

*BOND*, THE TREATY POWER, AND THE  
OVERLOOKED VALUE OF NON-  
SELF-EXECUTING TREATIES

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INTRODUCTION

The Supreme Court's decision in *Bond v. United States*<sup>1</sup> sidestepped potentially momentous questions of constitutional law regarding the treaty power and federalism under the U.S. Constitution. By adopting a narrow interpretation of a federal statute implementing the Chemical Weapons Convention,<sup>2</sup> the Court refused to reach the petitioner's claim that the statute exceeded the federal government's powers over the states.

Most commentators have rightly focused on the fundamental constitutional questions presented (and avoided) by the Court's decision. This contribution focuses on a different aspect of the case. The treaty at issue in the *Bond* case, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction<sup>3</sup> (commonly known as the Chemical Weapons Convention or CWC), was not directly applicable within the U.S. domestic legal system. Rather, the CWC is "non-self-executing," which means that its domestic legal effect requires a separate act of Congress. Congress did so by enacting the Chemical Weapons Convention Implementation Act of 1998 (CWCIA).<sup>4</sup> It was one of the provisions of the CWCIA that was used to prosecute Carol Bond. For this

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1 *Bond v. United States*, 134 S. Ct. 2077 (2014).

2 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997) [hereinafter CWC].

3 *Id.*

4 Pub. L. No. 105-277, 112 Stat. 2681 (codified at 18 U.S.C. §§ 229–229F (2012); 22 U.S.C. §§ 6701–6771).

reason, Bond's constitutional challenges to her conviction were largely aimed at the power of Congress to implement a treaty rather than at the constitutional force of the treaty itself. This made the *Bond* case the first Supreme Court decision in decades to consider the constitutional nature and scope of what has become an increasingly vital mechanism for international agreement making: the non-self-executing treaty.

Non-self-executing treaties like the CWC are common today, but they have often been subject to criticism from academic commentators. The criticism usually falls along two lines. First, numerous commentators have argued that too many treaties are interpreted to be non-self-executing, when in fact the Constitution's text, structure, and history suggests that most U.S. treaties should be interpreted to be self-executing.<sup>5</sup> Second, scholars have attacked the constitutionality of the U.S. government's practice of declaring treaties to be non-self-executing via statements attached to Senate resolutions of advice and consent.<sup>6</sup>

Underlying both of these critiques of non-self-execution is a concern about the way in which non-self-executing treaties weaken U.S. compliance with its international obligations. In the context of human rights treaties, the non-self-execution doctrine has been cast as an obstacle to effective compliance with U.S. international obligations.

We take a different view. In past work, we have explained that non-self-executing treaties are both constitutionally legitimate and also offer many advantages to those seeking to accommodate robust international commitments with the requirements of the U.S. constitutional system.<sup>7</sup> In this paper, we go farther and argue that non-self-executing treaties could also benefit (rather than undermine) international cooperation by the United States.

International relations scholars have noted that the lack of a credible enforcement mechanism is an obstacle to successful international cooperation through agreements. In an anarchic international system, states will often demand credible commitments from their treaty partners as a price of cooperation. Seen in this light, non-self-execution makes the U.S. commitment to the treaty even more credible than if it had merely ratified the treaty via the Senate. Whereas courts have allowed treaties to be terminated by the President without the approval of the Senate, the President cannot unilaterally terminate a statute implementing a treaty obligation. Non-self-executing treaties thus represent a meaningfully deeper commitment to an international obligation than a standard self-executing U.S. treaty. This could (and

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5 See *infra* notes 45–52 and accompanying text.

6 See, e.g., Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI-KENT L. REV. 515 (1991) (examining the "pattern in treaty actions of the U.S. Senate which tends to weaken the domestic legal effect of treaties").

7 See generally JULIAN KU & JOHN YOO, *TAMING GLOBALIZATION* (2012) (identifying non-self-executing treaties as a tool for avoiding constitutional obstacles to benefit from globalization).

in the case of the CWC, does) enhance prospects for international cooperation. This value in non-self-executing treaties is too often overlooked in critical commentary about non-self-execution.

This Article proceeds as follows. First, it discusses the *Bond* case and how the treaty at issue in *Bond* illustrates the practical importance of non-self-executing treaties in U.S. practice. It elaborates on this point in Part II by arguing that the CWC is the classic example of an important international treaty that could not have been properly implemented without separate legislation. Next, it offers a discussion of the academic criticism of non-self-execution as tending to undermine the United States' ability to comply with international obligations. It then responds to this criticism by exploring the ways in which non-self-executing treaties like the CWC can provide a level of credible commitment that facilitates international cooperation far more than is appreciated by many legal academic commentators.

### I. *BOND*, THE CHEMICAL WEAPONS CONVENTION, AND NON-SELF-EXECUTION

In 2006 and 2007, a Pennsylvania woman named Carol Bond attempted to assault her best friend, who was also her husband's lover and pregnant with his child, by spreading chemical poisons on her rival's mailbox and around her rival's home.<sup>8</sup> Although the case would normally have been subjected to state criminal law, federal prosecutors invoked the CWCIA to prosecute and eventually to convict Bond of possessing and using a chemical weapon.<sup>9</sup>

Bond brought a number of challenges to her conviction, including a challenge to the CWCIA's applicability to her conduct,<sup>10</sup> and a challenge to the CWCIA's constitutionality as exceeding Congress's powers under Article I of the Constitution.<sup>11</sup> Both of her challenges were rejected by lower courts,<sup>12</sup> but she won a different result from the Supreme Court.<sup>13</sup>

In his decision for the Court, Chief Justice Roberts held that Bond's charges under the CWCIA should be dismissed.<sup>14</sup> Moreover, five Justices agreed with him that the CWCIA provision used to prosecute Bond should not be interpreted to reach Bond's conduct.<sup>15</sup> Specifically, the majority opinion found that Bond's use of an arsenic-based chemical compound does not qualify as a "chemical weapon" as that term is used in the CWCIA.<sup>16</sup> While the chemical compound Bond used might qualify as a "toxic chemical"

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8 *Bond v. United States*, 134 S. Ct. 2077, 2085 (2014).

9 *See id.* ("[T]hey also charged her with two counts of possessing and using a chemical weapon, in violation of section 229(a).").

10 *Id.*

11 *Id.* at 2085–86.

12 *Id.* at 2086.

13 *Id.* at 2083.

14 *Id.*

15 *Id.* at 2082.

16 *Id.* at 2085.

subject to the statute,<sup>17</sup> the Court held that Bond's crime could not qualify as the use of a "chemical weapon."<sup>18</sup> The ordinary meaning of "using a chemical weapon" did not fit a situation where Bond used a common chemical substance for personal revenge.<sup>19</sup> This reading was buttressed by the Court's desire to avoid interpretations of the statute that would create constitutional conflicts. In this case, the Court cited the background principle of federalism and the need to maintain the balance between state and federal authorities in criminal law enforcement.<sup>20</sup>

The Court's reasoning did not draw unanimous support. Three Justices (Alito, Scalia, and Thomas) disagreed with the Court's reading of the CWCIA as not reaching Bond's conduct.<sup>21</sup> All three would have held that Bond's charges should nonetheless be dismissed because the CWCIA as applied to Bond exceeded Congress's enumerated powers under the Constitution.<sup>22</sup>

Justice Scalia (joined by Justice Thomas) would have held that Congress's power to implement a treaty like the CWC is limited to its powers under Article I, Section 8.<sup>23</sup> Importantly, he wrote that Congress's "necessary and proper" power allows legislation to assist in the making of treaties, but not in the implementation of treaty obligations.<sup>24</sup> Because Congress would not otherwise have the power to criminalize Bond's conduct, he would have held the statutory provision of the CWCIA unconstitutional. Under Justice Scalia's reasoning, the CWCIA statute would have been unconstitutional even if the CWC's regulation of the subject matter was otherwise constitutional.<sup>25</sup> This result, according to Justice Scalia, still imposed important checks on the federal government's power to legislate over the states.<sup>26</sup> While the federal government could negotiate a self-executing treaty to comprehensively regulate an area of domestic law, such a treaty would need to acquire a supermajority of the Senate, agreement by a foreign nation, and could not be subsequently altered by normal legislation. But legislation implementing a non-self-executing treaty that broadly regulates an area of domestic law would allow "Congress to gain lasting and flexible control over the [domestic area of] law."<sup>27</sup> Importantly, Justice Scalia did not question the propriety or constitutionality of treating the CWC as a non-self-executing treaty.

Justice Thomas added an opinion (joined by Justice Scalia in full and Justice Alito as to Parts I, II, and III) offering an originalist analysis of the

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17 *Id.* at 2088.

18 *Id.* at 2091.

19 *Id.* at 2090–91.

20 *See id.* at 2088–90 ("We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States.").

21 *Id.* at 2094 (Scalia, J., concurring in the judgment).

22 *Id.*; *id.* at 2102–03 (Thomas, J., concurring in the judgment).

23 *Id.* at 2098 (Scalia, J., concurring in the judgment).

24 *Id.* at 2098–99.

25 *Id.* at 2099.

26 *Id.*

27 *Id.* at 2102.

scope of the treaty power. He argued that the treaty power itself (and not just implementing legislation) is subject to constitutional limitations arising out of federalism.<sup>28</sup>

Much of the analysis in the Scalia and Thomas opinions was responding to the landmark 1920 Supreme Court decision in *Missouri v. Holland*,<sup>29</sup> which upheld a treaty with Canada that banned the killing of migratory birds. “It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could,”<sup>30</sup> Justice Oliver Wendell Holmes wrote for the Court in *Missouri v. Holland*.<sup>31</sup> All three concurring justices in *Bond* would have limited the effect of that opinion’s discussion of the scope of the treaty power to dicta, or even overruled it.<sup>32</sup>

As Justice Thomas argued, it is likely that the Founders’ original understanding supports a federalism limitation on the treaty power itself.<sup>33</sup> While the Founders established a treaty power to unify foreign policy in Washington, they did not wish to expand federal power beyond the limitations on Congress imposed by the Constitution. Early peace treaties with the British came close to encroaching on state powers by preserving pre-Revolutionary War debts,<sup>34</sup> but the federal government has rarely relied on treaties for domestic regulation.<sup>35</sup> Indeed, the drafters of the Constitution created a sweeping “necessary and proper” clause to vest in Congress all of the powers it would need to carry out its constitutionally delegated powers, and thus avoid exploiting innocent clauses to carry out treaties.<sup>36</sup> Although Justice Thomas’s originalist analysis of the scope of the Treaty Clause has great force, a majority of the Court decided not to face the issue he raised in the *Bond* decision.

Thus, although the *Bond* Court ended up avoiding a direct confrontation between the treaty power and the Constitution’s commitment to federalism, at least three Justices were willing to support such constitutional

28 *Id.* at 2013 (Thomas, J., concurring in the judgment).

29 252 U.S. 416 (1920).

30 *Id.* at 433.

31 *Id.* at 430.

32 See *Bond*, 134 S. Ct. at 2102 (Scalia, J., concurring in the judgment) (“We should not have shirked our duty and distorted the law to preserve [*Holland*’s] assertion; we should have welcomed and eagerly grasped the opportunity—nay, the obligation—to consider and repudiate it.”); *id.* at 2109 (Thomas, J., concurring in the judgment) (“*Holland* did not conclude that the Treaty Power itself was unlimited.”); *id.* at 2111 (Alito, J., concurring in the judgment) (“I believe that the treaty power is limited to agreements that address matters of legitimate international concern.”).

33 See *id.* at 2103–08 (Thomas, J., concurring in the judgment) (“I believe the Court should address the scope of the Treaty Power as it was originally understood.”).

34 See *id.* (arguing that the treaty power was not intended to vastly expand the power of the federal government).

35 See *id.* at 2108–09 (observing that there have been few instances where treaties have been used for domestic regulation).

36 See *id.* at 2102–03.

limitations. Justice Thomas offered a persuasive originalist case for a direct federalism limitation on the treaty power itself, but it is Justice Scalia's opinion that may become a more significant marker of a future court decision on the treaty power. Because many significant treaties are non-self-executing, exploring federalism limitations on the implementation of such treaties may arise more often than direct challenges to the treaty power. The *Bond* decision thus highlights the continuing importance of non-self-executing treaties to future disputes and conversations about treaties in domestic U.S. law.

## II. THE ONGOING CONTROVERSY OVER NON-SELF-EXECUTION

Although courts have never seriously challenged the use of non-self-executing treaties, and the Supreme Court endorsed it again in its 2008 decision in *Medellín v. Texas*,<sup>37</sup> the non-self-execution doctrine has remained controversial among scholars. In this Section, we review the origins of the non-self-execution doctrine and the ensuing academic debate over the propriety of non-self-execution.

### A. *The Origins of the Non-Self-Execution Doctrine*

Under Article VI of the Constitution, "Treaties made . . . under the Authority of the United States" are the "supreme Law of the Land."<sup>38</sup> This provision and the inclusion of treaties as a basis for federal court jurisdiction in Article III of the Constitution are the textual bases for giving treaties the status of domestic U.S. law. As Chief Justice Marshall explained in the 1829 decision *Foster v. Neilson*,<sup>39</sup> the U.S. Constitution adopted a different system for domestication of treaties than the previous British system. "Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."<sup>40</sup> But Marshall went on to explain that "when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."<sup>41</sup>

Marshall's analysis in *Foster* is widely cited as the judicial origin of the doctrine of non-self-execution. According to the Court, Article 8 of the U.S. treaty with Spain<sup>42</sup> merely engaged the U.S. government to pass legislation to

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37 552 U.S. 491, 504–05 & n.2 (2008) (discussing the legal effect of self-executing and non-self-executing treaties and defining both terms).

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

39 27 U.S. (2 Pet.) 253 (1829).

40 *Id.* at 254.

41 *Id.*

42 Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, U.S.-Spain, art. 8, Feb. 22, 1819, 8 Stat. 252.

ratify and confirm land grants.<sup>43</sup> The Court in *Foster* did not feel itself authorized to ignore state laws inconsistent with the treaty. Marshall's recognition in *Foster* that some treaty provisions cannot be executed by courts absent separate acts of legislation received academic criticism in the ensuing years,<sup>44</sup> but courts have never seriously questioned the propriety of non-self-executing treaties.

### B. *The Debate over Non-Self-Execution*

Although the United States has entered into numerous non-self-executing treaties like the CWC, the idea that treaties can be non-self-executing has been roundly criticized by some prominent academic voices. These critics typically rely on formalist or originalist criticisms of Marshall's conclusion in *Foster*.

#### 1. Critiques of Non-Self-Execution

The heart of academic criticism of non-self-execution rests on the text of Article VI of the U.S. Constitution. That provision, as discussed above, recognizes the "Constitution, . . . Laws of the United States[,] . . . and all Treaties made . . . under the Authority of the United States" as "the supreme Law of the Land."<sup>45</sup> As Professor Louis Henkin suggested, this language means non-self-executing treaties are "not what the Constitution provides or what the Framers intended."<sup>46</sup> Professor Jordan Paust has extended this argument to argue that non-self-execution is one of the most "glaring of attempts to deviate from the specific text of the Constitution."<sup>47</sup> This critique of non-self-execution is buttressed by appeals to the historical origins of the treaty power in the need to override state laws that were inconsistent with important U.S. treaties. In particular, the failure of numerous states to comply with the provisions of the peace treaty with Britain requiring the recognition of the rights of British creditors was cited as a key motivation for the Constitution's inclusion of treaties in the Supremacy Clause.<sup>48</sup>

In his work examining the Constitution's text in foreign affairs, Professor Michael Ramsey agrees that the practice of non-self-executing treaties is difficult to reconcile with the text of Article VI of the Constitution.<sup>49</sup> He nonetheless finds the practice relatively harmless because a "non-self-executing" treaty is, in his view, an unconstitutional treaty with no domestic legal

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43 See *Foster*, 27 (2 Pet.) U.S. at 254.

44 See *infra* subsection II.B.1.

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

46 LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 202 n.\*\* (2d ed. 1996).

47 Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 760 (1988).

48 See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2013 (1999).

49 See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 162 (2007).

effect.<sup>50</sup> Since most non-self-executing treaties lack domestic legal effect anyway, he suggests the problem is largely academic.<sup>51</sup>

But most critics have been firmer in their criticism, especially of the usage of non-self-execution in the ratification of human rights treaties. As Louis Henkin declared, U.S. ratification of such treaties as non-self-executing “threatens to undermine a half-century of effort to establish international human rights standards as international law.”<sup>52</sup>

## 2. Defenses of Non-Self-Execution

As one of us has argued at length, there is a substantial formalist case for treating many treaties as non-self-executing.<sup>53</sup> As a textual matter, the Supremacy Clause’s primary purpose was to ensure that federal constitutional, statutory, and treaty law would be supreme to state law.<sup>54</sup> But the text does not plainly require all treaties to be “self-executing” or directly judicially enforceable.<sup>55</sup> Rather, the Clause could simply have existed to ensure that Congress had authority to pass legislation to carry out constitutional or treaty obligations over the states.<sup>56</sup> Some parts of the Constitution, most notably Article III’s reference to Congress’s power to create lower federal courts,<sup>57</sup> were obviously not “self-executing” supreme law until Congress acted by statute. By the same token, some treaties could also have been similarly non-self-executing.

Moreover, there is ample historical evidence that the Framers of the Constitution would have permitted non-self-executing treaties. As one of us argued at great length, evidence from the constitutional convention and the ratification debates suggests that the Framers of the Constitution recognized an important role for Congress in the implementation of treaties through legislation.<sup>58</sup>

As stated earlier, despite this academic skepticism, courts have rarely found non-self-executing treaties to be constitutionally controversial. Moreover, the Supreme Court recently endorsed the legitimacy of non-self-executing treaties in its 2008 decision in *Medellín v. Texas*.<sup>59</sup> In that case, the Court considered a Mexican national’s challenge to his capital sentence based on two treaties: the Vienna Convention on Consular Relations and the U.N.

50 *Id.* at 171.

51 *Id.*

52 Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 349 (1995).

53 See Yoo, *supra* note 48, at 1962, 2040–74.

54 *Id.* at 1964 (“[T]he Constitution places treaties on par with other constitutional provisions and federal law in their supremacy over state law.”).

55 *Id.* at 1961.

56 *Id.*

57 U.S. CONST. art. III, § 1.

58 See Yoo, *supra* note 48, at 2073.

59 552 U.S. 491, 504–05 (2008).

Charter.<sup>60</sup> The latter treaty obligated the United States to “undertake[ ] to comply” with judgments of the International Court of Justice (ICJ).<sup>61</sup>

Although the ICJ had issued a judgment requiring the United States to grant Medellín a new judicial hearing to demonstrate the impact of U.S. treaty violations on his trial and sentence, the Supreme Court held that the relevant U.N. Charter provision was non-self-executing.<sup>62</sup> As a non-self-executing treaty provision, the ICJ judgment had no domestic legal effect unless and until Congress enacted new legislation.

Indeed, Chief Justice Roberts even suggested a clear statement of the intent of treaty makers to make the treaty “self-executing” is needed, at least where such a treaty would otherwise raise constitutional questions.<sup>63</sup> In the *Medellín* case, the Court noted that treating the ICJ judgment as self-executing would raise constitutional questions about its Article III powers.<sup>64</sup>

As we have argued elsewhere, the *Medellín* decision represented a model for how international obligations should be accommodated within the U.S. constitutional system.<sup>65</sup> By finding the treaty provision non-self-executing and even suggesting that a clear statement is required, the Court imposed reasonable safeguards for the constitutional values of federalism and separation of powers.

Additionally, non-self-execution does not (as its critics sometimes suggest) mean the United States is trying to limit or weaken its international cooperation. Indeed, as we will explain in the next two Parts, international treaties like the CWC can be designed to be non-self-executing and require separate implementation, yet still enhance prospects for international cooperation.

### III. THE CHEMICAL WEAPONS CONVENTION AND NON-SELF-EXECUTION

The CWC was signed by the United States and more than 150 other countries on January 13, 1993.<sup>66</sup> President Clinton submitted the CWC to the Senate in November 1993 and the Senate gave its advice and consent in April 1997.<sup>67</sup>

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60 *Id.* at 497.

61 *Id.* at 500.

62 *Id.* at 508.

63 *Id.* at 505.

64 *Id.* at 501–11.

65 See Julian G. Ku, *Medellín’s Clear Statement Rule: A Solution for International Delegations*, 77 *FORDHAM L. REV.* 609, 609 (2008).

66 Message from the President of the United States Transmitting the Convention on the Prohibition of Development, Stockpiling and Use of Chemical Weapons and on Their Destruction, Opened for Signature and Signed by the United States at Paris on January 13, 1993, S. TREATY DOC. NO. 103-21, at I–II (1993) [hereinafter CWC Message from the President].

67 *Id.* at I; Eric J. Leklem, *Senate Gives Advice and Consent; U.S. Becomes Original CWC Party*, ARMS CONTROL ASS’N (Apr. 1, 1997), [https://www.armscontrol.org/act/1997\\_04/cwcapr](https://www.armscontrol.org/act/1997_04/cwcapr).

The CWC was the product of nearly twenty-five years of negotiations in Geneva by the Conference on Disarmament.<sup>68</sup> The CWC “prohibits the development, production, acquisition, stockpiling, retention, and, direct or indirect, transfer to anyone of chemical weapons [ ] [and] the use of chemical weapons against anyone.”<sup>69</sup> The main goal of the CWC was to “exclude the possibility of the use or threat of use of chemical weapons.”<sup>70</sup>

As discussed earlier, more than 150 countries originally signed the CWC, and today, nearly 190 countries are parties to the arms control treaty.<sup>71</sup> As with many arms control agreements, verification of national compliance with the CWC is a crucial aspect of the treaty’s effectiveness. With so many states as members, verification is even more complex and challenging. To that end, the CWC set up two systems of monitoring and verification. The first system provided for a standard regular monitoring regime involving a member state’s own declarations and reports on compliance.<sup>72</sup> The second system, however, involves the creation of an international inspection regime with the power to conduct “challenge inspections” in any location within the territory of a member state.<sup>73</sup> To this end, the CWC also launched a process for the creation of the Organization for the Prohibition of Chemical Weapons (OPCW) that is charged with conducting the international inspections authorized by the CWC.<sup>74</sup>

The CWC thus required member states to not just agree to stop the use of chemical weapons, but it also required states to eliminate existing chemical weapons and take measures to stop the production or use of chemical weapons or related chemicals. Such measures are subject to verification procedures, including those of an international organization. Given these far-reaching obligations, it is not surprising that the CWC has a specific provision for how member states will carry out these various obligations.

In particular, the CWC requires that each member state “adopt the necessary measures to implement its obligations under this Convention,” in accord with its constitutional processes.<sup>75</sup> Those measures shall

- (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

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68 *Chemical Weapons Convention: Genesis and Historical Development*, ORG. FOR THE PROHIBITION OF CHEM. WEAPONS, <http://www.opcw.org/chemical-weapons-convention/genesis-and-historical-development/> (last visited Mar. 16, 2015).

69 CWC Message from the President, *supra* note 66, at IV.

70 *Id.*

71 *Status of Participation in the Chemical Weapons Convention as at 14 October 2013*, OPCW Doc. S/1131/2013 (Oct. 14, 2013), available at [http://www.opcw.org/index.php?eID=dam\\_frontend\\_push&docID=16815](http://www.opcw.org/index.php?eID=dam_frontend_push&docID=16815).

72 John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 90 (1998).

73 *Id.* at 91–92.

74 *Id.* at 92.

75 CWC, *supra* note 2, art. VII(1).

...  
 (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.<sup>76</sup>

This key provision of the CWC plainly contemplates that member states will “in accordance with [their] constitutional processes,” adopt “measures” to carry out the CWC’s obligations.<sup>77</sup> Moreover, the CWC requires member states to adopt “penal” legislation within its territory and over its nationals even when those nationals are outside the member state’s territory.<sup>78</sup> Finally, member states are obligated to report back to the OPCW of the measures taken to implement the CWC in paragraph 5.<sup>79</sup>

The language in this provision is thus a clear example of a treaty provision requiring separate legislation or other acts by member states apart from simply acceding to the CWC. It is worth noting that the CWC language does not directly prohibit or criminalize violations of the CWC. It simply obliges member states to adopt measures to do so. By directing this language to future acts of a member state, this provision of the CWC is a classic example of a non-self-executing treaty provision that requires a separate act for implementation within the U.S. legal system.

The executive branch, upon submitting the CWC to the Senate, recognized the need for additional legislation. Shortly after the CWC was submitted to the Senate, the executive branch submitted the Chemical Weapons Convention Implementation Act for congressional passage. That legislation was delayed and was submitted again after the CWC was approved by the Senate in 1997. Such legislation was needed, according to its congressional sponsor, because the CWC “contains a number of provisions that require implementing legislation to give them effect within the United States.”<sup>80</sup> That legislation was eventually enacted in 1998.<sup>81</sup> One part of this legislation served as the basis for Bond’s prosecution.<sup>82</sup> Section 229 makes it unlawful to “develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.”<sup>83</sup>

The CWC is hardly the only treaty of importance where non-self-execution has proved an effective and even preferred method of U.S. adherence. One of the most successful private commercial treaties, the Convention on

76 *Id.*

77 *Id.*

78 *Id.* art. VII(1)(a), (1)(c).

79 *Id.* art. VII(5).

80 143 CONG. REC. 8302 (1997) (remarks of Rep. Hamilton).

81 See Pub. L. No. 105-277, 112 Stat. 2681 (codified at 18 U.S.C. §§ 229–229F (2012); 22 U.S.C. §§ 6701–6771).

82 See *Bond v. United States*, 134 S. Ct. 2077, 2085 (2014) (reviewing the applicability of 18 U.S.C. § 229 to Bond’s conduct); see also 112 Stat. 2681 (amending Part I of Title 18 with the insertion of Chapter 11B, which contains the prohibitions at issue in *Bond*).

83 18 U.S.C. § 229.

the Recognition and Enforcement of Arbitral Awards (New York Convention), has been widely recognized as non-self-executing within the U.S. system.<sup>84</sup> Although the New York Convention does not specifically require separate legislation, the Federal Arbitration Act has proved an effective method of ensuring U.S. compliance.<sup>85</sup> Non-self-execution is not only constitutionally uncontroversial in practice, but it has proven attractive and useful for many kinds of U.S. treaties, including the CWC. Even assuming there are no constitutional problems with non-self-executing treaties, the question remains: what are the advantages of the non-self-execution process?

#### IV. A FUNCTIONAL JUSTIFICATION FOR NON-SELF-EXECUTION

Building off the example of the CWC, this Part considers instrumental reasons why the United States might rely upon non-self-executing treaties. Our approach joins with those of other scholars who favor an instrumental analysis of constitutional questions, or those who are interested in constitutional design, rather than constitutional legitimacy.<sup>86</sup> Part IV may also persuade scholars who do not agree on an interpretive framework, but might find that the utilitarian consequences are a persuasive tiebreaker.

We make an important distinction between foreign and domestic affairs in this Part. Much of the design literature seeks to promote certain goals in democratic constitutionalism. Adrian Vermeule, for example, argues that small changes in the lawmaking process can produce significant improvements in impartiality, accountability, transparency, and deliberation.<sup>87</sup> While these are important values, we add a separate calculus for foreign affairs. We ask whether a constitutional process will serve the United States' ability to advance its foreign policy goals. In previous work, for example, we have taken a similar approach to ask whether vesting foreign policy authority in the federal courts make sense as a question of institutional arrangements and incentives.<sup>88</sup> One of us has also drawn on this approach to analyze war powers questions.<sup>89</sup> Similarly, here we will examine the consequences of *Bond* as a question of constitutional design of the foreign affairs power.

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84 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

85 See Federal Arbitration Act, Pub. L. No. 68-401, ch. 213, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-14).

86 See, e.g., ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 13 (2000) (utilizing strategic theory to analyze constitutional design); DENNIS C. MUELLER, *PUBLIC CHOICE III*, at 3 (2003) (advocating improvements in government design); ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY 2* (2007) (arguing for the application of mechanisms of democracy to improve constitutional design).

87 See VERMEULE, *supra* note 86, at 4.

88 Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153; Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006).

89 Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006).

### A. *Obstacles to International Cooperation*

Before asking whether non-self-executing treaties advance U.S. foreign policy, we first must make some assumptions about the problems at issue. International agreements serve as a means to resolve disputes between nations. Peace treaties, for example, recognize the end of a war. Arms control agreements, such as the Chemical Weapons Convention, seek to prevent ruinous arms competition or the use of excessively harmful weapons. Treaties can resolve border disputes, formalize the transfer of territory, or promise favored treatment for citizens and goods and services.

Rational nations should turn to treaties to settle disputes where the gains from cooperation outweigh the benefits of conflict. Situations involving the possibility of armed conflict should produce high incentives to settle disputes peacefully because nations can avoid the deadweight losses from going to war.<sup>90</sup> Nations can divide a resource, redraw a border, or end a struggle that gives each side some benefit while foregoing the loss of life and treasure in conflict. This approach follows the law and economics analysis of litigation, where parties acting rationally and with full information should always prefer settlement to going to court, which will consume time and money without any return.<sup>91</sup> Similarly, nations that have full information about the military resources and political will of themselves and their opponents should prefer an agreement over a conflict that wastes resources and will probably produce the same outcome.

Nations, however, encounter significant obstacles to treaties that do not discourage domestic contracts with the same force. At home, parties can rely on a legal system, backed up by courts and police, to enforce a settlement. Parties will face difficulties in reaching the agreement due to asymmetric information over the range of the settlement and to the financial resources available for litigation. But once the parties reach a settlement, high uncertainty will not surround the enforcement of the terms.

This is not the case with international agreements. Leading scholars of international relations begin with the fundamental observation that the international system is characterized by anarchy.<sup>92</sup> The world does not enjoy a

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90 James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379, 380 (1995) (arguing that possible armed conflict create incentives for countries to reach negotiated settlements); Robert Powell, *The Inefficient Use of Power: Costly Conflict with Complete Information*, 98 AM. POL. SCI. REV. 231, 231 (2004) [hereinafter Powell, *Inefficient Use*] (same); Robert Powell, *War as a Commitment Problem*, 60 INT'L ORG. 169, 169 (2006) [hereinafter Powell, *War*] (discussing the "inefficiency puzzle of war," which observes that countries should be willing to resolve a conflict before going to war as each side will have less available resources after fighting).

91 See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 436 (1994) (arguing that increased disclosure improves prospects of settlement bargaining); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1078–80 (1989) (same).

92 See, e.g., HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (5th ed. 1973) (laying out the principles of political realism); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979) (discussing the role of international organizations in an anarchic international sys-

unified government that has a monopoly on violence and can maintain law and order. While the United Nations formally serves as something of a world government by treaty, it has no military forces under its direct command, it relies upon the member states to provide its financial resources, and it cannot regulate private individuals directly. As a result, nation-states must rely on their own resources to protect their security from the aggressive designs of others.

Anarchy does not necessarily produce a philosopher's state of nature with a war of all against all. Some problems extending beyond a state's borders will produce opportunities for cooperation.<sup>93</sup> Even in the area of security, nations form defensive alliances that pool their resources to deter potential aggressors. Other opportunities, such as free trade, the environment, and coordination of transportation and communication, provide benefits to states if they cooperate which exceed going it alone. There can be little doubt that there are mutual gains for states that can reach an agreement to commit to reciprocal actions, such as lowering trade barriers to take advantage of the law of comparative advantage.

Anarchy, however, impedes the ability of states to enforce those agreements, despite their obvious benefits to both parties. Without international courts or police with effective authority to force compliance, a nation-state can renege on a treaty without consequence other than retaliation from the other states. This produces a classic prisoner's dilemma: two suspects could receive the lowest sentences if they could only cooperate on their stories, but they cannot because of a lack of trust. Similarly, nations might not enter into treaties because they do not trust their partners to live up to their promises. This problem will be particularly acute where one party must take a first step that bears high costs before the other party must act. For example, a nation that has strong offensive military capabilities but weak defensive systems may be reluctant to withdraw from a disputed territory and lose its tactical advantages without a firm guarantee that the other side will withdraw too. Without institutional mechanisms for enforcement, the first nation cannot be sure that the second nation will not exploit its vulnerabilities during its first step.

We can illustrate this problem by reference to the literature on international bargaining. As Thomas Schelling argued, "conflict situations are essentially bargaining situations."<sup>94</sup> Nations will seek to acquire territory, population, goods, or resources. They will wish to stop harms, such as pollution, drugs and terrorism, disease, or excessive migration. Nations may come into conflict when these goals meet the agenda of other nations. They may want to add territory and population held by another, or seek to stop pollution emitted by the factories of another country. A crisis will arise when the

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tem); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5, 10 (1994) ("The first [assumption of realism] is that the international system is anarchic.").

93 See generally ROBERT O. KEOHANE, AFTER HEGEMONY (1984) (discussing the role of hegemony in promoting international cooperation).

94 THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 5 (1960) (emphasis omitted).

two sides cannot reach an agreement that peacefully divides the benefits at stake.

James Fearon and Robert Powell have advanced Schelling's insight to construct a sophisticated model of the choice between war and peace. Under their approach, rational nations with perfect information should favor a settlement over conflict to resolve a dispute.<sup>95</sup> The primary reason is that states can avoid the deadweight loss of war by reaching an agreement. A nation, of course, could choose to gamble by going to war in the hopes of capturing all of a territory rather than only a part. Full information and rational decision-making, however, preclude gambling on war. The two nations should agree to a deal that divides a resource in proportion to their objective chances of prevailing in a conflict.

To see why this is so, we must analyze the expected values of war versus peace. Like Learned Hand's formula for torts, the expected value of war equals its expected benefit minus its expected cost. Take, for example, a hypothetical struggle between China and the United States over Taiwan. If China seeks to absorb Taiwan, the expected value of going to war equals the expected benefit of winning the war and gaining Taiwan minus the expected cost of a conflict with the United States. China's expected benefit of war is a function of the probability of winning times the value of the resource. The probability of winning depends on factors such as industrial production, military capability, leadership, and political will. The sum of China's and the United States' chances of winning add up to one—in other words, neither side can have one hundred percent odds of prevailing—and the value of the resources will generally (though need not) be the same for both nations.

With full information, these conditions should lead two nations in crisis to reach a settlement rather than turn to armed hostilities. If both sides know the expected values of going to war, they can simply divide the resource based on the differences in their probability of winning. They will receive the expected benefit of any conflict but avoid the expected cost. If China and the United States, for example, each had fifty percent odds of prevailing in a conflict, they could simply divide Taiwan much as the United States and U.S.S.R. split Korea and Germany after World War II. In a conflict, they not only run a fifty percent chance of coming away with nothing, but both nations would suffer the deadweight costs of fighting the war itself. One condition that might prevent a conflict, however, is if the two countries place greatly different values on the resource in question. If Beijing, for example, values Taiwan far more highly than Washington does because of the symbolic and historical meaning of uniting China, the expected values of the two countries might not produce a possible settlement range.

War, in the words of Robert Powell, becomes an "inefficiency puzzle."<sup>96</sup> Nations should almost always reach settlement and avoid the costs of war. They do not because of international anarchy. Lack of a supranational gov-

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95 Fearon, *supra* note 90, at 381; Powell, *Inefficient Use*, *supra* note 90, at 231.

96 Powell, *War*, *supra* note 90, at 169.

ernment inhibits agreement because it makes it difficult to overcome informational asymmetries. The most important of these are the variables that contribute to a nation's probability of winning a conflict. Some of these factors may appear in the public domain, such as economic size and growth, defense budgets, and military size. But others will fall primarily within the knowledge of a single nation. The United States, for example, will have private information on the quality of its armed forces, the superiority of its strategies and tactics, and the political willingness to fight through to the end.

These asymmetries produce several problems. First, imperfect information will lead to mistakes in bargaining. If nations overestimate their probability of winning a conflict—and correspondingly underestimate their opponent's odds—they will not realize there is a broader range for agreement and go to war more often instead of seeking peace. If China, for example, incorrectly estimates the United States' likelihood of prevailing in a conflict, it will demand a greater share of Taiwan than it should. In more cases than under perfect information, the United States will reject offers from China because they are too low and will accept war instead. Second, nations will have an incentive to conceal their true probability of prevailing in a conflict. A nation might seek to conceal its military abilities in order to take advantage of an opponent. China hid its large troop formations in 1950 to launch a surprise attack on American forces that advanced north of the thirty-eighth parallel during the Korean War. Or a nation might seek to exaggerate its resources in order to bluff its way to a better deal than it should have won. Great Britain and France mistook Germany's capabilities in 1938 and 1939 and allowed it to seize Czechoslovakia and invade Poland without response.

Third, nations will have few ways to reliably reveal private information. In order to avoid the costs of war, a nation in a crisis may have an incentive to reveal its true capabilities. This picture will allow the nations to more accurately judge the probabilities of a war's outcome, which should smooth the way to a settlement. But under conditions of anarchy, nations will have difficulty revealing private information in a credible manner. Suppose China, for example, wanted to show the United States that a fifty-fifty division of Taiwan would reflect their relative power positions. It could show Washington that it had sufficient military resources within striking distance of Taiwan to fight the U.S. Navy to a draw. But the United States would have serious concerns that China was bluffing. Beijing might misrepresent, exaggerate, or selectively reveal information about its forces in order to win a better deal than it could expect. Unlike the case with domestic litigation, the parties to the dispute cannot reveal information through a third party—such as a federal court—that would provide certainty about its accuracy.

Even if nations could overcome these informational asymmetry problems, the anarchy of the international system creates a second, more difficult obstacle to cooperation. Even with perfect information, nations may still refuse to reach a peaceful settlement because of a lack of enforcement in the future. They may understand that they will both be better by avoiding

war, for example, and dividing a territory or resource. But nations may not trust each other to obey the agreement in the future. This problem will prove particularly acute in situations where a settlement changes the status quo between states or where rapid changes are already affecting the balance of power.<sup>97</sup> One nation will find it difficult to trust the other to keep a promise if the latter will become even more powerful as a result of the agreement.

Information problems, for example, do not seem to explain the problems with ending internal armed conflict or long wars. Internal armed conflicts between a government and a rebel group often go on for years—fourteen years, on average.<sup>98</sup> Over the course of the war, both sides acquire information about each other's goals, resources, and will. Even with far more information than at the war's outset, the parties often choose to fight rather than reach an agreement. This may well be due to lack of enforcement mechanisms. A settlement may put one of the two parties in a better position than when the fighting continues. A rebel group may gain breathing space where it can regroup, or the government may restore its authority in lost territory. One side cannot be confident that the other will not take advantage of its new position to break the agreement and take even more resources in the following year.

Take our Taiwan hypothetical as an example. Assume that in the first time period, China has no control over territory in Taiwan, which is protected by the United States. In this first time period, the United States has a greater probability of prevailing in any conflict with China because of its larger navy, air force, and sophisticated forward bases in the East Asia theatre. In time period two, China's economy has boomed, which translates into greater military power and a higher probability of winning in a war with the United States over Taiwan. In this period, China and the United States agree to divide the island in the middle because, with full information, they both estimate their chances of winning a war at fifty-fifty. China acquires physical territory on the island for the first time, which will increase its probability of prevailing in the future because of the ease of deploying troops. China's prospects will also improve in the next time period because of faster economic growth and military spending rates.

Under these conditions, the United States will have little confidence that China will keep its agreement in time period two. Under the treaty, Beijing will emerge with an even greater advantage for future time periods. When those time periods come along, China's probability of winning increases, which should lead it to revise the division of Taiwan further in its favor. Indeed, we can understand the China-U.K. agreement over the handover of Hong Kong in this light. In December 1984, China had risen to a superior military position in any conflict with the United Kingdom over the island. To guarantee a peaceful transfer of power, Beijing promised in an agreement with London that Hong Kong would continue to enjoy an independent polit-

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97 *Id.* at 171–72.

98 James D. Fearon, *Why Do Some Civil Wars Last So Much Longer than Others?*, 41 J. PEACE RES. 275, 275–76 (2004).

ical system. Today, it appears that China is reneging on its promise to provide Hong Kong's citizens a system of universal suffrage for electing the city's leaders. In 2014, the United Kingdom has little military ability to prevent Beijing's revision of the deal handing over Hong Kong.

*B. Overcoming Obstacles to International Cooperation Through Non-Self-Execution*

Domestic politics could help overcome these two obstacles to international cooperation. Democracy itself could provide a means for a government to reveal information credibly by raising the electoral costs of misrepresentation. A nation with a separation of powers could create a competitive political environment in which one branch of government must disclose information to win the agreement of other branches necessary for the nation to act. Such structures could also help with commitment problems. A democracy could raise the political cost of breaking a treaty. A constitution could establish multiple barriers to withdrawing from an international commitment. Our discussion here will describe how a system of non-self-execution, combined with a view of treaties that rejects an expansive *Missouri v. Holland*<sup>99</sup> understanding of federal power, actually helps the United States make more credible international agreements.

On the first problem, an internal constitutional system could allow a nation to provide credible information to an opponent by making it expensive for a government to bluff or lie. Some scholars, for example, have drawn upon democratic peace literature to argue that democracies enjoy superior methods for sending expensive signals about their information. Empirical studies suggest that since 1814, democracies have not fought wars against each other, though they have no problem fighting wars against nondemocracies.<sup>100</sup> Democracies also appear to have a higher win percentage, lower casualties, and shorter wars than nondemocracies. International relations scholars have inferred from this data that democracy may give nations the ability to send costly signals because of "audience costs."<sup>101</sup> Audience costs refer to the domestic political costs that arise to a governing regime when it makes threats or promises that it does not fulfill, such as a declaration to use force from which it later backs down. By revealing information that, if untrue, would trigger these costs, a democracy can separate itself from nations that seek to bluff.

Democracies with a separation of powers might even have stronger methods to send costly signals than a pure majoritarian democracy. Suppose a nation has a separation of powers that requires an independently elected executive and legislature to agree to the making of a treaty. While a simple unicameral parliamentary democracy can generate audience costs in its state-

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99 252 U.S. 416 (1920).

100 See DAN REITER & ALLAN C. STAM, *DEMOCRACIES AT WAR* 308 (2002).

101 James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 585–86 (1997); Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SCI. REV. 829, 830 (1998).

ments to the electorate, a separation of powers system also requires the executive to reveal information to the legislature in a credible fashion. While the executive might misrepresent information, the legislature could retaliate. This does not guarantee that the information is fully truthful, only that the executive has experienced costs in disclosing it. As with audience costs, these expensive signals between the branches of government allow a nation to separate itself from others that might bluff.

Viewed in this lens, a non-self-execution approach such as the one used in the CWC could provide the United States with more advantages in revealing costly information. If the President wishes to enter the United States into a treaty, such as the CWC, he must usually disclose information to the Senate to win its approval. In the normal course, the Senate Foreign Relations Committee will hold hearings to determine whether the agreement advances the national interests of the United States. This should provide a great deal of information to other nations uncertain about whether the United States benefits from entering the treaty and its probability of prevailing in any conflict should it decline.

Article II of the Constitution produces a second type of information. Because it sets approval at two-thirds of the Senate,<sup>102</sup> the Treaty Clause requires the President to use more political capital to persuade a supermajority to give its consent. The executive's willingness to expend that much effort itself sends a costly signal to the other states about the accuracy of its information. This type of information is particularly valuable because it would come after the President has signed the treaty, but before the Senate has given its consent and the United States ratifies, which allows the other nation to use the data to decide whether to ratify as well.

Notice what happens when the United States must also implement the international agreement by statute before it has legal effect within the United States. The President must disclose information to yet another body, the House of Representatives. That institution has a two-year<sup>103</sup> rather than six-year<sup>104</sup> election cycle and operates under different incentives, ones that are usually thought to be closer to the immediate mood of the electorate. It is organized in a tighter majoritarian fashion and tends to respond more quickly to partisan politics. The executive will have to disclose not only more information, but possibly information of a different kind. Because the House focuses only on domestic implementation of the treaty, it may demand information related to tax rates, budget impacts, criminal law, or interaction with other domestic law that might not interest the Senate. Also, domestic implementation increases the demand on the executive branch's political capital. It must push the treaty not just through the state-influenced Senate, but the majoritarian House. While obtaining a supermajority in the Senate alone might demand more political effort than winning a majority in both the House and the Senate, surely having to survive both paths demands more

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102 U.S. CONST. art. II, § 2, cl. 2.

103 *Id.* art. I, § 2, cl. 1.

104 *Id.* amend. XVII, cl. 1.

capital and energy than either one alone. Pushing a treaty through the Senate and then winning an implementing statute through both houses of Congress discloses a great deal of information about the United States' understanding of the costs and benefits of an agreement, what it believes to be its alternatives to making the agreement, and the political will of both branches.

While important, informational asymmetries do not pose the difficulties of enforcement, but it is here where a non-self-execution regime can prove to have the greatest value. Even if nations find a way to reveal information credibly to each other, they still may fail to reach agreement because they cannot trust each other to keep their promises. The lack of a supranational government means no third party can force a nation to comply with earlier treaty commitments.

Domestic political and constitutional constraints, however, can help address this challenge. A constitution could create mechanisms for a nation to bind itself to an agreement by making implementation difficult to stop. Initially, the United States lacked this ability because it relied on the states to carry out treaties. Under the Articles of Confederation, the United States had to ask states to implement international agreements.<sup>105</sup> American failures to live up to the 1783 Treaty of Paris, which ended the Revolutionary War, endangered American security by giving Great Britain the grounds to occupy strategic forts along the frontier.<sup>106</sup> Congress could not force states to drop trade barriers to fulfill international trade agreements.<sup>107</sup> According to Alexander Hamilton in *Federalist No. 22*, "The faith, the reputation, the peace of the whole union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."<sup>108</sup> Hamilton asked rhetorically: "Is it possible that foreign nations can either respect or confide in such a government?"<sup>109</sup> Hamilton understood that the mechanisms of the domestic constitution could help build trust between two nations over an international agreement.

A system that gives the national legislature the authority to carry out treaties would improve the nation's ability to send credible signals of commitment. First, the enactment of legislation introduces other institutions committed to complying with the international agreement. While a treaty receives the consent of the President and the Senate, implementing legislation adds the approval of the House, which represents the part of the government most directly accountable to the electorate. If the legislation creates a private cause of action or criminal provision, it may also have the effect of including the judiciary into the equation. Judicial review would represent a powerful commitment device by giving implementation authority to a branch

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105 See Yoo, *supra* note 48, at 2010.

106 *Id.* at 1980, 2015.

107 FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL 52-95 (1973).

108 THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

109 *Id.*

of the government independent of elections or direct control by the other branches of government.

Second, if the House and Senate implement a treaty, they are using their domestic powers to live up to the terms of an international promise. The domestic powers are independent of the agreement because the legislature's powers and the measures that they enact operate even in the absence of the treaty. Congress does not need an international agreement to set taxes at a certain level or to enact a criminal law regulating interstate commerce. A statute, for example, that lowers import barriers to comply with a free trade pact would still operate even if the trade pact no longer existed. An implementing statute sends a more powerful signal of commitment because it adopts a policy that will continue until Congress repeals the law.

Third, congressional implementation raises the costs of breaking the agreement. In part, this is due to constitutional practice. The Constitution could have made available the greatest signal of commitment if it had required the agreement of two-thirds of the Senate to terminate a treaty. Indeed, John Jay proposed this very rule because it would help overcome the enforcement problem between nations. Responding to Antifederalists in *Federalist No. 64*, Jay admonished: "These gentlemen would do well to reflect that a treaty is only another name for a bargain . . ." <sup>110</sup> Wrote the former U.S. Minister for Foreign Affairs under the Articles of Confederation: "[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it." <sup>111</sup> Jay argued that to encourage nations to enter treaties with the United States, the Constitution should allow treaty termination only when the President and two-thirds of the Senate agreed. <sup>112</sup>

Constitutional practice, however, evolved in the opposite direction. Congress, rather than the President and the Senate, terminated America's very first international agreement, the 1778 alliance with France. <sup>113</sup> President Washington had already undermined the treaty by unilaterally interpreting it to allow U.S. neutrality in the wars of the French Revolution. <sup>114</sup> By 1798, the Federalist Congress terminated the alliance by statute as part of the Quasi-War with France. <sup>115</sup> Presidents have also terminated treaties without Congress as far back as Abraham Lincoln and as recently as President George

110 THE FEDERALIST NO. 64, at 436–37 (John Jay) (Jacob E. Cooke ed., 1961).

111 *Id.* at 437.

112 *See id.*

113 Act of July 7, 1798, ch. 67, 1 Stat. 578.

114 George Washington, Proclamation (Apr. 22, 1793), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 156 (James D. Richardson ed. 1899).

115 *See, e.g.*, 1 THE CONTROVERSY OVER NEUTRAL RIGHTS BETWEEN THE UNITED STATES AND FRANCE 1797–1800 (James Brown Scott, ed. 1917) (including the several Acts limiting interaction between France and the United States during this time).

W. Bush's withdrawal from the Anti-Ballistic Missile (ABM) pact.<sup>116</sup> Presidents had already deprived the ABM Treaty of much of its force by interpreting it to allow research and development of a national missile defense system. While congressional agreement made the funding of national missile defense possible, President Bush did not need legislative approval to withdraw from the treaty.

Unilateral presidential authority over treaties reduces their strength as a signal of commitment. Requiring approval by both branches increases the political costs of treaty termination. Either the Senate may be unwilling to terminate or the President may have to expend political capital to persuade a supermajority of Senators, and at the very least coordinating both branches' actions can be costly even when controlled by the same political party. Requiring legislative approval bears resemblance to the idea of audience costs because the President will have to make political commitments to the Senate and perhaps the House to consent to treaty termination. His political promises may backfire if he cannot follow through on the foreign policies accompanying withdrawal. The current practice, however, does not require congressional consent. Presidents today need not incur political costs to persuade the House and Senate to agree to treaty termination, which makes treaties a less valuable sign of commitment.

A non-self-execution approach like that of the CWC, however, may cure this problem. If a treaty cannot take domestic effect without legislative implementation, an international agreement will usually require the participation of the House. As an act of Congress, the implementing legislation will require another act of Congress for repeal. A President's termination of a treaty will dissolve the formal legal obligation, but the policy of the United States will still continue because he cannot repeal the implementing legislation. For example, even if the President withdrew the United States from the Chemical Weapons Convention, the CWCIA would still make the possession of chemical weapons a federal crime. Executing legislation has the effect of creating a mechanism similar to John Jay's proposal for Senate consent to treaty withdrawal. While the votes required would demand a majority of both Houses rather than two-thirds of the Senate, the filibuster rule in the Senate would still allow a minority of states to block repealing legislation.

Notice that the rule of non-self-execution allows the United States to send varying degrees of signals about its commitment to an international agreement. A sole executive agreement may provide the weakest sign, because it will only survive as long as the President in office chooses to follow policies consistent with the pact. A treaty standing alone provides a great deal of information to another nation but it does not provide a much higher level of commitment. A treaty plus an implementing statute creates the highest level of American commitment because to renege on the promises demands the cooperation of the President, Senate, and House together. No

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116 See John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851 (2001); John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305 (2002).

one branch can terminate both the international agreement and the accompanying domestic policy. Non-self-execution, in other words, may help improve the achievement of American foreign policy goals. A non-self-execution regime gives the United States more tools to overcome the enforcement obstacles to international agreements and allows the United States to better reap the benefits of international cooperation.

#### CONCLUSION

Non-self-executing treaties remain academically controversial, even as the Supreme Court continues to explore and develop doctrines to facilitate their use within the U.S. constitutional system. The *Bond* case represents the Supreme Court's first chance in decades to explore the use (and constitutional limits) of non-self-executing treaties. Although the Court's majority did not address the constitutional questions directly, the concurrences signal that a substantial segment of the Court will remain engaged with the constitutional issues related to non-self-executing treaties.

But even in this constitutional debate over non-self-executing treaties, the practical utility of this type of treaty mechanism is rarely considered. In this symposium contribution, we explore the CWC as a quintessential example of the non-self-executing treaty in action. We further explore how non-self-executing treaties like the CWC can overcome serious obstacles to international cooperation. By requiring the disclosure of information about the United States' intentions to more institutions and by limiting the ability of the President to unilaterally terminate the United States' compliance, a non-self-executing treaty can help overcome information asymmetries and enforcement concerns that bedevil most international agreements. As non-self-executing treaties continue to play a central role in U.S. treaty-making, its functional and practical benefits should no longer be overlooked.

