merely because the treaty makers expressed their intent to bar judicial review of treaty-based claims and defenses.

In sum, the treaty makers have the power, by means of NSE declarations, to preclude federal courts from adjudicating the merits of plaintiffs' treaty-based claims, at least insofar as the treaty itself does not create an express private cause of action. However, in cases where a criminal defendant in state court contends that a state law is invalid because it conflicts with the treaty, the treaty makers do not have the power, by means of NSE declarations, to preclude the state court from adjudicating the merits of such a defense. Therefore, the Carter doctrine is valid to some degree, but constitutional limitations prevent the treaty makers from utilizing NSE declarations to bar all judicial remedies for

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reference pre-existing statutes as a limitation on the scope of the international obligation, just as Congress can enact a statute that incorporates by reference pre-existing state law as a limitation on the scope of the federal statute. *See infra* note 304 and accompanying text. But this approach does not merely limit the scope of the domestic law created by a treaty; it also limits the scope of the international law the treaty creates.

[191] David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1483 (1999) (describing the argument advanced by the United States in an *amicus* brief submitted to the Fourth Circuit in Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998)).

[192] *See* Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 598-99 (1976) (distinguishing between "the ordinary respect of the courts for the political domain," and "pure" political question doctrine, which requires "that some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them").

[193] *See* Vázquez, *Four Doctrines*, *supra* note 10, at 715-18 (criticizing the doctrine of non-self-execution as "free-wheeling abstention").

[194] *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992).

[195] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

treaty violations in all circumstances.

C. NSE Declarations Mean that Treaties do not Create Private Causes of Action

I have argued elsewhere that the NSE declarations, properly construed, mean only that the treaties to which these declarations are attached do not create a private cause of action.[196] There are several statements in the Senate record that support this interpretation of the NSE declarations.[197] In addition, there are some judicial decisions that support this interpretation.[198]

The preceding section demonstrated that the treaty makers have the power, by means of NSE declarations, to preclude federal courts from adjudicating the merits of plaintiffs' treaty-based claims, even in cases where plaintiffs seek judicial remedies for violations of treaty provisions that are, by their nature, judicially enforceable.[199] The greater power to preclude plaintiffs from raising any treaty-based claims in federal court clearly includes the lesser power to deny plaintiffs a private cause of action under a treaty.[200] Therefore, if the private cause of action interpretation is correct, it follows that the NSE declarations are valid because the treaty makers have the power to decide that a particular treaty provision will not create a private cause of action.

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[196] *See* Sloss, *supra* note 67; Sloss, *supra* note 62, at 1118-30.

[197] *See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the Comm. on Foreign Relations, U.S. Senate*, 103d Cong. 5 (1994) (stating that intent of proposed NSE declaration "is to clarify that the treaty will not create a new or independently enforceable private cause of action in U.S. courts"); *id.* at 12 (same); *Race Hearing*, *supra* note 168, at 18 (same); *ICCPR Hearing*, *supra* note 168, at 14 (same); RACE REPORT, *supra* note 160, at 25-26 (same); SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 19 (1992) (same).

[198] *See, e.g.*, Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000) (holding that fugitive facing extradition who raises claim under article 3 of Torture Convention has right to judicial review of Secretary of State's decision to extradite); Ralk v. Lincoln County, 81 F. Supp. 2d 1372 (S.D. Ga. 2000) (holding that alien has right of action under Alien Tort Claims Act to sue for violations of ICCPR). For analysis of *Cornejo-Barreto*, *see* Sloss, *supra* note 62, at 1140-41. For analysis of *Ralk*, *see* Kristen D.A. Carpenter, *The International Covenant on Civil and Political Rights: A Toothless Tiger?*, 26 N.C. J. INT'L L. & COM. REG. 1 (2000).

[199] *See supra* notes 175-180 and accompanying text.

[200] The power to deny plaintiffs a private cause of action under a treaty is a "lesser" power, because a treaty that does not itself create a private cause of action may still be enforceable by a plaintiff in federal court if that plaintiff invokes a federal statute to provide a cause of action for judicial enforcement of a substantive treaty right. *See* Sloss, *supra* note 62, at 1130-42.

V. A CRITIQUE OF THE RESTATEMENT DOCTRINE

Under the direct primary version of the intent thesis (Restatement doctrine), non-self-executing treaty provisions are not automatically converted into primary domestic law at the time the treaty is ratified. The Restatement doctrine differs from the Carter doctrine in that the Restatement doctrine embodies a primary law concept of non-self-execution, whereas the Carter doctrine reflects a remedial law concept. The Restatement doctrine differs from the *Whitney* doctrine because *Whitney* limits automatic conversion only of certain types of international legal obligations: those that, by their nature, are beyond the scope of the treaty makers' domestic lawmaking power. In contrast, the Restatement doctrine limits automatic conversion of all types of international legal obligations, including those within the scope of the treaty makers' domestic lawmaking power, provided that the treaty makers have manifested an intent to preclude automatic conversion.

If the treaty makers lacked the power to preclude automatic conversion, then their intent to do so would be irrelevant. Thus, the Restatement doctrine tacitly assumes that the treaty makers have the power to preclude automatic conversion of *any* treaty obligation by stipulating that the treaty shall not have the status of primary domestic law in the absence of implementing legislation. Therefore, proponents of the doctrine are forced to find a textual basis for that power in some provision of the Constitution. The power to decide that a specific treaty provision is not the supreme Law of the Land cannot be an Article I power because the Restatement doctrine holds that it is the treaty makers, not Congress, who have the power to make that decision.[201] Therefore, if the treaty makers do have such a power, it must derive either from their Article II power to make treaties[202] or from the Supremacy Clause.

Section A demonstrates that the presumed power to preclude automatic conversion cannot be rooted in the Supremacy Clause. Section B contends that Article II should not be construed to give the treaty makers the power to preclude automatic conversion because that interpretation of Article II undermines U.S. compliance with its treaty obligations without advancing any legitimate policy objective. Section C

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[201] Of course, under Article I, Congress does have the power to enact a statute that supersedes a previously enacted treaty as a matter of domestic law. *See, e.g.*, Whitney v. Robertson, 124 U.S. 190, 194 (1888) (if a statute and a treaty "are inconsistent, the one last in date will control the other").

[202] U.S. CONST. art. II, § 2, cl. 2.

addresses the objection that the Restatement doctrine is so deeply entrenched in judicial precedent that it must be retained.

A. The Plain Meaning of the Supremacy Clause

Many constitutional provisions are so vague that constitutional analysis quickly moves beyond the text to address structural, historical, and doctrinal considerations. However, there are some constitutional questions for which the text provides such a definitive answer that the Supreme Court has adopted a strict textual approach to constitutional interpretation. Thus, for example, the Supreme Court held that the line item veto is unconstitutional,[203] notwithstanding its endorsement by the political branches, because it conflicts with the Presentment Clause.[204] Similarly, the Court has held that statutes creating a legislative veto mechanism are also unconstitutional[205] because they conflict with the Presentment Clause and with the constitutional requirement that legislation must pass both Houses of Congress.[206]

This section proceeds from the assumption that the text of the Supremacy Clause is sufficiently clear that a textual approach to constitutional analysis is warranted. This does not mean that the text itself can answer every question pertaining to the status of treaties as supreme federal law, or even the most interesting questions. However, a textual analysis demonstrates that certain propositions must be rejected because they are flatly inconsistent with the text of the Supremacy Clause. Thus, by rejecting certain possibilities, the textual analysis in Section A clears the ground for Section B's analysis of structural, historical, doctrinal, and policy factors.

The Supremacy Clause states, in relevant part, that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[207] The following analysis contends that the Clause creates a "qualified automatic conversion rule." Specifically, the phrase "all Treaties" includes, at a minimum, all treaty provisions that create primary international legal duties binding on the United States.[208] The phrase "supreme Law of the Land" means that treaty

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[203] Clinton v. City of New York, 524 U.S. 417, 418 (1998).

[204] U.S. CONST. art. I, § 7, cl. 2, 3.

[205] INS v. Chadha, 462 U.S. 919, 944-59 (1983).

[206] U.S. CONST. art. I, §§ 1, 7.

[207] U.S. CONST. art. VI, cl. 2.

[208] Hart and Sacks divide primary laws into three categories: primary duties, primary liberties, and primary powers. HART & SACKS, *supra* note 38, at 127-130. They define a

provisions that create primary international duties have the status of primary domestic law. The phrase "shall be" means that primary treaty

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primary duty as "an authoritatively recognized obligation . . . not to do something, or to do it, or to do it if at all only in a prescribed way." *Id.* at 130. They define a primary liberty as "the absence of a duty." *Id.* at 132. Finally, they define a primary power as "a capacity . . . to effect by a deliberative act a settlement of a question of group living which will be accepted and enforced by the official representatives of the group." *Id.* at 133.

International law, like domestic law, creates primary duties, liberties and powers. For example, the U.N. Charter imposes a primary duty on member states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." U.N. CHARTER, art. 2(4). But the U.N. Charter also endows the Security Council with certain primary powers, including, for example, the power to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." *Id.*, art. 42. Finally, the U.N. Charter explicitly protects certain primary liberties of member states, including "the inherent right of individual or collective self-defence." *Id.*, art. 51.

This Article contends that the Supremacy Clause mandates the conversion of primary treaty-based international duties into primary domestic duties, subject to constitutional constraints. There are some cases where the Supremacy Clause also converts a primary international power or liberty into a primary domestic power or liberty. *See, e.g.*, Warren v. United States, 340 U.S. 523, 526 (1951) (holding that the primary liberties governed by paragraph 2 of article 2 of the Shipowners' Liability Convention were "operative by virtue of the general maritime law and that no Act of Congress is necessary to give them force"). However, there are other cases where it makes no sense to speak of converting an international power or liberty into domestic law. Consider, for example, the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, Oct. 2, 1996, U.S. - Switz., S. TREATY DOC. NO. 105-8 (1997). Article 26 requires the Contracting States to exchange specified information, but paragraph 3 of article 26 provides: "In no case shall the provisions of this Article be construed so as to impose upon either of the Contracting States the obligation to . . . supply particulars which are not procurable under its own legislation." *Id.* Thus, paragraph 3 grants the United States a primary international liberty to withhold certain information. However, paragraph 3 does not grant anyone within the domestic legal system a primary domestic liberty. The treaty has no impact whatsoever on Congress' domestic legal authority to enact legislation regulating the domestic collection of information. Moreover, the Executive Branch's domestic legal authority to collect information is not affected by the treaty because that authority depends entirely on domestic legislation. In short, the liberty-creating provision in paragraph 3, by its nature, has no impact on domestic law. Hence, the qualified automatic conversion rule applies to primary duties, but it does not necessarily apply in the same way to powers or liberties.

The distinction between powers, duties and liberties provides the key to understanding the well-known *Power Authority* case. Power Authority v. Fed. Power Comm'n, 247 F.2d 538 (D.C. Cir. 1957). In commenting on that case, Professor Henkin made a persuasive argument that a treaty provision that conferred power on the United States to divert river water from Niagara Falls did not automatically confer that power on the Federal Power Commission. *See* Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151, 1162-64 (1956). Although the treaty conferred a primary power on the United States as a matter of international law, the treaty itself did not confer a primary power on any particular actor within the domestic legal system. Hence, a political decision by Congress was needed to delegate that power for domestic purposes.

duties must be converted into primary domestic law, either by means of implementing legislation or automatically by the force of the Supremacy Clause itself. Finally, the phrase "made . . . under the Authority of the United States" excludes treaty provisions from the scope of the qualified automatic conversion rule insofar as the treaty makers lack the constitutional power to create a particular domestic legal rule by means of the treaty power.[209]

1. Made . . . Under the Authority of the United States

It is commonly agreed that the treaty makers' power to create primary domestic law is subject to some constitutional limitations.[210] The scope of those limits need not concern us here.[211] For present purposes, it is sufficient to note that there are some primary international legal rules that cannot be automatically converted into primary domestic law by the force of the Supremacy Clause, either because the federal government as a whole lacks the power to create such a primary domestic legal rule, or because the rule falls within the scope of Congress' exclusive legislative authority.[212] The text of the Supremacy Clause acknowledges the constitutional limits on the treaty makers' power to create primary domestic law by including the phrase "made . . . under the authority of the United States."[213] The plain meaning of this phrase is that primary international legal rules embodied in a treaty are excluded from the scope of the qualified automatic conversion rule if automatic conversion would be inconsistent with the constitutional limits on the treaty makers' authority to create primary domestic law.[214]

For example, suppose that the United States ratifies a treaty that creates a new international organization and, in that context, creates a primary international legal duty for the United States to contribute funds to that organization.[215] The treaty makers have the power to enter into

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[209] It is well settled that the phrase "made, or which shall be made" was intended to include treaties made prior to adoption of the Constitution, as well as after its adoption. *See* HENKIN, *supra* note 8, at 186.

[210] *See* RESTATEMENT (THIRD), *supra* note 6, § 111 cmt. a.

[211] *See supra* notes 128-131 and accompanying text.

[212] *See supra* notes 128-131 and accompanying text.

[213] U.S. CONST. art. VI, cl. 2.

[214] *Accord*, Caleb Nelson, *The Treaty Power and Self-Execution: A Comment on Professor Woolhandler's Article*, 42 VA. J. INT'L L. 801, 807-08 (2002); *see also* RESTATEMENT (THIRD), *supra* note 6, § 111(4) (stating that treaty is non-self-executing "if implementing legislation is constitutionally required").

[215] *See, e.g.*, Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, art.

such an agreement internationally. Hence, the treaty is "made . . . under the authority of the United States" for purposes of international law.[216] However, the treaty itself cannot appropriate funds,[217] and it is questionable whether the treaty makers have the constitutional authority to create a domestic legal duty for Congress to appropriate funds.[218] Assuming that the treaty makers cannot create such a domestic legal duty, the treaty provision requiring a contribution of funds would not be "made . . . under the authority of the United States" for purposes of domestic law, because the treaty makers lack the authority to appropriate funds themselves, and they lack the authority to compel Congress to appropriate funds.[219]

2. All Treaties are Supreme Law of the Land

The Framers' decision to use the word "all" to modify the word "treaties" in the Supremacy Clause presents a difficult interpretive problem. The phrase "Law of the Land" plainly refers to domestic law, not international law. Thus, the statement that "all treaties" are the "supreme Law of the Land" suggests that all treaty provisions have the status of primary domestic law. However, it is clear that some treaty provisions — even some provisions "made. . .under the authority of the United States" — cannot be considered "domestic law" in any meaningful sense of that term. For example, it makes no sense to say that a treaty provision entitling the United States to raise certain claims

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VIII, para. 1 S. TREATY DOC. NO. 103-21 (1993), 32 I.L.M. 800 (establishing Organization for Prohibition of Chemical Weapons); *id.* at art. VIII, para. 7 (providing that costs of Organization's activities shall be paid by States Parties).

[216] *See supra* note 134.

[217] *See* HENKIN, *supra* note 8, at 204 ("When a treaty requires . . . an appropriation of funds to carry out United States obligations, only the Congress can supply them."); CRANDALL, *supra* note 139, at 164 ("Treaties stipulating for the payment of money are carried into effect only pursuant to legislation of Congress for this purpose."). *But see* Paust, *Self-Executing Treaties, supra* note 4, at 780-81 (contending that the appropriations power is not exclusive to Congress).

[218] The question whether the treaty makers can create a domestic legal duty for Congress to enact legislation has been debated for more than 200 years. *See, e.g.*, CRANDALL, *supra* note 139, at 165-71. As Professor Henkin has stated, this debate "has not been authoritatively resolved in principle." HENKIN, *supra* note 8, at 205.

[219] If one assumes that the treaty makers do have the authority to create a domestic legal duty for Congress to appropriate funds, then the duty to contribute funds would be automatically converted into primary domestic law by virtue of the Supremacy Clause, and the treaty provision requiring a contribution of funds would be "made . . . under the authority of the United States," even for purposes of domestic law. Proponents of this view, though, would generally concede that the duty to appropriate funds is nonjusticiable. *See infra* note 284.

in the International Court of Justice is "domestic law," because the provision operates exclusively in the international sphere, not the domestic sphere.[220] More broadly, the dualist principle that international law and domestic law are distinct legal systems suggests that certain international legal rules cannot have the status of domestic law because, by their nature, they operate exclusively within the international legal system. Therefore, a strictly literal reading of the statement that "all treaties" are "Law of the Land" makes no sense.

However, the conclusion that a strictly literal interpretation is untenable does not mean that it is permissible simply to construe the phrase "all treaties" to mean "some treaties."[221] If the activity of constitutional interpretation is to be a legal enterprise, rather than a political enterprise, those engaged in constitutional interpretation cannot ignore the text completely.[222] Accordingly, this Article contends that the statement that "all treaties" are "Law of the Land" should be construed to mean, at a minimum, that all treaty provisions that create primary international legal duties binding on the United States have the status of primary domestic law.[223]

There are two main reasons why the phrase "all treaties" in the Supremacy Clause should be construed to include, at a minimum, all treaty provisions that create primary international legal duties binding on the United States. First, the main objection to a literal interpretation of the phrase "all treaties" is that some treaty provisions cannot be

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[220] *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IX, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (providing that disputes "relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute").

[221] Some scholars have effectively construed the phrase "all treaties" to mean "some treaties." *See, e.g.*, Yoo, *Rejoinder*, *supra* note 3, at 2220 (contending that treaties "in areas that fall within Congress's Article I, Section 8 powers" are not law of the land).

[222] *See generally* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

[223] This formulation excludes the following three types of treaty provisions: (1) provisions that create remedies within the international legal system; (2) provisions that create primary duties binding on entities other than the United States; and (3) provisions that create primary powers and liberties, as opposed to primary duties. Treaty provisions that create remedies within the international legal system generally cannot be converted into domestic law because they operate exclusively within the international sphere. Provisions that create duties binding on entities other than the United States generally cannot be converted into domestic law because they are not binding on the United States. As noted above, there are some cases where primary powers and liberties can be converted into domestic law. *See supra* note 208. However, there are other cases where it makes no sense to speak of converting an international power or liberty into domestic law because the provision operates exclusively within the international sphere. *See supra* note 208.

converted into domestic law because they operate exclusively within the international legal system. That objection, though, does not apply to primary treaty duties. There is no such thing as a primary treaty duty that operates exclusively in the international sphere because, for any duty that is internationally binding on the United States, there is someone within the domestic legal system who has the capacity to act (or fail to act) in a way that places the United States in violation of its international duty.[224]

Second, the Framers of the Constitution chose to include treaties in the Supremacy Clause primarily to help avoid unwanted violations of the United States' international treaty obligations.[225] Duty-creating provisions are the only type of treaty provisions that potentially give rise to treaty violations; it is not possible to violate a power-creating or liberty-creating provision.[226] Therefore, automatic conversion of power and/or liberty creating provisions would not promote the objectives that the Framers sought to achieve by including treaties in the Supremacy Clause. In contrast, automatic conversion of duty-creating provisions does promote those objectives by imposing a domestic legal constraint on the authority of relevant actors within the domestic legal system to act (or refrain from acting) in a manner that places the United States in violation of its international duty.

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[224] If Congress is the only institution with the domestic legal authority to implement the actions necessary to fulfill the treaty duty, then one might say that conversion of the duty into domestic law is barred because the treaty makers lack the constitutional authority to create a domestic legal duty for Congress to enact legislation. *See supra* notes 217-218 and accompanying text. However, that is a *constitutional* constraint on automatic conversion (which is consistent with the qualified automatic conversion rule). It differs in kind from the constraints that preclude conversion of international legal rules that operate exclusively in the international sphere.

[225] *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 276-77 (1796) (Iredell, J., concurring); *see also* Vázquez, *Four Doctrines*, *supra* note 10, at 697-700. A narrower reading of the historical materials might suggest that the Framers chose to include treaties in the Supremacy Clause solely to avoid treaty violations *by the states*. It is true that the federal government's inability under the Articles of Confederation to remedy treaty violations by the states was a major factor underlying the decision to include treaties in the Supremacy Clause. However, this narrower reading overlooks the fact that the Framers sought to ensure U.S. compliance with its international legal obligations "as a moral imperative — a matter of national honor." Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 482 (1989). *See also* Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 324-25 (2001) (contending that Founding Fathers viewed treaty compliance as a matter of national honor).

[226] Colloquially, people often speak of an "abuse of power." However, a genuine abuse of power invariably entails a violation of some duty — typically, a duty derived from one's position of power.

Professors Bradley and Goldsmith contend that the Supremacy Clause does not give treaties "the status of self-executing federal law," but merely makes "federal laws supreme over state laws."[227] This statement is ambiguous. If they mean that *all* treaty provisions are supreme over state law, then it follows that *all* treaty provisions have the status of primary domestic law because treaties could not be superior to state law if they did not have that status. On the other hand, if they mean that only some treaty provisions are supreme over state laws, they fail to justify their position that the phrase "all treaties" in the text of the Supremacy Clause should be construed to exclude some treaties.[228]

In sum, the statement that all treaties are the supreme Law of the Land means that all treaty provisions that create primary international duties binding on the United States have the status of primary domestic law, subject to the constitutional limitations noted above.

3. Shall Be

The Supremacy Clause does not say that all treaties "are" the Law of the Land. It says that all treaties "shall be" the Law of the Land. Hence, one could argue, the Supremacy Clause does not automatically give treaties the status of primary domestic law; it merely dictates that treaties "shall be" made into law by a subsequent legislative act.[229] This argument appears to be textually plausible until one considers the fact that the subject phrase — "shall be the supreme Law of the Land" — applies not only to treaties, but also to statutes, and to the Constitution itself. Thus, under this interpretation, every statute would require a subsequent statute to give it status as supreme federal law, which in turn would require a subsequent statute to give it status as supreme federal law, *ad infinitum*. Because that interpretation is patently absurd, the better view is that treaties "shall be" the Law of the Land automatically, by the force of the Supremacy Clause itself.

A third interpretation is possible, though. Under this view, some treaty provisions are automatically converted into primary domestic law, whereas other treaty provisions require implementing legislation before they acquire the status of primary domestic law. As noted above, there

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[227] Bradley & Goldsmith, *supra* note 163, at 446; *see also* Yoo, *Rejoinder*, *supra* note 3, at 2220 ("[T]he Supremacy Clause simply makes clear the superiority of federal law to state law.").

[228] *See* U.S. CONST. art. VI, cl. 2 (stating that "all Treaties" are "the supreme Law of the Land.").

[229] *See* Yoo, *Rejoinder*, *supra* note 3, at 2249.

are some treaty provisions for which implementing legislation is constitutionally required.[230] But even where implementing legislation is not constitutionally required, there is nothing that prevents Congress from choosing to enact legislation.[231] As long as Congress enacts the requisite implementing legislation, there is no constitutional difficulty. Some treaty provisions are automatically converted into primary domestic duties by virtue of the Supremacy Clause; others are converted into primary domestic law by the force of implementing legislation. Either way, the treaty duty becomes a primary domestic duty, consistent with the constitutional requirement that all treaties "shall be" the supreme Law of the Land.[232]

Suppose, though, that Congress chooses not to enact the requisite implementing legislation. Where implementing legislation is constitutionally required and Congress chooses not to enact it, the treaty duty would be internationally binding but it would not have the status of primary domestic law. Such an outcome is consistent with the text of the Supremacy Clause because the requirement that all treaties "shall be" the Law of the Land applies only to treaties "made . . . under the Authority of the United States,"[233] and a treaty provision for which implementing legislation is constitutionally required is not "made . . . under the Authority of the United States" for purposes of domestic

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[230] *See supra* note 131 and accompanying text.

[231] The Executive Branch often recommends implementing legislation for treaties when it submits the treaty to the Senate for its advice and consent, even in cases where legislation is not constitutionally required. For example, the Deputy Secretary of State's letter of submittal accompanying the Rotterdam Convention recommends legislation to clarify the EPA's authority to prohibit exports of designated chemicals. *See* Rotterdam Convention Concerning Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, S. TREATY DOC. NO. 106-21 (2000), 1998 WL 1788082, at *11. As a constitutional matter, there is little doubt that the treaty itself would provide sufficient authority for the EPA to issue the necessary regulations. Even so, nothing in the Constitution precludes Congress from enacting legislation to grant that authority to the EPA.

[232] The Restatement adopts the view that, in the case of legislative implementation, it is the statute, not the treaty, that becomes primary domestic law. RESTATEMENT (THIRD), *supra* note 5, § 111 cmt. h. If the statute and the treaty are substantially identical, then the question whether the treaty has independent status as primary domestic law has no practical significance. If the statute and the treaty are not substantially identical, then it is important to distinguish between those portions of the treaty that have been implemented by legislation, and those that have not been implemented by legislation. As above, if a particular provision has been implemented by legislation, then the question whether that provision has independent status as primary domestic law has no practical significance. With respect to provisions that have not been implemented by legislation, see *infra* notes 235-241 and accompanying text.

[233] U.S. CONST. art. VI, cl. 2.

law.[234]

Finally, consider the case where implementing legislation is *not* constitutionally required and Congress does *not* enact implementing legislation.[235] If pre-existing legislation satisfies the treaty requirements, then the situation is analytically indistinguishable from cases where Congress does enact implementing legislation.[236] However, if Congress does not enact implementing legislation and there is no pre-existing legislation that satisfies the treaty requirements, a question arises: do the treaty makers have the power to preclude automatic conversion by stipulating in the treaty itself, or in a unilateral reservation or declaration, that the treaty shall not have the status of primary domestic law in the absence of implementing legislation?[237]

The Restatement doctrine assumes that the treaty makers have such a power. If the treaty makers do have such a power, it must derive either from their Article II power to make treaties or from the Supremacy Clause.[238] Professor Vázquez contends that Article II gives the treaty makers the power to preclude automatic conversion.[239] I address that argument below.[240] Others would apparently locate such a power in the Supremacy Clause itself.[241] Their position effectively construes the constitutional requirement that treaties *shall be* the Law of the Land to mean that the treaty makers have the power to decide that some treaty

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[234] *See supra* notes 210-219 and accompanying text.

[235] *See, e.g.*, Race Report, *supra* note 160, at 14 (stating that "no new implementing legislation is considered necessary to give effect to the Convention").

[236] The claim that pre-existing law satisfies the treaty requirements is often made to justify a decision not to seek implementing legislation. *See, e.g., id.* at 14 (stating that "the specific requirements of the Convention find ample counterparts in our federal law").

[237] There is no doubt that the treaty makers can stipulate that the treaty will not enter into force *internationally* until after enactment of implementing legislation. *See infra* notes 257-261 and accompanying text. Hence, the precise question at issue is whether the treaty makers have the power to preclude automatic conversion even after the treaty has entered into force internationally.

[238] *See supra* notes 201-202 and accompanying text.

[239] *See* Vázquez, *Laughing*, *supra* note 17, at 2174-75.

[240] *See infra* notes 279-295 and accompanying text.

[241] *See* Yoo, *Rejoinder*, *supra* note 3, at 2249-57 (contending that treaties generally do not create domestic law, but that Supremacy Clause gives treaty makers power to decide that some treaties shall be domestic law); *see also* Bradley & Goldsmith, *supra* note 163, at 446-49. Bradley and Goldsmith contend that the Supremacy Clause does not limit the treaty makers' power to control the domestic legal effects of treaties. *Id.* This argument assumes that the treaty makers have such a power, without identifying the source of that power or characterizing the scope of that power. Properly stated, the question is not whether the Supremacy Clause limits the power of the treaty makers, but whether the Constitution gives the treaty makers the power to alter the constitutional rule embodied in the Supremacy Clause.

provisions *shall not be* the Law of the Land, even in cases where implementing legislation is not constitutionally required. That position is impossible to reconcile with the text of the Supremacy Clause. A constitutional provision specifying that treaties *shall be* law cannot be the textual basis for imputing to the treaty makers a power to decide that some treaty provisions *shall not be* law.

In sum, it is textually plausible to construe the phrase "shall be" to mean that some treaty duties shall become the supreme Law of the Land by the force of implementing legislation and others shall become the supreme Law of the Land automatically, by virtue of the Supremacy Clause. Moreover, there is nothing in the text of the Supremacy Clause, or elsewhere in the Constitution that precludes the political branches from deciding to enact implementing legislation, even in cases where such legislation is not constitutionally required. However, it is not permissible to read into the Supremacy Clause an implied power for the treaty makers to decide that certain treaty provisions "made . . . under the authority of the United States" *shall not be* the supreme Law of the Land, because that interpretation conflicts directly with the constitutional mandate that "all Treaties made . . . under the Authority of the United States, *shall be* the supreme Law of the Land." Therefore, as a textual matter, the only plausible defense of the Restatement doctrine is the proposition that Article II gives the treaty makers the power to decide that some treaty provisions "made . . . under the authority of the United States" *shall not be* the supreme Law of the Land. Section B addresses that argument.

B. Article II and the Restatement Doctrine

Section B contends that Article II should not be construed to give the treaty makers the power to preclude automatic conversion of primary treaty duties into domestic legal duties, because that interpretation of Article II undermines United States compliance with its treaty obligations without advancing any legitimate policy objective. The analysis is divided into four parts. The first part demonstrates that there is a significant tension between the Restatement doctrine and certain structural features of the Constitution. The second part shows that Professor Yoo's original intent defense of the Restatement doctrine is flawed. The third part rebuts Professor Vázquez' defense of the Restatement doctrine, which is based on his interpretation of the

Supreme Court's decision in *Foster v. Neilson*.[242] The final section considers the implications of rejecting the Restatement doctrine.

1. Structural Considerations — The Treaty Power and the Supremacy Clause

Assume that the United States has ratified a treaty in which article 5 creates primary international legal duties. Assume further that the treaty has entered into force internationally, that article 5 is binding on the United States as a matter of international law, that there is no constitutional impediment that would preclude automatic conversion of article 5 into a primary domestic legal duty, and that Congress has not enacted implementing legislation for article 5.[243] The Restatement doctrine holds that article 5 does not have the status of primary domestic law if the treaty makers manifested their "intention that [article 5] shall [not] become effective as domestic law of the United States at the time it becomes binding on the United States,"[244] either by including a provision to that effect in the treaty or by adopting a unilateral declaration or reservation to that effect.

The Restatement doctrine presupposes that the treaty makers have the power to preclude a particular treaty provision from becoming the Law of the Land, even if there is no constitutional impediment to automatic conversion. Section A established that the presumed power cannot be rooted in the Supremacy Clause.[245] Thus, implicit in the Restatement doctrine is the assumption that the Treaty Power gives the treaty makers the power "to countermand for a given treaty the [constitutional] rule that the Supremacy Clause would otherwise establish."[246]

The Restatement doctrine also presupposes that the treaty makers have the power to shape primary domestic law *directly* — that is, without modifying the international legal obligations they create. This is clear if one considers a hypothetical treaty in which article 12 specifies that article 5 "shall [not] become effective as domestic law of the United States at the time it becomes [internationally] binding on the United States."[247] In this example, article 12 relates exclusively to domestic law;

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[242] 27 U.S. (2 Pet.) 253 (1829).

[243] The stipulation that Congress has not enacted implementing legislation means, also, that there is no pre-existing legislation that satisfies the requirements of article 5. *See supra* note 236 and accompanying text.

[244] RESTATEMENT (SECOND), *supra* note 16, § 141.

[245] *See supra* notes 203-241 and accompanying text.

[246] Vázquez, *Laughing*, *supra* note 17, at 2187.

[247] RESTATEMENT (SECOND), *supra* note 16, § 141.

it has no international legal effect whatsoever. Even so, the Restatement doctrine assumes that article 12 is a valid treaty provision, not just internationally, but also domestically.[248] Thus, the Restatement doctrine presupposes that the treaty makers have the domestic constitutional power to create treaty provisions that affect primary domestic law even if they have no international legal effect.

There are reasons to doubt the existence of such a power. The treaty power is, first and foremost, a power to make international law by means of international agreements.[249] By itself, it does not give the treaty makers any power to create primary domestic law *directly*.[250] The combination of the Treaty Power and the Supremacy Clause gives the treaty makers the power to create primary domestic law indirectly — that is, by and through the international law they create. However, the proposition that the treaty makers have a power to create treaty provisions that have no international legal effect, but that still affect primary domestic law, arguably runs afoul of the longstanding principle that the treaty power extends only to matters that are "properly the subject of negotiation with a foreign country."[251]

If one construes the combination of the Treaty Power and the Supremacy Clause to grant the treaty makers a power to create primary domestic law directly, that power would be virtually indistinguishable from Congress' legislative power. Hence, this interpretation is difficult to reconcile with Article I, which vests "all legislative powers" in Congress.[252] Moreover, the placement of the Treaty Power in Article II, rather than Article I, suggests that the Framers conceived of the Treaty Power as an executive power, not a legislative power.[253] The view that

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[248] This Article contends that article 12 is not valid domestically. One could also make a plausible argument that article 12 is not valid internationally, either, but I leave that argument for another day.

[249] *See* HENKIN, *supra* note 8, at 216 (stating that "international agreements are primarily international acts and make domestic law only incidentally").

[250] This point becomes evident if one hypothesizes a constitutional text in which Article III and Article VI omitted any reference to treaties. *See* U.S. CONST. art. III, § 2, cl. 1 (extending judicial power to cases arising under treaties); U.S. CONST. art. VI, cl. 2 (providing that treaties are supreme Law of the Land). In that case, treaties would have no domestic legal force in the absence of implementing legislation, and the federal judiciary would not have jurisdiction to adjudicate claims arising under treaties. These considerations show that the Treaty Power, by itself, does not give the treaty makers any power to create primary domestic law *directly* — that is, independently of the international law they create.

[251] Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

[252] U.S. CONST. art. I, § 1.

[253] *Accord* Yoo, *Globalism*, *supra* note 3, at 1966.

the treaty makers have a power to create primary domestic law indirectly, but not directly, preserves the distinction between legislative and executive powers and avoids any conflict with the vesting provision in Article I.

Proponents of the Restatement doctrine might agree that the treaty makers do not have an affirmative power to create primary domestic law directly. However, they may argue, the treaty makers have a negative power to prevent particular treaty provisions from creating primary domestic law, and they can exercise this power directly — that is, independently of the international legal obligations embodied in the treaty. This position partially ameliorates the problems associated with the Restatement doctrine. However, proponents of that doctrine must still acknowledge that this alleged negative power presupposes an affirmative power to countermand the Supremacy Clause by deciding that some treaty provisions shall not be the Law of the Land. Hence, they must explain why one should imply, on the basis of the Treaty Power, an affirmative power to countermand the Supremacy Clause.

There is at least one constitutional provision that gives the political branches the power to countermand a constitutional rule: the Fourteenth Amendment gives Congress the power to countermand the Eleventh Amendment.[254] However, this is a rare exception to the ordinary principle that the political branches cannot override constitutional rules merely by manifesting their intent to do so. Therefore, inasmuch as proponents of the Restatement doctrine read into Article II an implied power for the treaty makers to override the constitutional rule embodied in the Supremacy Clause, they bear the burden of establishing an exception to the ordinary presumption that constitutional rules are immune from political manipulation.

In light of the preceding discussion, proponents of the Restatement doctrine might make the following argument. The Treaty Power, by itself, is a power to create international law, not domestic law. Further, the treaty makers' power to create primary domestic law (indirectly) derives only from the combination of the Treaty Power and the Supremacy Clause.[255] In addition, the power to create primary domestic law directly is a legislative power, which the Constitution vests in Congress.[256] Therefore, structural considerations support the view that the treaty makers should have the discretion to allow Congress to decide

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[254] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 516-20 (1997).

[255] *See supra* notes 249-251 and accompanying text.

[256] U.S. CONST. art. I, § 1.

whether a particular treaty provision shall become primary domestic law.

In fact, the treaty makers do have the discretion to allow Congress to decide whether a particular treaty provision shall become primary domestic law: the treaty makers can exercise that discretion by deferring *international* entry into force of the treaty until after Congress enacts implementing legislation.[257] If the treaty makers want to defer the international entry into force of a treaty until after Congress enacts domestic implementing legislation, they have a variety of options for doing so. First, they can specify in the text of the treaty that the treaty shall "not take effect [internationally] until a law ha[s] been passed by Congress to carry it into operation."[258] Second, the Senate can insist, as a condition of its consent to ratification, that the treaty's entry into force provision be amended to make the international entry into force of the treaty contingent upon enactment of domestic implementing legislation.[259] Third, the Senate can consent to ratification, subject to the condition that the President shall not ratify the treaty until after implementing legislation has been enacted.[260] Finally, the treaty makers can adopt a unilateral reservation to suspend the international operation of a particular treaty provision until implementing legislation is enacted, thereby allowing the majority of the treaty's provisions to take effect sooner.[261]

All of the preceding examples can be explained without reliance on a presumed power to shape primary domestic law directly. In fact, all four examples involve an exercise of the treaty makers' power to control

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[257] The treaty makers also have other options for involving Congress without relying upon a presumed power to countermand the Supremacy Clause. *See infra* notes 304-307 and accompanying text.

[258] Bartram v. Robertson, 122 U.S. 116, 119 (1887) (paraphrasing terms of fifth article of bilateral commercial convention between United States and Kingdom of Hawaii).

[259] *See* United States v. Am. Sugar Ref. Co., 202 U.S. 563, 565 (1906).

[260] *See, e.g.*, 132 CONG. REC. S1378 (daily ed. Feb. 19, 1986) (Senate resolution of ratification for Genocide Convention). Although this type of condition does not modify the treaty's entry into force provision, it is a valid condition because the Senate's power to provide "Advice and Consent" includes the power to establish a condition precedent for treaty ratification. U.S. CONST. art. II, § 2, cl. 2.

[261] *See* Letter of Submittal accompanying the Protocols to the Convention on the Rights of the Child, S. TREATY DOC. NO. 106-37 (2000) (recommending "declaration" to suspend particular international obligation of United States under Sale of Children Protocol). Although the letter of submittal labels this condition a "declaration," it is in fact a reservation because it modifies the United States' international legal obligations under the Protocol by exempting the United States from a particular obligation until "the United States informs the Secretary-General of the United Nations that its domestic law is in full conformity with the requirements of Article 4(1) of the Protocol." *Id.*

primary domestic law indirectly, because in each case the treaty makers are postponing the domestic entry into force of the treaty (or a particular provision) by postponing the international entry into force of the treaty (or a particular provision). Moreover, these examples do not show that the treaty makers have a power to countermand the Supremacy Clause. The Supremacy Clause does not require the conversion of international law into domestic law *before* the international law takes effect; it merely requires conversion *when* the international law takes effect. All four examples are consistent with this requirement. Because the treaty makers' recognized power to require legislation as a precondition for international entry into force of a treaty (or portion thereof) presupposes neither a power to shape primary domestic law directly, nor a power to countermand the Supremacy Clause, the existence of such a recognized power does not support the Restatement doctrine.

When the treaty makers defer international entry into force of a treaty until after Congress enacts implementing legislation, they involve Congress in shaping the domestic legal effects of treaty ratification, while simultaneously ensuring that the United States is able to comply with its international treaty obligations immediately upon entry into force of the treaty.[262] In contrast, the Restatement doctrine presumes that the Treaty Power gives the treaty makers the power to prevent domestic entry into force of the treaty even after it enters into force internationally. In light of the treaty makers' recognized power to defer international entry into force of a treaty, a constitutional interpretation that grants the treaty makers the additional power to prevent domestic entry into force even after a treaty enters into force internationally serves only one purpose: it gives the treaty makers the power to enter into binding obligations internationally while simultaneously taking steps to undermine U.S. compliance with those obligations.[263] The Framers certainly did not wish to encourage such a cynical approach to international law.[264] Moreover,

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[262] *See, e.g.*, SENATE COMM. ON FOREIGN RELATIONS, REPORT ON CONVENTION ON PROTECTION OF CHILDREN AND COOPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, S. EXEC. REP. NO. 106-14 (2000), at 12 (recommending that Senate provide its consent to ratification subject to declaration that "[t]he President shall not deposit the instrument of ratification for the Convention until such time as the federal law implementing the Convention is enacted and the United States is able to carry out all the obligations of the Convention . . .").

[263] If a treaty duty is binding internationally, but not domestically, then individuals can violate the treaty without any domestic legal consequence, thereby undermining treaty compliance.

[264] *See* Burley, *supra* note 225, at 482 (contending that Framers sought to ensure U.S. compliance with its international legal obligations "as a moral imperative — a matter of

it would be contrary to U.S. national interests to adopt this approach to treaty ratification because this approach would create the perception that the United States does not take its treaty obligations seriously, thereby making other countries more reluctant to enter into treaties with us and undermining our efforts to persuade other countries to comply with their treaty obligations.

2. Professor Yoo and the Framers' Intentions

Other scholars have analyzed in great detail the historical record associated with the Constitutional Convention and the state ratification debates.[265] Whereas the majority view contends that the Framers' intentions support an interpretation of the Supremacy Clause along the lines of the qualified automatic conversion rule,[266] Professor Yoo's historical narrative challenges that claim.[267] I do not propose to engage in that debate here. The aim of this section is far more modest — to show that, even if one accepts Professor Yoo's historical narrative, that narrative does not conflict with the qualified automatic conversion rule, nor does it support the Restatement doctrine. In fact, Yoo's historical narrative weighs against the Restatement doctrine because his narrative supports a narrow construction of the scope of the Treaty Power. In contrast, the Restatement doctrine presupposes an expansive view of the scope of the Treaty Power because it tacitly assumes that Article II gives the treaty makers the power to countermand the Supremacy Clause.

At the risk of oversimplifying Professor Yoo's richly detailed historical narrative, his argument essentially supports two points. First, the Framers intended for the House of Representatives to play a significant role in treaty implementation.[268] Second, the Framers conceived of the treaty power as an executive power, not a legislative power.[269] Based on these two premises, Yoo advocates strict separation of powers limitations on the treaty makers' power to create primary domestic law. Specifically, he advocates both a "hard" and a "soft" rule in favor of non-

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national honor").

[265] *See* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2120-51 (1999); Paust, *Self-Executing Treaties*, *supra* note 4, at 760-64; Vázquez, *Four Doctrines*, *supra* note 10, at 697-700; Yoo, *Globalism*, *supra* note 3, at 2024-68.

[266] *See* Flaherty, *supra* note 265; Paust, *Self-Executing Treaties*, *supra* note 4, at 760-64; Vázquez, *Four Doctrines*, *supra* note 10, at 697-700.

[267] *See* Yoo, *Globalism*, *supra* note 3, at 1960-63.

[268] *See id.* at 2037-40.

[269] *See id.* at 2069-74.

self-execution.[270]

Yoo's hard rule contends that the treaty makers lack the constitutional authority to create primary domestic law "in areas that fall within Congress's Article I, Section 8 powers."[271] This hard rule is a variant of the *Whitney* doctrine: treaty provisions within the scope of Article I, Section 8, cannot be automatically converted into domestic law by the force of the Supremacy Clause because they are not "made . . . under the Authority of the United States" for purposes of domestic law.[272] Yoo's hard rule is consistent with the qualified automatic conversion rule because the latter rule incorporates separation of powers limitations on automatic conversion.[273] Yoo's hard rule is also internally consistent with his historical narrative because the main thrust of his argument is that the Framers intended for there to be strict separation of powers limitations on the treaty makers' power to create primary domestic law.[274] But Yoo's hard rule does not support the Restatement doctrine because it presupposes neither a power to countermand the Supremacy Clause[275] nor a power to shape primary domestic law directly.[276]

Yoo's "soft" rule is that, when construing treaty provisions within the scope of Article I, Section 8, courts should presume that the treaty makers did not intend to create primary domestic law unless the treaty makers clearly manifest a contrary intention.[277] Because the treaty

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[270] Yoo, *Rejoinder*, *supra* note 3, at 2220.

[271] *Id.* Professor Yoo vacillates between a "primary law" concept of self-execution and a "remedial law" concept of self-execution. *Compare* Yoo, *Globalism*, *supra* note 3, at 1969-70 (analyzing cases in terms that suggest remedial law concept of self-execution) *with id.* at 2092 (suggesting that non-self-executing treaties lack status of primary domestic law). Although at times he expresses his "hard" rule in terms that imply a remedial law concept of non-self-execution, his argumentation supporting the hard rule fits best with the indirect primary version of the intent thesis because he is concerned with constitutional limits on the scope of the treaty makers' power to create primary domestic law.

[272] *See supra* notes 132-134 and accompanying text.

[273] *See supra* notes 210-219 and accompanying text.

[274] This statement is not intended to be an endorsement either of Yoo's hard rule, or of his structural and historical arguments. It is merely an observation that Yoo's hard rule is internally consistent with those arguments.

[275] Yoo's hard rule does not presuppose a power to countermand the Supremacy Clause because it is a variant of the indirect primary version of the intent thesis, and the indirect primary version is entirely consistent with the Supremacy Clause. *See supra* notes 132-134 and accompanying text.

[276] Yoo's hard rule presupposes that the treaty makers have a power to shape primary domestic law *indirectly*. That is, they indirectly preclude automatic conversion, not because they intend to preclude automatic conversion, but because they choose (intentionally) to create the type of treaty provision for which automatic conversion is constitutionally barred.

[277] Yoo, *Rejoinder*, *supra* note 3, at 2220.

makers' intent is relevant only insofar as they have the power to achieve a given result, Yoo's soft rule makes sense only if: (a) there are no constitutional impediments to using the treaty power to create primary domestic law within the scope of Article I, Section 8;[278] and (b) the treaty makers have the power to decide that some treaty provisions shall not be the Law of the Land, even if automatic conversion is not constitutionally barred. Thus, Yoo's soft rule is consistent with the Restatement doctrine because it presupposes that the treaty makers have the power to countermand the Supremacy Clause by deciding that certain treaty provisions shall not be the Law of the Land, even if there is no constitutional impediment to automatic conversion. However, Yoo's soft rule is inconsistent with his historical argument because his soft rule assumes that there are few, if any, separation of powers limitations on the scope of the treaty power, whereas his historical narrative is designed to show that there are substantial separation of powers limitations on the scope of the treaty power.

In sum, Yoo's hard rule is consistent with his historical narrative but it does not support the Restatement doctrine. In contrast, Yoo's soft rule is consistent with the Restatement doctrine but it is at odds with his historical narrative. Therefore, Yoo's historical narrative provides no support for the direct primary version of the intent thesis. Since the historical narratives of other scholars generally support interpretation of the Supremacy Clause in accordance with the qualified automatic conversion rule, none of the leading historical accounts support the Restatement doctrine.

3. Professor Vázquez' Defense of the Restatement Doctrine

Professor Vázquez has defended the thesis that Article II gives the treaty makers a power to countermand the Supremacy Clause.[279] Although Vázquez concedes that there is a significant tension between the Restatement doctrine and the text of the Supremacy Clause, he

[278] Yoo tacitly admits this point. He contends that if "the treatymakers can exercise a single Article I, Section 8 power granted to Congress, then the treatymakers must be able to exercise all of Congress' legislative powers." *Id.* at 2236. Given this assumption, Yoo is left with two options. One option (Yoo's hard rule) is that all of Congress' Article I, Section 8 powers are exclusive powers. The second option (Yoo's soft rule) is that all of Congress' Article I, Section 8 powers are concurrent powers, but courts should presume that the treaty makers did not intend to create primary domestic law within the scope of Article I, Section 8.

[279] Vázquez, *Laughing*, *supra* note 17, at 2184-88.

contends that the Supreme Court's decision in *Foster v. Neilson*[280] supports the Restatement doctrine. His argument merits detailed consideration because it is the most sophisticated effort by any scholar to defend the direct primary version of the intent thesis.

Vázquez begins by distinguishing between a treaty provision that says "do not deport refugees," which he calls a Type A provision, and a treaty provision that says "pass legislation prohibiting the deportation of refugees," which he calls a Type B provision.[281] He is clearly right to assert that Type B provisions are not self-executing,[282] but it is important to explain why that is so. Professor Vázquez' Type B provision creates an international legal duty to enact legislation; it does not create an international legal duty to refrain from deporting refugees. The international duty to enact legislation might be said to be non-self-executing for one of two reasons. If one believes that the treaty makers lack the constitutional power to create a domestic legal duty for Congress to enact legislation, then the Type B provision would not be automatically converted into domestic law because the Constitution precludes automatic conversion. As noted above, this is an example of the *Whitney* doctrine that is entirely consistent with the Supremacy Clause and the qualified automatic conversion rule.[283] On the other hand, if one believes that the treaty makers do have the power to create a domestic legal duty for Congress to enact legislation, then the international duty to enact legislation would be automatically converted into domestic law. However, it would not be judicially enforceable because it is clearly nonjusticiable.[284] This is an example of the *Foster* doctrine, which is also consistent with the Supremacy Clause and the qualified automatic conversion rule.

If I understand Professor Vázquez correctly, he would agree that a Type B provision, standing alone, is not evidence of the treaty makers'

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[280] 27 U.S. (2 Pet.) 253 (1829).

[281] Vázquez, *Laughing*, *supra* note 17, at 2184.

[282] *Id.*

[283] *See supra* notes 210-219 and accompanying text.

[284] Different courts might articulate different rationales as to why a lawsuit seeking to compel Congress to comply with an international legal duty to enact legislation is nonjusticiable. For example, a court might say that Congress, as an institution, is entitled to sovereign immunity, and Members of Congress enjoy absolute immunity for acts and omissions that are integral to their legislative function. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-4 (1975). One might also say, though, that a duty to legislate is horizontal. *See supra* notes 115-123 and accompanying text. In Professor Vázquez' example, the Type A duty not to deport refugees is owed to the refugees (vertical), but the Type B duty to enact legislation is owed only to other countries.

power to countermand the Supremacy Clause. But he then hypothesizes a treaty in which article 1 creates a Type A duty and article 27 states: "The requirements of articles 1-26 shall be achieved through future acts of domestic lawmaking."[285] There are three possible ways to interpret this pairing of articles 1 and 27. First, one could construe article 1 to be mandatory and executed, both domestically and internationally, while construing article 27 to be precatory, imposing a duty to legislate only on those countries where treaties are never self-executing.[286] Under this interpretation, article 1 is self-executing in the sense that it is judicially enforceable in domestic courts without the need for implementing legislation.[287]

A second possible interpretation is that article 27 renders article 1 executory in both the domestic and international spheres. In other words, the pairing of articles 1 and 27 creates a duty not to deport refugees, subject to a condition precedent that the duty does not become effective, either domestically or internationally, until future implementing legislation is enacted. Under this interpretation, the domestic duty is precisely coterminous with the international duty: both the domestic and international duty are executory until legislation is enacted, at which point the duty becomes executed on both the domestic and international planes. This interpretation is entirely consistent with the Supremacy Clause because the Supremacy Clause converts into domestic law only that which exists as a matter of international law: the Clause can never convert an executory international duty into an executed domestic duty. Thus, under this interpretation, article 27 is valid, but its validity does not depend upon any presumed power to countermand the Supremacy Clause.

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[285] Vázquez, *Laughing*, *supra* note 17, at 2187.

[286] This interpretive approach is consistent with the State Department's proposed approach to ratification of the International Plant Protection Convention, Nov. 17, 1997, S. TREATY DOC. NO. 106-23 (2000), *available in* 1997 WL 33143607. Article 1 of the Convention is an example of what Professor Vázquez calls a Type B provision. It states, in part, that "the contracting parties undertake to adopt the legislative, technical and administrative measures specified in this Convention." *Id.*, art. I. Notwithstanding this apparent international duty to legislate, the Secretary of State's letter of submittal states that "no new legislation is necessary" because existing legislation "provides sufficient authority to implement U.S. obligations under the revised IPPC." *Id.* at *7. In effect, Secretary Albright's position was that the substantive obligations of the Convention are self-executing, despite the fact that article I could be construed to render them non-self-executing.

[287] This assumes, as Professor Vázquez notes, that Article 1 is sufficiently determinate for the provision to be judicially enforceable. *See* Vázquez, *Laughing*, *supra* note 17, at 2184.

A third possible interpretation, which Professor Vázquez appears to endorse,[288] is that article 1 is immediately effective as a matter of international law but, due to article 27, does not become effective as a matter of domestic law until after implementing legislation is enacted. Assume that this interpretation is correct and that article 27 is valid, both domestically and internationally.[289] Given these assumptions, article 27 would countermand the Supremacy Clause by precluding automatic conversion of article 1. Additionally, under these assumptions, article 27 would affect primary domestic law *directly*, without affecting international law, because under this interpretation article 27 has no international legal effect whatsoever.[290]

Professor Vázquez asserts that the Supreme Court's decision in *Foster v. Neilson*[291] establishes the validity of article 27 under this third interpretation.[292] Assuming, *arguendo*, that his interpretation of *Foster* is correct,[293] it does not establish the validity of article 27 under the third interpretation. Vázquez claims that "*Foster* recognizes that a treaty is not self-executing if the obligation it imposes is an obligation to enact domestic legislation."[294] This describes a treaty with a Type B provision, but no Type A provision. As noted above, one can explain the non-self-executing character of this type of treaty without relying on any special power to countermand the Supremacy Clause. A mere duty to legislate is not self-executing either because the treaty makers lack the power to create a domestic legal duty to legislate (*Whitney*), or because such a domestic legal duty is nonjusticiable (*Foster*).[295]

But Vázquez posits a very different type of treaty — one with a Type A provision that is effective internationally, but not domestically, and a Type B provision that is effective domestically, but not internationally. He cannot rely on *Foster* to establish the treaty makers' power to create this type of treaty because *Foster*, under his interpretation, simply involved a Type B provision that applied in the same way both domestically and internationally. Thus, in the final analysis, Professor

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[288] *See id.* at 2187-88.

[289] With respect to the international validity of article 27, see *infra* note 347.

[290] The fact that article 27 is part of the treaty does not give it international legal effect. Under this interpretation, article 27 modifies the domestic legal effect of article 1 without affecting the international legal obligation created by article 1.

[291] 27 U.S. (2 Pet.) 253 (1829).

[292] Vázquez, *Laughing*, *supra* note 17, at 2187.

[293] As noted above, I disagree with Professor Vázquez' interpretation of *Foster*. *See supra* notes 73-101 and accompanying text.

[294] Vázquez, *Laughing*, *supra* note 17, at 2181.

[295] *See supra* notes 281-284 and accompanying text.

Vázquez' argument merely assumes the validity of his conclusion. He assumes that the treaty makers have the power to countermand the Supremacy Clause; and he assumes that they have the power to shape primary domestic law directly, without affecting the international obligations they create. The first assumption is at odds with the text of the Supremacy Clause and with the basic principle that the political branches cannot alter constitutional rules by a mere act of political will. The second assumption is at odds with the nature of the Treaty Power. Article II, in tandem with the Supremacy Clause, gives the treaty makers a power to control primary domestic law by and through the international legal provisions they create, but it was never intended to give the treaty makers a power to control primary domestic law without affecting international law in any way.

4. Implications of Rejecting the Restatement Doctrine

It is important to specify precisely the type of treaty provision that would be invalidated if courts rejected the Restatement doctrine. Recall the aforementioned distinction between a Type A treaty provision (one that says "do not deport refugees") and a Type B treaty provision (one that says "pass legislation prohibiting the deportation of refugees"). Rejection of the Restatement doctrine would not invalidate Type B provisions, as such. However, a problem arises if a Type A and Type B provision are paired together in a single treaty so that the Type A provision is immediately effective as a matter of international law, but the Type B provision deprives the Type A provision of domestic legal force unless or until implementing legislation is enacted. I will refer to a Type B provision that has this effect as a "spoiler provision." If the Restatement doctrine is rejected, spoiler provisions would be the only type of treaty provisions that would be invalidated.[296]

Although it is difficult to prove a negative, it seems likely that rejection of the Restatement doctrine would not invalidate any *actual* treaty provision, because there is no evidence that the United States has ever entered into a treaty with a spoiler provision. Between 1789 and 1989, the United States concluded 1,501 treaties.[297] It is beyond the scope of this article to examine every treaty concluded by the United States. However, a search of all 182 treaties that the President submitted to the

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[296] *See supra* notes 279-295 and accompanying text.

[297] CONGRESSIONAL RESEARCH SERV., 103D CONG., 1ST SESS., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 14 (Comm. Print 1993).

Senate in the 103rd through 106th Congresses demonstrates that none of those treaties contains a spoiler provision.[298]

This result should not be surprising. As an initial matter, it is unclear why another country would agree to include a spoiler provision in a treaty. In countries with dualist systems, such as the United Kingdom, where treaties generally are not ratified (and hence do not take effect either internationally or domestically) until after implementing legislation is enacted,[299] the Type A provision would become effective both domestically and internationally at the time of ratification, so the spoiler provision would have no effect. Similarly, in countries with monist systems, such as the Netherlands, where a treaty that has entered into force internationally "automatically becomes part of Dutch law after it has been published,"[300] the spoiler provision would also have no effect, because the Netherlands Constitution dictates that the Type A provision has domestic legal effect independent of any implementing legislation.[301] In short, assuming that the spoiler provision could effectively control the domestic legal status of a Type A provision in the United States, there are many countries for which it would have no domestic legal effect whatsoever. Moreover, the spoiler provision is tantamount to a declaration by the United States that "we will sign the treaty, and we will ratify the treaty, but we can't promise to comply with the treaty — that's for Congress to decide."[302] What could possibly persuade our treaty partners to agree to include such a provision in a treaty?

Proponents of the Restatement doctrine claim that the treaty makers' ability to postpone the domestic legal effect of a treaty, pending implementing legislation, is essential to preserve the House role in shaping the domestic consequences of treaty ratification.[303] In fact,

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[298] This conclusion is based on an electronic search in the Westlaw "USTREATIES" database.

[299] *See* The Right Honourable the Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 464 (1991) ("Thus treaties which affect the rights of the Crown subjects are made subject to the approval of Parliament, and are normally either submitted for its approval before ratification or ratified under condition.").

[300] Pieter van Dijk & Bahiyyih G. Tahzib, *Parliamentary Participation in the Treaty-Making Process of the Netherlands*, 67 CHI.-KENT L. REV. 413, 418 (1991).

[301] *See id.* at 417-19.

[302] The only purpose served by a spoiler provision that cannot be accomplished by some other type of treaty provision is that a spoiler provision allows the treaty makers to enter into binding obligations internationally while simultaneously taking steps to undermine U.S. compliance with those obligations. *See supra* notes 257-264 and accompanying text; *see also infra* notes 304-308 and accompanying text.

[303] *See, e.g.*, Yoo, *Globalism*, *supra* note 3, at 2093-94 (arguing that President and Senate should render multilateral treaties non-self-executing to preserve House's control over

though, the treaty makers do not need to use spoiler provisions because they utilize a variety of other types of treaty provisions to accomplish that objective.

For example, treaty drafters sometimes include "anti-preemption" provisions in treaties, which essentially incorporate provisions of domestic law as a limitation on the scope of the international duty embodied in the treaty.[304] In other cases, treaty drafters include "non-derogation" provisions, which specify that a treaty merely establishes a minimum level of protection, but does not prevent the parties from providing greater protection under their domestic laws.[305] These are both methods of framing international treaty provisions in a way that preserves the flexibility of domestic lawmakers to regulate matters related to the treaty without modifying or breaching the United States' international obligations.

As discussed above, treaty drafters can include in a treaty a provision that postpones international entry into force until after domestic implementing legislation is adopted.[306] In multilateral treaties, the treaty drafters often include fairly general provisions in the treaty, leaving domestic legislative and regulatory authorities to work out the details.[307] These options enable treaty drafters to conclude an agreement that is binding both domestically and internationally, but that still leaves ample flexibility for domestic legislative and regulatory authorities to shape the domestic legal effects of treaty ratification.

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domestic legislation).

[304] *See, e.g.*, Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, Oct. 2, 1996, art. 26, U.S.-Switz., S. TREATY DOC. NO. 105-8 (1997) (requiring Contracting States to exchange specified information, but in paragraph 3 expressly limiting that duty as follows: "In no case shall the provisions of the Article be construed so as to impose upon either of the Contracting States the obligation to . . . supply particulars which are not procurable under its own legislation.").

[305] *See, e.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Sept. 23, 1992, U.S.-Arm., art. IX, S. TREATY DOC. NO. 103-11 (1993) ("This treaty shall not derogate from: (a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party . . . that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.").

[306] *See supra* notes 257-261 and accompanying text.

[307] *See, e.g.*, International Convention for Suppression of Financing Terrorism, Dec. 9, 1999, art. 18, para. 1, S. TREATY DOC. NO. 106-49 (2000) ("States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including . . .").

Granted, inclusion of a spoiler provision is one theoretical option for preserving a role for the House in shaping the domestic legal effects of treaties. However, spoiler provisions are constitutionally problematic because they are valid domestically only if the treaty makers have a constitutional power to countermand the Supremacy Clause. Because the existence of such a power is at best uncertain, and because treaty drafters have other, constitutionally sound options for ensuring a House role in treaty implementation, it should come as no surprise that treaty drafters do not include spoiler provisions in U.S. treaties.

Moreover, the mechanisms that the treaty makers actually do utilize to help preserve a House role in domestic implementation of treaties all have one vital feature in common: they all maintain a symmetry between domestic and international law so that the scope of domestic legal duties under a treaty is precisely coterminous with the scope of the international duties. In contrast, spoiler provisions drive a wedge between domestic and international law by purporting to create international legal duties without any corresponding domestic legal duties. Creation of international duties without corresponding domestic duties undermines treaty compliance because it permits individuals to violate treaties without any domestic legal sanction.[308] Therefore, the only objective that can be accomplished by spoiler provisions that cannot be accomplished by some other mechanism is to encourage treaty violations. Moreover, since spoiler provisions are the only type of treaty provision whose validity depends upon the Restatement doctrine, the only purpose that doctrine serves is to give the treaty makers the power to enter into binding obligations internationally while simultaneously taking steps to encourage treaty violations by actors within the domestic legal system. The Framers of our Constitution would be horrified to learn that a doctrine promoting that objective gained widespread acceptance among U.S. courts and commentators during the latter half of the twentieth century.

C. Doctrinal Support for the Restatement Doctrine

One possible objection to the preceding critique of the Restatement doctrine is that the doctrine is so deeply entrenched in judicial precedent that it must be retained. This section demonstrates that doctrinal support for the Restatement doctrine is "a mile wide and an inch deep."

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[308] Of course, creation of a domestic duty does not necessarily ensure that there will be domestic legal sanctions for violations of that duty. *See supra* notes 38-40 and accompanying text. However, absent a domestic duty there can be no domestic sanctions.

The Supreme Court has never endorsed the Restatement doctrine. Prior to publication of the Restatement (Second) in 1965, there was virtually no support for the doctrine. Finally, although courts and commentators today generally accept the doctrine, they rarely even acknowledge, much less attempt to defend, the key constitutional assumption underlying the doctrine — the assumption that the treaty makers have the constitutional power to countermand the Supremacy Clause.

1. Supreme Court Precedent

Since *Whitney v. Robertson*,[309] the Supreme Court has published only nine decisions expressing a definite view that a particular treaty provision was or was not self-executing.[310] None of those decisions supports the Restatement doctrine. In *Trans World Airlines*, *Asakura*, and *Fok Young Yo*, the Court failed to identify any criteria whatsoever for distinguishing between self-executing and non-self-executing treaties.[311] Clearly, conclusory statements that a treaty is or is not self-executing say nothing about the treaty makers' power to countermand the Supremacy Clause.

In *Maul*, *Cook*, and *Aguilar*, the Court relied primarily on the Secretary of State's legal opinion to determine whether a particular treaty provision was self-executing.[312] In *Cameron Septic*, the Court held, as an

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[309] 124 U.S. 190 (1888).

[310] INS v. Stevic, 467 U.S. 407 (1984); Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243 (1984); Warren v. United States, 340 U.S. 523 (1951); Aguilar v. Standard Oil Co., 318 U.S. 724 (1943) (Stone, C.J., concurring/dissenting); Cook v. United States, 288 U.S. 102 (1933); Maul v. United States, 274 U.S. 501 (1927); Asakura v. City of Seattle, 265 U.S. 332 (1924); Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39 (1913); Fok Young Yo v. United States, 185 U.S. 296 (1902).

There are six other cases since *Whitney* in which the Court used the adjective "self-executing" to modify the word "treaty": Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 167 (1993); United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992); Factor v. Laubenheimer, 290 U.S. 276, 300 (1933); United States v. Lee Yen Tai; 185 U.S. 213, 221 (1902); DeLima v. Bidwell, 182 U.S. 1, 195 (1901); and Mitchell v. Furman, 180 U.S. 402, 428 (1901). These six cases do not express a definite opinion as to whether a particular treaty provision is or is not self-executing, much less suggest any criteria for determining whether a particular provision is self-executing.

[311] *See Trans World Airlines*, 466 U.S. at 252 (stating that Warsaw Convention is self-executing treaty); *Asakura*, 265 U.S. at 341 (bilateral treaty with Japan "operates of itself without the aid of any legislation"); *Fok Young Yo*, 185 U.S. at 303 (stating that 1880 treaty, which was not at issue in that case, was not self-executing, but "the provision of this treaty applicable here" (an 1894 treaty) "proceeded on the ground of its existence . . . and no act of Congress was required").

[312] *See Cook*, 288 U.S. at 119 n.19 (citing Secretary of State in support of proposition that subject treaty was self-executing); *Maul*, 274 U.S. at 530, n.34 (Brandeis, J., concurring)

alternative holding, that the patent treaty on which plaintiff based its claim was not self-executing.[313] The Court relied in part on a formal legal opinion of the Attorney General, which reasoned that an earlier patent treaty was *executory* because "each party to it *covenants to grant in the future* to the subjects and citizens of the other parties certain special rights in consideration of the granting of like special rights to its subjects or citizens."[314] The Court in *Cameron Septic* neither stated nor implied that the treaty makers have a power to shape primary domestic law without affecting international law. Moreover, it bears emphasis that the Court in these four cases was relying on *legal opinions* expressed by the political branches to distinguish between self-executing and non-self-executing treaty provisions. None of the four cases suggests that the *intent* of the political branches is a relevant criterion for distinguishing between self-executing and non-self-executing treaty provisions.

In *Warren*, the Court explicitly rejected the Secretary of State's legal opinion on self-execution.[315] Viewed together with the four cases cited in the previous paragraph, *Warren* suggests that the Court will sometimes, but not always, defer to the Executive Branch's legal opinion on self-execution. However, these cases offer no support for the proposition that the treaty makers have the power to countermand the Supremacy Clause.

Finally, in *Stevic* the Court stated that "the language of article 34 [of the Protocol on the Status of Refugees] was precatory and not self-executing."[316] Assuming that the Court meant that article 34 is not self-executing because it is precatory, the statement merely stands for the unremarkable proposition that a treaty provision that does not create

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(quoting statement by Secretary of State: "The proposed treaty is, in a strict sense, self-executing, requiring no legislation on the part of Congress to make it effective"). In *Aguilar*, Chief Justice Stone, in a partial dissent, cited a letter written by the Secretary of State to support his view that Article 2 of the Shipowners' Liability Convention was partially self-executing and partially non-self-executing. *Aguilar*, 318 U.S. at 738 (Stone, C.J., concurring/dissenting).

[313] Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39, 47-50 (1913).

[314] *See* 19 Op. Att'y Gen. 273, 278 (1889) (emphasis added).

[315] Warren v. United States, 340 U.S. 523, 526-28 (1951) (holding that Article 2 of Shipowners' Liability Convention was entirely self-executing, despite the Secretary of State's contrary view). *Warren* must be viewed as *sui generis* because it involved the question whether a treaty-based primary liberty was automatically converted into domestic law. *See supra* note 208.

[316] INS v. Stevic, 467 U.S. 407, 428-29, n.22 (1984). The Court's conclusion that the language of article 34 is precatory is eminently reasonable. Article 34 states: "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees."

international legal duties cannot create domestic legal duties. If, on the other hand, the Court understood the term "not self-executing" to mean something other than "precatory," then the term "not self-executing" is undefined and the conclusion that article 34 is non-self-executing is unsupported by any rationale. Either way, the Court's statement does not support the Restatement doctrine.

In sum, since its decision in *Whitney v. Robertson*,[317] the Court has never articulated coherent criteria for distinguishing between self-executing and non-self-executing treaty provisions. Moreover, the Court has never stated or implied that the treaty makers have the power to countermand the Supremacy Clause. Thus, there is no Supreme Court authority for the Restatement doctrine.[318]

2. Precursors of the Restatement Doctrine

Before publication of the Restatement (Second) in 1965, there was virtually no doctrinal support for the Restatement doctrine. The first two State Department Digests of International Law,[319] published in 1887 and 1906, respectively, provide support for the *Whitney* doctrine[320] and the *Foster* doctrine,[321] but not the Restatement doctrine.[322] Hackworth's

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[317] 124 U.S. 190 (1888).

[318] The two cases most frequently cited in support of the Restatement doctrine are *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), and *Whitney v. Robertson*, 124 U.S. 190 (1888). For analysis of *Foster*, see *supra* notes 75-101 and accompanying text. For analysis of *Whitney*, see *supra* notes 135-155 and accompanying text.

[319] *See* FRANCIS WHARTON, A DIGEST OF INTERNATIONAL LAW OF THE UNITED STATES (1887) [hereinafter Wharton DIGEST]; JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW (1906) [hereinafter Moore DIGEST]. Both digests are multi-volume treatises, published by the Government Printing Office, that contain excerpts from Executive Branch documents and judicial opinions pertaining to international law.

[320] *See, e.g.*, Treaties, 5 Moore DIGEST, *supra* note 319, § 758, at 222 ("A treaty is the supreme law of the land in respect of such matters only as the treaty-making power, without the aid of Congress, can carry into effect. Where a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution.").

[321] *See* Treaties, 2 Wharton DIGEST, *supra* note 319, § 138, at 73 ("A treaty, when proclaimed, is thenceforth the law of the land, to be respected as such, although, as in the case of many laws of a merely municipal character, some of the provisions thereof may be contingent or executory only.").

[322] Moore and Wharton do provide support for two propositions that are sometimes mistakenly assumed to constitute authority for the Restatement doctrine. First, a treaty requires implementing legislation if the treaty itself specifies that it shall not enter into force *internationally* until implementing legislation is enacted. Second, a treaty requires implementing legislation if it imposes on the United States an international legal duty to enact legislation. *See* Treaties, 2 Wharton DIGEST, *supra* note 319, §§ 132, 138; Treaties, 5 Moore DIGEST, *supra* note 319, § 758. For an explanation of why these two propositions *do*

Digest,[323] published in 1943, also supports the *Whitney* and *Foster* doctrines.[324]

Unlike its predecessors, though, Hackworth's Digest contains two statements that appear to be precursors of the Restatement doctrine. First, Hackworth's quotes the following statement from a law review article by Edwin Dickinson: "If the treaty was intended to be self-executing, it has immediately the effect of law. If not, it requires legislation before it can become a rule for the courts."[325] Standing alone, this quotation appears to support the Restatement doctrine. However, if one reads what Dickinson actually wrote, including the portions omitted from Hackworth's summary, it is clear that Dickinson was referring to the distinction between executory and executed treaty provisions:

> If the treaty was intended to be self-executing, it has immediately the effect of law. If not, it requires legislation before it can become a rule for the courts.... " An examination of the decisions of the Supreme Court on this topic will show there is no practical distinction whatever as between a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted with certain powers with reference thereto. The same may be said with regard to a treaty. *Both statutes and treaties become presently effective when their purposes are expressed as presently effective.*"[326]

Thus, whereas Dickinson was clearly endorsing the *Foster* doctrine, Hackworth's Digest, by omitting key language, made it appear as if Dickinson was endorsing the Restatement doctrine.

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not support the Restatement doctrine, see *supra* notes 257-264 and 281-284 and accompanying text.

[323] GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) [hereinafter Hackworth DIGEST].

[324] *See* Treaties, 5 Hackworth DIGEST, § 488, at 179 (constitution requires that treaty effecting change in existing revenue laws "must be carried into operation by an Act of Congress") (*Whitney* doctrine); *id.* at 184-85 ("provisions of this treaty relating to the diversion of water from the Niagara River were intended to operate presently and [therefore] additional legislation is not necessary") (*Foster* doctrine).

[325] *Id.*, § 488, at 177 (quoting Edwin D. Dickinson, *Are the Liquor Treaties Self-Executing?*, 20 AM. J. INT'L L. 444, 449(1926)).

[326] Dickinson, *supra* note 325, at 449 (quoting United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 155 F. 842, 845 (1907)) (emphasis added).

The second statement in Hackworth's that could be construed to support the Restatement doctrine is a quotation from *Robertson v. General Electric Co.*:[327] "Assuming that a treaty provision affecting patents may be made self-executing, so that no supporting legislation is necessary under the Constitution to give rise to individual rights thereunder, we are satisfied that section 308 was not intended to be, and is not, such a self-executing provision."[328] Careful review of *Robertson* reveals that the Justice Department endorsed the Restatement doctrine to support the government's litigating position in a case where the government was an interested party.[329] Although the Fourth Circuit ruled in favor of the government, it is unclear whether the court was embracing the Justice Department's rationale.[330]

A search of all federal and state cases published before 1965 shows that *Robertson* is the only judicial opinion published before the Restatement (Second) that appears to endorse the Restatement doctrine.[331] Thus, prior to 1965 there was virtually no doctrinal support for the Restatement doctrine.

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[327] 32 F.2d 495 (4th Cir. 1929).

[328] Treaties, 5 Hackworth DIGEST, *supra* note 323, § 488, at 178 (quoting *Robertson*, 32 F.2d at 499-500).

[329] In *Robertson*, G.E. sued the Commissioner of Patents in an attempt to compel him to issue a patent. 21 F.2d 214 (D.Md. 1927). For G.E. to prevail, it had to persuade the court that the Treaty of Berlin had extended the deadline for filing a German patent application in the United States. *Id.* at 214. The United States moved to dismiss the complaint on several grounds, one of which was that "[i]t was not the intention of the parties to the Treaty of Berlin that the provisions pertaining to patents should become [domestically] effective until ratified by an act of Congress." *Id.* at 214-15. The government's argument in *Robertson* implicitly endorses the Restatement doctrine because the argument makes sense only if one assumes that the treaty makers have the power to prevent a treaty from becoming domestically effective at the time it is internationally effective, even if automatic conversion is not constitutionally barred.

[330] *See Robertson*, 32 F.2d at 499-500.

[331] The author ran the following search in the "ALLCASES-OLD" database on Westlaw: (treaty /s "self-executing") & intent. The author ran an identical search in the "ALLCASES" database, with a date limit before Jan. 1, 1965. The two searches yielded a total of 34 hits. Careful review of those 34 cases shows that, aside from *Robertson*, there were only two decisions by any state or federal court published before 1965 that explicitly identified "intent" as a relevant criterion in determining whether a particular treaty provision is self-executing: *Bowater Steamship Co. v. Patterson*, 303 F.2d 369 (2d Cir. 1962) and *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952). *Bowater* applied the direct remedial version of the intent thesis, and *Sei Fujii* applied the indirect remedial version. Therefore, *Robertson* is the only judicial opinion published before 1965 that supports the Restatement doctrine.

3. The Restatement (Second) and Its Aftermath

Despite the lack of support for the Restatement doctrine prior to 1965, and despite the stark conflict between that doctrine and the text of the Supremacy Clause, the Restatement (Second) of Foreign Relations Law unequivocally endorsed the Restatement doctrine. According to the Second Restatement:

> A treaty made on behalf of the United States in conformity with the constitutional limitations stated in § 118, that [does not] manifest an intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States
>
> (a) is [not] self-executing . . . and
>
> (b) [does not] supersede inconsistent provisions of earlier acts of Congress or of the law of the several states of the United States.[332]

This summary of self-execution doctrine clearly differs from the *Whitney* doctrine because the initial clause refers to treaties made in conformity with constitutional limitations. Moreover, the Restatement view clearly differs from either remedial version of the intent thesis, because subparagraph (b) makes clear that treaties that are non-self-executing, in the sense provided here, lack the status of primary domestic law.[333]

Since 1965, many books have been published, in addition to the two Restatements, that appear to support the Restatement doctrine. The most recent State Department Digest on International Law quotes the Restatement (Second) with approval.[334] A study prepared by the

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[332] RESTATEMENT (SECOND), *supra* note 16, § 141. The quoted language is substantially the same as § 144 of the Proposed Official Draft, published in 1962. There was no Restatement (First) of Foreign Relations Law. The 1962 Proposed Official Draft was effectively the First Restatement.

[333] The Restatement (Third) of Foreign Relations Law is more ambiguous, but it can also be construed to endorse the Restatement doctrine. The Restatement (Third) says: "An international agreement of the United States is "non-self-executing" if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation." RESTATEMENT (THIRD), *supra* note 6, § 111(4). Here, the focus on the parties' intent regarding a treaty's effect "as domestic law," without reference to international law, suggests that the authors are endorsing a direct version of the intent thesis, not an indirect version. Moreover, the authors add: "Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies." *Id.*, § 111, cmt. h. This statement suggests that the self-execution issue is a question of primary law, not remedial law. Taken together, the two statements appear to endorse the direct primary version of the intent thesis.

[334] *See* Treaties, 14 Whiteman DIGEST, *supra* note 7, § 29, at 310-11.

Congressional Research Service for the Senate Foreign Relations Committee supports the Restatement doctrine.[335] Several leading international law casebooks appear to endorse the Restatement doctrine.[336] However, none of these books attempts to justify the key assumption underlying the Restatement doctrine: that the treaty makers have the power to countermand the Supremacy Clause.

A survey of judicial decisions since 1965 shows that few lower federal courts have explicitly endorsed the Restatement doctrine, but many lower federal courts have implicitly accepted that doctrine. There are numerous decisions by federal courts of appeals that reflect a primary law concept of self-execution: that is, they state or imply that the term "non-self-executing" means that a treaty provision lacks the status of primary domestic law in the absence of implementing legislation.[337] Many other decisions by federal courts of appeals explicitly identify intent as a relevant criterion for distinguishing between self-executing and non-self-executing treaties.[338] The combination of a primary law

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[335] *See* CONGRESSIONAL RESEARCH SERV., 103D CONG., 1ST SESS., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 47-49 (Comm. Print 1993).

[336] *See, e.g.*, CARTER & TRIMBLE, *supra* note 9, at 180-83; DAMROSCH, *supra* note 5, at 206-07; STEINER, *supra* note 9, at 556. *But see* PAUST, LAW AND LITIGATION, *supra* note 9, at 172-79 (critiquing doctrine of non-self-executing treaties).

[337] *See, e.g.*, Cheung v. United States, 213 F.3d 82, 94 (2d Cir. 2000) (defining self-executing treaty as "one that operates of itself without the aid of legislation"); United States v. Li, 206 F.3d 56, 67 (1st Cir. 2000) (Selya, J., concurring) (defining self-executing treaty as one that "takes effect upon ratification and requires no separate implementing statute"); Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116, 128 (2d Cir. 2000) ("Although the Supreme Court had already ruled [a trademark treaty] to be self-executing . . . Congress simply was not sure whether the trademark treaties had acquired the force of law."); United States v. Balsys, 119 F.3d 122, 138 n.13 (2d Cir. 1997) ("Extradition treaties are self-executing, and therefore do not require implementing legislation to be binding as law."); United States v. Grigsby, 111 F.3d 806, 814 (11th Cir. 1997) ("Article VIII of [treaty on endangered species] requires each signatory to enact laws to effectuate the treaty, which is not self-executing."); Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45 (2d Cir. 1995) ("Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation.").

[338] *See, e.g.*, McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1107 (D.C. Cir. 2001) (stating that treaties "provide no basis for private lawsuits unless implemented by appropriate legislation or intended to be self-executing"); Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001) ("The Senate's intent was clear — the treaty is *not* self-executing."); Lidas, Inc. v. United States, 238 F.3d 1076, 1080 (9th Cir. 2001) ("We must decide whether the treaty partners would have intended for articles 27 and 28 of the treaty to be 'fully operative' as self-executing provisions even if the remainder of the treaty was non-self-executing . . . ."); Barapind v. Reno, 225 F.3d 1100, 1107 (9th Cir. 2000) ("[T]he Protocol was not intended to be self-executing."); Li, 206 F.3d at 71 (Torruella, C.J., concurring/dissenting) ("[W]e should look to the 'intent' of the treaty to determine whether it is self-executing."); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968

concept of self-execution with an intent-based criterion for distinguishing between self-executing and non-self-executing treaty provisions yields the Restatement doctrine: Whether a particular treaty provision has the status of primary domestic law depends upon whether the treaty makers intended it to have the status of primary domestic law. Although many judicial opinions reflect a primary law concept of self-execution, and many others rely on intent to distinguish between self-executing and non-self-executing treaty provisions, very few judicial opinions unambiguously endorse the Restatement doctrine's combination of a primary law concept with intent-based criteria.[339]

Even so, the Restatement (Second) has had a tremendous influence on the evolution of non-self-execution doctrine.[340] Despite the fact that the United States has never entered into a treaty with a provision designed to prevent automatic conversion,[341] many lower federal courts since 1965 have mistakenly construed other types of treaty provisions as if they manifested the treaty makers' intent to prevent automatic conversion.[342]

(4th Cir. 1992) ("Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action."); More v. Intelcom Support Servs., Inc., 960 F.2d 466, 469 (5th Cir. 1992) (stating that treaties "do not provide the basis for a private lawsuit unless they are intended to be self-executing").

[339] Since 1990, there has been only one published decision by a federal appellate court that explicitly endorses both a primary law concept of self-execution, and an intent-based criterion for distinguishing between self-executing and non-self-executing treaties, and that was a dissenting opinion. *See* Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109, 1114 (11th Cir. 1991) (Hatchett, J., dissenting) (stating that treaty "affects the domestic law of the United States . . . to the extent that it is self-executing" and "that in determining self-execution, courts consider the parties' intent").

[340] Since publication of the Restatement (Third) in 1987, courts rarely cite the Second Restatement. Even so, courts continue to rely on judicial opinions, such as United States v. Postal, 589 F.2d 862 (5th Cir. 1979), which in turn relied on the Second Restatement. *See id.* at 878 (relying on Second Restatement to support conclusion that United States did not intend, by ratifying Convention on the High Seas, "to incorporate the restrictive language of article 6 . . . into its domestic law"). Four federal appellate opinions in the last three years have cited *Postal* as authority with respect to self-execution doctrine. *See* United States v. Duarte-Acero, 296 F.3d 1277 (11th Cir. 2002); Lidas, Inc. v. United States, 238 F.3d 1076, 1080 (9th Cir. 2001); United States v. Duarte-Acero, 208 F.3d 1282, 1284 n.8 (11th Cir. 2000); Li, 206 F.3d at 71 (Torruella, C.J., concurring/dissenting).

[341] *See supra* notes 297-308 and accompanying text.

[342] *See, e.g.*, United States v. Grigsby, 111 F.3d 806, 814 (11th Cir. 1997) (holding that Convention on International Trade in Endangered Species is not self-executing); Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45 (2d Cir. 1995) (holding that Convention on the Recognition and Enforcement of Foreign Arbitral Awards did not supersede a Kentucky statute because it is not self-executing); United States v. Gonzalez, 776 F.2d 931, 937-38 (11th Cir. 1985) (holding that Article 6 of Convention on the High Seas is not self-executing); *Postal*, 589 F.2d at 878 (concluding that United States did not intend, by ratifying Convention on the High Seas, "to incorporate the restrictive language of article 6 . . . into its domestic law").

Moreover, acting under the pernicious influence of the Restatement (Second), courts dutifully give effect to that presumed intent without even asking whether the treaty makers have the power to countermand the Supremacy Clause.

The Eleventh Circuit's recent decision in *International Café* illustrates the problem.[343] In that case, a foreign plaintiff brought a trademark claim against a U.S. corporation, relying in part on the Paris Convention for the Protection of Industrial Property.[344] The court stated that the "Paris Convention is not self-executing because, on its face, the Convention provides that it will become effective only through domestic legislation."[345] In support of this conclusion, the court cited article 17 of the Convention, which states: "It is understood that at the time an instrument of ratification or accession is deposited on behalf of a country, such country will be in a position under its domestic law to give effect to the provisions of the Convention."[346]

The Eleventh Circuit's analysis is wrong, as a matter of constitutional law, because the conclusion that the Convention lacks the status of primary domestic law implicitly assumes that the treaty drafters have the constitutional power to preclude automatic conversion of the Convention. Moreover, the court's analysis is wrong as a matter of treaty interpretation because article 17 does not say that implementing legislation is required to give the Convention domestic legal effect;[347] rather, article 17 creates an international legal obligation to ensure that the Convention is applied domestically. In short, by mistakenly relying on the Restatement doctrine, the court misinterpreted article 17 to mean exactly the opposite of what it says. Whereas article 17 creates an unambiguous duty to apply the Convention domestically, the court construed article 17 to mean that it was powerless to apply the

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[343] Int'l Cafe, S.A.L. v. Hard Rock Cafe Int'l (U.S.A.), Inc., 252 F.3d 1274 (11th Cir. 2001).

[344] *See generally* Paris Convention for the Protection of Industrial Property, July 14, 1967, 53 Stat. 1780, 24 U.S.T. 2140 [hereinafter Paris Convention].

[345] *Int'l Café, S.A.L.*, 252 F.3d at 1277 n.5.

[346] Paris Convention, *supra* note 344, art. 17.

[347] In fact, treaties *never* include provisions that purport to answer the question whether implementing legislation is required to give the treaty domestic legal force because that is a question of domestic constitutional law, not a question of international law. *See* 1 SIR ROBERT JENNINGS & SIR ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW § 21 (9th ed. 1992) ("From the standpoint of international law . . . the choice between the direct reception and application of international law, or its transformation into national law by way of statute, is a matter of indifference . . . . These are matters for each state to determine for itself according to its own constitutional practices.").

Convention domestically in the absence of implementing legislation.[348] *International Café*'s reliance on an unstated and erroneous constitutional premise to support its mistaken interpretation of a treaty provision exemplifies the doctrinal confusion created by the Restatement doctrine.

In sum, widespread support for the Restatement doctrine cannot justify the continued application of that doctrine. There was virtually no support for the Restatement doctrine prior to 1965 and the Supreme Court has never endorsed the Restatement doctrine. Furthermore, there is no evidence that the treaty makers have ever drafted a treaty provision that was intended to prevent automatic conversion.[349] Even so, since the Restatement (Second) implicitly endorsed the proposition that the treaty makers have the power to prevent automatic conversion, the Restatement doctrine has induced courts to misinterpret treaties by reading into the text an intent to preclude automatic conversion, even in cases where the treaty makers did not have any such intent. Moreover, judicial application of the Restatement doctrine undermines treaty compliance without advancing any legitimate policy goal.

VI. A FRAMEWORK FOR JUDICIAL ANALYSIS

The intent thesis holds that the intent of the treaty makers determines whether a treaty is self-executing or non-self-executing. The intent thesis is not wrong, as such, but it is problematic because its apparent simplicity deceives courts into confusing several distinct issues. That confusion sometimes yields judicial opinions that are premised on erroneous, unstated constitutional assumptions. Moreover, some judicial applications of the intent thesis unjustifiably subvert U.S. compliance with its treaty obligations.

Part VI sketches an analytic framework for courts to apply, in cases where individuals claim a right under a treaty, to determine whether a specific treaty provision is judicially enforceable.[350] The framework applies generally to cases in which litigants assert treaty-based rights, either offensively or defensively, in state or federal court. The proposed framework divides the self-execution inquiry into a series of discrete

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[348] The main holding of the case was that the district court lacked subject matter jurisdiction over plaintiff's claim. *See Int'l Café, S.A.L.*, 252 F.3d at 1276-79. It is unclear whether a correct analysis of the self-execution issue would have altered that holding.

[349] *See supra* notes 297-308 and accompanying text.

[350] The proposed framework does not address cases where Congress has enacted implementing legislation for the specific treaty provision at issue. In such cases, the court need not decide whether the treaty provision is enforceable because the court can enforce the statute.

steps that distinguish questions of international law from questions of domestic law, and questions of primary law from questions of remedial law. The proposed framework also separates questions that require analysis of the treaty makers' intentions from questions that must be answered without reference to the treaty makers' intentions because they concern matters that the treaty makers are powerless to control. By employing this framework, courts can avoid constitutional error and also avoid decisions that unjustifiably subvert U.S. compliance with its treaty obligations.

The first step in the analysis is to determine whether the treaty provision at issue creates a primary international duty. This is a question of international law. Analysis of the treaty makers' intentions is relevant because a treaty provision creates a primary international duty if and only if the treaty makers intended to create a primary international duty. If the treaty provision does not create a primary international duty, then individuals cannot claim rights under the treaty because a right is "the mere obverse of" a duty.[351] Thus, a treaty provision that does not create a primary international duty is not judicially enforceable by private litigants. If the treaty provision does create a primary international duty, the court should proceed to step two.

Step two addresses the nature and content of the primary international duty. This is strictly a question of treaty interpretation, which should be analyzed in accordance with generally accepted principles applicable thereto.[352] The treaty makers' intentions are relevant to step two because a treaty is interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[353] In step two, the court should determine, *inter alia*, whether the primary international duty at issue is executed or executory, and whether it is vertical or horizontal.[354] These distinctions will be crucial in step four below.

Having determined the content of the primary international duty, the court should then consider (in step three) whether the treaty creates a primary domestic duty. This is a question of domestic constitutional

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[351] HART & SACKS, *supra* note 38, at 137.

[352] For a concise summary of treaty interpretation principles, *see* RESTATEMENT (THIRD), *supra* note 5, § 325. *See also* Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31, 32, 1155 U.N.T.S. 331.

[353] *Id.*, art. 31, para. 1.

[354] *See supra* notes 107-125 and accompanying text (discussing distinctions between executory and executed treaty provisions and between vertical and horizontal provisions).

law, not a question of international law.[355] If a given treaty provision creates a primary international duty that is binding on the United States as a matter of international law, then the Supremacy Clause dictates that the provision also creates a corresponding primary domestic duty, unless the Constitution precludes automatic conversion of the specific international duty into a primary domestic duty.[356] In step three, the treaty makers' intentions are irrelevant because the treaty makers lack the constitutional power to prevent automatic conversion of a primary international duty that is within the scope of the treaty makers' domestic lawmaking powers.[357] If the court concludes that the treaty provision at issue does not create a primary domestic duty, then the analysis is complete, because the court cannot enforce an international duty that does not give rise to a corresponding domestic duty.[358] If the subject treaty provision does create a primary domestic duty, the court should proceed to step four.

In step four, the focus shifts from primary domestic law to domestic remedial law. The court must consider whether the primary domestic duty created by the treaty is the type of duty that is enforceable by a domestic court. Domestic separation of powers principles suggest that courts are generally not competent to enforce indeterminate, executory or horizontal duties at the behest of private litigants; however, courts are competent to enforce a treaty-based duty that is vertical, executed, and determinate.[359] Whether a treaty-based duty is vertical, and whether it is executed, are questions of international law that should be resolved in accordance with the treaty interpretation principles referenced in step two above. Whether a treaty-based duty is sufficiently determinate to be judicially enforceable is a question of degree that implicates both domestic separation of powers principles and international treaty

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[355] It is not necessary in every case for the court to decide whether the treaty creates a primary domestic duty. In accordance with the *Ashwander* principle, the court might legitimately duck the constitutional question if the answer is unclear and the case can be decided on other grounds. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (stating that courts should "refrain from passing upon [constitutional issues] unless obliged to do so . . ."). What is critical, though, is that the court should recognize that the question whether a treaty creates a primary domestic duty is a constitutional law question, not a treaty interpretation issue.

[356] *See supra* part V.A.

[357] *See supra* part V.B.

[358] To be more precise, if an international treaty duty does not give rise to a corresponding domestic duty, the court cannot apply that treaty provision as a rule of decision. However, the court might still apply the treaty provision as a guide to interpretation of other legal provisions. *See supra* note 170 and accompanying text.

[359] *See supra* notes 104-125 and accompanying text.

interpretation principles. As a general rule, though, if a treaty provision is sufficiently determinate that a court can ascertain, as a matter of international law, whether there has been a violation, then the provision is sufficiently determinate to be enforced by a domestic court.

Assuming that the treaty provision at issue creates a primary domestic duty of a type that the judiciary is competent to enforce, the court should then consider (step five) whether the treaty makers intended to limit or preclude judicial enforcement of the treaty. In step five, the court should adopt a presumption that the treaty makers did not intend to limit or preclude judicial enforcement, but that presumption should be rebuttable by clear evidence of a contrary intent.[360] If the court concludes that the treaty makers did intend to limit or preclude judicial enforcement, then the court should honor that intent,[361] subject to the proviso that there are some constitutionally compelled remedies for treaty violations, and the treaty makers lack the power to prevent courts from providing a remedy that is constitutionally compelled.[362] If the court concludes that the treaty makers did not intend to limit or preclude judicial enforcement, then the treaty is judicially enforceable.

The conclusion that the treaty is judicially enforceable does not necessarily mean that the party asserting a treaty-based right is entitled to the specific judicial remedy that he or she seeks. In cases where a plaintiff in a civil action seeks to enforce a treaty offensively, the plaintiff must show that he or she has a valid cause of action.[363] More broadly, the court must also consider, *inter alia*: (a) whether the party against whom the treaty is being invoked actually violated the treaty; (b) whether the party invoking the treaty suffered a cognizable injury as a result of that treaty violation; and (c) whether it is appropriate for the court to grant the specific remedy requested. Detailed analysis of these issues is beyond the scope of this Article.[364] However, it bears emphasis that analysis of these issues in treaty cases is no different, in principle,

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[360] Such a presumption is justified because, by the time the court has reached step five, the court has already determined that the treaty creates a primary domestic duty of a type that the judiciary is competent to enforce. Judicial refusal to enforce such a duty is at odds with rule of law principles. Therefore, a determination that such a duty is not judicially enforceable can be justified only if there is clear evidence of a political intent to preclude judicial enforcement.

[361] If the court concludes that the treaty makers intended to limit judicial enforcement, but did not intend to preclude judicial enforcement altogether, then the court should not impose any greater limits on judicial enforcement than the treaty makers intended.

[362] *See supra* notes 181-195 and accompanying text.

[363] *See* Vázquez, *Treaty-Based Rights*, *supra* note 47, at 1143-57.

[364] For a thoughtful analysis of these issues, *see id.* at 1133-61.

from the analysis courts employ to determine the availability of judicial remedies for violations of federal statutes, because a treaty-based primary domestic duty is essentially equivalent to a primary statutory duty.[365]

In applying the proposed framework, courts should be guided by two general principles. First, in cases where an individual has been harmed as a result of a treaty violation, courts should provide a meaningful remedy,[366] unless clearly established limits on judicial authority bar a judicial remedy.[367] Second, in cases where the U.S. has a treaty obligation to provide domestic judicial remedies for treaty violations,[368] courts should give effect to that obligation,[369] except in cases where they are powerless to do so, or where there is clear evidence that the political branches have made a political decision to violate the treaty. Courts' failure to act in accordance with these principles subverts U.S. compliance with its treaty obligations, and undermines the rule of law, without promoting any separation of powers values.

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[365] *See, e.g.*, Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (stating that a treaty is "equivalent to an act of the legislature . . . ").

[366] The consistent refusal of state courts to provide judicial remedies for acknowledged violations of article 36 of the Vienna Convention on Consular Relations contravenes this principle. *See, e.g.*, State v. Martinez-Rodriguez, 33 P.3d 267, 271-74 (N.M. 2001).

[367] For example, where a federal habeas petitioner alleges a violation of article 36 of the Vienna Convention on Consular Relations after failing to raise the issue in state court, the procedural default doctrine will bar a judicial remedy in all or most cases. *See* Breard v. Greene, 523 U.S. 371, 375-76 (1998).

[368] *See supra* notes 65-70 and accompanying text.

[369] Giving effect to the obligation to provide domestic remedies means, first, determining whether there has been a treaty violation, and second, providing an effective remedy if there has been a violation.