The Treaty Power and Self-Execution: A Comment on Professor Woolhandler’s Article

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INTRODUCTION

Ann Woolhandler’s paper raises many fascinating issues. I will focus on just one of them: what does history tell us about whether modern human-rights treaties to which the United States is a party should be understood to be “self-executing” in American courts? In particular, I want to consider what should happen when a justiciable case to which a treaty provision might be relevant is properly before an American court. Under what circumstances should the court look to the treaty itself for a rule of decision, without regard to whether that rule has also been established by domestic legislation?

As Ann suggests, there are a variety of reasons why one might conclude that individuals whom a particular treaty provision seems to benefit cannot invoke that provision as a rule of decision for an American court, even if the provision is relevant to issues that are properly before the court. One set of reasons relates to issues of domestic constitutional law: what is the scope of the treaty power, and

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to what extent can the President and the Senate use that power to establish rules of decision that apply, of their own force, in domestic litigation? Another set of reasons has less to do with the scope of the treaty power than with the proper interpretation of individual treaties themselves.

When Ann talks about how the obligations imposed by modern human-rights treaties differ from the sorts of treaty provisions that American courts enforced in the nineteenth century, she suggests that these two sets of reasons are linked: in part because modern human-rights treaties would “test the limits of the treaty power” if their provisions were understood to take domestic legal effect automatically, American courts “should require a clearer statement” before interpreting them to be self-executing.¹ This argument draws at least tacit support from familiar principles that our courts use in interpreting statutes. Just as courts often interpret federal statutes in ways that avoid constitutional questions, so too one might think that courts should apply the same canon in interpreting treaties. On this view, uncertainties about the President’s power to enter into modern human-rights treaties should spill over into our interpretation of those treaties.

I want to question this linkage. As I will explain, the applicable rules of treaty interpretation do not necessarily incorporate quite the same principles that our courts apply in interpreting domestic statutes. A strong argument can indeed be made that treaties entered into without constitutional authority cannot take domestic legal effect in the absence of implementing legislation. For this argument to apply, however, we need to decide whether the treaty was in fact entered into without constitutional authority; the argument does not kick in merely because the President might or might not have had authority to make the treaty.

This comment will proceed as follows. Part I notes that under the Supremacy Clause, the “self-executing” nature of a treaty is partly a matter of treaty interpretation. Part II adds that limits on the President’s constitutional authority to make treaties are also relevant to the treaties’ effects in American courts. But Section II.C concludes that these two issues are not as closely linked as we might be tempted to think.

I. TREATY INTERPRETATION AND “SELF-EXECUTION”

Most people agree that whether a particular treaty is self-executing depends, at least in part, on what the treaty says. Still, it is probably worth saying a few words about why questions of treaty interpretation

are relevant to the issue of "self-execution."

Article II of the Constitution says 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." The Supremacy Clause of Article VI adds that "all Treaties" made "under the Authority of the United States" are part of "the supreme Law of the Land," which binds "the Judges in every State" notwithstanding anything to the contrary in state law. It seems fairly clear to me that treaties made "under the Authority of the United States" can provide rules of decision that the Supremacy Clause requires American courts to recognize even in the absence of implementing legislation.

Just because treaties can provide such rules of decision, though, does not mean that they all do so. It is useful to divide treaties into three different categories: (1) treaties that themselves address "self-execution" (whether explicitly or implicitly) and purport to require it, (2) treaties that themselves address "self-execution" (whether explicitly or implicitly) and purport to disavow it, and (3) treaties that do not address "self-execution" at all. How to categorize any particular treaty is obviously a matter of treaty interpretation, but one can readily imagine examples in each category.

Treaties of the first sort specify or imply that American courts will enforce the treaty's provisions even in the absence of implementing legislation. If a treaty is properly understood to include such a stipulation, then this enforcement mechanism is part of the bargain to which the United States commits itself when it adopts the treaty; when we adopt the treaty, we not only are making certain substantive commitments, but we also are promising that those commitments will be recognized as rules of decision in American courts without the need for further legislation.

Treaties of the second sort include the opposite sort of specification. A treaty might specify, for instance, that American courts will not recognize whatever rules of decision the treaty suggests unless and until Congress or the state legislatures enact appropriate implementing

3. Id. art. VI, cl. 2.
4. But cf. John C. Yoo, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution, 99 COLUM. L. REV. 2218, 2254 (1999) (flirting with the idea that to the extent a treaty purports to do things that the Constitution authorizes Congress to do by statute, American courts "should refuse to execute it without congressional implementation").
5. The categories themselves are oversimplified. Among other things, a single treaty might specify or imply that one section will be "self-executing" in the relevant sense while another section will not be "self-executing" in that sense. But it is unnecessary to pursue this particular complication; a treaty of this sort can be analyzed like two separate treaties that fit into different categories.
legislation.

By virtue of the Supremacy Clause, treaties in both of these categories are part of the "supreme Law of the Land" (assuming that they were made "under the Authority of the United States" and do not conflict with other aspects of our supreme law). But this does not mean that their provisions will have the same effects in American courts. To the contrary, it seems clear that treaties of the first sort will, and treaties of the second sort will not, provide rules of decision that American courts must apply even in the absence of implementing legislation.

It is harder to pin down what the Supremacy Clause means for the third category of treaties. Treaties of this third sort do not address the question of "self-execution" at all, whether explicitly or implicitly; the signatory nations have reached agreement on certain substantive terms, but they have not addressed how those terms are to be enforced within each nation. Reasonable people can disagree about how American law fills this void. But I personally am inclined to think that the Supremacy Clause does not fill the void at all. As a result, I am not convinced that treaties of the third sort automatically change the rules of decision that American courts would otherwise apply to the cases that come before them.6

The treaties themselves certainly do not make this effect part of the bargain: by hypothesis, the failure of American courts to apply the treaty's substantive provisions as rules of decision would not put America in breach of the treaty. One might be tempted to argue that even though the treaty does not purport to create this obligation, the Supremacy Clause does. But because the Supremacy Clause merely requires American courts to follow the treaty, I am skeptical of such claims; if the treaty does not purport to require judicial recognition of the treaty's substantive provisions, then the terms of the Supremacy Clause do not seem to impose this obligation either.

To be sure, it is sometimes said that "the Supremacy Clause was designed to maximize compliance by the United States with its treaty obligations."7 Even if a treaty is silent about how its provisions must be implemented within each nation, it is unlikely to be silent about whether those provisions must be implemented; a signatory nation that fails to implement the treaty at all will be in breach of its international obligations. If Congress and the state legislatures both fail to enact implementing legislation, then the approach that I am suggesting will put America in breach of the treaty. To minimize such breaches, one

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6. The argument that follows owes much to John Harrison.

might think that the Supremacy Clause should be understood to require American courts to give effect to treaties of the third type, with or without implementing legislation.

The problem with this argument, however, is that it applies with equal force to treaties of the second type, which affirmatively disavow self-execution. The fact that a treaty explicitly disavows self-execution does not mean that it also disavows all kinds of execution; if Congress and the state legislatures refuse to pass the implementing legislation contemplated by the treaty, then the United States may well be in breach of the international obligations created by the treaty. Nonetheless, everyone seems to agree that the Supremacy Clause does not require (or even authorize) American courts to give effect to the treaty’s substantive provisions before implementing legislation is passed. If a treaty specifies that implementing legislation is necessary before its provisions will be rules of decision for American courts, then the Supremacy Clause does not require American courts to apply those rules before such legislation is enacted—any more than the Supremacy Clause requires American courts to apply federal statutes before their effective dates.

As a matter of statutory interpretation, of course, federal statutes that do not specify a delayed effective date are generally understood to go into effect immediately upon enactment. One might attempt to invoke the same idea in the treaty context: one might maintain that unless a treaty specifies or implies that it is not self-executing, it should be understood to take effect automatically in American courts. But if one is advancing this argument as a matter of treaty interpretation, then one is simply denying the existence of the third category: one is arguing that all treaties that do not disavow self-execution should be understood to require it. This position seems implausible; it is easy to imagine countries reaching various substantive agreements without addressing how those agreements will be implemented domestically. If, on the other hand, one is arguing that the Supremacy Clause itself makes those agreements “self-executing,” then one is reading more into the Supremacy Clause than its text really warrants. The Supremacy Clause makes treaties the supreme law of the land, but it stops there; it does not require American courts to provide enforcement mechanisms that are not part of the bargain.

In any event, whatever one thinks about treaties in the third category, the existence of the second category confirms that treaties can be the “supreme Law of the Land” without being self-executing in American courts. Depending upon what a treaty is understood to say, it may not itself give rise to rules of decision that the Supremacy Clause requires
American courts to enforce and apply.

II. HOW LIMITS ON THE TREATY POWER RELATE TO "SELF-EXECUTION"

What this analysis means for any particular treaty obviously depends on which category the treaty falls into. But Ann’s paper suggests that doubts about the scope of the President’s constitutional authority to make treaties can affect this question of treaty interpretation. This Part takes up that topic.

I want to start by assuming, for the sake of argument, that there are some significant limits on the President’s authority to make treaties. Section II.A explains why such limits would bear on the question of treaty “self-execution”; even if a treaty purports to require “self-execution” (and hence even if the treaty fits into what I have been calling the first category), American courts should not give effect to provisions that exceed the President’s constitutional authority to make. After spelling out the possible relevance of limits on the treaty power, Section II.B considers what those limits might be. As I will argue, one of the most important limits—if it exists at all—is bound to be murky and contested. But Section II.C will explain why American courts should not necessarily strive to interpret treaties in a way that lets them avoid these debatable issues.

A. The Legal Status of Unauthorized Treaties

Suppose that there are indeed some limits on the treaty power, and that the President and the Senate transgress them. That is, the President—with the approval of the necessary supermajority in the Senate—purports to enter into a treaty that lies beyond his constitutional authority to make.

At the time of the founding, accepted views of the law of nations might have excused the United States from any obligations under such an unauthorized agreement. If an agent purported to enter into a treaty on behalf of a sovereign, the law of nations would deem the sovereign to be bound by the agent’s promises if those promises were “within the terms of his commission and the limits of his authority.”8 At least to the extent that the scope of the agent’s authority was disclosed to the other side, though, the agent could not bind his principal by entering into an

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agreement that exceeded that authority. Indeed, some authors maintained that according to the usage of nations, treaties entered into by agents were not binding until ratified by the relevant sovereigns, and sovereigns did not have to ratify treaties that exceeded their agents' instructions—even if those instructions had been kept secret from the other side.\(^9\)

Of course, the Constitution of the United States was a novelty, and its framers could not have been entirely sure how it would interact with established principles of the law of nations. Still, the sovereignty of the United States was said to reside in the people, for whom the President and the Senate were merely agents. To the extent that the Constitution implied any limits on the ability of those agents to enter into treaties, those limits could certainly have been treated like public restrictions on an agent's authority. Under the law of nations as it existed at the time of the founding, then, a case could be made that treaties entered into without constitutional authority did not bind the United States.

Since the time of the founding, however, the usages of nations have undergone some changes. According to the Vienna Convention on the Law of Treaties, even when a nation's consent to be bound by a treaty “has been expressed in violation of a provision of its internal law regarding competence to conclude treaties,” the consent is still valid as a matter of international law “unless that violation was manifest”—that is, unless the violation would have been “objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”\(^10\) Under the modern law of nations, it is therefore quite possible that a treaty might be deemed to give the United States some obligations to other countries even though the United States Constitution did not actually authorize the President to make the treaty.

Nonetheless, such unauthorized treaties might well form no part of the law that the Constitution requires the President to execute and courts to apply. Under the Supremacy Clause, after all, only treaties made “under the Authority of the United States” are included in “the

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9. See, e.g., HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 187 (Phila., Carey, Lea & Blanchard 1836) (citing some leading discussions of this subject); see also HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 330-38 (Boston, Richard Henry Dana, Jr., 8th ed. 1866) (summarizing discussions of this issue in more detail).

10. Vienna Convention on the Law of Treaties, May 23, 1969, art. 46, reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 49, 63 (2001). Although ninety nations are parties to this Convention, the United States is not one of them. See id. at 49 n.*. Still, the United States tends to treat the Convention as an accurate statement of the prevailing customs of nations. See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 144-45 (1987); see also, e.g., Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308-09 (2d Cir. 2000) (discussing the Convention's status).
supreme Law of the Land."\textsuperscript{11} Whether because of that language or because of inferences drawn from other aspects of our constitutional system, the United States Supreme Court "has regularly and uniformly recognized the supremacy of the Constitution over a treaty."\textsuperscript{12} Thus, the "rule of recognition" supplied by our domestic law\textsuperscript{13} might be different from the corresponding rule that the custom of nations has come to establish on the international plane.

This divergence—which may not have existed at the time of the framing—accounts for one possible meaning of the concept of "non-self-executing" treaties. Suppose that we understand the treaty-making power conferred by our Constitution to be limited to certain types of subjects, and we conclude that a particular treaty goes beyond those limitations. The rule of recognition applied under the law of nations may say that these provisions are nonetheless binding upon the United States, because the President purported to agree to them and because his lack of authority to do so was not "manifest." But the rule of recognition applied by the institutions of our government—including not just the courts but also the President himself—might well be different. To the extent that the President was not authorized to make the treaty, its provisions might not qualify for recognition as part of the "Law of the Land."

It does not necessarily follow that the rules of decision articulated by those provisions can never become part of our domestic law. Depending on the topic, Congress or the various state legislatures may have the power to enact statutes incorporating those rules of decision. In the absence of such legislation, however, the Supremacy Clause will not require American courts or executive officers to recognize the treaty’s rules of decision as part of our law. Thus, one can sensibly say that treaties entered into without constitutional authority are not "self-executing": in the absence of valid implementing legislation, they do not have domestic legal effect. This is so even if the treaties themselves purport to require "self-execution."

B. The Murky Nature of Possible Limits on the Treaty Power

Sometimes, of course, the reason that a treaty’s provisions exceed the President’s treatymaking authority will also prevent Congress or the various state legislatures from implementing those provisions by statute. To the extent that other parts of the Constitution cut back on the

\textsuperscript{11} See U.S. Const. art. VI, cl. 2.
\textsuperscript{12} Reid v. Covert, 354 U.S. 1, 17 (1957) (plurality opinion).
treatymaking power conferred by Article II, they often do so in broad terms that apply to statutes as well as treaties. Consider, for instance, the Constitution's specification that "[n]o Title of Nobility shall be granted by the United States."¹⁴ A treaty in which the United States purported to grant such a title would exceed the President's authority, and hence would not qualify for recognition as part of the "Law of the Land."¹⁵ But the same constitutional provision also disables Congress from granting titles of nobility, and a separate part of Article I imposes the same restriction on the states.¹⁶ The title-granting treaty, then, not only would be "non-self-executing" but could never be implemented within the United States.¹⁷

Still, other restrictions on the treaty-making power do leave room for Congress or the state legislatures to pass implementing legislation. Take Article I's specification that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."¹⁸ If, as seems natural, one reads "Law" in this context to refer to statutes, then treaties cannot themselves appropriate money from the Treasury. It follows that a treaty purporting to do so would not be "self-executing" even if it said that it was; before the United States can spend money to carry out treaty obligations, Congress must pass a suitable appropriations statute.¹⁹

Modern human-rights treaties do not necessarily require any appropriations from the Treasury. But they have been thought to test the

¹⁵. In this particular example, one might wonder what it would mean for a provision granting a title of nobility to take effect as part of the "Law of the Land." Modern Americans tend to think of titles of nobility as being purely honorific and as carrying no legal consequences. At common law in England, however, peers of the realm enjoyed various legal privileges, such as exemptions from certain forms of process. See, e.g., 1 WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH IN PERSONAL ACTIONS: WITH REFERENCES TO CASES OF PRACTICE IN THE COURT OF COMMON PLEAS 110-15 (Phila., William P. Farrand 1st Am. ed. 1807).
¹⁷. Indeed, such a treaty provision might not even be deemed to bind the United States on the international plane, because the President's lack of authority might be "manifest."
¹⁸. See U.S. CONST. art. I, § 9, cl. 7.
¹⁹. According to David Currie, indeed, treaties cannot even give Congress a legal duty to enact such statutes. On this view, a treaty purporting to require Congress to enact an appropriations statute would exceed the scope of the treaty-making power conferred by the Constitution; at least as far as our domestic rule of recognition is concerned, whether Congress passes such a statute would remain within its lawful discretion. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 211-17 (1997) (discussing Congress's debates over this issue in the context of the 1794 Jay Treaty). Even if one disagrees with Professor Currie on this point and believes that a treaty can give Congress a duty under United States law to enact an appropriations statute, it is hard to envision any domestic means of enforcing this duty. Cf. 29 ANNALS OF CONG. 67 (1816) (reporting remarks of Sen. Roberts, who used this fact as an argument for the position later advocated by Professor Currie).
limits of the treaty power in at least two other respects. First, they sometimes deal with matters of state law that, at least in the absence of a national treaty, would be beyond the reach of the federal government’s enumerated powers. Second, the matters that they address—relating primarily to a nation’s treatment of its own citizens—do not directly involve interactions between nations and have not traditionally been the subject of international agreements. If either of these facts has constitutional significance, modern human-rights treaties might provide additional examples of agreements that lie beyond the scope of the treatymaking power (and hence do not automatically become part of the “Law of the Land” under our federal Constitution) but that can nonetheless be implemented by domestic statutes.

The idea of federalism-based restrictions on the treaty power has some attractions. The Constitution seems quite careful about defining the federal government’s power to establish legal rules by statute; Article I contains a detailed list of the powers that are being conferred upon Congress, and Congress cannot legislate in areas outside of its granted powers. The Constitution does not go into similar detail when it authorizes the President to make treaties that, like valid federal statutes, operate as “the supreme Law of the Land.” If the treaty power is read broadly, it may therefore threaten the structure of federalism that the Constitution is otherwise careful to protect.

Of course, the Framers may have thought that even in the absence of substantive limitations on the treaty power, the Constitution’s procedural limitations on that power would adequately protect federalism. In order to make a treaty, after all, the President needs the concurrence of “two thirds of the Senators present.” Under the original constitutional scheme, Senators were to be chosen by the various state legislatures, and so the Framers expected the Senate to be a stronghold for states’ interests.

Whatever the Framers may have thought, however, people chosen by state legislatures are not a perfect proxy for protecting the benefits of federalism. One of the most powerful normative arguments in favor of federalism emphasizes the advantages of having separate legal regimes that compete with each other for people and capital. This sort of competition may be good for the citizenry, but it is not necessarily beloved by state legislators; one of the main goals of competitive federalism, after all, is to put a market-based brake on each state legislature’s regulatory power. Just as we might not want to entrust the

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protection of competition within a particular industry entirely to representatives of the existing businesses in that industry, so too we might not want to entrust the protection of competitive federalism entirely to people chosen by state legislatures.\footnote{In at least one sense, then, the switch to direct election of Senators by the people of each state—which is often described as eroding the Constitution’s structural protection of federalism—may conceivably have strengthened the protections for the type of federalism that we might actually want to foster. Of course, independent of these effects, there are other reasons to favor the Seventeenth Amendment.}

Even if one is sympathetic to the idea of federalism-based limitations on the treaty power, though, the basis of such limitations is unclear. Curt Bradley has suggested that the President can use the treaty power to establish rules with domestic legal effect only if Congress could have established those rules by statute; this aspect of the treaty power, Curt says, should be “subject . . . to the same federalism restrictions that apply to Congress’s legislative powers.”\footnote{Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 456 (1998).} Many of those restrictions, however, stem entirely from the twin facts that the federal government is one of enumerated powers and that the Constitution does not give Congress unlimited legislative authority. The Constitution unquestionably refrains from granting Congress the power to make certain statutes. But Article II does not seem to refrain from granting the President (with the concurrence of the necessary supermajority in the Senate) the power to make certain treaties; if a particular international agreement does indeed qualify as a “treaty,” then Article II apparently authorizes the President to enter into it, and Article VI makes it part of “the supreme Law of the Land.” The only explicit limitations on this power are those found in other parts of the Constitution, which impose some affirmative restrictions like the prohibition on granting titles of nobility.\footnote{See supra text accompanying note 14; see also Reid v. Covert, 354 U.S. 1 (1957) (addressing the relationship between treaties and the generally worded guarantees of the Fifth and Sixth Amendments).}

To be sure, it is theoretically possible that Article II’s grant of treaty-making power is subject to some implicit limitations. Indeed, even critics of Curt’s suggestion about federalism-based limitations are perfectly willing to infer other limitations on the treaty-making power. By its terms, for instance, the First Amendment—which specifies that “Congress shall make no law” doing certain prohibited things—does not seem to restrict the President’s power to make treaties. Critics of Curt’s position nonetheless have little trouble concluding that the President cannot use the treaty power to establish rules that the First Amendment
would deny Congress the power to establish by statute.\textsuperscript{24}

Still, I see no particular reason to infer that the treaty power, insofar as it confers the authority to establish rules that American courts and executive officers will recognize as the “Law of the Land,” is limited to matters within the reach of Congress’s enumerated powers. The text provides no obvious support for this inference; nothing in Article II links the President’s power to enter into treaties with Congress’s power to make statutes. As David Golove has discussed in detail, moreover, early practice cuts against this implied limitation: from the very start, the United States entered into treaties addressing (and appearing to affect of their own force) the domestic legal rights of aliens and the domestic legal powers of foreign consuls on subjects that Congress, in the absence of a treaty, would have been thought incapable of regulating.\textsuperscript{25} If the only reason that modern human-rights treaties might be deemed incapable of “self-execution” is that Congress could not enact their provisions by statute, I am not sold: it seems clear to me that the President and Senate can establish by treaty at least some rules of decision that Congress would lack the power to establish by ordinary legislation.

Modern human-rights treaties, however, may run into constitutional trouble from a related argument (which Curt and others have also discussed). Members of the founding generation may well have thought that certain subject-matter limitations are built into the very concept of a “treaty.” It is at least possible, then, that some provisions in modern human-rights agreements go beyond the “Power . . . to make Treaties” that Article II confers upon the President.

The Oxford English Dictionary defines a “treaty” as “[a] contract between two or more states, relating to peace, truce, alliance, commerce, or other international relation,” and it illustrates this definition with examples dating back to the fifteenth century.\textsuperscript{26} In keeping with this understanding, Charles Evans Hughes famously suggested that the power to make “treaties” was the power to reach agreements on “matters of international concern” and did not extend to other matters.\textsuperscript{27} Although opponents of this limitation sometimes speak


\textsuperscript{25} See, e.g., Golove, supra note 24, at 1104-32 (discussing the experience under the Articles of Confederation); id. at 1149-93 (discussing some early treaties entered into under the Constitution).

\textsuperscript{26} See 18 Oxford English Dictionary 465 (2d ed. 1989).

\textsuperscript{27} Proceedings of the American Society of International Law at Its Twenty-
as if Chief Justice Hughes invented it,\textsuperscript{28} his suggestion about the scope of the treaty power fits well with views expressed in the early Republic. Indeed, even people who took a broad view of the treaty-making power used terms consistent with Hughes’s suggestion. Writing in 1796, for instance, Alexander Hamilton argued that a “treaty” could embrace “whatever is a proper subject of compact between Nation & Nation.”\textsuperscript{29} In an 1816 speech to the United States Senate, James Barbour agreed that the term “treaty” had a “known signification,” and “reaches to those acts of courtesy and kindness, which philanthropy has established in the intercourse of nations, as well as to treaties of commerce, of boundaries, and, in fine, to every international subject whatsoever.”\textsuperscript{30}

As others have noted, however, this possible limitation on the treaty-making power is hard to delineate in practice.\textsuperscript{31} On one view, indeed, the limitation is almost entirely toothless: an aspect of United States law is an “international subject” (or a “matter[] of international concern”) if another country cares about it. The color of our stop lights, for instance, might be an “international subject” if Great Britain will give us something that we want in exchange for our agreement to switch from red to purple.

To put teeth into the concept of “matters of international concern,” one would need to develop some objective standards to determine whether other countries have a legitimate stake in the aspects of our law that they purport to care about (and, by the same token, whether the United States has a legitimate stake in the aspects of other countries’ law that we purport to care about). Whatever British diplomats may say, for instance, we might conclude that Great Britain does have a legitimate stake in the way we treat British subjects on American soil but does not have a legitimate stake (absent unusual circumstances) in the color of our stop lights. These distinctions invite the same sorts of

\textsuperscript{28} See, e.g., 1 Restatement (Third) of the Foreign Relations Law of the United States § 302, Reporters’ Note 2 (“It had sometimes been suggested that a treaty or other international agreement must deal with ‘a matter of international concern.’ That suggestion derived from a statement by Charles Evans Hughes.”).


\textsuperscript{30} 29 Annals of Cong. 49 (1816); see also 10 Documentary History of the Ratification of the Constitution 1396 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (reporting James Madison’s remarks at the Virginia ratifying convention on June 19, 1788, to the effect that “[t]he object of treaties is the regulation of intercourse with foreign nations, and is external”).

\textsuperscript{31} See, e.g., Henkin, supra note 24, at 197 (questioning the existence of “any formula for determining which matters are and which are not our ‘business’ or the proper ‘business’ of other countries”).
questions that are already familiar from the law of “standing” applied in
central courts: to decide which subjects are matters of international
concern and hence are within the reach of the treaty power, we would
need to identify which interests (or “injuries in fact”) should be
recognized and which should be rejected as insubstantial.

C. The Relevance of Canons About Avoiding Constitutional
   Questions

The morass of modern standing law may give us pause about
embarking on this project. If we accept Chief Justice Hughes’s notion,
the resulting limitations on the treaty-making power are likely to get
quite murky.

An intermediate solution may therefore seem appealing. To the extent
possible, we may want our courts to remain agnostic about the scope of
subject-matter limitations on the treaty power: perhaps we are willing to
entertain the possibility that such limitations might exist, but we are not
eager to have courts try to specify exactly what they are. Ann’s
proposed solution achieves this attractive result by drawing upon what
scholars of statutory interpretation call the “avoidance canon.” She
suggests that when faced with treaty provisions that may or may not
exceed possible subject-matter limitations on the treaty power,
American courts should construe the treaty (in the absence of a clear
statement to the contrary) to stipulate that those provisions do not
automatically become rules of decision for American courts, or at least
not to stipulate that the provisions do automatically become rules of
decision for American courts. Thus, doubts about the President’s power
to make a particular treaty should lead courts to put the treaty in what I
am calling the second or third categories.

This solution neatly avoids (or at least postpones) questions of
domestic constitutional law. If the treaty itself is understood to say that
implementing legislation is necessary before its provisions will be rules

32. See WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION:
33. In some circumstances, the courts may have to confront the constitutional questions after
Congress has passed implementing legislation. Suppose that in the absence of a (constitutionally
authorized) treaty, this legislation would be beyond the reach of Congress’s enumerated powers;
the legislation is constitutional if, but only if, it is necessary and proper for carrying into
execution the treaty-making power that Article II gives the President. To decide whether to
recognize the rules of decision provided by this legislation, the courts may well need to address
the question that they avoided before. Even under Ann’s suggested solution, then, courts
sometimes will have to face questions about the scope of the treaty-making power in order to
decide whether a particular treaty can be implemented by federal legislation or only by state
legislation.
of decision for American courts, then the Supremacy Clause does not require American courts to apply those rules before such legislation is enacted. As a result, American courts will not have to decide whether the treaty's provisions exceed the power conferred by Article II: regardless of the answer to this question, the treaty's provisions will form rules of decision for them only to the extent that appropriate implementing legislation is passed.

Despite the neatness of this solution, though, I wonder about its legitimacy as a matter of treaty interpretation. Even when courts are construing domestic statutes, application of the avoidance canon is often questionable. It seems to me that the canon is on even shakier ground as applied to treaties.

When two countries enter into a treaty, they presumably are agreeing to the same thing. The rules of treaty interpretation therefore ought to be rules of international applicability. In keeping with this proposition, the proper interpretation of treaties has long been thought to be a subject for the law of nations. This remains true in modern times: rules of treaty interpretation are prescribed either by explicit convention or by the custom of nations.

I do not think that our federal Constitution has much to say about the content of those rules. In particular, it does not "Americanize" them. Members of the founding generation were perfectly prepared to have American courts interpret treaties according to the prevailing international customs and conventions that formed part of the law of nations.

I am skeptical that the avoidance canon used by American courts in construing domestic statutes is also part of the international conventions that currently govern the interpretation of treaties. To be sure, those conventions might well counsel against interpretations that would make a treaty manifestly exceed the authority that our Constitution confers upon the President. The manifest unconstitutionality of one interpretation of the treaty is reason to prefer a different interpretation, because it suggests that all parties to the treaty probably intended the

34. See Frederick Schauer, Ashwander Revisited, 1995 SUP. CT. REV. 71.
35. See, e.g., VATTÉL, supra note 8, at 199-221 (setting forth various rules, "founded upon right reason and ... approved and prescribed by the Law of Nature," for interpreting treaties).
36. See, e.g., Vienna Convention, supra note 10, arts. 31-33.
37. See, e.g., 4 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS 332 (Boston, Thomas B. Wait 1821) (reprinting circular letter drafted by John Jay and unanimously approved by the Confederation Congress for transmission to the various states in April 1787) (indicating that it is the duty of American courts "to determine [questions about the meaning of a treaty] according to the rules and maxims established by the laws of nations for the interpretation of treaties").
treaty to mean something else. Current norms of customary international law, after all, put other countries on notice of the clear provisions of our Constitution; even under the international rule of recognition, the United States is not bound by treaties that manifestly exceed the President’s treaty-making power.\textsuperscript{38} If a particular interpretation of a treaty would render the treaty unenforceable even as a matter of international law, it seems sensible to prefer a different interpretation. Thus, the rules of interpretation applicable to treaties may well incorporate a kind of “savings” canon: when possible, treaties to which the United States is a party should be interpreted to avoid manifest transgressions of the President’s treaty-making authority.

The mere fact that a particular interpretation of a treaty would raise constitutional \textit{questions}, though, cannot benefit from the same argument. Current norms of international law put the burden of constitutional doubts on us, not on other countries: if the treaty may or may not be within the President’s authority to conclude, then it apparently \textit{can} give rise to international obligations for the United States (according to the international rule of recognition). The law of nations, then, does not necessarily support any presumption against interpreting treaties to approach the limits of the President’s constitutional authority.

In defense of the avoidance canon, one might presume that the President is reluctant to come too close to the constitutional line: if one interpretation of a treaty would make it plainly constitutional and another interpretation would make it questionable, perhaps there is reason to think that at least the \textit{American} negotiators understood the treaty in the former sense. But even if one assumes that treaty-makers try not to use their powers to the fullest, this argument may not bear on the question of “self-execution.” Suppose, for instance, that the President enters into a human-rights treaty that may or may not be within his constitutional authority. For American courts to interpret the treaty as being “non-self-executing” may avoid constitutional \textit{questions for them}, but it usually cannot be defended in terms of the President’s likely intent: if the President did indeed commit the United States to international obligations that lay beyond his powers, then he went beyond what Article II permits regardless of whether the treaty is “self-executing” in American courts.\textsuperscript{39}

\textsuperscript{38} \textit{See supra} note 10 and accompanying text.

\textsuperscript{39} This problem might be avoided if the treaty is read to make the following agreement: \textit{if} the United States implements its provisions domestically, then the other parties to the treaty will do what the treaty says they will do (at least unless and until the U.S. repeals its implementing legislation). This agreement essentially gives the U.S. an option; no international obligation
In sum, if one would otherwise interpret a human-rights treaty to be "self-executing" (i.e., to provide rules of decision applicable in American courts even without implementing legislation), then the mere fact that the treaty may be near the limits of the President’s treaty-making authority does not strike me as reason enough to reach a different conclusion.

follows from the agreement unless the U.S. has the implementing legislation in force. But the language of many treaties does not lend itself to this reading.