Maryland Law Review

Volume 69 | Issue 2 Article 5

10-26-2012

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Recommended Citation

William M. Carter Jr., *Treaties as Law and the Rule of Law: the Judicial Power to Compel Domestic Treaty Implementation*, 69 Md. L. Rev. 344 (2010)
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TREATIES AS LAW AND THE RULE OF LAW: THE JUDICIAL POWER TO COMPEL DOMESTIC TREATY IMPLEMENTATION

WILLIAM M. CARTER, JR.*

ABSTRACT

The Supremacy Clause states that the United States Constitution, federal statutes, and ratified treaties are the "supreme Law of the Land." Despite the textual and historical clarity of the Supremacy Clause, some courts and commentators have insisted that the "non-self-executing treaty doctrine" means that ratified treaties must always await implementing legislation before becoming domestic law. In particular, the non-self-executing treaty doctrine has been used as a shield against claims under international human rights treaties. This Article does not seek to provide another critique of the non-self-executing treaty doctrine in general. Rather, this Article argues that a determination that a treaty is non-self-executing means only that the treaty of its own force does not provide a private individual with a cause of action. The treaty, nonetheless, remains domestic law under the Supremacy Clause. This Article contends that where a human rights treaty requires domestic implementation, that duty of implementation may be judicially enforced by mandamus relief. Although United States policymakers may modify ratified treaties to obviate any duty of domestic implementation, they may not do so by relying on a misinterpretation of the non-self-executing treaty doctrine, nor may they do so by a Senate declaration of non-self-execution. In short, ratified treaties are part of our law. Furthermore, it is not only international law, but also our Constitution that is flouted when the government refuses to comply with the supreme law that it voluntarily creates upon ratifying a treaty.

I. INTRODUCTION

International law largely relies on the cooperation of domestic governments for its enforcement. This is particularly true with regard

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to international human rights treaties. With some notable exceptions,[1] however, most countries have failed to make international human rights treaties enforceable within their domestic legal systems.

The United States Constitution's Supremacy Clause makes ratified treaties an integral part of our domestic legal system by declaring them part of the "supreme Law of the Land."[2] Despite the clear text of the Supremacy Clause, the "non-self-executing treaty doctrine" is often invoked as justification for judicial refusal to recognize individual claims under international human rights treaties. In brief, the non-self-executing treaty doctrine holds that a treaty does not provide a private cause of action in domestic courts unless the treaty itself explicitly or implicitly requires that it be enforceable without additional domestic legislation implementing the treaty.[3] The current judicial practice is to presume that most treaties are non-self-executing.[4] Additionally, to the extent that a particular human rights treaty could be considered self-executing from its language, the Senate has consistently issued declarations of non-self-execution as a condition of its advice and consent to ratification.[5]

Scholars have criticized the United States' refusal to give international human rights treaties domestic effect. Some have argued that the current presumption that most treaties are non-self-executing is

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1. *See* Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 217 (1997) (noting that Spain grants all ratified human rights treaties constitutional status); Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 204–05 (explaining that in the Netherlands, Germany, Italy, Austria, and France, treaties are directly applicable as domestic law). For a comprehensive overview of the treaty-making process and the domestic effect of treaties in different countries, see Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1362–72 (2008).

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

3. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (explaining that courts must regard a treaty "as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision," but that "the legislature must execute the contract [imported by a treaty] before [such a contract] can become a rule for the Court"); *infra* Part II.B (providing a more detailed discussion of *Foster*).

4. *See* Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 541 (1999) (discussing the developing trend of presuming treaties to be non-self-executing).

5. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 139–42 (1999) (noting that the United States included declarations of non-self-execution in its instruments of ratification with respect to the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

flawed.[6] Others have argued that regardless of whether a treaty is non-self-executing, it is nonetheless "the supreme Law of the Land" under the Supremacy Clause and therefore should be domestically enforceable.[7] These scholars argue that characterizing a treaty as non-self-executing speaks only to whether the treaty itself creates an individual cause of action, which still leaves room for its enforcement by way of other statutes that provide a cause of action for the vindication of federal rights.[8]

Despite this author's belief that the non-self-executing treaty doctrine is constitutionally flawed, this Article is not intended to be another attack on the doctrine itself. Rather, this Article will examine the limits of the non-self-executing treaty doctrine and will analyze how those limits reveal that even non-self-executing treaties are amenable to domestic judicial enforcement in a manner consistent with both separation of powers principles and the rule of law.

As originally conceived, the non-self-executing treaty doctrine solely addresses whether a treaty itself creates a private cause of action domestically for a violation of the treaty.[9] In other words, the non-self-executing treaty doctrine does not directly address whether a ratified treaty imposes a binding domestic legal obligation upon the United States. Rather, it addresses several other issues that lead courts and commentators to mistakenly conclude that a non-self-executing treaty has absolutely no domestic legal effect.

Where a treaty is non-self-executing, the treaty's obligations do not themselves provide a cause of action. This view of non-self-execu-

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6. *See, e.g.*, David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 4 (2002) ("[T]he modern doctrine of non-self-executing treaties, created by courts and commentators in the latter half of the twentieth century, distorts that balance [between separation of powers principles and competing rules of law].").

7. *See, e.g.*, Buergenthal, *supra* note 1, at 221; Charles H. Dearborn, III, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 234 (1979); Jordan J. Paust, *Customary International Law and Human Rights Treaties* Are *Law of the United States*, 20 MICH. J. INT'L L. 301, 323 (1999) (contending that even if portions of a treaty were "'non-self-executing,'" the treaty "should still trump inconsistent state law under the Supremacy Clause").

8. *See, e.g.*, Sloss, *supra* note 6, at 44 (arguing that declarations of non-self-execution "mean only that the treaties to which these declarations are attached do not create a private cause of action"). For example, 42 U.S.C. § 1983 provides an action against anyone who, under color of state law, deprives a person of rights guaranteed by federal law, which would include ratified treaties. Another example is the habeas corpus relief that individuals may seek. *See* 28 U.S.C. § 2254(a) (2006) (providing that writs of habeas corpus may be granted in cases where custody is "in violation of the Constitution or laws or *treaties* of the United States" (emphasis added)).

9. *See infra* Part II.B (discussing the original understanding of the non-self-executing treaty doctrine).

tion concedes that ratified treaties have the force of law domestically, but lack only a cause of action that would allow enforcement by private individuals.[10] If the cause of action is provided by another source of law, such as a federal statute, then the treaty presumably can be the basis for a private lawsuit.[11] Moreover, although a private individual cannot bring a cause of action based on a non-self-executing treaty, the treaty may still be invoked defensively, such as in a criminal proceeding.[12] What these definitions of non-self-execution have in common is that none of them denies that non-self-executing treaties are federal law under the Supremacy Clause. Nor could they, consistent with the Clause's text. As one commentator has noted, the Supremacy Clause provides that "'*all* Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land' . . . not that some treaties or only 'self-executing' treaties have that effect."[13]

This Article will analyze an overlooked possibility for enforcing international human rights treaties within the United States. Because the Supremacy Clause provides that ratified treaties are supreme federal law, a writ of mandamus may provide a means for requiring the United States to make a treaty domestically effective. Mandamus provides the federal judiciary with the power to order federal officers or agencies to carry out a duty that they have failed to effectuate. Whether mandamus would be effective in a particular case depends on the precise nature of the treaty obligation at issue. In appropriate circumstances, a plaintiff may be able to invoke mandamus and request that a federal court order government officials to comply with their legal obligation to implement the rights covered by the treaty and to provide an effective mechanism for the vindication of those rights.[14] To be clear, such a mandamus action would seek to enforce

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10. *See, e.g.*, Paust, *supra* note 7, at 323 (characterizing non-self-execution as "relating merely to the creation of a private cause of action directly under the treat[y] and thus not precluding [the treaty's] use" as domestic law in other ways).

11. *See* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143–57 (1992) (examining federal statutory rights of action for treaty violations).

12. This was the argument in *Medellín v. Texas*, 128 S. Ct. 1346 (2008), which this Article discusses in detail in Part II.B.

13. Paust, *supra* note 7, at 324 (quoting U.S. CONST. art. VI, cl. 2); *see also* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 606 (2008) ("[T]he plain text of the Supremacy Clause rules out the possibility that a treaty might be valid and in force yet lack the force of domestic law.").

14. *See infra* Part IV.C. The United States' compliance with its duty (if any) to guarantee enjoyment of the rights provided by a particular treaty need not necessarily take the form of passing a statute authorizing private lawsuits. It is at least plausible, for example,

the government's duty to *implement* the treaty rather than to provide individual relief for a breach of the treaty.

This Article contains both doctrinal and normative dimensions. Doctrinally, this Article will posit the mechanism of mandamus as an unrecognized alternative to direct enforcement of international human rights treaties. The doctrinal aspect is important because international human rights treaties often afford substantive rights beyond those provided by the Constitution or federal law.[15] Normatively, this Article will make what should be a relatively uncontroversial proposition—the United States must follow the laws that it enacts. Respect for the rule of law refutes the existence of a body of law that is recognized by the Supremacy Clause as "supreme Law" but is simultaneously a domestic legal nullity.

This author acknowledges that judicial orders mandating implementation of a treaty by the political branches would raise difficult separation of powers concerns. Moreover, this Article largely leaves open the procedural questions regarding who would be the proper plaintiffs and defendants in such a mandamus action.[16] Nonetheless, at a minimum, the Constitution demands that the federal government either implement a treaty that it has ratified or take action to modify or withdraw from the treaty, thereby depriving it of the status of domestic law under the Supremacy Clause.

Part II of this Article will review the history and purpose of the Supremacy Clause, the origins of the non-self-executing treaty doctrine, and the subsequent expansion of that doctrine beyond its original meaning. Part III will discuss and respond to separation of powers concerns regarding domestic judicial enforcement of treaty obligations. Part IV will explain that when a non-self-executing treaty contains a clear duty of domestic implementation, such a duty may be judicially enforced in a mandamus action. Part V will consider the effect that a declaration of non-self-execution has upon the preceding analysis: Such a declaration may negate the duty of domestic treaty implementation, but only in very narrow circumstances.

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that the creation of an administrative agency with real power to investigate and redress alleged treaty violations could satisfy the United States' "duty" under a particular treaty.

15. *See infra* Part IV.C (providing "implementation gap" examples).

16. *See infra* Part IV.C (discussing briefly these issues). A full examination of such procedural issues is beyond the scope of this Article, which seeks only to show that a mandatory duty of treaty implementation is consistent with the Supremacy Clause.

II. TREATY ENFORCEMENT IN UNITED STATES COURTS

A. *Text and History of the Supremacy Clause*

The Supremacy Clause provides that the Constitution, federal statutes, and "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[17] Under the Supremacy Clause's text, a treaty becomes fully incorporated into our domestic legal system upon ratification. The Clause's text does not contemplate further action beyond ratification in order to create this type of "supreme Law." Therefore, the United States is nominally a "monist" legal system—one in which ratified treaties become part of domestic law at the moment of ratification.[18]

The available historical evidence indicates that the Constitution's Framers intended that this approach to treaties would differ substantially from the practice in Great Britain. At the time of the adoption of the United States Constitution, Great Britain followed a strictly "dualist" approach to international law, under which treaties had no domestic legal effect unless and until Parliament took action.[19] Under the United States Constitution, by contrast, the President's ratification of a treaty with the Senate's consent renders a treaty domestic law without further legislative action.[20]

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

18. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987) ("Monists view international and domestic law as together constituting a single legal system . . . . Domestic courts [in monist systems] must give effect to international law, anything in the domestic constitution or laws to the contrary notwithstanding.").

19. *See id.* at 865 (explaining that in the United Kingdom, "[t]reaties are made under the authority of the Crown and are international acts rather than laws of the realm, and treaty obligations are enforced in court only as they are enacted or implemented by Parliament").

20. *See* Medellín v. Texas, 128 S. Ct. 1346, 1378 (2008) (Breyer, J., dissenting) ("[A]fter the Constitution's adoption, while further parliamentary action remained necessary in Britain [for a treaty to become domestic law], further legislative action in respect to the treaty's . . . provision was no longer necessary in the United States [by virtue of the Supremacy Clause]." (emphasis omitted) (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199, 275–77 (1796))); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 701 (1995) (explaining that "the Supremacy Clause served to alter the British rule, and established the different principle in the United States that treaties do not generally require legislative implementation" to become domestic law (internal quotation marks omitted)); *see also* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 760–64 (1988) (reviewing the historical evidence and concluding that "most of the Framers intended all treaties *immediately* to become binding on the whole nation" and for the treaties "to be applied by the courts whenever a cause or question arose from or touched on them; and to prevail over and preempt any inconsistent state action").

B. *The Original Understanding of Non-Self-Execution*

Foster v. Neilson[21] is the first Supreme Court case to articulate explicitly the non-self-executing treaty doctrine. *Foster* involved a lawsuit between two private individuals over a parcel of land.[22] The plaintiffs sought to eject the defendant from the land by claiming title to the land by virtue of a treaty between the United States and Spain.[23] The relevant treaty provision stated that land grants made by the Spanish government while it still controlled the territory at issue "shall be ratified and confirmed" by the United States.[24] If the treaty itself "confirmed" the Spanish land grant to the original grantee, then the land would have rightfully belonged to the plaintiffs, who were successors in interest to the original owner.[25] The Court held that the treaty itself did not ratify and confirm the Spanish land grants.[26] Rather, the treaty was a promise by the United States government to later enact laws ratifying and confirming the land grants.[27]

Foster distinguished between a treaty that "operates of itself" versus one that "the legislature must execute."[28] In modern parlance, the former would be considered self-executing, while the latter would be viewed as non-self-executing. It is important for purposes of this Article to examine exactly how and why the *Foster* Court made this distinction, as well as what the Court believed the distinction meant for Supremacy Clause purposes. The *Foster* Court began with the presumption established by the Supremacy Clause's text that all treaties made under the authority of the United States are the supreme law of the land. Chief Justice Marshall's opinion stated the following:

> In the United States a different principle [than that in dualist legal systems] is established [by the Supremacy Clause]. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself . . . .[29]

Chief Justice Marshall, however, recognized one exception to the principle that ratified treaties are part of domestic law. Some treaty

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21. 27 U.S. (2 Pet.) 253 (1829).
22. *Id.* at 254–55.
23. *Id.* at 255–56.
24. *Id.* at 310.
25. *See id.* at 314–15.
26. *Id.*
27. *Id.*
28. *Id.* at 314.
29. *Id.*

obligations by their terms could not be "regarded in courts of justice as equivalent to an act of the legislature" because they constitute promises to perform future action and the nature of the promised action is such that it is addressed to the Legislative or Executive Branch.[30] In other words, treaty provisions falling in this category cannot provide a rule of decision for the courts because these provisions are not vested rights and duties, but are instead promises to undertake future action. Barring this exception, however, *Foster* explained that the Supremacy Clause presumptively makes ratified treaties "equivalent to an act of the legislature" and therefore enforceable in our courts like the Constitution and federal statutes.[31] Indeed, the presumption in favor of domestic enforceability of ratified treaties, without the need for further congressional action, was so uncontroversial that shortly after *Foster*, Justice Baldwin wrote that "it would be a bold proposition, that an act of Congress must be first passed in order to give [treaties] effect . . . and equally bold to assert . . . that [their] stipulations may be performed or not, at the discretion of Congress."[32]

As originally articulated, the *Foster* doctrine is fairly modest: Despite the Supremacy Clause, a ratified treaty is not enforceable in a private cause of action if, by its own terms, the treaty promises future action by the political branches rather than creating vested rights that can provide a rule of judicial decision.[33] For purposes of this Article, what is critical about the *Foster* distinction between self-executing and non-self-executing treaties is that the Court was seeking to determine whether the treaty itself created a judicially enforceable cause of action for violation of the treaty. Treaties that were already "executed" upon ratification could provide such a cause of action, while those that required further domestic legislation before being executed could not. In no part of the *Foster* opinion did the Court suggest, however, that non-self-executing treaties lack the status of domestic law under the Supremacy Clause. Subsequent courts and scholars who have argued that non-self-executing treaties are not domestic law *at all*[34] cannot have based their arguments upon *Foster* because *Foster* was

30. *Id.*

31. *Id.*

32. Lessee of Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 388 (1840) (Baldwin, J., concurring).

33. *See supra* text accompanying notes 28–31.

34. For example, the Supreme Court recently articulated certain Supremacy Clause principles:

> The label "self-executing" has on occasion been used to convey different meanings. What we mean by "self-executing" is that the treaty has automatic domestic

limited to the question of whether such treaties create a cause of action. Indeed, Professor Henkin observes the following:

> The [*Foster*] Court did not declare . . . that non-self-executing treaties are not law of the land; it stated only that if a treaty contains a promise by the United States to do something that only the political branches can do, then by hypothesis the courts cannot give effect to that treaty. . . . [N]othing in [*Foster*] suggests that [a non-self-executing] treaty is not law in some other sense for other purposes. In fact, as an obligation of the United States, the treaty is law for the political branches, a binding obligation for the political branch that had the duty and the authority to carry it out on behalf of the United States.[35]

To be sure, there are circumstances in which a treaty cannot become effective as domestic law upon ratification despite the Supremacy Clause.[36] Those situations are not a result of *Foster*-type non-self-execution, however. For example, a treaty cannot become domestic law if it conflicts with the Constitution, either because it infringes upon a constitutionally protected right or because it violates a structural provision of the Constitution. Similarly, a treaty cannot become domestic law where it seeks to accomplish domestic goals that under the Constitution can be accomplished only by statute. Moreo-

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> effect as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.

Medellín v. Texas, 128 S. Ct. 1346, 1356 n.2 (2008). The *Medellín* Court also observed the following:

> Even when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.

Id. at 1357 n.3 (emphasis and internal quotation marks omitted).

These principles cannot be squared with *Foster*. Recall that *Foster* held that a treaty that "operates of itself" provides a cause of action for a private individual to seek a judicial remedy for the treaty's breach. *See Foster*, 27 U.S. (2 Pet.) at 314. A treaty whose text contemplates further legislative action in order for the treaty to be "executed" does not provide such a cause of action. *See id.* *Foster* did not hold, contrary to the *Medellín* Court's second footnote, that non-self-executing treaties are not "domestically enforceable." Rather, it held that one particular means of domestic enforcement—a private civil cause of action asserting the treaty itself as a basis for substantive relief—is foreclosed if the treaty is non-self-executing. *See id.* Moreover, *Foster* held that if a treaty *is* self-executing, then it *does* provide a private cause of action, contrary to *Medellín*'s third footnote. *See id.*

35. Henkin, *supra* note 18, at 866 n.65.

36. Vázquez, *supra* note 20, at 699–700.

ver, a treaty's terms may be sufficiently vague or precatory as to lack the status of law altogether.

These situations all differ from *Foster*-type non-self-execution in at least two significant respects. First, *Foster*-type non-self-execution is "internal" to the treaty—that is, it results from the text and the intent of the treaty itself rather than an "external" limitation on domestic lawmaking imposed by the Constitution. Second, where a treaty provision is unconstitutional, extra-constitutional, or too vague, that provision cannot become effective as domestic law for *any* purpose. It is a domestic legal nullity. By contrast, the *Foster* non-self-execution inquiry asks a far more limited question—whether the treaty creates a private cause of action. Given that most treaties are neither unconstitutional nor extra-constitutional and that many international human rights treaties are sufficiently clear in their terms to be amenable to judicial enforcement, many treaties presumptively become domestic law upon ratification. This remains true even if the treaty itself does not create a private cause of action.

The conflation of whether a treaty creates a domestic cause of action with whether it is domestic law at all is partially based on confusion between rights and remedies.[37] Courts have long recognized that the two other forms of supreme federal law—the Constitution and federal statutes—can create a right or duty without also creating a private cause of action for violations of that right or duty.[38] The absence of an express private cause of action does not mean that the statute or constitutional provision is not binding domestic law.[39] Nor does it mean that the statute is necessarily unenforceable by private individuals, provided that a court either finds that the statute implicitly autho-

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37. *See* Vázquez, *supra* note 13, at 600 (criticizing the "common but untenable view that non-self-executing treaties lack the force of domestic law"). The Supreme Court recently contributed to this confusion in *Medellín*. *See infra* text accompanying notes 56–64 (observing that the *Medellín* decision can be read as intimating that a non-self-executing treaty is not domestic law at all).

38. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 280–82 (2002) (discussing cases holding that federal statutes that cannot be enforced by private individuals under 42 U.S.C. § 1983 nonetheless remain enforceable by the appropriate federal agencies); *see also* John T. Parry, *A Primer on Treaties and § 1983 After* Medellín v. Texas, 13 LEWIS & CLARK L. REV. 35, 61–62 (2009) ("[T]he determination that a treaty provision is not self-executing in the sense of being enforceable in court should not affect its status as federal law, any more than the failure of a federal statute to create private rights lowers its federal law status."); Vázquez, *supra* note 13, at 613 ("Like treaties, the Constitution . . . often confers primary rights without specifying particular enforcement mechanisms.").

39. The President, for example, presumably could not ignore with impunity a federal statute eliminating funding for a war or establishing federal taxation, even if such a statute did not itself create a civil cause of action for its enforcement.

rizes a cause of action[40] or that some other statute provides an applicable cause of action.[41]

Regrettably, the Supreme Court's recent decision in *Medellín v. Texas*[42] has contributed to the confusion regarding the non-self-executing treaty doctrine. *Medellín* involved a Mexican national imprisoned in Texas.[43] Medellín claimed that Texas officials' failure to inform him of his right to notify and contact the Mexican consulate upon his arrest violated his rights under the Vienna Convention on Consular Relations ("VCCR").[44] Several lower courts held that state rules of procedural default barred Medellín's VCCR claim because he first raised it in a proceeding for post-conviction relief rather than at trial or on direct appeal of his conviction.[45] While the domestic litigation was ongoing, the International Court of Justice ("ICJ") issued its decision in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*.[46] *Avena* held that due to the VCCR violations, certain Mexican nationals (including Medellín) were entitled to review and reconsideration of their sentences, notwithstanding the rules of procedural default.[47] The President then issued a memorandum ("President's Memorandum") stating that the United States would comply with its international obligations under the *Avena* decision "by having State courts give effect to the decision."[48]

When the case reached the Supreme Court, Medellín argued that he was entitled to a review of his sentence based on the *Avena* decision

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40. *See* Thompson v. Thompson, 484 U.S. 174, 179 (1988) (discussing the implied cause of action doctrine, under which a federal statute lacking an explicit cause of action may be deemed to implicitly authorize one if doing so would be consistent with Congress's intent).

41. *See Gonzaga*, 536 U.S. at 280–82 (discussing the use of § 1983 to enforce rights created by federal statutes that do not themselves contain a cause of action for enforcement). This Article does not mean to suggest that treaties and federal statutes are necessarily constitutional equivalents, which would be an oversimplification. *See, e.g.*, Henkin, *supra* note 18, at 871 ("The supremacy clause does not address the hierarchy of various forms of federal law; it only declares the supremacy of every kind of federal law over state law."). The nature of that hierarchy is beyond the scope of this Article. The discussion above is intended merely to point out that the question of whether a law provides a cause of action and whether it is law at all are two different questions.

42. 128 S. Ct. 1346 (2008).

43. *Id.* at 1353.

44. *Id.* at 1354–55; *see* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

45. *Medellín*, 128 S. Ct. at 1354–55.

46. 2004 I.C.J. 12 (Mar. 31).

47. *Id.* at 71–72.

48. Memorandum from President George W. Bush to Attorney General Alberto R. Gonzales (Feb. 28, 2005).

and the President's Memorandum seeking to implement *Avena*.[49] Medellín argued that, under the Supremacy Clause, the treaties requiring compliance with ICJ judgments became the law of the land upon their ratification.[50] The Court disagreed and held that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law" sufficient to override state procedural default rules.[51] The Court adopted a strict dualist interpretation of the relationship between international and domestic law, stating that "[n]o one disputes that the *Avena* decision . . . constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts."[52]

In reaching its holding, the Court made several critical errors. First, the Court seems to have presumed that most treaties are to be interpreted as non-self-executing unless extraordinarily clear language to the contrary appears in the treaty.[53] Failing to find such language in the treaties at issue in *Medellín*, the Court concluded that they were non-self-executing.[54] As noted above, however, the non-self-executing treaty doctrine as originally articulated in *Foster* presumes just the opposite. *Foster* held that under the Supremacy Clause, most treaties are self-executing unless evidence to the contrary appears in the treaty.[55]

The more fundamental error in *Medellín* is that the Court appears to have erroneously equated "self-executing" with "domestic law." The original and correct understanding is that a non-self-executing treaty does not itself create a cause of action.[56] Concluding that the treaty does not itself give private individuals the right to sue for violations of the treaty does not mean, however, that the treaty lacks the

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49. *Medellín*, 128 S. Ct. at 1353.

50. *Id.* at 1356.

51. *Id.* at 1353.

52. *Id.* at 1356.

53. *Id.* at 1369 (explaining that a treaty should be seen as non-self-executing whenever it was "ratified without provisions clearly according it domestic effect"); *see also id.* at 1380 (Breyer, J., dissenting) (noting in his criticism of the majority's reasoning that "self-executing treaty provisions are not uncommon or peculiar" and that "the Supremacy Clause itself answers the self-execution question by applying many, but not all, treaty provisions directly to the States").

54. *See id.* at 1369 (majority opinion) (explaining that if the President wants a treaty to "have domestic effect of its own force, that determination may be implemented in mak[ing] the treaty, by ensuring that it contains language plainly providing for domestic enforceability" (internal quotation marks omitted)).

55. *See supra* text accompanying notes 29–31.

56. *See supra* notes 21–35 and accompanying text (discussing the reach of the *Foster* rule).

status of domestic law.[57] Rather, it means that a person whose rights under the treaty are violated must seek some mechanism for redress other than a private civil cause of action under the treaty itself. Medellín sought such an alternative: He claimed that the VCCR violation provided a basis for habeas corpus relief.[58] The Court failed to acknowledge that the VCCR might provide a basis for a habeas claim even if it did not give Medellín the right to bring an affirmative civil claim against the government.

The *Medellín* Court also held that the President could not order state courts to comply with a non-self-executing treaty.[59] The United States, as amicus curiae, argued that the President could order state courts to comply with *Avena* even if the treaties obliging compliance with ICJ judgments were non-self-executing.[60] In short, the United States contended that the treaties at issue were supreme—albeit non-self-executing—federal law that the Executive Branch could enforce domestically. The Court rejected this argument, reasoning as follows:

> The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. . . . [W]hen treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.[61]

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57. The clearest instance of the *Medellín* Court conflating rights and remedies is its statement that "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create *private rights* or provide for *a private cause of action* in domestic courts.'" *Medellín*, 128 S. Ct. at 1357 n.3 (emphasis added) (second alteration in original) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987)).

58. *Id.* at 1354–55 (noting that "Medellín first raised his [VCCR] claim in his first application for state postconviction relief" and subsequently "filed a habeas petition in Federal District Court"); *see also* 28 U.S.C. § 2254(a) (2006) (providing that writs of habeas corpus may be granted in cases where custody is "in violation of the Constitution or laws or *treaties* of the United States" (emphasis added)).

59. *Medellín*, 128 S. Ct. at 1372.

60. *Id.* at 1367.

61. *Id.* at 1368 (emphasis and internal quotation marks omitted). In assessing whether the President could constitutionally order domestic compliance with the treaties obligating the United States to enforce ICJ judgments, the Court applied Justice Jackson's "familiar tripartite scheme" for assessing presidential power. *Id.* at 1367–68 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring in the judgment)). At least one scholar has suggested that *Youngstown* was only of marginal relevance to the issues presented in *Medellín*. *See* Ingrid Wuerth, Medellín*: The New, New For-*

In this portion of its analysis, the Court repeated its mistaken assumption that only self-executing treaties carry the force of domestic law. In so doing, it mischaracterized the President's Memorandum as a constitutionally illegitimate form of executive lawmaking rather than executive enforcement of existing law.

If *Medellín* stands for the proposition that a treaty has *no* domestic legal force unless it is self-executing,[62] it is a radical departure from the Supremacy Clause's text and the Court's own precedent.[63] Reading *Medellín* in this way would require a finding that the Court implicitly meant to overrule its earlier cases while citing those cases favorably.[64] Regardless of *Medellín*'s merits, the case need not conflict with the premise of this Article for the following reasons.

The first holding of *Medellín* was that the particular treaties at issue, based on the Court's textual analysis, were not self-executing.[65] Having determined that the relevant treaties were not self-executing, the Court held that the substantive protections of the *Avena* judgment were not enforceable by private individuals like the *Medellín* petitioners.[66] The approach advocated in this Article, by contrast, does not address whether private individuals may seek to vindicate their substantive rights under non-self-executing treaties, but instead addresses whether such treaties are domestic law requiring domestic implementation.

The second holding of *Medellín* was that the President's Memorandum could not require state courts to apply *Avena*. Specifically, the Court held the following:

> [T]he non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts. The

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malism?, 13 LEWIS & CLARK L. REV. 1, 2 (2009) (criticizing *Medellín*'s "odd, expansive, and unnecessary" application of Justice Jackson's *Youngstown* framework).

62. Recall that in the Court's view, a finding of self-execution requires that the treaty's terms clearly state that it is to have domestic effect. *See Medellín*, 128 S. Ct. at 1369.

63. *See* Vázquez, *supra* note 13, at 648 (noting passages from *Medellín* that "suggest that the [Court] understood that the effect of a determination that a treaty is non-self-executing is that the obligations imposed by the treaty as a matter of international law lack the force of domestic law," and noting that if this is true, "the Court was endorsing a view that had been repeated by many lower courts and commentators but had never before been endorsed by the Court itself" (footnote call number omitted)).

64. *See Medellín*, 128 S. Ct. at 1356 (citing, *inter alia*, Whitney v. Robertson, 124 U.S. 190 (1888); United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829)). While this author believes that the *Medellín* Court either misunderstood or misapplied these cases, *see supra* notes 56–63 and accompanying text, the Court did not purport to overrule them.

65. *See Medellín*, 128 S. Ct. at 1369.

66. *See id.* at 1353.

> President may comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution. But he may not rely upon a non-self-executing treaty to establish binding rules of decision that preempt contrary state law.[67]

This approach is also erroneous. It focuses, however, only on the President's ability to domestically enforce a treaty by one particular means—"unilaterally making the treaty binding on domestic courts."[68] It does not purport to limit other methods of domestic treaty enforcement "by some other means."[69] Nor does it directly speak to judicial enforcement of the duty to implement a treaty domestically, which is the focus of this Article.[70]

III. SEPARATION OF POWERS: CRITIQUES AND RESPONSES

The preceding analysis illuminates several principles. First, a non-self-executing treaty does not itself provide an individual with a private cause of action to seek a remedy for violations of the treaty's substantive provisions. Second, the most natural reading of the Supremacy Clause's text and history is that even a non-self-executing treaty, upon ratification, becomes part of the domestic law of the United States. The question then becomes, what does it mean for a ratified, non-self-executing treaty to be "supreme Law" domestically?

This Article contends that the Supremacy Clause makes such treaties binding domestic law. If the treaty imposes a duty of domestic implementation, compliance with that duty may be secured by the issuance of a writ of mandamus. Before beginning that inquiry, how-

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67. *Id.* at 1371 (internal quotation marks omitted).

68. *Id.*

69. *Id.*

70. To illustrate, assume that in *Medellín*, the federal government had taken no action to secure compliance with the ICJ's *Avena* judgment. Under the approach advocated by this Article, the *Medellín* petitioners could have sought a writ of mandamus ordering the appropriate federal officials to fulfill their alleged duties under the treaties discussed in *Medellín*. Their contention would be that Article 94(1) of the Charter of the United Nations, which provides that each member state "undertakes to comply" with ICJ judgments to which it is a party, supplies the type of governmental duty suitable for mandamus relief. U.N. Charter art. 94, para. 1. Thus, had the President undertaken no action to comply with the *Avena* decision, the petitioners could have sued in mandamus seeking to force such action if Article 94 provides a mandamus duty. As noted in Part IV, however, the question of *how* to secure compliance with *Avena* would rest with the political branches. The mandamus alternative seeks only to remove from the political branches one particular and limited option with regard to ratified treaties' domestic effect. It would recognize that once the political branches have voluntarily created supreme domestic law in the form of a ratified treaty, they no longer have the option of deciding not to comply with that law simply by ignoring it.

ever, it is useful to consider the broader separation of powers concerns that even such a limited judicial role in domestic treaty enforcement might entail.

Scholars and courts have offered various rationales for the position that, despite the Supremacy Clause, ratified treaties are not domestic law unless they are implemented by a subsequent act of Congress.[71] This Article addresses only the objections based upon structural principles of federal lawmaking and based upon separation of powers.

The first argument concerns the process of federal lawmaking. The President's ratification of a treaty with the Senate's consent differs from the bicameralism and presentment process for federal legislation because treaty ratification does not involve the House of Representatives.[72] Some argue that while the Constitution may allow *international* obligations to be created by only the President and the Senate, such obligations should not become *domestic* law unless the full Congress participates.[73] Under this view, requiring implementing legislation to make a ratified treaty domestic law cures this "democracy gap"[74] because the House must participate in order to pass implementing legislation. Commentators contend that indirectly inserting the House in the treaty process in this manner is necessary in order to ensure "that the treaty power [retains] majoritarian roots."[75]

This structural argument falls short. As Professor Henkin has accurately noted, "The question is not how many or which branches are involved [in creating a treaty versus a federal statute]; rather, the [relevant] issue is the constitutional status of the two instruments."[76] The Constitution provides two different processes for creating supreme

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71. This Article has discussed and refuted the argument that this was the holding of *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829). *See supra* Part II.B.

72. The Treaty Clause provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

73. *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1962 (1999) (arguing that "[t]he Treaty Clause had created a democracy gap . . . because vesting the power partially in the Senate and excluding the House threatened to remove the people's most direct representatives from an important lawmaking function"); *cf.* The Head Money Cases, 112 U.S. 580, 599 (1884) ("A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. . . . If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate.").

74. *See* Yoo, *supra* note 73, at 1962.

75. *Id.*

76. Henkin, *supra* note 18, at 871.

domestic law.[77] Federal statutes require bicameralism and presentment; treaties, under the text of the Supremacy Clause and the Treaty Clause, do not. The Framers presumably would have worded the Supremacy Clause or the Treaty Clause differently had they intended the House's participation to be a prerequisite to treaties enjoying the status of domestic law.[78] Moreover, even commentators who oppose judicial enforcement of treaties in private causes of action seem to agree that even non-self-executing treaties are domestic law in the sense that they have preemptive effect over contrary state laws.[79] As a structural matter, it is difficult to see why it is constitutionally permissible to exclude the House when creating federal law in the form of a treaty preempting state law, but not otherwise.[80]

The more substantial objections to the view that treaties become domestic law upon ratification relate to separation of powers principles. This Article readily acknowledges that even a limited judicial role in domestic treaty enforcement may raise separation of powers concerns. Opposition to domestic judicial enforcement of treaty obligations often rests upon the argument that the Constitution delegates the foreign affairs power to the political branches, as well as the corol-

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77. There is, of course, a third type of supreme federal law—the Constitution itself. The process for creating new constitutional provisions is not at issue here.

78. Indeed, the historical record makes clear that the Framers deliberately excluded the House from the process of making supreme federal law in the form of treaties. *See* Hathaway, *supra* note 1, at 1277–78 (explaining that "[a]fter vigorous debate, [the Framers] decided to place responsibility for concluding treaties in the hands of the President and the Senate alone"). Professor Yoo seeks to refute this straightforward analysis with a "functional approach," by which he seeks to demonstrate that the Constitution generally renders treaties non-self-executing. Yoo, *supra* note 73, at 1960. Whatever the merits of such a "functional approach," Professor Yoo, like many other commentators, also appears to over-read *Foster* and consequently conflates the question of whether a treaty is domestic law with the question of whether it provides a private cause of action. *Compare id.* at 1961 (observing that "the original understanding does not *compel* a reading of the Supremacy Clause that immediately makes treaties *law* within the United States [upon ratification]" (second emphasis added)), *with id.* at 1978 (explaining, after discussing scholars who support self-execution in the sense of treaties providing a private individual with a cause of action for the treaty's breach, "internationalists too hastily equate 'Law of the Land' with judicial enforceability").

79. *See, e.g.*, Yoo, *supra* note 73, at 1979 ("Including treaties in [the Supremacy Clause] serves the purpose of making clear that treaties are entitled to the same supremacy as constitutional and statutory provisions, when they are enforced by the national government in conflict with state laws.").

80. One distinction may be the difference between treaty enforcement by the political branches in the form of preemption versus treaty enforcement by private individuals in lawsuits. The latter is argued to raise concerns about an ad hoc foreign policy being created by private individuals' lawsuits. This is a serious policy concern and is discussed in greater detail below. It is a policy concern, however, and not one grounded in structural issues related to excluding the House from the lawmaking process.

lary proposition that the judiciary has no constitutional role in foreign affairs.[81] Under this view, judicial enforcement of treaty obligations violates separation of powers principles. If the political branches want the judiciary to have a role in treaty enforcement, they can enact implementing legislation providing for a domestic cause of action. When the political branches have chosen not to do so, the argument goes, the judiciary should stand aside.

At the broadest level, describing all judicial involvement in treaty interpretation or enforcement as raising "separation of powers" concerns is imprecise. There are myriad situations in which international law interacts with our domestic legal system, only some of which actually raise real separation of powers concerns: "First, international law could be used to override domestic law or policy formulated by the elected branches . . . . Second, international law might be used to evaluate the legitimacy of actions undertaken by other nations . . . . Third, international law can be used to supplement existing [domestic] law."[82]

Different domestic uses of international law raise different separation of powers concerns, which may carry more or less weight depending on the circumstances. Indeed, some uses of international law may not raise separation of powers problems at all. The ongoing debate regarding the use of international law as persuasive authority to interpret the Eighth Amendment,[83] for example, revolves around notions of domestic sovereignty and "American exceptionalism," not separation of powers.[84]

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81. *See, e.g.*, Medellín v. Texas, 128 S. Ct. 1346, 1363 (2008) (observing that "'[t]he judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided'" (quoting Foster v. Neilson, 27 U.S. (2 Pet.) 253, 307 (1829))); Yoo, *supra* note 73, at 1962 (arguing that the Framers intended that "the political branches, rather than the courts, would maintain the discretion to decide how the nation should meet its international obligations"); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 749–50 (2004) (Scalia, J., concurring in part and concurring in the judgment) (arguing that, by applying "'the Law of Nations'" via the Alien Tort Claims Act, 28 U.S.C. § 1350 (2006), "unelected federal judges have been usurping [the political branches'] lawmaking power by converting what they regard as norms of international law into American law").

82. Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2281–82 (1991).

83. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding that the Eighth Amendment prohibits the imposition of capital punishment for juveniles and stating that "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'").

84. *See, e.g.*, ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 137 (2003) (arguing that "[i]nternationalism is illegitimate when courts decide to interpret their own constitutions with guidance from the decisions of foreign courts" and that it is

Furthermore, this Article recognizes that Congress and the President have constitutional mechanisms—such as later-in-time legislation that supersedes the treaty,[85] jurisdiction-stripping legislation, or reservations to the treaty—that they can use to limit domestic treaty enforcement.[86] Requiring actual legislation limiting the domestic applicability of a treaty is preferable to the *sub silentio* attempt to accomplish the same result by adopting a treaty requiring domestic implementation but then refusing to implement it.[87] If Congress were to ratify a treaty and then pass legislation stripping the courts of jurisdiction over the treaty, the process would then at least be subject to public scrutiny and debate.

Moreover, this separation of powers argument is generally couched in terms of avoiding lawsuits by private individuals seeking to determine the meaning of a treaty's substantive obligations. The concern is that we should have a single, consistent foreign policy determined by the President and Congress instead of multiple foreign policies determined ad hoc by individual litigants and federal judges.[88] Under the approach that this Article advocates, however, the judicial role would be limited to enforcing the government's duty to make a treaty domestically effective. A mandamus action would not involve an adjudication of the treaty's substantive obligations or an inquiry into whether they have been breached. Rather, the issue would be whether the treaty's terms impose a duty of domestic implementation. If so, the judicial task would be to issue injunctive relief

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not "apparent why the United States or any other country should submit to the jurisdiction of international tribunals that will override their own national interests").

85. *See* The Head Money Cases, 112 U.S. 580, 597 (1884) (providing that a later-in-time statute prevails over any previously enacted inconsistent treaty provision).

86. *See infra* Part V.

87. The position that Congress can create supreme domestic law by ratifying a treaty and yet not be bound to do what the treaty commands is somewhat reminiscent of the recent debate over presidential "signing statements." *See, e.g.*, Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307, 308 (2007) (describing President Bush's frequent use of "signing statements"). With treaties, the President and Senate agree to ratify a treaty—making it supreme domestic law under the Supremacy Clause—and then refuse to comply with its terms domestically by calling it non-self-executing. With presidential signing statements, the President signs a bill, making it supreme domestic law under the Supremacy Clause and yet claims by virtue of a signing statement not to be bound by that law. In both circumstances, the relevant branch of government claims the right not to be bound by the supreme domestic law that it voluntarily participated in creating.

88. *See, e.g.*, Yoo, *supra* note 73, at 1976 ("If individuals cannot bring suit in federal court to enforce every treaty obligation, then the political branches need not worry that the litigation decisions of private persons or judicial decisions will interfere with foreign policy.").

requiring the political branches to comply with that duty by adequate and effective means of their own choosing.

It is true that the political question doctrine generally requires that judges abstain from reviewing "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[89] The political question objection to domestic treaty enforcement rests, however, on the mistaken view that all treaties deal solely or even primarily with "foreign affairs" matters. The classic statement of this view of treaties is reflected in dicta from the *Head Money Cases*:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions 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 . . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress.[90]

The Court has recognized, however, that the *Head Money Cases* dicta should not be taken literally in all circumstances. In discussing the political question doctrine, the Court has observed that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[91] It is the nature and purpose of the treaty, not the mere classification of treaties as dealing with "foreign affairs," that determines whether it presents matters amenable to judicial resolution. Where a treaty truly concerns obligations between nations, committing the treaty's interpretation and enforcement to the political branches may make sense. In contrast, where a treaty is designed to regulate the conduct of each government toward individuals within its own territory, the treaty can no longer be said to deal exclusively with foreign affairs matters delegated solely to the political branches.[92] Indeed, as Professor Vázquez has noted, the *Head*

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89. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

90. *The Head Money Cases*, 112 U.S. at 598.

91. Baker v. Carr, 369 U.S. 186, 211 (1962).

92. One author characterizes this as the difference between treaties that are "horizontal" (those that involve relations among nations) versus those that are "vertical" (those that involve relations between nations and individuals). *See* Brilmayer, *supra* note 82, at 2279–80 (describing the "horizontal" and "vertical" conceptions of international law). Professor Brilmayer argues that "cases with predominately vertical elements have a superior claim to be heard in American courts." *Id.* at 2280; *see also* Vázquez, *supra* note 13, at 605 (arguing that "when a treaty binds the United States to behave in a given way towards a particular individual, the treaty is 'judicially enforceable' by the individual just as any stat-

Money Cases Court itself acknowledged that treaties can confer individual rights:

> A treaty [under the Supremacy Clause] . . . is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.[93]

International human rights treaties are designed to confer rights upon individuals and to regulate each nation's treatment of its own citizens and subjects.[94] Having agreed to such a treaty, a state's objection that such treaties solely involve foreign affairs rings hollow.[95]

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ute or constitutional provision would be, unless the treaty is non-self-executing in the *Foster* sense").

93. *The Head Money Cases*, 112 U.S. at 598–99. As Professor Vázquez notes, the two portions of the *Head Money Cases* quoted above are consistent with one another when understood in the context of the case. Vázquez, *supra* note 13, at 625. The case dealt with the "last-in-time rule," whereby a later inconsistent federal statute can trump a previously ratified treaty for domestic purposes. *Id.* (citing *The Head Money Cases*, 112 U.S. at 599). The Court simply recognized that this is a domestically valid regime and therefore the other parties to the treaty were left with "'international negotiations'" as their remedy. *Id.* (quoting *The Head Money Cases*, 112 U.S. at 598). Where a treaty remains valid and in force domestically, however, the Court stated that the Supremacy Clause makes it "a law of the land as an act of Congress is." *The Head Money Cases*, 112 U.S. at 598.

94. *See, e.g.*, Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 569 (1997). The author explains the following:

> Human rights has built significantly from the basic premise that nations cannot treat their subjects as they please. In addition to freedoms from torture, political executions, and other extreme forms of inflicted human suffering, human rights now cuts deeply to vindicate individual rights against a broad range of governmental activity . . . .

Id.; *see also* U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 9, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) [hereinafter *General Comment No. 31*] ("The beneficiaries of the rights recognized by the [International Covenant on Civil and Political Rights] are individuals."); Vázquez, *supra* note 13, at 612–13 ("[T]reaties often obligate the states-parties to behave in particular ways towards individuals. When treaties impose such obligations, the individuals involved may be said to have a primary right to be treated in such ways, even though they lack secondary or remedial rights under international law.").

95. Additionally, the United States has been a strong proponent of the principle of subsidiarity regarding international human rights treaties; that is, the principle that international human rights standards are best and most properly implemented by domestic governments, with international mechanisms serving a subsidiary enforcement role. *See generally* William M. Carter, Jr., *Rethinking Subsidiarity in International Human Rights Adjudication*, 30 HAMLINE J. PUB. L. & POL'Y 319 (2008). There is substantial inconsistency between this view, which holds that human rights enforcement should be left to domestic governments, and the view that holds that international human rights treaties have no domestic effect.

Finally, viewing human rights treaty enforcement as solely the province of the political branches ignores the fact that victims of domestic human rights violations are unlikely to be able to sway the political branches to act in their favor. Persons seeking the benefit of human rights protections are often politically and economically powerless; invoking the political process is therefore unlikely to prove effective.[96] It is also unlikely that the political branches would act of their own accord to enforce a treaty when such enforcement is sought based on their own conduct in violation of the treaty.

IV. TREATIES AS DOMESTIC LAW: THE MANDAMUS ALTERNATIVE

The Constitution makes ratified treaties part of our domestic law. Even where the treaty itself does not create a private cause of action, it remains domestic law under the Supremacy Clause. An essential attribute of the rule of law is that governmental actors are subject to constraints beyond their discretionary decisions regarding whether they comply with the law.[97] Judicial review provides one such constraint. The discussion that follows provides a way to balance the tension between the Supremacy Clause, separation of powers principles, and the rule of law.

A. *The History and Nature of Mandamus*

Relief in the nature of mandamus has ancient roots in common-law legal systems. The Supreme Court has described the nature of mandamus as follows:

> Mandamus is employed to compel the performance, when refused, of a ministerial duty . . . . It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.[98]

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96. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (noting that "prejudice against discrete and insular minorities may . . . tend[ ] seriously to . . . curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . a correspondingly more searching judicial inquiry" may be appropriate in such cases).

97. *See, e.g.*, David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 313 (2003) (explaining that "almost all of the rule-of-law formulations" include enforceable constraints on government actors' discretion as one of the attributes of the rule of law).

98. Miguel v. McCarl, 291 U.S. 442, 451 (1934) (citation and internal quotation marks omitted). The Federal Rules of Civil Procedure abolished the writ of mandamus in federal district courts. FED. R. CIV. P. 81(b) ("The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.").

While *Marbury v. Madison*[99] is best known for its holdings regarding subject matter jurisdiction and judicial review, it is also the seminal case regarding mandamus relief. *Marbury* involved several individuals who had been validly appointed as justices of the peace and confirmed by the Senate.[100] The previous President had signed the letters of commission evidencing their appointments.[101] All that remained was for the Secretary of State to deliver the commissions.[102] The Secretary of State, on orders from the new President, refused to do so[103] for political reasons.[104] The appointees sued in the Supreme Court and requested that the Court issue mandamus compelling the Secretary of State to deliver the commissions.[105]

The Court expressed skepticism that mandamus could issue to the President himself.[106] As to a Cabinet officer like the Secretary of State, however, the Court believed there was no constitutional barrier to mandamus in an appropriate case: The Court held that "mandamus to a secretary of state is [not] equivalent to a mandamus to the President of the United States" when mandamus is sought to compel a cabinet officer to perform a ministerial duty commanded by law.[107] The Court explained the following:

> It is true [that the Secretary of State] is a high officer, but he is not above law. It is not consistent with the policy of our political institutions . . . that any ministerial officer having

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District courts may issue relief in the nature of mandamus, however, through the use of statutory or equitable remedies. *See, e.g.*, 28 U.S.C. § 1361 (2006) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."). Accordingly, the traditional considerations governing the issuance of a writ of mandamus remain the same when a court is asked to order equitable or statutory relief in the nature of mandamus. *Miguel*, 291 U.S. at 452 ("The mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations."); Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984) ("[A] mandatory injunction is essentially in the nature of mandamus, and jurisdiction can be based on either 28 U.S.C. § 1361, § 1331 [the general federal question statute], or both."). For the sake of simplicity, the remainder of this Article will refer simply to "mandamus," rather than "relief in the nature of mandamus."

99. 5 U.S. (1 Cranch) 137 (1803).

100. *Id.* at 137–38.

101. *Id.* at 138.

102. *Id.*

103. *Id.*

104. *See* Sanford Levinson & Jack M. Balkin, *What Are the Facts of* Marbury v. Madison *?*, 20 CONST. COMMENT. 255, 257–59 (2003) (describing *Marbury*'s political backdrop).

105. *Marbury*, 5 U.S. (1 Cranch) at 137–38.

106. *Id.* at 149 ("[C]an a mandamus go to a secretary of state in any case? It certainly cannot in *all* cases; nor to the President in *any* case.").

107. *Id.*

> public duties to perform, should be above the compulsion of law in the exercise of those duties. As a ministerial officer he is compellable to do his duty . . . . [A] specific civil remedy to the injured party can only be obtained by a writ of mandamus.[108]

Thus, the *Marbury* Court recognized that mandamus is an available remedy for government officials' failure to perform duties required by law.

B. *The Requirements for Mandamus*

The traditional requirements for mandamus relief are as follows: "(1) the plaintiff's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available."[109] These requirements are designed to respect separation of powers principles by ensuring that "to the extent a statute vests discretion in a public official, his exercise of that discretion [is] not [to] be controlled by the judiciary."[110] A plaintiff can invoke mandamus only to seek the enforcement of an underlying right. Thus, where governmental action or inaction is wholly discretionary, the plaintiff cannot claim any right to be enforced by mandamus.[111]

The availability of mandamus relief has traditionally turned on the distinction between ministerial and discretionary governmental duties. The most conservative view is that mandamus relief can only be issued when the governmental duty is purely ministerial.[112] Under

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108. *Id.* at 149–50.

109. Guerrero v. Clinton, 157 F.3d 1190, 1197 (9th Cir. 1998) (citation and internal quotation marks omitted); *see also Marbury*, 5 U.S. (1 Cranch) at 152 ("It is the general principle of law that a mandamus lies, if there be no other adequate, specific, legal remedy . . . ." (citation and emphasis omitted)). As will be discussed, there is substantial authority for giving a broader scope to duties sufficient for mandamus beyond the purely ministerial, including the duty to exercise discretion granted by law. *See infra* text accompanying notes 112–36.

110. Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984) (citations and internal quotation marks omitted); *see also* 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3655 (3d ed. 1998) (stating that mandamus jurisprudence "reflects the policy that the judiciary should not interfere with a government officer's valid exercise of a delegated power").

111. *See, e.g.*, Miguel v. McCarl, 291 U.S. 442, 451 (1934) (explaining that where the governmental duty is not "plainly prescribed," it is regarded as being discretionary and cannot be controlled by mandamus).

112. *See, e.g.*, United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 420 (1931) ("Under the established rule the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined.").

this view, mandamus is appropriate only where the duty to act is of a mechanical nature, such as the duty to deliver letters of commission as was at issue in *Marbury*. In contrast, a more nuanced approach recognizes that mandamus will also be appropriate to compel the exercise of discretion when the law so requires. Even under this approach, however, a court is "not to direct the exercise of judgment or discretion in a particular way."[113] In other words, a court may find that a government official has a legal duty to exercise her discretion, but the court may not order that such discretion be exercised to reach a particular result.

Assessing whether a particular international human rights treaty imposes duties sufficient for mandamus purposes requires specific analysis of the treaty's text and intent. Prior to providing textual analysis of several treaties, it is worthwhile to examine the nature of the duties beyond the purely ministerial[114] that have been found sufficient for mandamus purposes.

Japan Whaling Ass'n v. American Cetacean Society[115] involved the International Convention for the Regulation of Whaling ("ICRW"), which established quotas on whaling activities.[116] Federal law required the Secretary of Commerce to certify to the President when "'nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program'" (such as the ICRW).[117] Upon such certification from the Secretary of Commerce, federal law required the Secretary of State to impose economic sanctions.[118]

Despite the fact that Japan had exceeded the ICRW's quotas during the 1984–85 whaling season, the Secretary of Commerce refused to certify that its actions had diminished the effectiveness of the

113. *Miguel*, 291 U.S. at 451 (citation and internal quotation marks omitted).

114. Seldom will an international human rights treaty impose duties that are purely ministerial. As will be discussed in Part V.B, the duty that is the focus of this Article is the duty of member nations to make international human rights treaties domestically effective. *See, e.g.*, International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . ."). Such a duty cannot be characterized as purely ministerial for mandamus purposes because an exercise of discretion is required to determine how to carry the duty into effect.

115. 478 U.S. 221 (1986).

116. *Id.* at 223.

117. *Id.* at 225 (quoting 22 U.S.C. § 1978(a)(1) (2006)).

118. *Id.* at 226 (citing 16 U.S.C. § 1821(e)(2)(A)–(B) (2006)).

ICRW.[119] Instead, the United States negotiated an executive agreement with Japan whereby Japan agreed to certain whaling limits and also to stop all commercial whaling by 1988.[120]

Several wildlife organizations sought a writ of mandamus against the Secretary of Commerce.[121] The plaintiffs argued that the Secretary was required to certify once it was determined that ICRW quotas had been violated.[122] The Supreme Court disagreed and found that the Secretary had discretion regarding the substantive determination of whether to certify, thereby triggering the imposition of sanctions, or not to certify and instead pursue alternate means of achieving the treaty's goals.[123] The Court also stated, however, that the Secretary had a non-discretionary duty to "promptly make the certification decision," which he did by deciding that certification was not warranted.[124] Accordingly, while the substance of the decision was discretionary, the Secretary had a mandatory duty to make the determination.[125]

A recent case sheds additional light on the propriety of issuing mandamus to federal agencies and Cabinet officers. In *American Council of the Blind v. Paulson*,[126] the plaintiffs sued the Secretary of the Treasury and alleged that the design of paper currency made it difficult for blind or visually impaired persons to distinguish denominations of money and that the currency's design discriminated against the visually impaired in violation of Section 504 of the Rehabilitation Act of 1973.[127] The plaintiffs sought declaratory and injunctive relief.[128] Specifically, they identified a range of changes to the design of paper currency that would allow the visually impaired to distinguish denominations.[129] Both the district court and the United States Court of Appeals for the District of Columbia Circuit found a violation of the Act and held that injunctive relief should issue.[130] Notably, while both

119. *Id.* at 227–28.
120. *Id.*
121. *Id.* at 228.
122. *Id.* at 231–32.
123. *Id.*
124. *Id.* at 228, 232.
125. *See id.* at 233 ("We do not understand the Secretary to be urging that he has *carte blanche* discretion to ignore and do nothing about [excess whaling in violation of ICRW quotas].").
126. 525 F.3d 1256 (D.C. Cir. 2008).
127. *Id.* at 1259; *see also* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006) (providing in relevant part that no individual with a disability shall be "subjected to discrimination . . . under any program or activity conducted by any Executive agency").
128. *Paulson*, 525 F.3d at 1261.
129. *Id.*
130. *Id.* at 1264, 1273.

courts refused to specify the appropriate remedial action, they did hold that an injunction ordering the Secretary to comply with the law by means of his own choosing was proper.[131] The court of appeals, in rejecting the Secretary's argument that injunctive relief would "impermissibly curtail [his] discretion," noted that the "district court expressly acknowledged the Secretary's broad discretion to determine how to come into compliance with section 504."[132]

On remand, the district court addressed the propriety of injunctive relief.[133] The Secretary argued that injunctive relief was unnecessary because the Treasury Department was already in the process of crafting a remedial plan.[134] While acknowledging this to be the case, the district court held that this was insufficient to obviate the need for injunctive relief:

> [W]hile I do not question the Treasury Department's commitment to achieving compliance, the best-laid plans can be derailed by shifting priorities, limited resources, and the other vagaries of bureaucratic action. As I have noted [in the original litigation], [t]his Court has neither the expertise, nor, I believe, the power, to choose among the feasible alternatives, approve any specific design change, or otherwise to dictate to the Secretary of the Treasury how he can come into compliance with the law. But this Court does have the expertise and the authority to create goals and to hold the government to those goals. That is the purpose of this injunction.[135]

In short, the district court held that while the Secretary did have discretion in determining *how* to comply with the law at issue, he did not have discretion regarding *whether* to comply with it.[136]

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131. *Id.* at 1273.

132. *Id.*

133. Am. Council of the Blind v. Paulson, 581 F. Supp. 2d 1, 1–2 (D.D.C. 2008).

134. *Id.* at 1.

135. *Id.* at 2 (third alteration in original) (citation and internal quotation marks omitted). The court's opinion also contains a rather ambiguous reference to mandamus relief, the entire text of which is as follows:

> The Treasury Department also argues that an injunction would be inappropriate because it would [act as] the equivalent of mandamus, and mandamus is only permissible when a public official has violated a ministerial, rather than a discretional, duty . . . . But that claim is based on language from the plaintiffs' proposed order that is not in the Court's injunction order.

Id. at 2 n.1 (citation omitted). The import of the court's footnote is unclear.

136. State courts have reached similar conclusions. *See, e.g.*, Brownlow v. Wunch, 80 P.2d 444, 448 (Colo. 1938) (noting that in a mandamus action, the court can "compel[ ] the exercise of discretion without attempting to control it"); Gustafson v. Wethersfield Twp. High Sch. Dist. 191, 49 N.E.2d 311, 312 (Ill. App. Ct. 1943) (finding that a board of

C. *The Duty to Implement International Human Rights Treaties*

Considering whether a treaty provision imposes a duty that is amenable to mandamus enforcement requires an assessment of what the United States agreed to do when it ratified the treaty. If the treaty provision is wholly precatory or discretionary, it will not impose a "duty" for mandamus purposes.[137] By contrast, where the duty to implement is clear and mandatory, even if it involves discretion as to means and methods of enforcement, mandamus is an appropriate remedy to compel implementation.[138] The discussion that follows makes the following propositions:

(1) the text and history of several major international human rights treaties create a mandatory duty of domestic implementation;

(2) the Supremacy Clause incorporated these duties into domestic law upon ratification of those treaties;

(3) barring a provision in the treaty itself[139] or other federal law indicating a contrary result, mandamus is an appropriate remedy when government officials have failed to implement such treaties, as it would be if a similar duty existed under a federal statute; and

(4) the selection of means of implementation should be the exclusive province of the President (or his Cabinet officers) and Congress, provided the means selected are directed in good faith toward effective implementation.

The major human rights treaties that the United States has ratified impose a duty of domestic enforcement. The discussion regarding this point has, for the sake of simplicity, spoken generally of a duty to "implement the treaty" in domestic law. To be more precise, human rights treaties do not necessarily require that the treaty be implemented by making the treaty itself part of domestic law. Rather, the states parties are required to make effective the rights guaranteed

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education's refusal to act when it was the officers' duty to act may be the subject of mandamus, although the manner in which the officers are to act is left up to the board); Hargis v. Swope, 114 S.W.2d 75, 77 (Ky. Ct. App. 1938) (noting that a court will issue mandamus to compel the exercise of discretion, but "not [require] that it shall be exercised in any particular way"); Dunston v. Town of York, 590 A.2d 526, 528 (Me. 1991) (noting that mandamus "can be used to compel officials . . . to exercise their discretion"); State *ex rel.* Botkins v. Laws, 632 N.E.2d 897, 901 (Ohio 1994) (noting that a writ of mandamus cannot control an officer's exercise of discretion, but can be used to compel him to exercise that discretion when he has a "clear legal duty" to do so).

137. *See supra* Part IV.B.

138. *See supra* Part IV.B.

139. The United States' reservations, understandings, and declarations ("RUDs") may be part of the treaty itself in accordance with principles of international law. The effect of RUDs—particularly, declarations of non-self-execution—is considered in Part V.

by the treaty in their domestic law. While making the treaty *in toto* enforceable as domestic law would satisfy the duty of implementation, methods short of such wholesale incorporation may also satisfy that duty.

Of the major international human rights treaties, the United States has ratified the International Covenant on Civil and Political Rights ("ICCPR")[140] and the International Convention on the Elimination of All Forms of Racial Discrimination ("Race Convention").[141] These treaties textually require domestic implementation. For example, Article 2(1) of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[142] Article 2(2) provides that "[w]here not already provided for by existing [domestic law], each State Party . . . undertakes to take the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[143] Thus, the United States has the following legal obligations under the ICCPR: (1) to "respect" the rights provided in the ICCPR by refraining from violating those rights; (2) to "ensure" the rights in the ICCPR by taking the steps necessary to prevent others from violating those rights; and (3) to take whatever measures may be necessary to effectuate ICCPR rights if those rights are not already protected under domestic law.

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140. ICCPR, *supra* note 114.

141. Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Race Convention]. The United States has also ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention], and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. This Article does not address the duty of implementation under these treaties for two reasons. First, unlike the ICCPR and Race Convention, the United States has already taken fairly extensive steps to implement the guarantees of the Torture and Genocide Conventions in domestic law. Second, the Torture and Genocide Conventions, to a much greater degree than either the ICCPR or Race Convention, require implementing action that under the Constitution can only be accomplished by legislation (such as criminalizing torture or genocide). *See* Torture Convention, *supra*, art. 4(1) ("Each State Party shall ensure that all acts of torture are offences under its criminal law."); Genocide Convention, *supra*, art. V ("The Contracting Parties undertake to enact . . . necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide . . . ."). Accordingly, these treaties raise different Supremacy Clause issues with regard to whether their provisions can become domestic law upon ratification. *See generally* Vázquez, *supra* note 20 (describing some of the Supremacy Clause issues relating to the Torture Convention).

142. ICCPR, *supra* note 114, art. 2(1).

143. *Id.* art. 2(2).

The Race Convention also contains specific duties of implementation. It provides that the states parties "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms."[144] The Race Convention provides several highly specific and mandatory measures the states parties must take in pursuit of this goal. The Convention provides that the states parties must refrain from engaging in racial discrimination themselves[145] and "shall" also do the following: (1) review and eliminate any laws or policies that have the purpose or effect of creating or perpetuating racial discrimination;[146] (2) prohibit by all appropriate means racial discrimination by others, including private actors;[147] (3) when necessary, adopt "special and concrete measures" aimed at equalizing the status of racial and ethnic minorities in order to ameliorate the present effects of past discrimination;[148] and (4) pass laws prohibiting hate speech and incitement and outlawing groups engaging in such activities.[149]

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144. Race Convention, *supra* note 141, art. 2(1). In contrast with current United States constitutional law, the Race Convention does not define race conscious policies aimed at equalizing the status of racial minorities as prohibited "racial discrimination":

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals . . . shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Id. art. 1(4). Indeed, the Race Convention *requires* states parties to adopt such measures when necessary:

> States Parties shall, when the circumstances so warrant, take . . . special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them . . . . These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Id. art. 2(2).

145. *Id.* art. 2(1)(a)–(b).

146. *Id.* art. 2(1)(c).

147. *Id.* art. 2(1)(d).

148. *Id.* art. 2(2).

149. *Id.* art. 4. Article 4 of the Race Convention differs in notable respects from the other duties discussed in this section. First, even assuming that it does impose a mandatory duty of the type suitable to mandamus enforcement, it is likely both an unconstitutional content-based distinction and unconstitutionally overbroad under current First Amendment doctrine. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (finding that a city ordinance unconstitutionally discriminated based on content in violation of the First Amendment). Accordingly, it could not, despite the Supremacy Clause, become effective as domestic law upon ratification because it conflicts with the Constitution. *See supra* Part II.B. Second, the action it requires—the enactment of legislation—is of a type that only Congress can perform. Accordingly, it would be "non-self-executing" in the sense that under our Constitution, it is directed to the legislature. *See supra* Part II.B.

When the United States ratified these treaties, the Supremacy Clause made these duties part of domestic law. The Clause also provides for constitutional parity in domestic law of ratified treaties and federal statutes.[150] Accordingly, such treaty duties should be enforceable by mandamus where similar duties would be enforceable if contained in a federal statute. An analysis of the binding nature of the duties imposed reveals that where they have not been fulfilled,[151] mandamus would provide an appropriate remedy.

It is true that the duty of implementation will be considered fulfilled where the rights protected by a treaty are already adequately protected in existing domestic law.[152] While existing United States constitutional and statutory provisions do provide some of the protections found in the ICCPR and the Race Convention, there are numerous areas where gaps remain. For example, Article 1(1) of the Race Convention defines prohibited discrimination as any distinction based on race that has the "purpose or effect" of impairing the exercise of "human rights and fundamental freedoms."[153] By contrast, the Supreme Court has held that only purposeful racial discrimination triggers strict scrutiny under the Fourteenth Amendment's Equal Protection Clause.[154]

Another example is in the area of private action. Under the "state action" doctrine, constitutional protections against discrimination apply only where government officials are responsible for or implicated in the discrimination. The lack of state action is an absolute

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150. Professor Vázquez calls this the "requirement of equivalent treatment." Vázquez, *supra* note 13, at 611–13.

151. This assumes that the reason for non-implementation is not that the government is unable to fulfill the obligation because doing so would violate the Constitution. Mandamus obviously would not be appropriate to compel the government to take unconstitutional action.

152. *See, e.g.*, ICCPR, *supra* note 114, art. 2(2) ("Where not already provided for by existing [domestic law], each State Party . . . undertakes to take the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.").

153. Race Convention, *supra* note 141, art. 1(1). Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women employs a similar definition of discrimination against women. *See* Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 (defining prohibited discrimination as any distinction based on sex that has the "effect or purpose" of impairing the exercise of "human rights and fundamental freedoms"). The United States has signed, but not yet ratified, this convention. United Nations Treaty Collection, Convention on the Elimination of All Forms of Discrimination Against Women: Status, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Feb. 21, 2010).

154. Washington v. Davis, 426 U.S. 229, 239 (1976).

bar to constitutional relief.[155] Both the ICCPR and the Race Convention, however, require that the states parties take action to eliminate and remedy private discrimination by non-governmental actors.[156]

Thus, there is an "implementation gap" between the rights protected under existing United States law and the requirements of these treaties. One need not believe that these treaty rights are normatively "better" than domestic law. Rather, for purposes of this Article, the point is that the duty to make those rights domestically effective is one that the United States voluntarily assumed but fails to effectuate.[157]

Several principles are relevant in considering whether such unfulfilled implementation duties are amenable to mandamus enforcement. The first is that mandamus is only appropriate where the alleged duty is mandatory.[158] A law's textual use of the word "shall" has been consistently interpreted to imply a mandatory duty. In *Miguel v. McCarl*,[159] for example, the Court ordered the Chief of Finance to pay military retirement benefits to a man who had served over thirty years in the military.[160] The Comptroller General had argued that the petitioner did not qualify for retirement pay under the applicable stat-

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155. The Civil Rights Cases, 109 U.S. 3, 13 (1883). It is true that federal statutes, such as Title VII of the Civil Rights Act of 1964, often prohibit private discrimination. Such statutes, however, do not prohibit the full spectrum of the private discrimination envisioned under the ICCPR.

156. Race Convention, *supra* note 141, art. 2(1)(d) (requiring that states parties "shall prohibit and bring to an end . . . racial discrimination by *any* persons, group, or organization" (emphasis added)); *see also* ICCPR, *supra* note 114, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . ."). The U.N. Human Rights Committee (the body charged with enforcing and construing the ICCPR) has interpreted Article 2(1) of the ICCPR as requiring states parties to take action against private violations of ICCPR rights, at least in some circumstances. The Committee has stated the following:

> [T]he positive obligations on States Parties to ensure [ICCPR] rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. . . . The [ICCPR] itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities.

General Comment No. 31, *supra* note 94, ¶ 8.

157. *See General Comment No. 31*, *supra* note 94, ¶ 13 ("Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.").

158. *See supra* Part IV.B. The contention here is that the duty to implement treaty rights is mandatory, even if the particular means of implementation are left to the discretion of each state party.

159. 291 U.S. 442 (1934).

160. *Id.* at 456.

utes because sufficient funds had not been appropriated.[161] The Court found that the Comptroller's discretion did not extend to denying the pension because, *inter alia*, the relevant statute stated that when a person had served thirty years in the military, "'he *shall* . . . be placed upon the retired list'" and granted his pension.[162] The use of the mandatory phrase "shall" indicated that Congress intended that executive officials be required to follow the statutory command once the statutory predicates were met.[163]

The implementation duties contained in the human rights treaties that the United States has ratified are phrased as mandatory affirmative commands ("shall"), rather than discretionary suggestions ("may").[164] The constitutional parity of treaties and statutes under the Supremacy Clause suggests that mandatory language in a treaty should be construed to have similar domestic effect as mandatory lan-

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161. *Id.* at 450–51.

162. *Id.* at 449 (emphasis added) (quoting the statute at issue).

163. *Id.* at 454; *see also* Puerto Rico v. Branstad, 483 U.S. 219, 226–28 (1987) (construing the Constitution's Extradition Clause and the federal Extradition Act, both of which require that upon a proper extradition request, states "shall" arrest and deliver fugitives to the requesting state, as imposing a mandatory duty amenable to mandamus enforcement); Nyaga v. Ashcroft, 323 F.3d 906, 918 (11th Cir. 2003) (Barkett, J., dissenting) (arguing that mandamus relief was appropriate to compel immigration authorities to grant visas because, *inter alia*, "[t]hroughout [the relevant statute], Congress chose to employ authoritative language that affirmatively directs action" and "[t]he term 'shall' pervades [the relevant statute]").

164. *See supra* notes 140–49 and accompanying text (discussing the duties of implementation under the ICCPR and the Race Convention). It could be argued that some of these duties are discretionary because they do not say that the states parties "shall" do certain things, but rather that they "undertake" to do those things. *See, e.g.*, ICCPR, *supra* note 114, art. 2(1) (stating that "[e]ach State Party to the present Covenant *undertakes* to respect and to ensure [ICCPR rights]" (emphasis added)). The argument would be that agreeing to "undertake to" do something implies future discretionary action—namely, enacting implementing legislation—before the treaty's commands become domestic law. In *Medellín v. Texas*, the Court found Article 94(1) of the United Nations Charter to be non-self-executing because its text provides that "'[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party,'" rather than stating that members "shall" or "must" comply with such judgments. 128 S. Ct. 1346, 1358 (2008) (emphasis added by the Court) (alteration in original) (quoting U.N. Charter art. 94, para. 1). As Justice Breyer pointed out, however, this reading of "undertakes" is highly dubious. A more likely explanation is that the drafters of the United Nations Charter intended this language to "indicate a present obligation to execute, without any tentativeness of the sort the majority [in *Medellín*] finds in the English word 'undertakes.'" *Id.* at 1384 (Breyer, J., dissenting). Regardless, some of the treaty duties outlined in the text above do employ the word "shall," which the *Medellín* majority itself recognized as representing an immediately binding obligation. *See id.* at 1358 (majority opinion) (stating that Article 94(1) of the United Nations Charter is non-self-executing because it "does not provide that the United States 'shall' or 'must' comply with an ICJ decision").

guage in a federal statute, unless there is an indication to the contrary.[165]

Mandamus will nevertheless be inappropriate if the law's command, although phrased in a mandatory fashion, is too indeterminate or unclear to be enforced. Mandamus requires that the duty to be enforced is "clear and certain."[166] Some provisions, even if couched in mandatory terms, would not be appropriate for mandamus enforcement if there was lack of clarity as to what exactly the duty is to be enforced. For example, Article 55 of the United Nations Charter, a treaty to which the United States is a party, provides that the United Nations "shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[167] Article 56 states that "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[168] When read together, these two provisions make clear that United Nations member states must take action to promote human rights and fundamental freedoms. Yet the indefiniteness of what is pledged would defy mandamus enforcement because there would be no touchstone by which to determine whether the duty had been fulfilled. In assessing whether a state party had satisfied its Articles 55 and 56 duties, a court would first have to discern, among other matters, what it means to "promote" human rights, and indeed, which "human rights and fundamental freedoms" member states have pledged to work together to promote.[169]

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165. Authoritative interpretations of these treaties reinforce the textual indications that these duties were intended to be mandatory. *See, e.g.*, Office of U.N. High Comm'r for Human Rights, Comm. on Elimination of Racial Discrimination, *General Recommendation No. 15: Organized Violence Based on Ethnic Origin (Art. 4)*, ¶ 2, U.N. Doc. A/48/18 (Mar. 23, 1993) (stating that "the provisions of article 4 [of the Race Convention] are of a mandatory character"); *General Comment No. 31*, *supra* note 94, ¶ 5 ("The article 2, paragraph 1, obligation to respect and ensure the rights recognized by the Covenant has immediate effect for all States parties."); *id.* ¶ 14 ("The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect.").

166. Guerrero v. Clinton, 157 F.3d 1190, 1197 (9th Cir. 1998).

167. U.N. Charter art. 55.

168. *Id.* art. 56.

169. In *Sei Fujii v. State*, the Supreme Court of California held that these provisions of the Charter could not be considered self-executing because they "lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification." 242 P.2d 617, 621–22 (Cal. 1952) (en banc). As with many court opinions on the subject of non-self-execution, the *Sei Fujii* opinion is unclear as to whether it believed that the Charter was non-self-executing in the sense of not being domestic law at all or not providing a private cause of action. *See id.*

By contrast, there is nothing indeterminate or unclear about, for example, the duty under the Race Convention "to review . . . and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination."[170] Fulfillment or non-fulfillment of this duty can be assessed by reference to concrete and determinate standards: (1) has the state party undertaken the required review of its laws and policies; and (2) if so, has it eliminated those that have the purpose or effect of creating or perpetuating discrimination? Similarly, under Article 2(2) of the ICCPR, the questions would be the following: (1) are there rights under the ICCPR that are not adequately protected by existing domestic law; and (2) if so, has the state party taken "the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures"[171] to give effect to those rights? For purposes of mandamus, such duties need not be further construed; they are clear and understandable on their face.[172]

While courts may therefore compel treaty implementation when a treaty so requires, they cannot compel the political branches to adopt a particular means of implementation. This is so for two separate reasons, one international and one domestic. First, as a matter of international law, most human rights treaties do not require that the rights they guarantee be implemented in a specific manner.[173] Second, under mandamus jurisprudence, courts may order government officials to exercise their discretion when the law so requires, but they cannot order that the discretion be exercised to reach a particular result.[174] Accordingly, a judicial order that government officials must implement a treaty should leave the means of implementation to the good faith discretion of the relevant officials. Possible means of im-

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170. Race Convention, *supra* note 141, art. 2(1)(c).

171. ICCPR, *supra* note 114, art. 2(2).

172. *Cf.* Miguel v. McCarl, 291 U.S. 442, 453 (1934) ("Statutory provisions so clear and precise do not require construction. In such case, as this court has often held, the language is conclusive. There can be no construction where there is nothing to construe." (citations and internal quotation marks omitted)).

173. *See, e.g.*, ICCPR, *supra* note 114, art. 2(2) ("[E]ach State Party . . . undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."). Some treaties do in fact require that specific means of implementation be adopted. For example, the Genocide Convention specifically requires that the states parties adopt domestic laws criminalizing acts of genocide. *See* Genocide Convention, *supra* note 141, art. V ("The Contracting Parties undertake to enact . . . necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide . . . ."). A requirement that Congress adopt particular laws could not be enforceable by mandamus, however. *See supra* Part IV.B.

174. *See supra* Part IV.B.

plementation could include the following Executive Branch actions: (1) reviewing existing domestic law to identify any "implementation gaps" and recommending legislation to Congress that would fill such gaps; (2) requiring federal law enforcement agencies to establish complaint procedures to allow individuals to assert treaty violations; (3) investigating and pursuing alleged violations of treaty rights; (4) ordering relevant administrative agencies to pass federal regulations to implement treaty rights as to persons or matters within the scope of their regulatory power;[175] and (5) issuing executive orders or other policymaking requiring that federal agencies apply treaty rights in actions that come before them.[176]

As noted in the Introduction, this Article purposefully leaves open many procedural questions that would be raised by such a mandamus action. A few preliminary principles are worth noting, however. First, international human rights treaties address their rights and protections to individuals.[177] When the United States fails to comply with its duty to implement treaty rights, that duty is therefore breached with regard to individuals and other states parties. The Supremacy Clause assimilates that duty of implementation into domestic law. Accordingly, a private individual should be able to bring a mandamus claim alleging the government's breach of the mandatory duty owed to the plaintiff.[178]

Second, regardless of whether a court can issue mandamus to the person of the President himself,[179] it is clear as a matter of international and domestic law that the primary duty to secure domestic compliance with international law lies with the Executive Branch. It is also clear that mandamus will issue to those Executive Branch officials be-

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175. *Cf.* Medellín v. Texas, 128 S. Ct. 1346, 1356 (2008) (noting that Congress, as part of the implementation of the Torture Convention, directed the appropriate federal agencies to "prescribe regulations to implement the obligations of the United States under Article 3" of the Convention (citation and internal quotation marks omitted)).

176. *Cf.* Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287 (2008) (similarly suggesting the incorporation of international human rights norms into administrative agency actions in the immigration context).

177. *See supra* notes 92–95 and accompanying text (observing that individuals are the rights-holders under international human rights treaties).

178. Additionally, principles of Article III standing would need to be assessed to determine, among other matters, whether the plaintiff has suffered an "injury in fact." *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining the three constitutional requirements for standing, including "injury in fact").

179. *See supra* note 106 and accompanying text.

low the President charged with the duty forming the basis of the mandamus action.[180]

V. THE EFFECT OF DECLARATIONS OF NON-SELF-EXECUTION ON THE DUTY TO IMPLEMENT HUMAN RIGHTS TREATIES

The analysis to this point has sought to establish the proposition that when the federal government creates supreme domestic law in the form of a treaty, it must comply with that law domestically. Accordingly, if the United States ratifies a treaty containing a duty of domestic implementation, yet fails to implement the treaty, this Article contends that compliance with that duty can be secured through the mechanism of mandamus. The question remains as to how the United States can obviate that duty if it so chooses.

There are several unquestionably constitutional methods by which the United States can modify the domestic legal effect of its international obligations. The first would be simply to refuse to ratify the treaty. Another option would be to negotiate treaty language explicitly stating that the treaty will not have domestic effect as to any of the member states unless implementing legislation is adopted. While this option raises no constitutional concerns, it may be impracticable in the context of multilateral treaties. Different legal systems have different legal rules regarding the domestic effect of treaties. Accordingly, it would often be impracticable to formulate a general textual rule as to a treaty's domestic effect in all member states, even if the United States could secure the other parties' agreement to such a general rule.[181]

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180. *See, e.g.*, Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 232 (1986) (finding that the Secretary of Commerce had a mandatory duty to exercise discretion); Miguel v. McCarl, 291 U.S. 442, 452, 455 (1934) (explaining that a court could issue relief in the nature of mandamus to the Comptroller General and the Chief of Finance); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 149–50 (1803) ("[The Secretary of State] is compellable to do his duty, and if he refuses . . . a specific civil remedy to the injured party can only be obtained by a writ of mandamus."); Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1273–74 (D.C. Cir. 2008) (issuing relief in the nature of mandamus against the Secretary of the Treasury).

181. *See, e.g.*, Vázquez, *supra* note 13, at 668 (explaining that multilateral treaties may involve countries that have very different rules regarding the domestic legal status of international agreements and that an attempt to formulate a general principle of domestic enforceability might run afoul of those rules); *cf.* Medellín v. Texas, 128 S. Ct. 1346, 1381 (2008) (Breyer, J., dissenting) (noting the difficulties in searching for textual evidence of the states parties' intent regarding domestic implementation because "whether further legislative action is required before a treaty provision takes domestic effect in a signatory nation is often a matter of how that Nation's domestic law regards the provision's legal status").

The United States could also ratify a treaty and then separately pass a federal statute clearly stating that the treaty shall have no domestic legal effect unless and until implementing legislation is adopted. While treaties and federal statutes enjoy constitutional parity under the Supremacy Clause, the "last-in-time" rule means that a later federal statute that directly conflicts with an earlier treaty supersedes that treaty for domestic purposes.[182] Congress could also take a more nuanced approach. Through the combination of legislation stripping the federal courts of jurisdiction to hear cases arising under the treaty and legislation preempting state court consideration of such cases, Congress could maintain the treaty's status as supreme domestic law, but commit the enforcement of the treaty solely to the political branches.

This Article does not suggest that any of these options for limiting the domestic effect of ratified treaties is necessarily wise or that this list is exhaustive. Rather, these illustrations are provided to point out that although the Supremacy Clause makes ratified treaties part of our domestic law upon ratification, there are a variety of ways in which the political branches can limit or eliminate a treaty's domestic enforceability. Rather than pursuing such avenues, however, the current practice is as follows: (1) the United States ratifies an international human rights treaty that contains both rights-creating provisions and a duty to respect and ensure those rights domestically; (2) the United States submits a "declaration of non-self-execution" upon ratifying the treaty; and (3) relying upon such a declaration, the political branches and the judiciary hold that the treaty is no longer domestic law. The dubious constitutionality of this course of action is discussed below. An examination of declarations of non-self-execution reveals that many of them should be construed only as eliminating one avenue of relief for the treaty's violation—namely, a private cause of action to enforce the treaty's substantive guarantees. To the extent that a declaration of non-self-execution truly seeks to eliminate any domestic legal effect of a treaty containing a duty of domestic implementation, it is of dubious legality both as a matter of international and domestic law. This Article concludes, however, that such a declaration[183] can, in limited circumstances, obviate the duty of domestic implementation

182. *See* The Head Money Cases, 112 U.S. 580, 597 (1884) (ruling that a later-in-time statute prevails over any previously enacted inconsistent treaty provision).

183. A "declaration" that purports to modify a state party's legal obligations under a treaty is more properly analyzed as a reservation rather than a declaration. *See infra* note 207 and accompanying text.

where it can be considered part of the treaty that the United States has ratified.

A. *The Treaty-Making Process and Declarations of Non-Self-Execution*

The Constitution's Treaty Clause gives the President the power to make treaties as long as he obtains the Senate's "Advice and Consent."[184] The Senate often attaches conditions to its consent in the form of reservations, understandings, or declarations ("RUDs").[185] The President may then ratify the treaty, subject to the Senate's conditions, or reject those conditions, in which case the treaty cannot be ratified.

One common RUD the Senate has imposed with regard to international human rights treaties is a declaration of non-self-execution ("NSE declaration"). Contrary to the common misunderstanding of many courts and commentators, such a declaration does not automatically render the treaty a domestic nullity. Rather, the presumed effect of such a declaration should be the same as a finding of non-self-execution in a treaty without such a declaration. An NSE declaration is a statement by the Senate that the treaty itself shall not provide a private cause of action.[186] Where an individual relies upon some other source of law to provide his cause of action, whether it be the mandamus action suggested in this Article or another cause of action, it does not run afoul of an NSE declaration.

The United States' RUDs to the ICCPR clearly demonstrate the difference between a declaration of non-self-execution providing that the treaty itself shall not create a cause of action and a reservation purporting to provide that the treaty, despite the Supremacy Clause, is not domestic law. In providing its consent to ratification of the ICCPR, the Senate entered a declaration stating that "[t]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."[187] The Senate Committee on Foreign Relations explained the purpose of the declaration as follows: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. *The in-*

184. U.S. CONST. art. II, § 2, cl. 2.

185. Catherine H. Gibson, *Frankfurter's Gloss Theory, Separation of Powers, and Foreign Investment*, 36 N. KY. L. REV. 103, 119 (2009) ("Rather than ratifying treaties exactly as submitted by the President, the Senate now issues its consent subject to ex-post conditions, called reservations, understandings, or declarations (collectively RUDs).").

186. *See Sloss*, *supra* note 5, at 152 (noting that one aspect of "[t]he statement that a treaty is not self-executing" is that the treaty "does not create a private cause of action").

187. 138 CONG. REC. 8071 (1992).

tent is to clarify that the Covenant will not create a private cause of action in U.S. courts."[188] The Committee did not state that the declaration meant that the ICCPR would lack the force of domestic law. The Committee did not even purport to limit the treaty's use in private lawsuits. The stated purpose was only to clarify that the treaty itself would not *create* a private cause of action.

To be sure, it is possible that the Senate could intend an NSE declaration to mean that a treaty will not, despite the Supremacy Clause, become domestic law until further action by the full Congress and the President.[189] With regard to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"),[190] for example, the evidence is mixed. In explaining the purpose of the NSE declaration for the Torture Convention, the Senate Committee on Foreign Relations stated that it intended "to clarify that the provisions of the Convention would not of themselves become effective as domestic law."[191] The Committee later stated, however, that it intended its NSE declaration to the ICCPR to have the same effect as its earlier NSE declaration to the Torture Convention—to wit, that neither treaty would create a private cause of action.[192]

Even if there is ambiguity concerning the Senate's intent regarding a particular NSE declaration, three principles of statutory construction counsel against construing such declarations as meaning that the treaty shall not be effective as domestic law upon ratification. The first is the principle that Congress is presumed to legislate against the background of the common law with knowledge of the common-

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188. S. EXEC. REP. NO. 102-23, at 19 (1992) (emphasis added).

189. Where that is the case, an NSE declaration is more properly analyzed as a reservation for Supremacy Clause purposes. *See infra* Part V.B. With regard to the ICCPR, however, even if what the Senate meant was that the ICCPR would not become domestic law until implementing legislation was enacted, that is not what the declaration says. Additionally, the quoted portion of the Senate Report makes clear that what the Senate indeed meant was that the ICCPR would not create a private cause of action.

190. Torture Convention, *supra* note 141.

191. S. EXEC. REP. NO. 101-30, at 12 (1990).

192. The Committee stated the following:

> The intent [of the NSE declaration] is to clarify that the Covenant [ICCPR] will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated. We recommend the following declaration, virtually identical to . . . the one adopted by the Senate with respect to the Torture Convention.

S. EXEC. REP. NO. 102-23, at 19.

law terms it uses.[193] A declaration that certain provisions of a treaty "are not self-executing" should be read against the common-law background beginning with *Foster*, under which a non-self-executing treaty remains domestic law but does not itself create a private cause of action.[194]

The second interpretive principle, commonly known as the *Charming Betsy* canon, is that ambiguous federal statutes should be construed so as not to violate international law.[195] Reading an NSE declaration as providing that a treaty shall have no domestic legal effect would put the United States in breach of the treaty if it contains a duty of domestic implementation. Reading an NSE declaration in such a manner would also violate principles of international law regarding treaty interpretation. Under the Vienna Convention on the Law of Treaties ("Vienna Convention"),[196] which the United States regards as authoritative,[197] treaty parties obligate themselves to perform the treaty's obligations in good faith and may not invoke domes-

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193. *See, e.g.*, Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991). The Court observed the following:

> Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.

Id. (citations and internal quotation marks omitted).

194. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). There is a reasonable argument that the relevant "common-law background" here is the widely held, but incorrect, view among lower courts that "non-self-executing" means "not domestic law." *See supra* Part II.B. In other words, perhaps the Senate intends to incorporate this mistaken common-law interpretation when it declares a treaty to be non-self-executing. The canon assumes, however, that Congress understands the common law correctly.

195. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (noting the observation that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). An NSE declaration is not, of course, an "act of Congress." Nevertheless, the *Charming Betsy* canon is relevant. The reasons for the canon seem equally applicable whether construing the intent of the full Congress with regard to a statute or that of the Senate with regard to a declaration. In either case, the primary concern is avoiding the inadvertent placement of the United States in breach of its international legal obligations. *See, e.g.*, MacLeod v. United States, 229 U.S. 416, 434 (1913) (observing that "it should not be assumed that Congress proposed to violate the obligations of this country to other nations"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. a (1987) (explaining that "[i]t is generally assumed that Congress does not intend to repudiate an international obligation of the United States").

196. May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

197. Although the United States is not a party to the Vienna Convention, the political branches, the courts, and the American Law Institute have all recognized that the Vienna Convention provides authoritative principles of treaty interpretation. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 286–87 (1988).

tic law as a justification for failure to perform the treaty.[198] This conflict with international law can be avoided if NSE declarations are read as stating only that the treaty does not create a private cause of action, since human rights treaties may be silent as to what method of domestic implementation is appropriate in each country.

The third interpretive principle is the canon of constitutional avoidance. This canon of construction "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[199] An NSE declaration, unlike a reservation to a treaty,[200] is not "part of" the treaty.[201] It is instead a unilateral statement that purports to control domestic implementation of the international obligation.[202] If an NSE declaration is interpreted to mean that a ratified treaty is not part of the law of the United States for any purpose, the declaration conflicts with the Supremacy Clause, which makes ratified treaties part of the supreme

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198. Vienna Convention, *supra* note 196, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); *id.* art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). While Article 27 states that it is without prejudice to Article 46, *id.*, Article 46 only provides that a state party's domestic law may be invoked under limited circumstances to invalidate its consent to a treaty where the treaty-making process was not conducted in accordance with domestic law, *id.* art. 46(1). Article 46 is not at issue here because the issue is failure to perform the treaty to which the United States validly consented, rather than the validity of its consent to the treaty.

199. Clark v. Martinez, 543 U.S. 371, 381 (2005); *see also* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (2009) ("'[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" (quoting Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam))).

200. A reservation to a treaty modifies a state party's legal obligation under the treaty. Vienna Convention, *supra* note 196, art. 2(1)(d). If accepted by the other states parties and if valid as a matter of international law, the reservation modifying the treaty becomes part of the treaty as to the member state that has entered it. *Id.* arts. 19–23. A true reservation stating that the treaty will have no domestic legal effect would not raise the Supremacy Clause conflict discussed here because the Supremacy Clause would incorporate the treaty as modified by the reservation into domestic law.

201. Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DEN. J. INT'L L. & POL'Y 533, 564 (1998) (explaining that a "'declaration' may not be a part of the treaty at all, and, thus, would not be part of U.S. law under the Supremacy Clause," while "'[u]nderstandings' and 'declarations' . . . are unilateral statements by a State concerning its interpretation of a treaty provision and do not modify the State's international obligations").

202. Vázquez, *supra* note 13, at 677–78. Although a declaration may functionally be a reservation in certain circumstances, the United States' NSE declarations have not been entered as part of the treaty-making process and therefore cannot function as reservations. *See infra* Part V.B.

law of the land.[203] Several scholars have suggested that NSE declarations may well be unconstitutional because of this conflict.[204] While this author tends to agree with that view, the canon of constitutional avoidance would suggest that judges should not construe NSE declarations to raise this constitutional conflict if another construction is reasonably available.[205] Construing NSE declarations to mean only that the treaty shall not create a domestic cause of action avoids the Supremacy Clause conflict because the Supremacy Clause does not necessarily require that "the supreme Law of the Land" provide a private cause of action.[206] The Clause does, however, require ratified treaties to be treated as domestic law.

B. NSE Declarations as Reservations to the Duty of Domestic Treaty Implementation

The discussion above demonstrates that courts should neither assume that NSE declarations are intended to deny ratified treaties domestic legal status nor that such declarations obviate the duty of domestic implementation. When the United States enters a reservation to that effect, however, or when an NSE declaration can be fairly

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203. Where the United States has modified the treaty to deny it any domestic legal status (regardless of whether the modification is denominated as a reservation or a declaration), such a modification is "part of" the treaty as to the United States. *See supra* note 200. Part V.B will consider the effect that such a modification would have on the mandamus analysis presented in this Article.

204. *See, e.g.*, Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 349–50 (1995) ("Lawyers in the United States should take arms against the anticonstitutional practice of declaring human rights conventions non-self-executing."). It has also been suggested that NSE declarations may be unconstitutional for other reasons:

> While the Constitution granted the Senate the power to withhold consent to a treaty, it "does not contemplate a power in the Senate to impose terms not contained in the treaty as negotiated by the President. The Senate enjoys a veto power, not a power of revision." Moreover, because [a] non-self-executing declaration concerns the domestic effect of a treaty, it may be, in effect, domestic legislation without the [constitutionally required] participation of the House of Representatives.

Rosati, *supra* note 201, at 565–66 (footnote call number omitted) (quoting John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1233–34 (1996)); *see also* U.S. CONST. art. I, § 7, cl. 2 (stating that "[e]very Bill [must] pass[ ] the House of Representatives and the Senate . . . before it become[s] a Law").

205. *See supra* note 199 and accompanying text.

206. U.S. CONST. art. VI, cl. 2. Indeed, as Professor Vázquez points out, direct judicial enforcement in the sense of a private cause of action is not even necessarily required as a matter of international law. Vázquez, *supra* note 13, at 679 n.357 ("'Article 2 . . . does not require that the [ICCPR] be directly applicable in the courts . . . .'" (alteration in original) (quoting *General Comment No. 31*, *supra* note 94, ¶ 13)).

read as such a reservation,[207] a different result follows. If the United States enters an explicit or functional reservation denying a treaty any domestic legal status until implementing legislation is enacted, such a reservation, if valid under international law, can obviate the duty of domestic implementation. The conflict with the Supremacy Clause can only be avoided, however, when the reservation is part of the treaty; that is, when it modifies the supreme domestic law that the United States has created upon the treaty's ratification.

A reservation modifies a state party's legal obligation under the treaty.[208] The United States can enter reservations to treaties, including a reservation that the treaty shall not become domestically effective until implementing legislation is adopted.[209] In order for such a reservation to nullify the treaty's domestic legal status, however, two conditions would have to exist, with the second condition flowing from the first.

The first condition is that the reservation would have to become, under principles of international law, part of the treaty as to the United States. A full discussion of the international legal principles governing validity of reservations is beyond the scope of this Article. It is sufficient to note that a reservation will be considered valid under international law where the following circumstances exist: (1) the reservation in question is not barred by the treaty itself; (2) the reservation is not incompatible with the object and purpose of the treaty; and (3) the other states parties have accepted (or at least not objected to) the reservation.[210] While this author has grave doubts that a reservation stating that the United States will take no action to implement a human rights treaty could be consistent with the object and purpose of such a treaty,[211] it will be assumed for present purposes that a valid

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207. What the provision is called is not determinative. Rather, the intended effect of the provision determines whether it is a declaration or reservation. *See* Vienna Convention, *supra* note 196, art. 2(1)(d) (defining a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State").

208. *Id.*

209. Such a reservation may be a perfectly legitimate effort to meet our international legal obligations in a way that comports with our domestic law. *See, e.g.*, Genocide Convention, *supra* note 141, art. V (requiring that states parties "enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention" and to make genocide a domestic crime). Because conduct can be criminalized only by statute in our legal system, separate legislation is required before this treaty obligation can be given any domestic effect.

210. Vienna Convention, *supra* note 196, arts. 19–20.

211. *See* U.N. Human Rights Comm., *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in*

reservation to such effect could be crafted and accepted by the other states parties. If such a reservation becomes part of the treaty as to the United States, the second condition follows—the treaty becomes domestic law upon ratification, but with the modification. In short, what would be assimilated into domestic law under the Supremacy Clause is not a treaty containing a duty of domestic implementation, but a treaty without such a duty.

An example may prove useful. When the United States ratifies a treaty containing a duty of domestic implementation, that duty becomes domestic law. It is the same as if Congress had enacted a federal statute requiring the government to undertake action to implement the statute. For example, Title VI of the Civil Rights Act of 1964[212] contains a substantive prohibition of racial discrimination by recipients of federal funds.[213] Title VI also provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of [Title VI] . . . by issuing rules, regulations, or orders" necessary to achieve the statutory objectives.[214] This federal law therefore creates a legal duty of implementation by requiring the issuance of rules, regulations, or orders by the appropriate federal agencies.

By contrast, when a treaty is ratified with a valid reservation providing that the treaty shall have no domestic legal effect until further legislative action, the treaty no longer imposes any duty of implementation. It would be as if Title VI, instead of stating a substantive rule and then requiring implementation of that rule, stated the substantive rule and then stated that "this statute shall not be effective as federal law until so made by a federal statute to be enacted later." While Title VI with this hypothetical provision would still be law, it is fairly well accepted that the courts cannot order the legislature to legislate.[215]

Relation to Declarations Under Article 41 of the Covenant, ¶ 9, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) (explaining that a state party may not validly "reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant" because such a reservation would be incompatible with the object and purpose of Article 2 of the ICCPR).

212. 42 U.S.C. §§ 2000d–2000d-7 (2006).

213. *Id.* § 2000d.

214. *Id.* § 2000d-1.

215. *See, e.g.*, Liberation News Serv. v. Eastland, 426 F.2d 1379, 1383–84 (2d Cir. 1970) (stating that the legislative history of the federal mandamus statute demonstrates that "Congress was thinking solely in terms of the executive branch" when it enacted the statute). That does not mean, however, that legislative action or inaction is automatically immune from judicial review. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 187–88, 237 (1962)

Accordingly, the decision of whether to implement the law would functionally rest solely with the political branches.[216]

VI. CONCLUSION

The United States has voluntarily chosen to ratify international human rights treaties. Having done so, the Supremacy Clause makes such treaties part of the supreme law of the land. Whether ratifying such treaties is wise or whether the rights contained in a specific treaty are desirable are subjects of legitimate debate. That debate ends, however, once the treaty is ratified. Under our Constitution, once the choice is made to create supreme domestic law, the political branches cannot choose to ignore that law.

The non-self-executing treaty doctrine has been stretched far beyond its proper application and original meaning to provide support for a theory under which treaties have no domestic legal force, despite the clear textual command of the Supremacy Clause. Implying the power of our government to disregard the duty to implement ratified treaties when they require such implementation undermines the goals of the international human rights system. Equally important, it undermines the rule of law and principles of constitutionalism requiring our government to be bound by the laws it creates. The government undoubtedly has a variety of legitimate means at its disposal to modify its international legal obligations or to deprive them of domestic applicability. Ignoring the Constitution is not one of them.

(holding that an equal protection claim that the state legislature failed to reapportion voting districts based on population changes presented a justiciable cause of action).

216. It should be noted that the principles articulated here are consistent with the premise of this Article regarding the availability of mandamus to enforce the duty to implement non-self-executing treaties domestically. When the United States ratifies a treaty, the Supremacy Clause makes the treaty domestic law. *See* U.S. CONST. art. VI, cl. 2. Where the treaty contains a duty of implementation, then regardless of whether it is self-executing in the sense of creating a private cause of action, it must be implemented. This duty, as supreme federal law, may be enforced by mandamus. In other words, what has become domestic law is the treaty, and that treaty contains a duty of implementation that cannot be ignored by the political branches. By contrast, the proposition in this Part of the Article is that the United States can, through an appropriate reservation, *change* the treaty to obviate any duty of domestic implementation. Because the treaty no longer says that it must be domestically implemented, such implementation could not be compelled.