

# “Political” Commitments and the Constitution

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### INTRODUCTION

How does the Constitution regulate the president's power to make agreements with foreign nations? Does it govern *all* international agreements made by the president or only *some* of them? These questions lie at the core of recent debates over the executive's ability to forge a new security relationship with Iraq. According to a November 2007 Declaration of Principles signed by President George W. Bush and Iraqi Prime Minister Nouri al-Maliki, the two nations envisioned two key components to that relationship.<sup>1</sup> First, they would agree on a status-of-forces agreement (SOFA), detailing conditions for the continued stationing of U.S. forces in Iraq.<sup>2</sup> Second, the United States and Iraq would conclude a Strategic Framework Agreement (SFA) in which the United States would promise to help Iraq if it faced foreign aggression or a renewed domestic terrorist insurgency.<sup>3</sup>

The United States and Iraq reached agreement on both the SOFA and the SFA on November 17, 2008.<sup>4</sup> The lengthy negotiations, however,

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1. Press Release, White House, Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America (Nov. 26, 2007), at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-11.html> [hereinafter Declaration of Principles].

2. See Declaration of Principles, *supra* note 1, princ. 3(2).

3. *Id.* princ. 3(1). The Declaration of Principles envisioned additional U.S. economic, political, diplomatic, and cultural support for Iraq in the context of the SFA. *Id.*; see also *Declaration and Principles: Future U.S. Commitments to Iraq: J. Hearing Before H. Subcomm. on the Middle East and South Asia and the H. Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 14–62 (2008) (testimony of David Satterfield, Senior Adviser, Coordinator for Iraq, U.S. State Department).

4. Agreement between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (Nov. 17, 2008), available at [http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE\\_SOFA.pdf](http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf); Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq (Nov. 17, 2008), available at [http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE\\_SFA.pdf](http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SFA.pdf) [hereinafter SFA]. See

caused considerable controversy for both sides.<sup>5</sup> In the United States, the executive branch resisted calls for legislative consultation or approval of these agreements, insisting it could forge them alone.<sup>6</sup> The Bush administration proffered two very different rationales for this position. With respect to the SOFA, the executive claimed that the president could rely on independent constitutional authority to form a "sole executive agreement" rather than a treaty subject to the Senate's advice and consent or a "congressional-executive agreement" authorized by the whole Congress.<sup>7</sup> In doing so, the executive opened a new chapter in long-running debates over the Constitution's allocation of the power to make legally binding international agreements for the United States.<sup>8</sup>

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Peter Graff, *Iraq, US Sign Pact on Troops Withdrawal Deadline*, REUTERS, Nov. 17, 2008, at <http://www.reuters.com/article/vcCandidateFeed7/idUSLH492272>. The new agreements succeeded the existing UN mandate that expired on December 31, 2008. See MATTHEW C. WEED, U.S.-IRAQ STRATEGIC FRAMEWORK AGREEMENT AND STATUS OF FORCES AGREEMENT: CONGRESSIONAL RESPONSE (Cong. Research Serv., CRS Report for Congress Order Code RL34568, July 11, 2008).

5. In Iraq, the controversy centered on the SOFA, with legislative and popular resistance to a long-term U.S. presence and immunities for U.S. forces and contractors. See, e.g., Sudarsan Raghavan, *Progress Cited on U.S.-Iraq Pacts; Foreign Minister Says Nations Are Working to Resolve Differences*, WASH. POST, July 3, 2008, at A13; Mary Beth Sheridan & Karen DeYoung, *Iraq Seeks Changes to Security Pact*, WASH. POST, Oct. 29, 2008, at A11; Mary Beth Sheridan, *Iraqi Cabinet Backs U.S. Security Deal; Parliament, Top Council Must Approve*, WASH. POST, Nov. 17, 2008, at A12; Mary Beth Sheridan, *Maliki Defends U.S.-Iraq Deal to Public, Criticizes Opposition*, WASH. POST, Nov. 19, 2008, at A13.

6. See Satterfield, *supra* note 3, at 19; Lolita C. Baldor, *Gates, Rice defend US-Iraq security agreement*, ASSOCIATED PRESS, Nov. 19, 2008, available at [http://www.huffingtonpost.com/2008/11/19/gates-rice-defend-us-iraq\\_n\\_145016.html#](http://www.huffingtonpost.com/2008/11/19/gates-rice-defend-us-iraq_n_145016.html#); Graff, *supra* note 4; Condoleezza Rice & Robert Gates, Op-Ed., *What We Need Next in Iraq*, WASH. POST, Feb. 13, 2008, at A19; Mary Beth Sheridan & Karen DeYoung, *U.S., Iraqi Officials Question Terms of Draft Security Deal; At Issue: Legal Authority Over Troops*, WASH. POST, Oct. 18, 2008, at A10.

7. Although the constitutional text only references the Senate route, all three branches of government recognize the president's ability to rely on either Congress or on executive power alone to make at least *some* treaties as that term is used in international law. See, e.g., U.S. CONST. art. II, § 2, cl. 2 (granting the president the "[p]ower, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur"); *Medellin v. Texas*, 128 S. Ct. 1346, 1371 (2008) (confirming the presidential power to make sole executive agreements in area of claims dispute resolution); *Dames & Moore v. Regan*, 453 U.S. 654, 679–80, 686 (1981) (recognizing the presidential authority to conclude sole executive agreements); *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (recognizing congressional-executive agreements); see also CONG. RESEARCH SERV., COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 3–5 (Comm. Print 2001) [hereinafter SENATE FOREIGN RELATIONS COMMITTEE REPORT]; LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 215–30 (2d ed. 1996); Robert E. Dalton, *National Treaty Law & Practice: United States*, in NATIONAL TREATY LAW & PRACTICE 765, 780–85 (Duncan Hollis et al. eds., 2005). Unless otherwise noted, we use "treaty" in its broader, international sense.

8. Specifically, this debate revolves around the precise scope and interchangeability of do-

The executive branch initially offered a very different rationale for rejecting legislative involvement in the SFA, insisting that the agreement would be nonbinding—a *political commitment*.<sup>9</sup> By definition, political commitments do not create legally binding obligations, even if they have normative force in the political (or moral) context. As such, the executive claimed it could make the SFA commitment free from the constitutional constraints that apply to international legal agreements like the SOFA.<sup>10</sup> Ultimately, the United States and Iraq opted to recast the SFA—like the SOFA—as a legally binding treaty commitment.<sup>11</sup> The SFA negotiations thus introduced, but left unresolved, an important question of international and constitutional significance: what authority does the president have to make political commitments in the first place?

From an international perspective, the executive stood on firm ground in promising Iraq security through a political commitment rather than a legal one. Political commitments have a long history. They are not simply “scraps of paper”; political commitments include some of the most significant texts of the last century.<sup>12</sup> The United States regards the Atlantic Charter, which formed the basis for the Allied Powers’ coordinated efforts during World War II, as a political commitment.<sup>13</sup> President

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mestic methods for making legally binding treaties. *See, e.g.*, MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 165–91 (1990); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on the Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

9. *See* Satterfield, *supra* note 3, at 17, 19 (stating that, according to the State Department, Iraq agreements will not include a binding commitment to defend Iraq); Karen DeYoung, *Iraqi Official: Security Pact Altered; Change Aimed at Bypassing Need for Congressional Approval*, WASH. POST, June 18, 2008, at A10 (“Under sharp questioning from U.S. lawmakers, the administration has insisted that the [security] agreement will be ‘nonbinding’ and can be legally signed by [President George W.] Bush without congressional approval.”).

10. *See* Satterfield, *supra* note 3, at 19, 22; Greg Bruno, *U.S. Security Agreements and Iraq*, COUNCIL ON FOREIGN REL. BACKGROUNDER, Nov. 17, 2008, at <http://www.cfr.org/publication/16448>.

11. *See* SFA, *supra* note 4. The executive branch has indicated that both the SOFA and the SFA will be treated as sole executive agreements and reported to Congress pursuant to the Case-Zablocki Act. *See infra* note 174 and accompanying text. The SOFA required the completion of additional domestic processes before it entered into force, including the approval of the Iraqi parliament.

12. *See* Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296, 303 (1977).

13. *See* Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1603 [hereinafter Atlantic Charter]; ARNOLD

Richard Nixon and China's Chairman Mao Zedong used the same mechanism to establish a new Sino-U.S. relationship via the "Shanghai Communiqué."<sup>14</sup> Perhaps the most renowned political commitment came in 1975, when nation-states competing in the Cold War concluded the Helsinki Accords. The Accords established an organizational forum—the forerunner of today's Organization for Security and Cooperation in Europe (OSCE)—to host dialogue on issues ranging from human rights to security.<sup>15</sup> More recently, on July 8, 2008, the Group of Eight (G8) issued a Declaration on Environment and Climate Change, in which the United States (for the first time) committed to seek fifty-percent reductions in global greenhouse gas emissions by 2050.<sup>16</sup> Alongside these more prominent examples, bilateral and multilateral political commitments have been "employed in almost every field of international relations."<sup>17</sup>

The popularity of political commitments reflects their utility to nation-states. They serve as alternatives for normative commitments where states cannot (or do not want to) create legal obligations, whether as a matter of international law via treaty or national law via contract. Beyond substance, political commitments may establish processes for interstate communication on a range of topics, projects, and problems. And, whether political commitments involve substance, process, or both, states can and do rely on them.<sup>18</sup> When a state undertakes a politi-

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McNAIR, *THE LAW OF TREATIES* 6 (1961); Dalton, *supra* note 7, at 767; Pierre Michel Eisemann, *Le Gentleman's agreement comme source du droit international*, 106 *JOURNAL DU DROIT INTERNATIONAL* 326, 332–33 (1979) (Fr.). In negotiations over the Vienna Convention on the Law of Treaties, the Soviet Union disputed this characterization, listing the Charter and Allied Agreements at Cairo, Yalta, and Potsdam as "very important rules of international law." Conference on the Law of Treaties, Vienna, Austria, Mar. 26–May 24, 1969, U.N. Doc. A/Conf.39/11/Add.1 (1969); *see also* Schachter, *supra* note 12, at 297–98.

14. U.S.-China Joint Communiqué, 66 DEP'T ST. BULL. 435 (1972) [hereinafter Shanghai Communiqué]. The Shanghai Communiqué was the first of three informal Sino-U.S. agreements addressing normalization of diplomatic relations and promises to cooperate along economic, cultural, and political lines.

15. The Final Act of the Conference on Security and Cooperation in Europe, 73 DEP'T ST. BULL. 323 (1975) [hereinafter Helsinki Accords].

16. Press Release, White House, G8 Declaration on Environment and Climate Change (July 8, 2008), at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/07/20080708-3.html> [hereinafter G8 Declaration]; *see also* Sheryl Stolberg, *Pact on Gas Emissions Eludes Rich and Developing Nations*, N.Y. TIMES, July 10, 2008, at A10. G8 participants include Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States.

17. Anthony Aust, *The Theory & Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787, 788 (1986).

18. *See, e.g.*, Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, 5 J. INT'L ECON. L. 647 (2002); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 613 (2005); Schachter, *supra* note 12, at

cal commitment, other participating states tailor their conduct accordingly. At times, compliance with the political norm or participation in the agreed process serves as its own end; or, it can presage or supplement legal agreements. In any case, if a state violates its political commitment, other states can sanction it, albeit through political instead of legal means (witness, for example, the recent political fallout from Russia's decision to suspend political commitments to the North Atlantic Treaty Organization (NATO) following its incursions into Georgia).<sup>19</sup> Given such utility and popularity, political commitments have garnered significant scholarly attention in both international relations and international law.<sup>20</sup>

From a constitutional perspective, however, political commitments appear invisible. The question of whether and how the United States can enter into political commitments with other nations has received virtually no attention.<sup>21</sup> Thus, unlike recurring debates over constitutional control of the president's treaty-making powers, the United States has entered into political commitments without any serious examination of the practice's constitutional foundations. Courts have had little to say on the topic, given their obvious reluctance (and likely inability) to opine on what are quintessentially "political" questions.<sup>22</sup> The lack of judicial

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19. See Founding Act on Mutual Relations, Cooperation and Security, NATO-Russia, May 27, 1997, 36 I.L.M. 1006 [hereinafter NATO-Russia Founding Act]; Paul Ames, *NATO: Russia Halts Military Cooperation*, ASSOCIATED PRESS, Aug. 21, 2008, available at <http://abcnews.go.com/International/wireStory?id=5626122>.

20. For international law scholarship supportive of the practice, see, for example, Aust, *supra* note 17; Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?*, 11 NETH. Y.B. INT'L L. 65 (1980); Eisemann, *supra* note 13, at 344–48; Fritz Münch, *Comments on the 1968 Draft Convention on the Law of Treaties: Non-binding Agreements*, 29 ZIETSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (1969) (F.R.G.); Schachter, *supra* note 12; and Michael Virally, *La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique*, 60 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 166 (1983) (Fr.). But see JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 72 (1996) (disputing the possibility of nonlegal normative orders for agreement); PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES ¶ 74, at 26 (José Mico & Peter Haggemacher trans., 1989) (1972) (finding "considerable uncertainty" in the political commitment concept). International relations scholarship has focused on the role of political commitments in regime design and on questions of legalization. See, e.g., Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991); Raustiala, *supra* note 18.

21. Michael Ramsey has given the topic limited attention while evaluating sole executive agreements. Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. REV. 133, 143 (1998); see also SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 7, at 58–59 (noting the political commitments practice).

22. See, e.g., *Baker v. Carr*, 369 U.S. 186, 198 (1962) (referring to "political questions" as

review does not, however, mean political commitments operate free of constitutional constraints. There are numerous examples of constitutional allocations of power that effectively lack judicial oversight.<sup>23</sup> If anything, judicial inactivity stresses the need for the executive and legislative branches to devise views on where authority for these instruments lies.<sup>24</sup>

We believe the time has come for a sustained constitutional inquiry of the U.S. political commitments practice. First and foremost, we aim to demonstrate why constitutional actors should care about political commitments. We reject the notion that simply because international law does not govern political commitments, it follows that domestic law must adopt the same position. Nor do we agree that if political commitments have no direct effect on federal or state law, they lack constitutional relevance. On the contrary, we argue that this instrument functions as an indispensable tool of U.S. foreign relations, one with potentially significant consequences not only for how others treat the United States and its nationals, but also for future executive *and* congressional conduct. Political commitments can operate on extended timelines, create deep normative expectations, and involve extensive institutional arrangements. Moreover, in the absence of international legal enforcement mechanisms, the international consequences of political commitments mimic those of treaty commitments. As a normative matter, therefore, we believe that the Constitution *should* view the authority to conclude political commitments as a power of the federal government.

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nonjusticiable).

23. See, e.g., *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973) (holding that Congress, not courts, supervises National Guard issues); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 145 (1912) (holding that courts cannot decide the "political question" of whether a state government is "republican"); *Luther v. Borden*, 48 U.S. 1, 46–47 (1849) (holding that courts will not determine which state government is legitimate in the face of two competing claims given power delegated to Congress under the Guaranty Clause); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 L. & CONTEMP. PROBS. 293 (1993).

24. In this respect, we view our work as part of the larger body of scholarship challenging the centrality of judicial decision making to constitutional interpretation. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

Second, as a descriptive matter, we seek to show that the Constitution *does* govern the formation of political commitments. Because this power has gone unacknowledged to date, we recognize that its nature and allocation require some elaboration. Is it plenary to the executive branch or shared in some sense with the legislature? Can the executive use the “political” moniker to conclude any commitment it wants, regardless of whether, absent that label, the text would require legislative or Senate approval? In other words, can the president use political commitments as an end run around the treaty power? Or, do democratic values dictate a legislative role in certain decisions of national importance even absent a direct legal impact?

Neither the text of the Constitution nor the historical context in which it was framed provides extensive guidance for the current U.S. political commitment practice. Nevertheless, the executive can invoke customary and structural rationales to provide a constitutional foundation for the president’s authority to conclude these commitments on behalf of the United States. At the same time, neither these rationales nor prudence generally favors a plenary executive power over political commitments. As with international *legal* agreements, we argue that the executive power to make international *political* commitments is subject to legislative checks, even if distinct from—and lesser than—those that operate in the treaty context. Although recognizing constitutional controls over the political commitment power could impose new costs on the executive, we believe that they are outweighed by attendant benefits in terms of democratic accountability and signaling effects for both international and domestic actors.

In seeking to situate political commitments within the constitutional structure, we recognize its potential overlap with two widely explored constitutional powers—foreign affairs and treaty making.<sup>25</sup> But, political commitments operate in ways that existing theories of these powers do not address. Unlike many “discretionary” foreign affairs powers (e.g., recognition of other governments), political commitments involve a mutuality of commitment that produces costs (and benefits) inapplicable to unilateral executive action. Moreover, whatever parallels exist

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25. See, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005) [hereinafter Prakash & Ramsey, *Foreign Affairs*]; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234–35 (2001) [hereinafter Prakash & Ramsey, *Executive Power*]; *supra* note 8 (regarding treaty-making power).

functionally, by definition, political commitments do not constitute treaties.

Our ultimate goal, therefore, lies in defining a distinct constitutional space for political commitments. Doing so has significant implications. First, at the most general level, it reaffirms the Constitution’s reach beyond judicially enforced “law” to regulate relationships among constitutional actors in creating—and participating in—normative frameworks more generally. Second, it provides a constitutional foundation for the vast majority of executive political commitments that have gone unsubstantiated to date. Third, it opens the door for discussion of when (and how) Congress should insert itself into the political commitment context. Given the political interactions at issue, we avoid drawing fixed lines that the president (and Congress) may not cross. Instead, we offer a contextual framework based on variations in the political commitment’s form, substance, organization, and autonomy to guide when Congress should demand consultation or a larger role.

Part I of this Article addresses political commitments as an international phenomenon. We define political commitments and, filling a gap in the existing literature, suggest four variables—form, substance, organization, and autonomy—for differentiating among them. In Part II, we explore the relationship between political commitments and the Constitution. We explain how the international and domestic functions of such instruments warrant constitutional scrutiny, why existing constitutional powers cannot play that role, and how standard interpretative methods support the construction of a discrete executive political commitment power that is neither plenary nor unlimited. Part III explores this power’s application to specific situations. We conclude by noting the implications a recognized executive political commitment power would have for the future of U.S. foreign relations.

## I. POLITICAL COMMITMENTS IN AN INTERNATIONAL CONTEXT

### A. *Defining the Political Commitment*

Political commitments have likely existed since antiquity.<sup>26</sup> They did not enjoy explicit recognition as such, however, until the latter half of the nineteenth century with the emergence of the “gentlemen’s agreement.”<sup>27</sup> Originally conceived as personal commitments among officials, governments extended this practice to accommodate national commitments on political matters.<sup>28</sup> In a 1907 U.S.-Japanese gentlemen’s agreement, for example, Japan promised to constrain emigration to the United States in return for a U.S. promise not to enact discriminatory or exclusionary legislation against the Japanese.<sup>29</sup> The term “gentlemen’s agreement” has since fallen into desuetude, but the concept behind it remains very much in use under an array of other names.<sup>30</sup> Of

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26. Early analogues to the modern practice existed in concepts of *personal* (as opposed to *real*) treaties, sponsions, and informal agreements. See HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 167 (Knud Haakonssen & Richard Tuck eds., Liberty Fund 2005) (1625) (defining sponsions as agreements made by unauthorized officials that do not bind a state until tacitly or expressly ratified); EMERICH DE Vattel, *THE LAW OF NATIONS* §§ 209–11, at 218–20 (Lawbook Exchange 2005) (J. Chitty trans., 1854) (1758) (distinguishing *personal* treaty, which expires with a contracting person, from *real* treaty that attaches to the state); Letter from John Forsyth, U.S. Sec’y of State, to Alcée Louis la Branche, Chargé d’Affaires to Texas (May 2, 1838), reprinted in 5 JOHN BASSETT MOORE, *DIGEST OF INTERNATIONAL LAW* § 752, at 210 (1906) [hereinafter Forsyth-la Branche Letter] (“Claims where they are few in number and inconsiderable in amount, are frequently adjusted by *informal agreement* between the diplomatic agent and the minister of foreign affairs . . .” (emphasis added)). Earlier suggestions that Roman law viewed treaties as moral commitments without binding effect have little modern support. See David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius’ De Jure Belli Ac Pacis*, 10 EMORY INT’L L. REV. 1, 84–85 (1996).

27. Fritz Münch was among the earliest scholars to appreciate the practice, albeit a century after it began. Münch, *supra* note 20, at 105; see also Bothe, *supra* note 20, at 68; Schachter, *supra* note 12, at 299. Jan Klabbers claims the first gentlemen’s agreement arose in a secret 1878 Anglo-Russian agreement accepting Russian occupation of Batoum (now Georgia), which, when publicized, Lord Salisbury claimed only bound him personally as a “gentlemen’s agreement.” KLABBERS, *supra* note 20, at 16.

28. See Wilfried Fidler, *Gentlemen’s Agreements*, 7 ENCYCLOPEDIA PUB. INT’L L. 106 (1981).

29. Memorandum by the Division of Far Eastern Affairs (Jan. 11, 1924), reprinted in 2 U.S. DEP’T OF STATE, *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1924*, at 339–74 (1939); Dalton, *supra* note 7, at 766. The commitment emerged through a series of six letters exchanged between the United States and Japan and included an additional promise to repeal a San Francisco school segregation ordinance.

30. Accord Bothe, *supra* note 20, at 95 (endorsing the “political” label); see also KLABBERS, *supra* note 20, at 18 (listing variations in terminology, including, for example, gentlemen’s agreements, informal agreements, de facto agreements, nonbinding agreements, political texts, extralegal agreements, nonlegal agreements, international understandings, and soft law). With the

these, we prefer “political commitment” as the most descriptive of the phenomenon.

What is a “political commitment” today? We define it as a nonlegally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature. In offering this definition, we make four conscious assumptions.

First, we assume that, just as “law” (however defined) does not operate as an exhaustive system for determining human behavior, international law does not represent the only set of rules applicable to interstate relations.<sup>31</sup> In doing so, we dispute the views of several European scholars—most notably Jan Klabbers—who deny either that alternative normative orders for agreement exist beyond law or that states can intentionally select nonlegal orders as the basis of obligation for their commitments.<sup>32</sup> Whatever the theoretical strength of that position, it does not accord with reality—state practice clearly supports the notion of interstate commitments with normative force external to any sense of legal obligation.<sup>33</sup> In addition to the United States, states such as Canada, France, the Netherlands, Thailand, Switzerland, and the United Kingdom, among many others, acknowledge the conclusion of political commitments.<sup>34</sup> Furthermore, as a theory, Klabbers’s effort mistakenly

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notable exception of soft law, discussed *infra*, we regard the political commitment category to include all of these terms.

31. *Accord* Bothe, *supra* note 20, at 65–66; *cf.* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 123–36 (1991) (distinguishing law from other social control systems); H.L.A. HART, *THE CONCEPT OF LAW* 8–10 (2d ed. 1994) (distinguishing legal rules from other types of rules).

32. *See* KLABBERS, *supra* note 20, at 119 (“If states wish to become bound, they have no choice but to become legally bound.”); *see also* REUTER, *supra* note 20. By contrast, our theoretical framework meshes with that proposed by Michael Virally. *See* Virally, *supra* note 20, at 227–30 (distinguishing engagements on legal, moral, and political levels).

33. *See, e.g.*, ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 42, 44 (2000); MCNAIR, *supra* note 13, at 6 (“Frequently, heads of States or duly empowered ministers concur in making declarations of policy which they regard as morally and politically binding but which do not create legal obligations between their States . . . .”); Bothe, *supra* note 20, at 66 (using an empirical approach to reveal political commitment practice); Ian Sinclair, *The Concept of Treaty in International Law*, 91 AM. J. INT’L L. 748 (1997) (book review) (disputing Klabbers’s views).

34. *See, e.g.*, J.G. Brouwer, *National Treaty Law and Practice: Netherlands*, in NATIONAL TREATY LAW & PRACTICE, *supra* note 7, at 483, 486–87; Maurice Copithorne, *National Treaty Law and Practice: Canada*, in NATIONAL TREATY LAW & PRACTICE, *supra* note 7, at 91, 92–93; Pierre Eisemann & Raphaële Rivier, *National Treaty Law and Practice: France*, in NATIONAL TREATY LAW & PRACTICE, *supra* note 7, at 253, 256–57; Ian Sinclair et al., *National Treaty Law and Practice: United Kingdom*, in NATIONAL TREATY LAW & PRACTICE, *supra* note 7, at 727, 729; Sompong Sucharitkul, *National Treaty Law and Practice: Thailand*, in NATIONAL TREATY LAW & PRACTICE, *supra* note 7, at 687, 697–98; Luzius Wildhaber et al., *National Treaty Law and Practice: Switzerland*, in NATIONAL TREATY LAW & PRACTICE, *supra* note 7, at 627, 642–

devalues the role of state consent in giving (or denying) international legal force to agreements.<sup>35</sup> He also suggests that because all law results from political agreements, it follows that law is the only normative order for politics—the two concepts occupy coextensive spheres.<sup>36</sup> In contrast, we assume that even if all law lies within the political sphere, the converse does not hold—politics can (and does) occupy a larger space. Thus, states can choose to create agreements that are legally binding (i.e., agreements having both legal *and* political force) or that rely only on aspects of the political sphere that exist independent of law (i.e., agreements having an exclusively political force).<sup>37</sup> By definition, therefore, we understand a political commitment's normative status to operate independently of any legal force or sanction.<sup>38</sup>

Second, our definition has a negative component. Specifically, political commitments cannot have any legal force. Political commitments thus differ from two types of agreements where states create *legal* commitments: treaties and contracts. Treaty commitments involve legally binding obligations governed by international law. Contracts also

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35. See Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 173 (2005) (refusing “to disregard old state-centric paradigm . . . [because] it is states who continue, through their consent, to dictate who forms the law, who interprets it and who applies it”); see also AUST, *supra* note 33, at 41–44.

36. KLABBERS, *supra* note 20, at 154–55 (“Every international agreement is . . . political, concluded for political reasons between political entities to reach political goals. . . . If law is the normative order governing politics . . . there is no point in positing the existence of agreements which are politically binding only.”).

37. We employ a similar line of reasoning to contest Klabbbers's dismissal of morally binding commitments. Klabbbers suggests that moral rights and obligations flow from something other than the inherent moral quality of promises, since otherwise all agreements would be morally binding and, therefore, could not exist at the discretion of states. KLABBERS, *supra* note 20, at 150. But even if all agreements have moral force, we contend states may opt to rely on the moral duty to perform promises made as the exclusive basis of obligation. In other words, we include agreements of an exclusively moral character in our conception of political commitments—those promises where any sense of obligation flows solely from the act of having made a promise and not from some underlying moral quality of the substance of the promise (which we concede may not be created intentionally). Of course, if we are wrong and Klabbbers is right, his position suggests that all political commitments are treaties, which raises serious questions about the executive's domestic legal authority to make such promises and undermines the international practice generally.

38. As characterized by former U.S. Secretary of State Henry Kissinger, political commitments are “important statements of diplomatic policy [which] engage the good faith of the United States so long as the circumstances that gave rise to them continue. But they are not binding commitments of the United States.” *Early Warning System in Sinai: Hearing Before the S. Comm. on Foreign Relations*, 94th Cong. 211 (1975) [hereinafter *Sinai Hearings*] (statement of Henry Kissinger, U.S. Secretary of State).

involve legally binding obligations, but rely on domestic legal systems to govern their formation, interpretation, and operation.<sup>39</sup>

The 1969 Vienna Convention on the Law of Treaties (VCLT) defines a “treaty” as “an international agreement concluded between states in written form and *governed by international law*, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>40</sup> The Convention’s drafters understood this definition to exclude political commitments.<sup>41</sup> In 1991, the U.S. State Department expressed a similar view in describing political commitments concluded alongside the Treaty with the Soviet Union on the Reduction and Limitation of Strategic Offensive Arms (START Treaty):

An undertaking or commitment that is understood to be legally binding carries with it both the obligation of each Party to comply with the undertaking and the right of each Party to enforce the obligation under international law. A “political” undertaking is not governed by international law . . . . Until and unless a party extricates itself from its “political undertaking,” which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a Party contravenes a political commitment, it will be subject to an appropriate politi-

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39. See AUST, *supra* note 33, at 24–25; Kelvin Widdows, *What is an Agreement in International Law?*, 50 BRIT. Y.B. INT’L L. 117, 144–49 (1979).

40. Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT] (emphasis added). Although not a party, the United States has long recognized the VCLT as generally declarative of customary international law. See, e.g., Transmittal of the Vienna Convention on the Law of Treaties, S. EXEC. DOC. NO. L, 65-118, at 1 (1971) (statement of Secretary of State William P. Rodgers) (emphasizing how the VCLT “is already generally recognized as the authoritative guide to current treaty law and practice”); Dalton, *supra* note 7, at 766. The VCLT definition is not exhaustive, however; it does not include treaties involving international organizations or (to the extent they still arise) oral treaties. See Duncan B. Hollis, *A Comparative Approach to Treaty Law And Practice*, in NATIONAL TREATY LAW & PRACTICE, *supra* note 7, at 8, 9–13.

41. During VCLT negotiations, the Swiss Government proposed to modify the “treaty” definition to exclude “agreements concluded between States at the international level but not constituting treaties, such as declarations of intent, political declarations and ‘gentlemen’s agreements.’” Conference on the Law of Treaties, *supra* note 13, at 225–26. The Drafting Committee rejected that amendment as “superfluous.” See *id.* at 346; see also Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 495, 504–05 (1970) (discussing U.S. negotiators’ account of VCLT negotiations). In preparing the draft used for VCLT negotiations, the UN International Law Commission also viewed treaties as distinct from political commitments. See Int’l Law Commission, *Report of the Commission of the International Law Commission to the General Assembly*, at 96, U.N. Doc. A/4169 (Apr. 20–June 26, 1959).

cal response.<sup>42</sup>

Thus, by our definition, treaty obligations and political commitments exist in contraposition. International law governs the treaty such that its breach can generate both political *and* legal consequences; in contrast, only politics governs the political commitment so its breach will only produce political consequences.<sup>43</sup>

Third, we have consciously chosen a binary approach to distinguish treaties and political commitments, and in the process do not attempt to classify the latter as “soft law.” Although “soft law” has multiple meanings, essentially it views law not as a binary phenomenon where something is or is not law, but as a continuum reflecting degrees of bindingness or enforceability ranging from soft to hard.<sup>44</sup> Michael Reisman described the “soft” position on this continuum as occupied by unenforceable laws, whether because of ambiguity, intention, or lack of sanctions.<sup>45</sup> As Prosper Weil has noted in his soft law critique, however, this approach subsumes two very different ideas: (a) norms that, while precise, are not intended to give rise to obligations under international law; and (b) legal norms incapable of enforcement because they are too vague or lack monitoring or enforcement mechanisms.<sup>46</sup> Our definition of political commitments would include the first set of norms but not the second. Moreover, while we have our doubts about the soft law thesis generally, it would prove especially difficult to implement in a constitu-

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42. Transmittal of the Treaty with the U.S.S.R. on the Reduction and Limitation of Strategic Offensive Arms (START Treaty), Nov. 25, 1991, S. TREATY DOC. NO. 102-20, at 1086; SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 7, at 58–59. Political consequences also flow from the breach of treaties, but, at least under international law, legal consequences do not flow from the breach of a political commitment.

43. See *supra* notes 36–38 and accompanying text.

44. See, e.g., Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q. 901, 913 (1999) (describing the multifaceted and various forms of soft law); Christine M. Chinkin, *The Challenges of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 865–66 (1989); Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 434–35 (1991).

45. W. Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RECUEIL DES COURS 1, 180–81 (1997) (Neth.).

46. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 417 n.7, 417–18 (1983). That problem can be avoided by narrowing the soft law definition. See, e.g., Wolfgang H. Reinicke & Jan M. Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-Binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75, 76 n.3 (Dinah Shelton ed., 2000) [hereinafter COMMITMENT AND COMPLIANCE] (defining soft law as nonlegally binding normative agreements).

tional context.<sup>47</sup> Some soft law (i.e., unenforceable legal norms) by virtue of their admitted legality would trigger constitutional processes relating to U.S. treaty-making powers, while other types of soft law would not.<sup>48</sup> Distinguishing treaties from political commitments—and treating each as subject to distinct constitutional processes—mitigates such confusion.<sup>49</sup>

Fourth and finally, we have identified sovereign states as the sole actors capable of making political commitments. We have done so for practical rather than theoretical reasons. Indeed, to the extent political commitments do not derive from international law, there is no reason to limit political commitment making to the entities that can conclude treaties.<sup>50</sup> We do so, therefore, as a matter of convenience, given our constitutional focus on political commitments that the federal government may negotiate and conclude.<sup>51</sup> Others may wish to explore whether (and how) the political commitment category could expand to include commitments involving nonstate actors.

Turning to what *is* covered in our political commitment concept—in other words, a nonlegally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature—it comprises three basic elements:

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47. Critics of soft law have challenged its normative value and theoretical coherence. For normative critiques, see, for example, Richard B. Bilder, *Beyond Compliance: Helping Nations Cooperate*, in COMMITMENT AND COMPLIANCE, *supra* note 46, at 65, 72 and Weil, *supra* note 46. Klabbers and Kal Raustiala, in contrast, challenge the soft law theory's internal coherence. See KLABBERS, *supra* note 20, at 158–59; Raustiala, *supra* note 18, at 587–88.

48. Soft law does not differentiate based on the form or intent of instruments, treating political commitments such as the G8 Declaration on Climate Change as equivalent to nonjusticiable treaty commitments in instruments such as the UN Charter or IMF agreements. See Richard R. Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549, 552–54 (1980).

49. We do not mean to suggest that political commitments never exist within a treaty, but only that soft law fails to make exactly those sorts of distinctions in favor of a more generalized scale of normativity. See *infra* notes 116–19 and accompanying text.

50. See Hollis, *supra* note 35, at 146 (identifying international actors that make treaties). Indeed, the political commitment concept could be extended domestically, an effort that Jacob Gersen and Eric Posner have recently undertaken in examining congressional resolutions, albeit through a soft law lens. See Jacob E. Gersen & Eric A. Posner, *Soft Law*, 61 STAN. L. REV. 573 (2008).

51. *Accord* Raustiala, *supra* note 18, at 586. Nor do we mean to suggest that subnational actors cannot conclude political commitments; subnational actors make them with some frequency. See Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071 (2008). But to the extent separate constitutional provisions regulate U.S. states, we do not include their political commitments within the category that, we argue, warrants distinct constitutional treatment. See, e.g., U.S. CONST. art. I, § 10, cl. 1 (“No state shall enter into any treaty, alliance or confederation . . . .”); *id.* art. I, § 10, cl. 3 (“No state shall, without the consent of Congress . . . enter into any agreement or compact with . . . a foreign power . . .”).

*mutuality, expectation, and manifest intent.* Mutuality refers to the element of agreement requiring an interchange or communication among participating states. Political commitments are bilateral or multilateral in nature; unilateral declarations of a single state, whatever their political (or legal) importance, do not qualify as political commitments under our definition.<sup>52</sup> Expectation involves the normative aspect of the political commitment's reference to future behavior. Political commitments produce expectations of future conduct, whether in terms of a change in behavior from the status quo or a continuation of existing behavior.<sup>53</sup> Not every joint statement or multilateral instrument will constitute a political commitment; they must contain some promise involving future behavior to do so. Finally, manifest intent reflects the need for the participating states to desire their mutual expectation to acquire exclusively political (or moral) normative force.

Of these three criteria, treaties also require mutuality and expectation, although qualitative differences in the nature of expectations likely exist.<sup>54</sup> Indeed, as political commitments have proliferated, they have adopted many of the same forms, structures, implementation procedures, and even exit provisions as treaties.<sup>55</sup> Thus, *the* distinguishing feature of the political commitment vis-à-vis the treaty rests on intent.<sup>56</sup>

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52. The exact boundaries of mutuality may require further elaboration to differentiate cases where a state is truly acting alone from those where a state appears to act unilaterally, but, in fact, is doing so to perfect an agreement reached with one or more other states. For example, depending on how broadly one construes mutuality, it might include the companion U.S. and U.S.S.R. unilateral declarations made to extend the first Strategic Arms Limitation Treaty (SALT I) after it expired by its own terms. See Bothe, *supra* note 20, at 72–73; see also SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 7, at 59; *infra* notes 67–68 and accompanying text.

53. Bothe, *supra* note 20, at 72–73 (assessing expectations in nonlegal agreements); Raustiala, *supra* note 18, at 584–85 (discussing the “depth” of agreements by reference to the departure they require from what the state would do in the absence of the agreement).

54. See *infra* notes 133–35 and accompanying text.

55. See Bothe, *supra* note 20, at 85–88. Traditionally, political commitments were thought to be terminable at will, but more modern examples suggest that this is not a requirement. AUST, *supra* note 33, at 38. Similarly, political commitments may now contain dispute settlement provisions, even if not of the third-party variety. *Id.* at 38–39.

56. See, e.g., Letter from Douglas J. Bennet, Jr., Assistant Sec’y for Cong. Relations, to John J. Sparkman, U.S. Senator (Aug. 14, 1978), reprinted in MARIAN LLOYD NASH, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 799 (1978) (relating that the Bonn Declaration “is an important political commitment, [but] it is not an international agreement within the meaning of United States law or international law since the parties did not evidence an intent to be legally bound”); Memorandum from Monroe Leigh, U.S. State Dep’t Legal Adviser (Mar. 12, 1976), reprinted in ELEANOR C. MCDOWELL, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 265 (1976) (“The central requirement [of treaty making] is that the parties intend their undertaking to be of legal, and not merely political or personal, effect.”); see also AUST, *supra* note 33, at 31; MCNAIR, *supra*, note 13, at 6; Bothe, *supra* note 20, at 94; Schachter, *supra* note 12, at 296–97; Widdows,

Generally, states create a treaty if they intend to do so; likewise, states create a political commitment when they so intend. The difficulties of determining subjective intent are well-documented, requiring reliance on manifest intent instead.<sup>57</sup> As Oscar Schachter noted, "[I]nferences as to such intent have to be drawn from the language of the instrument and the attendant circumstances of its conclusion and adoption."<sup>58</sup>

How do states manifest their intent to create a political commitment? States may expressly indicate that intention by writing it into the agreement. The NATO-Russia Founding Act's preamble references its "political commitments," while the preamble to the 1987 Stockholm Disarmament Declaration describes the agreement as "politically binding."<sup>59</sup> In other cases, the text may disclaim any intention to create a legally binding instrument.<sup>60</sup> Anthony Aust cites a confidential bilateral text, which stated that it "represents a political commitment by the Sides [Governments] and does not constitute a legally-binding agree-

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*supra* note 39, at 120–39. *But see* KLABBERS, *supra* note 20, at 95 ("[I]ntent, its importance notwithstanding, cannot always be decisive.").

57. When cases on questionable legal texts have come before the International Court of Justice (ICJ), the Court has focused on objective manifestations of intent rather than post hoc rationalizations. In *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1978 I.C.J. 3, 43 (Dec. 19), the ICJ held that the instrument at issue failed to demonstrate an intent to submit a dispute to the Court. Scholars disagree about whether the ICJ reached this conclusion because the commitment was not intended to be legally binding or because an agreement to consent to ICJ jurisdiction was not triggered by the facts presented. *Compare* AUST, *supra* note 33, at 17 ("The Court found that there had been no intention to conclude an agreement to submit to the jurisdiction of the Court."), *with* Bothe, *supra* note 20, at 75 ("[E]ven if [the document] were a legal agreement, it could not, according to its terms, be a basis for the jurisdiction of the Court."), and Christine Chinkin, *A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States*, 10 LEIDEN J. INT'L L. 223, 234 (1997) ("The Court did not dismiss the [joint communiqué] as being without any legal effect but only as insufficient to support a unilateral application of the dispute to the Court."). In *Qatar v. Bahrain*, the ICJ found the parties had agreed to consent to its jurisdiction based on intent evidenced in "terms of the instrument" itself and "the circumstances of its conclusion," not from what the parties said afterwards was their intention. *Maritime Delimitation and Territorial Questions (Qatar v. Bahr.)* 1994 I.C.J. 112, 122, 138 (July 1). Christine Chinkin, however, read the case to deemphasize party intent in favor of an "objective" approach to interpreting the agreement. Chinkin, *supra*, at 236–37. Sir Hersch Lauterpacht had earlier advocated the same approach. Sir Hersch Lauterpacht, Special Rapporteur, *Report by the Special Rapporteur on the Law of Treaties*, U.N. Doc. A/CN.4/87 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 123, 125, U.N. Doc. A/CN.4/SER.A/1954/ADD.1.

58. Schachter, *supra* note 12, at 297.

59. NATO-Russia Founding Act, *supra* note 19, at 1008; Conference on Confidence- and Security-Building Measures and Disarmament in Europe, *Final Stockholm Document*, Sept. 19, 1986, 26 I.L.M. 190, 195.

60. *See, e.g.*, U.S.-Israel Free Trade Area Agreement, Declaration on Trade in Services, Apr. 22, 1985, 24 I.L.M. 653, 679 [hereinafter U.S.-Israel Declaration] (providing in its preamble that "principles set forth below shall not be legally-binding").

ment.”<sup>61</sup> Intention may also exist by inference, as in the Helsinki Accords provision declaring that instrument incapable of the registration required of “every treaty” under Article 102 of the UN Charter.<sup>62</sup>

What if the text is not so explicit? Some states have adopted particular nomenclature—for example, using the title “Memorandum of Understanding” (MOU); employing the verb “will” instead of “shall”; or referencing the agreement’s effective date instead of its entry into force—to demonstrate when they intend to create a political commitment.<sup>63</sup> Other states, including the United States, insist that terminology only serves as a reflection of state intent, such that nomenclature alone cannot be determinative of an agreement’s status as a political commitment (or treaty).<sup>64</sup> Ultimately, the question of intent may turn on a presumption—in other words, where states enter into agreements that do not manifest intent as to their legal or political status, the former (or latter) is presumed. To date, most (but not all) international lawyers favor a presumption of treaty making in lieu of creating political commitments.<sup>65</sup>

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61. AUST, *supra* note 33, at 28. In a title that reflects not only intent but perhaps also an attempt at humor, participants in the UN Conference on Environment and Development issued a “[n]on-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development regarding all types of forests.” U.N. Conference on Env’t & Dev. [UNCED], *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, U.N. Doc. A/Conf.151/26 (Vol. III), Annex III (June 13, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm> [hereinafter *Forest Principles*].

62. Helsinki Accords, *supra* note 15, at 349; see U.N. Charter art. 102, para. 1 (“Every treaty and every international agreement entered into by any Member . . . shall as soon as possible be registered with the Secretariat and published by it.”); cf. Conference on Security and Co-operation in Europe, *Charter of Paris for a New Europe*, Nov. 19–21, 1990, at 13, available at [http://www.osce.org/documents/mcs/1990/11/4045\\_en.pdf](http://www.osce.org/documents/mcs/1990/11/4045_en.pdf) (1990) [hereinafter *Charter of Paris for a New Europe*] (declaring the charter “not eligible for registration”). States have not faithfully fulfilled the Article 102 obligation; today it has little weight in determining an instrument’s legal status. See D.N. Hutchinson, *The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or not it is a Treaty*, 46 CURRENT LEGAL PROBS. 257 (1993).

63. AUST, *supra* note 33, at 27 (discussing the British Commonwealth practice).

64. *Id.* at 32.

65. For scholars presuming legally binding intent, see, for example, Aust, *supra* note 17, at 798; Lauterpacht, *supra* note 57, at 125; Widdows, *supra* note 39, at 142. *But see* J.E.S. Fawcett, *The Legal Character of International Agreements*, 30 BRIT.Y.B. INT’L L. 381, 400 (1953) (presuming agreements do not “create legal relations unless the parties expressly or impliedly so declare”); Schachter, *supra* note 12, at 297 (“[D]eclarations of principles are considered too indefinite to create enforceable obligations and . . . should be presumed to be nonbinding.”).

B. *The Need for a Political Commitment Typology*

The foregoing discussion illustrates the attention international lawyers have given to political commitments. Generally, international law has focused on the political commitment concept, not for its own sake, but to further refine the concept of the treaty.<sup>66</sup> Scholars have also asked if legal consequences flow from political commitments. Just as principles of good faith and reliance implicate estoppel with respect to a state's unilateral declarations, international lawyers ask whether estoppel bars states from breaching even their *nonlegal* political commitments if other states reasonably rely on them.<sup>67</sup> Ultimately, however, that line of inquiry does not involve political commitments per se, but rather the circumstances in which international law controls state behavior generally.<sup>68</sup>

Likewise, when international relations scholars focus on political commitments, they tend to do so in contraposition to treaty making. That is the central thrust of Charles Lipson's seminal work, *Why are Some International Agreements Informal?*<sup>69</sup> Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal examine differences between political commitments and treaties as part of their "legalization" project's study of international institutions.<sup>70</sup> Similarly, Kal Raustiala juxtaposes contracts (treaties) and pledges (political commitments) alongside variables of substance and structure to explore alternative design features for international agreements.<sup>71</sup>

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66. See *supra* notes 39–46 and accompanying text.

67. See, e.g., Aust, *supra* note 17, at 807, 810–11 (suggesting estoppel may apply to certain political commitments, but not mere statements of political will); Münch, *supra* note 20, at 11 (suggesting estoppel might apply where there is a gentleman's agreement and reasonable reliance on it); Schachter, *supra* note 12, at 301 (suggesting estoppel might apply to certain informal agreements). But see KLABBERS, *supra* note 20, at 111–14 (suggesting that legal consequences for political commitments undermine their claim for a separate, political normative status). On the legal consequences of unilateral declarations, see Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1 (1977).

68. See Sinclair, *supra* note 33, at 750.

69. Lipson, *supra* note 20.

70. See, e.g., Abbott et al., *supra* note 20. Specifically, they define legalization in terms of three characteristics: (1) obligation, (2) precision, and (3) delegation. *Id.* at 401–02; see also Judith Goldstein et al., *Legalization and World Politics*, 54 INT'L ORG. 385 (2000). Unlike other international relations scholars (e.g., Charles Lipson, Kal Raustiala), proponents of legalization use a continuum, rather than binary division, for assessing obligations ranging from legal to political commitments.

71. Raustiala, *supra* note 18, at 583–85; see also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 91–100 (2005) (discussing choices at stake in selecting between legal and nonlegal agreements).

For these experts, the issue is not to refine the boundary line between treaties and political commitments, but to explain *why* states choose to use one method or the other.<sup>72</sup> Scholars have offered four functional rationales to explain state preferences for political commitments versus treaties:

- *Flexibility*—political commitments can be more quickly and simply formed, amended, or exited than treaties;
- *Credibility*—political commitments communicate less strong or less intense expectations of future behavior than do treaties;
- *Confidentiality*—political commitments have less public visibility than treaties and can be kept secret if desired; and
- *Domestic law*—domestic law controls treaty making but not the formation of political commitments.<sup>73</sup>

Thus, these studies purport to identify the tradeoffs (i.e., ex post flexibility and confidentiality versus ex ante credibility and domestic law) at stake in choosing political commitments over treaties.<sup>74</sup>

Both international law and international relations literature prove problematic, however, in analyzing the political commitment phenomenon itself. Scholars tend to treat political commitments as a single, homogenous category or as occupying one pole of a spectrum, instead of exploring internal variations within the category.<sup>75</sup> This deficiency is understandable given the preexisting focus on differentiating political commitments from treaties to explain selection tendencies; a difference, as we explain below, that has value to our project. But, it ignores how political commitments themselves can differ in terms of flexibility, credibility, and confidentiality. Moreover, the domestic law rationale for

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72. As Raustiala has noted, the functional explanations are remarkably uniform. Raustiala, *supra* note 18, at 591 n.72.

73. See, e.g., AUST, *supra* note 33, at 35–39; Bothe, *supra* note 20, at 90–92; Lipson, *supra* note 20, at 499–500; Raustiala, *supra* note 18, at 591–92. A separate line of international relations scholarship seeks explanatory variables for the tradeoffs among these rationales, such as levels of uncertainty, risks of opportunistic behavior, and diversity in interests and preferences. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

74. See, e.g., Raustiala, *supra* note 18, at 592 (“Rational states trade off ex ante credibility for ex post flexibility.”). The Senate Foreign Relations Committee Report acknowledges the utility of the distinction as well. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 7, at 62.

75. Lipson explored variations among political commitments, but focused on differences in form, distinguishing among hidden, tacit and informal agreements. Lipson, *supra* note 20, at 518–30.

the treaty/political commitment distinction presupposes a negative answer to the very question we ask here, namely, whether the Constitution regulates the process by which the United States enters into political commitments.

To inform our constitutional analysis, we need a typology of political commitments. Our goal though is not simply taxonomic, classifying political commitments just to classify them; rather, we seek to identify characteristics of political commitments that can inform our analysis of whether and how the Constitution regulates their use. Specifically, we identify four independent variables for differentiating among political commitments: (1) form, (2) substance, (3) organization, and (4) autonomy. We have selected these variables because each may be assessed objectively, and each affords an independent basis for differentiating the amount of flexibility, credibility, or confidentiality that political commitments produce.<sup>76</sup>

### 1. *Form*

Political commitments vary widely in terms of the form they take.<sup>77</sup> At their most informal, states can make oral political commitments. Denmark's prime minister and his Finnish counterpart reportedly settled their dispute over the construction of a bridge over the deep-water channel of the Great Belt by a telephone conversation.<sup>78</sup> On the other end of the spectrum, political commitments can involve elaborate, signed written agreements by heads of state. On August 1, 1975, U.S. President Gerald Ford, along with thirty-four other national leaders, signed the sixty-five pages of the Helsinki Accords.<sup>79</sup>

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76. These variables are not exhaustive, but instead illustrative. Future scholarship should explore alternative variables, including participant identity, norm significance, instrument confidentiality, or third-party oversight.

77. See SENATE FOREIGN RELATION COMMITTEE REPORT, *supra* note 7, at 61–62.

78. See *Passage through the Great Belt (Fin. v. Den.)*, 1991 I.C.J. 12 (July 29); see also Press Release, Foreign Press Services, *The Oral Agreement Between Finland and Denmark on the Passage Through the Great Belt Dispute* (Sept. 4, 1992), in 3 FINNISH Y.B. INT'L L. 610–13 (1992). Finland sued Denmark in the ICJ in response to Denmark's plan for building a suspension bridge over the Great Belt. Finland feared that the bridge would restrict access to the strait, Finland's only outlet to the world's oceans. In its oral agreement, Denmark agreed to pay Finland ninety million kroner as compensation for any negative effects Finland would suffer from the construction of the bridge. In exchange, Finland dropped its complaint with the ICJ. See *Order Discontinuing the Proceedings, Passage through the Great Belt (Fin. v. Den.)*, 1992 I.C.J. 348 (Sept. 10). Although we join others in characterizing this agreement as a political commitment, Anthony Aust takes the view that it was a rare example of an oral treaty. AUST, *supra* note 33, at 7.

79. Helsinki Accords, *supra* note 15.

In between these poles lie various middle positions, illustrated in Table 1 below. Political commitments can take the form of an exchange of letters, such as the exchange between the United States and the Soviet Union settling the Cuban Missile Crisis (a commitment never fully honored).<sup>80</sup> Lower level government officials may sign political commitments on behalf of the United States or an individual government agency. Although not without controversy, Secretary of State Henry Kissinger gave Israel written security assurances via a political commitment in the context of negotiating the Sinai Peace Accords.<sup>81</sup> In other instances, a political commitment is formed through unsigned declarations produced at bilateral summits (e.g., the Shanghai Communiqué) or international conferences (e.g., the 1992 Rio Declaration on Environment and Development).<sup>82</sup> States have even used identical letters to adopt multilateral political commitments—for example, the London Guidelines on exports of nuclear material, equipment or technology.<sup>83</sup>

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80. For the letters, see 6 FOREIGN RELATIONS OF THE UNITED STATES, 1961–1963: KENNEDY-KRUSHCHEV EXCHANGES 1–118 (Charles S. Sampson ed., 1996), available at [http://www.state.gov/www/about\\_state/history/volume\\_vi/exchanges.html](http://www.state.gov/www/about_state/history/volume_vi/exchanges.html); see also THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 884 (10th ed. 1980). Soviet Premier Nikita Khrushchev committed to pull offensive nuclear weapons out of Cuba with UN verification; President John F. Kennedy agreed not to invade and to lift the quarantine on Cuba. UN verification never occurred, as the Soviets removed their missiles while Fidel Castro refused on-site inspections on sovereignty grounds. *Id.*

81. See Early Warning System Agreement, U.S.-Isr., Sept. 1, 1975, 26 U.S.T. 2271; Israel-United States Memorandum of Understanding, U.S.-Isr., Sept. 1, 1975, 32 U.S.T. 2150; ISR. MINISTRY OF FOREIGN AFFAIRS, 3 ISRAEL'S FOREIGN RELATIONS: SELECTED DOCUMENTS 1974–1977, at 281–90 (Meron Medzini ed., 1982) (reproducing texts of the Sinai Peace Accords); *The Spirit of the Sinai Settlement*, TIME, Oct. 20, 1975, at 41. Israel viewed Kissinger's "moral commitment" as a legal obligation, binding the United States to resupply Israel's military and provide it with certain aid. *The Spirit of the Sinai Settlement*, *supra*, at 42.

82. See Shanghai Communiqué, *supra* note 14; UNCED, *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf.151/26 (Vol. 1) (Aug. 12, 1992) [hereinafter *Rio Declaration*].

83. See International Atomic Energy Agency [IAEA], *Nuclear Suppliers Group: Guidelines for Nuclear Transfers*, IAEA Doc. INFCIRC/254 (Feb. 1978), reprinted in 17 I.L.M. 220 [hereinafter *London Guidelines*].

TABLE 1: FORMALITY OF POLITICAL COMMITMENTS

LOW	MEDIUM	HIGH
Oral commitments	Unsigned, written commitments; Agency level commitments; Exchanges of letters	Elaborate, signed instruments; Commitments made on a nation's behalf

Why does form matter? Just as the distinction between treaties and political commitments may signal different types of credibility, so too can form provide a gauge for the level of credibility a state seeks to attach to its political commitments.<sup>84</sup> The more formal a commitment, the greater it engages a state's credibility with respect to future behavior under the deal.<sup>85</sup>

## 2. Substance

Whatever the form, political commitments can also vary significantly in terms of the content of the commitments undertaken. First, political commitments may vary by subject matter. Political commitments have appeared on virtually every topic of international concern.<sup>86</sup> They have had a significant impact on matters including security, arms control, nuclear proliferation, monetary exchange, financial capital, sovereign debt, trade, health, conservation, environmental preservation, pollution, development, and human rights.<sup>87</sup>

84. See *supra* note 73 and accompanying text.

85. This is not to suggest, of course, that all oral political commitments lack credibility, but that both sides have less *national* credibility at stake in an oral commitment than a written one. (Of course, the personal credibility of a face-to-face oral commitment may be high.)

86. See Aust, *supra* note 17, at 788. Based on domestic interest group demands, Raustiala argues that political commitments are less prevalent in the environment, human rights, and trade areas. Raustiala, *supra* note 18, at 600. Even if true quantitatively, it is difficult to conceive of international environmental or human rights regimes without reference to political commitments such as the Stockholm and Rio Declarations, the American Declaration on the Rights and Duties of Man, or the UN Declaration on Human Rights. See *Rio Declaration*, *supra* note 82; U.N. Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Final Declaration*, U.N. Doc. A/CONF.48/14 (1973), reprinted in 11 I.L.M. 1416; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, O.A.S. Official Rec., OEA/Ser.L./V./II.23, doc. 21 rev. 6 (1948); Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

87. See, e.g., U.S.-Israel Declaration, *supra* note 60 (trade); Helsinki Accords, *supra* note 15 (security); *Forest Principles*, *supra* note 61 (conservation); Communiqué on World Economy and Foreign Exchange Rates, Sept. 22, 1985, reprinted in 24 I.L.M. 1731 (monetary policy); *Rio Dec-*

Second, the political commitment's substance varies in two other key respects beyond its subject matter: *normativity* and *precision*. By normativity, we mean the extent of expectation conveyed by the promise—in other words, whether the political commitment involves a promise of result, effort, or intention. Normativity exists in its strongest form when a state guarantees certain results with immediate effect. For example, in the 1972 China-Japan Communiqué, China “renounce[d] its demand for war reparation from Japan,” a promise performed via the statement itself.<sup>88</sup> Less, but still substantial, normative weight accompanies promises of result with respect to future behavior. The same 1972 communiqué records how China and Japan “shall in their mutual relations settle all disputes by peaceful means and shall refrain from the use or threat of force.”<sup>89</sup>

Normativity lessens when a state's commitment focuses more on expected effort to achieve a result than on the result itself. For example, instead of indicating what they “shall” or “must” do, states often indicate what they “will” or “should” do. In the 1978 Bonn Declaration, participating heads of state and governments resolved that their governments “should take immediate action to cease all flights” to countries that refused to extradite or prosecute terrorist hijackers.<sup>90</sup> States may also retain highly normative language (e.g., “must,” “shall”) but qualify it in terms of effort (e.g., “must work to,” “shall strive to”).<sup>91</sup>

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laration, *supra* note 82 (conservation); *London Guidelines*, *supra* note 83 (nuclear); UDHR, *supra* note 86 (human rights); Press Release, The Paris Club, The Paris Club and the Republic of Iraq Agree on Debt Relief (Nov. 21, 2004), at <http://www.clubdeparis.org/sections/services/communiqués/irak6017/switchLanguage/en> (sovereign debt); International Convergence of Capital Measurement and Capital Standards: A Revised Framework, June 2006, at <http://www.bis.org/publ/bcbs128.pdf> [hereinafter Basel Accord] (financial markets). For a discussion of political commitments on arms control, see *infra* note 103.

88. Joint Communiqué of the Government of Japan and the Government of the People's Republic of China (Sept. 29, 1972), translated in Takakazu Kuriyama, *Some Legal Aspects of the Japan-China Joint Communiqué*, 1973 JAPANESE ANN. INT'L L. 42, 81–83 [hereinafter Japan-China Joint Communiqué]. Takakazu Kuriyama documents the Japanese government's view of the communiqué as a nonlegal document. *Id.* at 50.

89. *Id.* at 82.

90. Joint Statement on International Terrorism (July 17, 1978), reprinted in 17 I.L.M. 1285 [hereinafter Bonn Declaration]. In a 1996 OSCE Agenda on Security Cooperation, participating states “condemn[ed] and pledge[d] to refrain from any policy of ‘ethnic cleansing’ or mass expulsion.” Organization for Security and Co-operation in Europe, *Declaration on a Common & Comprehensive Security Model for Europe for the Twenty-First Century; Framework on Arms Control; Agenda on Security Cooperation*, OSCE DOC.S/1/96 (Dec. 3, 1996), reprinted in 36 I.L.M. 486, 490 [hereinafter *Lisbon Summit Declaration*] (emphasis added).

91. Alternatively, states can qualify effort commitments in ways that raise normativity. See Helsinki Accords, *supra* note 15, art. 6 (“[P]articipating States will refrain from any intervention . . . in the internal or external affairs falling within the domestic jurisdiction of another participat-

Commitments to maintain (or change) a policy lie further down the normativity scale. In the NATO-Russia Founding Act, NATO members reiterated that “they have no intention, no plan and no reason to deploy nuclear weapons on the territory of new members, nor any need to change any aspect of NATO’s nuclear posture or nuclear policy—and do not foresee any future need to do so.”<sup>92</sup> At the lowest level of normativity are statements of mere intention—announcing what participating states “plan” or “desire” to do. For example, a 1998 political commitment between the U.S. and Uzbek defense departments listed certain defense and military cooperation activities that the two sides “plan to make their best efforts to undertake” in the coming year.<sup>93</sup>

The element of precision, by contrast, relates not to the extent of expectation but to its content—in other words, whether the promise involves commitments to principles, standards, or rules. Principles set forth considerations for evaluating conduct rather than providing a norm for conduct itself.<sup>94</sup> Standards impose norms on future conduct, but do so in ways that require *ex post* analysis of compliance. Rules, in contrast, provide *ex ante* norms for future conduct.<sup>95</sup> Just as principles, standards, and rules can give content to legal obligations, similar diversity exists among political commitments. For example, the Rio Declaration includes a precautionary principle: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>96</sup> Examples of standards exist in the “nonle-

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ing State . . . . They *will* likewise *in all circumstances refrain* from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty . . . .” (emphasis added).

92. NATO-Russia Founding Act, *supra* note 19, at 1013.

93. Plan of Cooperation between the Department of Defense of the United States of America and the Ministry of Defense of the Republic of Uzbekistan for 1998 (Feb. 27, 1998) (on file with authors) [hereinafter U.S.-Uzbek Plan of Cooperation].

94. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–28 (1977).

95. See, e.g., Daniel Bodansky, *Rules vs. Standards in International Environmental Law*, 98 AM. PROC. SOC’Y INT’L L. 275, 276 (2004); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

96. See *Rio Declaration*, *supra* note 82, princ. 15. States, such as the United States, prefer to refer to it as the “precautionary approach” out of concern that conceding it as a principle would grant the norm international legal force. See, e.g., John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, *The Role of Precaution in Risk Assessment and Management: An American’s View*, Remarks Prepared for European Commission Conference: The US, Europe, Precaution and Risk Management: A Comparative Case Study Analysis of the Management of Risk in a Complex World (Jan. 11–12, 2002), available at [http://www.whitehouse.gov/omb/inforeg/eu\\_speech.aspx](http://www.whitehouse.gov/omb/inforeg/eu_speech.aspx) (“What do I mean by precaution? I can assure you that I do not intend to define any universal precautionary principle. As you know, the

gally binding” criteria agreed to in the Santiago Declaration for sustainable conservation and management of forests.<sup>97</sup> By contrast, the London Chemical Guidelines provide specific rules on “minimum information to be provided” to the International Register of Potentially Toxic Chemicals created under that instrument.<sup>98</sup>

It is important to distinguish precision from normativity. Although participating states may convey the same level of normativity in two political commitments, for example “pledging to do X” in both, “X” can vary greatly in generality or specificity. Contrast, for example, the precision of the 1996 OSCE Agenda on Security Cooperation’s “pledge to refrain from any policy of ethnic cleansing or mass expulsion”<sup>99</sup> with the 2000 Charter for European Security in which participating states “pledge to take measures to promote tolerance and to build pluralistic societies where all, regardless of their ethnic origin, enjoy full equality of opportunity.”<sup>100</sup> Table 2 illustrates the variety of both normativity and precision in the substance of political commitments.

TABLE 2: SUBSTANCE OF POLITICAL COMMITMENTS

	LOW	MEDIUM	HIGH
Normativity	Statements of Intention	Declarations of Effort	Promises of Result
Precision	Principles	Standards	Rules

The combination of precision and normativity, therefore, affects much of a political commitment’s credibility (not to mention its flexibility or confidentiality).<sup>101</sup> Commitments with high normativity and high

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US government supports precautionary approaches to risk management but we do not recognize any universal precautionary principle.”); see also John S. Applegate, *The Taming of the Precautionary Principle*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 13, 14 (2002) (recognizing the United States’ vigorous opposition to the precautionary principle).

97. See The Santiago Declaration: Statement on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests (Feb. 3, 1995), reprinted in *Sustaining the World’s Forests: The Santiago Agreement*, 93 J. FORESTRY 18, 19 (1995).

98. See UNEP Guidelines for the Exchange of Information on Chemicals in International Trade, pt. II, § 6, reprinted in 17 I.L.M. 220 (as amended in 1989) [hereinafter London Chemical Guidelines].

99. *Lisbon Summit Declaration*, supra note 90, at 489 (emphasis added).

100. OSCE, *Charter for European Security* (Nov. 19, 1999), reprinted in 39 I.L.M. 255, 259 (emphasis added); see also *Charter of Paris for a New Europe*, supra note 62, at 5 (“[W]e renew our pledge to refrain from the threat or use of force against the territorial integrity or political independence of any State . . . .”) (emphasis added).

101. See supra note 73 and accompanying text.

precision send the strongest signal of expected future behavior. By contrast, where normativity and precision conflict (i.e., promises of result with respect to general principles or statements of intention with respect to highly precise rules), credibility benefits decrease. And few expectations result from a text that has both low normativity and low precision.

### 3. *Organization*

Independent of any substantive expectations of future behavior, political commitments also vary by the extent to which they involve agreement on a process for organization of future communications. Some have no organizational content; they are one-time commitments. Political commitments that settle disputes, for example, often have little organizational function (e.g., the Danish-Finish settlement agreement).<sup>102</sup> Other commitments involve participating states committing to *some* process of future negotiations or meetings. The United States and the Soviet Union frequently did this in the arms control context during the Cold War.<sup>103</sup> Other political commitments have substantial organizational content, whether organizing a bilateral relationship (e.g., the NATO-Russia Founding Act) or establishing a multilateral regime within which participating states agree to discuss and cooperate on a common problem or project.<sup>104</sup> The Financial Action Task Force (FATF), constituted in 1989 as a G7 (now G8) initiative, established a framework for coordinating national and international responses to money laundering and terrorist financing. More than thirty states have committed to participating in the FATF, which operates with the assistance of a secretariat and has produced forty recommendations on money laundering and nine on terrorist financing.<sup>105</sup> At the top of the organizational structure are political commitments that establish perma-

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102. See *supra* note 78 and accompanying text; see also *Simultaneous Agreements Made between France and Spain and Great Britain and Spain for the Maintenance of the Territorial Status Quo of these Three Countries in the Mediterranean and in that Part of the Atlantic Ocean which Washes the Shores of Europe and Africa* (May 16, 1907), *reprinted in* 1 AM. J. INT'L L. 425 (Supp. 1907).

103. See, e.g., U.S.-U.S.S.R. Joint Statement on Strategic Arms Limitations, Nov. 24, 1974, *reprinted in* 71 DEP'T ST. BULL. 879 (1974); Joint Communiqué, Moscow, U.S.-U.S.S.R., July 3, 1974, *reprinted in* 71 DEP'T ST. BULL. 185 (1974); see also Protocol to U.S.-U.S.S.R. Treaty on Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., July 3, 1974, 27 U.S.T. 1645.

104. See *supra* notes 19, 59. The London Chemical Guidelines, for example, establish multiple institutional arrangements, leveraging existing and new institutions. See London Chemical Guidelines, *supra* note 98, pt. I, § 5, at 4.

105. For the FATF's mandate, membership details, and the text of its recommendations, see FATF/GAFI, at <http://www.fatf-gafi.org> (last visited Jan. 22, 2009).

ment international institutions or organizations. The Helsinki Accords did this with the OSCE, which now has fifty-six state participants, a staff of three thousand, and an annual budget of over € 164 million.<sup>106</sup> Table 3 explores this range of organizational content for political commitments.

TABLE 3: ORGANIZATIONAL IMPLICATIONS  
OF POLITICAL COMMITMENTS

LOW	MEDIUM	HIGH
One-time commitments	Commitments to future negotiations; Temporary frameworks to address global problems	Establishment of permanent institutions for developing, overseeing, or settling normative issues

We recognize that, on one level, organization is simply another version of a political commitment's substance. After all, promises to meet, negotiate, or even regulate a particular topic have elements of normativity and precision like other promises. We have chosen to distinguish the political commitment's organizational element, however, because it reflects a conceptually distinct type of promise—one that relates to *process*. The presence (or lack) of organization affects a political commitment's flexibility in terms of both operation and exit options. Highly organized political commitments afford states less flexibility than do less organized promises. Similarly, highly organized commitments suggest a particular type of credibility (i.e., commitment to a process or regime) independent of agreement on other norms of "substance." This degree of commitment to processes and institutional fora for interstate communication has distinct effects on the ability of political commitments to constrain (or empower) future state behavior.

#### 4. *Autonomy*

The previous variables—form, substance, and organization—examine aspects of a political commitment's content, in other words, the *internal* relationships it establishes among participants. Autonomy, in contrast, examines a political commitment's *external* relationships—the

106. See Organization for Security and Co-operation in Europe, About, Facts and Figures, at <http://www.osce.org/about/19298.html>.

extent to which it stands apart from, or relates to, legal commitments. Some political commitments operate with near total autonomy, having no fixed connection to a treaty or treaty commitment. The Helsinki Accords, for example, created an avowedly nonlegal framework for interstate relations; today, the OSCE manages (and generates) normative commitments separate and apart from international law.<sup>107</sup> Other political commitments have less autonomy. Many arise where states desire a treaty, but political will or factual circumstances do not yet allow one to be created. We might view these political commitments as “prelegal”—moving states along a path toward legal commitment, even if the political commitment itself lacks legal force.<sup>108</sup> Some political commitments even involve promises to generate treaty commitments.<sup>109</sup>

Political commitments that are directly tied into law in some way lie further down the autonomy scale. Some have a direct relationship with domestic law, relying on it to handle questions of their formation and operation. For example, participating states agreed to constitute the Global Aids Fund under Swiss law to ensure that it could own property, contract, and otherwise perform assigned functions.<sup>110</sup> The United States has implemented the Kimberley Process on eliminating trade in “blood diamonds” via statute.<sup>111</sup>

Political commitments can also be formed under the authority of international legal commitments or regimes. Pierre Eisemann referred to these as “informal supplemental agreements.”<sup>112</sup> The political commit-

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107. Occasionally, however, certain OSCE participating states have sought to convert that organization, via treaty, into an international organization governed by international law.

108. Alexandre Kiss, *Commentary and Conclusions*, in COMMITMENT AND COMPLIANCE, *supra* note 46, at 223, 229–30.

109. OSCE, *Budapest Summit Declaration on Genuine Partnership in a New Era* (Dec. 6, 1994), *reprinted in* 34 I.L.M. 764, 790 [hereinafter *Budapest Summit Declaration*] (stating that participating states that are not parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) reiterate their “pledge to accede to the NPT as non-nuclear-weapon States in the shortest time possible”); Memorandum of Understanding on Port State Control in the Caribbean Region, Feb. 9, 1996, *reprinted in* 36 I.L.M. 231, 237 (“Each Authority that has accepted the Memorandum will . . . take all necessary steps to ratify instruments relevant for the purposes of this Memorandum.”).

110. See David Sullivan, *International Coalitions of the Willing*, 99 PROC. AM. SOC’Y INT’L L. 243, 244, 246 (2005); see also The Global Fund to Fight AIDS, Tuberculosis and Malaria, The Framework Document of the Global Fund to Fight AIDS, Tuberculosis and Malaria, at [http://www.theglobalfund.org/documents/TGF\\_Framework.pdf](http://www.theglobalfund.org/documents/TGF_Framework.pdf) (last visited Jan. 22, 2009).

111. Clean Diamond Trade Act, 19 U.S.C. §§ 3901–3913 (2003); Interlaken Declaration on Kimberley Process Certification Scheme for Rough Diamonds, Nov. 5, 2002, *available at* <http://www.kimberleyprocess.com/download/getfile/5> [hereinafter Interlaken Declaration] (endorsing the Kimberley Process Certification Scheme).

112. Eisemann, *supra* note 13, at 331, 333–35 (referring to *l’accords informel supplétif*).

ment by which permanent members of the Security Council allocate other Security Council seats on a regional basis serves as an example of this phenomenon. The need for, and function of, the commitment embodied in the membership selection process derives from a treaty—the UN Charter.<sup>113</sup> The content of a political commitment may also connect it to international law. In the 1995 OSCE Budapest Summit, for example, participating states made a separate political commitment to fulfill their existing international law obligations.<sup>114</sup> Alternatively, political commitments can relate to interpretations or applications of international law. For example, in 2003, the parties to the Montreal Protocol committed politically to a common interpretation of the text to avoid the trade problems that could have resulted from varying plausible interpretations of the Protocol.<sup>115</sup>

In some cases, a political commitment has no autonomy; it exists within a treaty, alongside treaty obligations.<sup>116</sup> The Algiers Accords, which settled the U.S.-Iran hostage crisis, contains legal commitments to set up, utilize, and abide by the decisions of the U.S.-Iran Claims Tribunal (undoubtedly, a treaty commitment) alongside what is likely a political commitment—a U.S. “pledge” to maintain its policy of not interfering in Iran’s internal affairs.<sup>117</sup> Similarly, the Sinai Peace Accords

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113. See Eli Lauterpacht, *Gentlemen’s Agreements*, in *INTERNATIONALES RECHT UND WIRTSCHAFTSORDNUNG* 381, 383–84 (1977) (F.R.G.).

114. See *Budapest Summit Declaration*, *supra* note 109, at 790 (“[P]articipating States will . . . implement fully all their existing undertakings in the field of nuclear disarmament and arms control.”).

115. U.N. Env’t Programme, *Report of the 15th Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, at 45, Dec. XV/3, U.N. Doc. UNEP/OzL.Pro.15/9 (Nov. 11, 2003). In *Natural Resources Defense Council v. EPA*, 464 F.3d 1, 8–9 (D.C. Cir. 2006), the Court of Appeals for the District of Columbia viewed certain “adjustments” agreed to by the parties as “political commitments” that it could not enforce without raising constitutional questions under the nondelegation doctrine. *Id.* But the Montreal Protocol expressly authorizes adjustments to its terms, so the Court was wrong to view them as political commitments, which, by definition, lack legal status. Montreal Protocol on Substances that Deplete the Ozone Layer art. 2, Sept. 16, 1987, 1522 U.N.T.S. 29, 31–33 (authorizing a supermajority vote of meeting of the parties to adjust for all parties’ control measures with respect to consumption and production of ozone depleting substances covered by the treaty).

116. See Bothe, *supra* note 20, at 71. Referring to the agreements on spheres of influence made by the Allies after World War II, Michael Bothe argues that “[w]ith respect to Yalta and Potsdam in particular, it is probably correct to distinguish between the various parts of the agreements reached. Some parts are of such a nature as to produce specific legal obligations for the participating states, while others determine lines of policy, and their qualification as legally binding would not appear to be justified.” *Id.*

117. Declaration of the Government of the Democratic and Popular Republic of Algeria (Jan. 20, 1981), 20 I.L.M. 224, 224–25; U.S. Authorization to Approve Text of Documents relating to the Release of the Hostages (Jan. 18, 1981), 20 I.L.M. 223; see also International Status of South-

contained both political commitments and obligations that were binding on the United States as a matter of treaty law.<sup>118</sup> These situations can create difficulty, however, as distinguishing legal, albeit nonjusticiable, norms from those that are nonlegal political commitments will not always be obvious.<sup>119</sup>

TABLE 4: AUTONOMY OF POLITICAL COMMITMENTS

NONE	MEDIUM	HIGH
Political commitments that exist within a treaty	Political commitments that presage legal commitments; Those derived from existing international legal norms or regimes	Political commitments that exist completely independent of legal norms or regimes

Autonomy is significant because a political commitment’s flexibility and credibility may not only be a function of the commitment’s content, but also of its relationship to other normative paradigms: domestic and international law. The more autonomous the political commitment, the more it can be evaluated in isolation—solely in terms of its form, substance, and organization. But as political commitments lose autonomy, their flexibility and credibility will also depend on the international legal norms to which they relate. A political commitment that purports to govern a treaty’s interpretation or application can improve (or threaten) the credibility and flexibility of the treaty itself. In this way, a political commitment’s degree of autonomy implicates domestic legal controls on treaty making.<sup>120</sup> The less autonomous the political commitment, the more likely the Senate or Congress may view it as an attempt to cir-

West Africa, Advisory Opinion, 1950 I.C.J. 128, 139–40 (June 11) (noting that Articles 75 and 77 of the UN Charter do not impose any legal obligation on mandatory States to conclude or negotiate trusteeship agreements with the United Nations and that “[i]t is not for the Court to pronounce on the political or moral duties which these considerations may involve”). A copy of the U.S. brief in the A/30 Case brought by Iran against the United States in the Iran-U.S. Claims Tribunal confirms the U.S. position that paragraph 1 of the Algiers Accords constitutes a political commitment. See Statement of Defense of the United States, at 40–45, Islamic Rep. of Iran v. United States, Claim A-30 (Iran-U.S. Claims Tribunal, undated), available at <http://www.state.gov/documents/organization/65779.pdf> (last visited Feb. 22, 2009).

118. See *supra* note 81.

119. Thus, it would be a mistake to confuse paragraph 1 of the Algiers Accords with Article 1 of the U.S.-Iran Treaty of Amity, even though the ICJ held that it could not enforce the latter. Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803, 815 (preliminary objection) (Dec. 12).

120. See *supra* note 73 and accompanying text.

cumnavigate the treaty-making processes that would otherwise apply (or have already applied) and in which they may have (or have had) decisive roles.<sup>121</sup>

In sum, political commitments occupy a great deal of space in international relations. They operate in contraposition to treaties, as nonlegally binding mechanisms for states to commit themselves to future behavior within an exclusively political or moral paradigm. It is a mistake, however, to conceive of political commitments only in terms of how they differ from treaties; political commitments represent a discreet and deep category of interstate agreement unto themselves. States can enter into widely divergent types of political commitments depending on the form, substance, organization, and autonomy selected.

## II. A CONSTITUTIONAL POLITICAL COMMITMENT POWER

In contrast to the recognized space that political commitments occupy in international relations, their constitutional role has received no recognition. Neither government officials nor scholars have questioned whether or how the president can conclude political commitments.<sup>122</sup> On the contrary, conventional wisdom presumes that domestic law constraints simply do not apply to political commitments.<sup>123</sup> As a result, political commitments generate domestic legal concern only if they implicate other recognized constitutional powers, such as treaty making or enumerated foreign affairs powers. Domestic debates over the U.S.-Iraqi Declaration of Principles served as a paradigmatic example of this phenomenon. Critics of the executive's position did not challenge the executive's ability to conclude political commitments per se, but argued instead that the particular commitments envisioned were really treaty commitments in disguise, thus mandating the application of treaty-making procedures.<sup>124</sup> This position implies—and the executive has es-

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121. Once the political commitment loses all autonomy, these concerns recede as the domestic law constraints on treaty making undoubtedly apply to such instruments.

122. Michael Ramsey's brief discussion of nonlegal commitments constitutes a lone exception. See Ramsey, *supra* note 21, at 143.

123. See GOLDSMITH & POSNER, *supra* note 71, at 91; *supra* note 73 and accompanying text.

124. See, e.g., *Declaration and Principles: Future U.S. Commitment to Iraq: J. Hearing Before H. Subcomm. on the Middle East and South Asia and the H. Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 45–46 (testimony of Lawrence Korb, Senior Fellow, Center for American Progress); *The November 26 Declaration of Principles: Implications for U.N. Resolutions on Iraq and for Congressional Oversight: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 16–23 (2008) (testimony of Oona A. Hathaway, Professor, Yale Law School); see also *infra* notes 278–79 and accompanying text (de-

entially argued—that when an instrument is “merely” a political commitment, constitutional law is irrelevant.<sup>125</sup>

We believe this conventional wisdom is simply wrong. Constitutional actors should care about political commitments. Political commitments serve both international and domestic functions that warrant treating their formation and operation as subject to constitutional controls. Determining how the Constitution should apply is a harder question. Certainly, the federal government has authority over treaty making specifically, and foreign affairs more generally, even as the scope and allocation of those powers remain contested.<sup>126</sup> Given such ambiguities, there might be room to cabin political commitments within the exercise of one of these already recognized powers. We do not believe, however, that political commitments align well with the objectives or scope of either recognized power as presently theorized. At the same time, we can build a discrete political commitment power utilizing theories of constitutional construction beyond the courts. Although textualism and originalism make limited contributions to finding a constitutional basis for this power, our vision of a political commitment power—as a power of the executive that is neither plenary nor unlimited—finds strong support in customary, structural, and prudential modalities of constitutional interpretation.

#### A. *Why Constitutional Actors Should Care About Political Commitments*

The Constitution clearly cares about treaties; questions about the scope of the treaty power, domestic processes for making treaties, and judicial enforcement have long dominated the constitutional landscape.<sup>127</sup> While treaties differ from political commitments, we do not

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scribing executive dismissal of congressional concern over the U.S.-Russia political commitment on Russian arms sales to Iran).

125. See generally *supra* notes 9–10 and accompanying text.

126. For debates over the treaty power’s allocation, see *supra* note 8. For debates over the foreign affairs power, see Bradley & Flaherty, *supra* note 25; Prakash & Ramsey, *Executive Power*, *supra* note 25; see also Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000).

127. For discussion of the treaty power’s scope, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003). On the domestic allocation of U.S. treaty-making authorities, see *supra* note 8. For discussion of the judiciary’s role, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99

think these differences warrant excluding political commitments from constitutional discourse entirely. On the contrary, functional similarities—rather than differences—link treaties and political commitments in ways that suggest both forms of agreements warrant constitutional scrutiny. Internationally, treaties and political commitments now serve as alternative vehicles for the executive to accomplish similar foreign policy goals, with overlap in terms of the flexibility, credibility, and confidentiality each tool provides. Domestically, treaties have a legal status that political commitments lack, but political commitments still have important effects. Modern political commitments function in ways that the political branches cannot (and should not) ignore.

### 1. *International Functions of Political Commitments*

Political commitments—like treaties—are essentially vehicles for communicating agreements among nation-states. U.S. interests in pursuing agreements vary. Agreements may respond to collective problems such as transnational terrorism.<sup>128</sup> Or, they may seek to coordinate allocation of public goods such as water or greenhouse gas emissions.<sup>129</sup> At one time, political commitments and treaties functioned to achieve such aims quite differently. A treaty bound the nation-state as a whole with violations entitling injured parties not merely to retorsion (otherwise legal acts), but also reprisal (otherwise illegal acts) that often involved gunboats or other uses of force.<sup>130</sup> As a “gentlemen’s agreement,” a political commitment only bound its maker, limiting the temporal scope of the commitment by how long the official held office and providing no basis for employing force in response to a violation.<sup>131</sup>

Today, the differences between treaties and political commitments have narrowed considerably. States can no longer employ force to remedy treaty violations, and political commitments now generally adhere to the United States as a whole, not to a particular administration or

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COLUM. L. REV. 2095, 2123–24 (1999); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); and John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2233 (1999).

128. See, e.g., U.S.-ASEAN Joint Declaration on Combating Terrorism (Aug. 1, 2002), available at <http://www.state.gov/p/eap/rls/ot/12428.htm>.

129. See, e.g., G8 Declaration, *supra* note 16. Rational choice theory suggests states may also reach agreement to record coincidences of interest or to coerce a state into some course of conduct. See GOLDSMITH & POSNER, *supra* note 71, at 88–91.

130. See, e.g., PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 4, 14–15 (7th ed. 1997). Hence, the term “gun-boat diplomacy.”

131. See generally *supra* notes 26–29 and accompanying text.

agency.<sup>132</sup> As a result, the two instruments often function in analogous ways.

Let us be clear: we are not saying that treaties and political commitments are functionally indistinguishable. Use of the treaty form undoubtedly gives a commitment different credibility than its political counterpart; the principle of *pacta sunt servanda* provides a basis for obligation in treaties that does not exist for political commitments.<sup>133</sup> International and domestic law requirements constrain formation, operation, and exit from treaties in ways that frequently make them less flexible than political commitments.<sup>134</sup> Political commitments also fall outside the (nominal) restrictions on confidentiality applicable to treaties.<sup>135</sup>

It is a mistake, however, to infer from these differences that political commitments lack credibility entirely, or that they remain completely flexible, voluntary forms of cooperation and coordination. On the contrary, depending on their form, substance, organization, and autonomy, political commitments can convey *very* credible promises of future U.S. behavior.<sup>136</sup> For example, that was the case for the U.S. commitments in the Atlantic Charter and, more recently, the Global Aids Fund.

Similarly, political commitments do not always derive from simple and quick processes; the Helsinki Accord was the product of a two-year negotiating process, resulting in a document that is virtually indistinguishable from a treaty.<sup>137</sup> Moreover, notwithstanding the standard assumption that political commitments are freely revocable, they often prove quite durable. Secretary of State Robert Lansing characterized his 1917 political commitment with Japanese Minister Ishii Kikujirō regarding China (the Lansing-Ishii Agreement) as merely "a statement of governmental policy, revocable at will, and not binding on the United

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132. *See id.*

133. *See* VCLT, *supra* note 40, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 2–3 (2d ed. 1984).

134. The U.S. Senate advice and consent process alone can take years to produce decisions on the advisability of American participation in a treaty; indeed, the Senate is still considering a treaty submitted to it in 1949. *See* Convention Concerning Freedom of Association and Protection of the Right to Organize, S. 5318, 81st Cong. (1st Sess. 1949).

135. The UN Charter requires public registration of all treaties under Article 102, but non-compliance with that provision has little practical consequence. U.N. Charter art. 102; *see supra* note 62 and accompanying text.

136. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 7, at 63 (explaining that political commitments "are often used, and often evoke expectations of compliance from affected states").

137. Helsinki Accords, *supra* note 15.

States,” but it took a multilateral conference and two solemn treaties to overcome its terms.<sup>138</sup> Academic notions that the United States only concludes public treaties or favors secret political commitments are also inaccurate. The United States still makes some secret treaties, while many political commitments have extraordinarily public visibility (e.g., the Shanghai Communiqué).<sup>139</sup>

Both treaties and political commitments constrain state behavior consistent with an ethic that has deep historical roots—ensuring U.S. promises are kept.<sup>140</sup> Officials regularly conform U.S. foreign policy to existing political commitments.<sup>141</sup> Little empirical evidence exists on how, if at all, compliance with treaties compares to political commitments.<sup>142</sup> But, looking at U.S. practice, differences are not easily discerned. The United States has taken extensive action to comply with treaties such as the Montreal Protocol, but it is not clear if those acts are materially different from efforts to implement political commitments such as the Kimberley Process. Nor is it clear if U.S. participation in the OSCE human rights dialogue differs significantly from its promotion of human rights under Article 55 of the UN Charter.<sup>143</sup>

Perhaps most importantly, treaties and political commitments often function the same way in cases of breach. International law *allows* states to create legal mechanisms to monitor compliance, settle disputes, or remedy treaty breaches. But, states frequently decline to incorporate such tools into their treaty commitments, and nothing in the horizontal nature of the international legal order requires that they do so. Thus,

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138. See, e.g., *Treaty of Peace with Germany: Hearing Before the S. Foreign Relations Comm.*, 66th Cong. 219 (1st Sess. 1919) [hereinafter *Lansing-Ishii Hearings*]; EDWIN S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 236 (1941); GREEN H. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 431 (1943). Similarly, the 1907 Gentlemen’s Agreement with Japan lasted seventeen years before an act of Congress superseded it. See *Immigration Act of 1924*, 68th Cong., 43 Stat. 153 (1924) (nullifying the 1907 commitment by setting quotas on Japanese immigration).

139. See, e.g., 1 U.S.C. § 112b(a) (2004) (recognizing that the president may conclude secret treaties). The Senate treats all Article II treaties as secret until that label is removed. See *STANDING RULES OF THE SENATE*, S. DOC. NO. 110-9, at 42 (2007) (Rule XXX(1)(a)).

140. See SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 49–51 (2d ed. 1916) (discussing the Framers’ concern that the Constitution ensure U.S. state compliance with treaty obligations).

141. Baxter, *supra* note 48, at 556 (“Bureaucrats follow through on what they have said that they would do through force of bureaucratic habit—an analogue to what has sometimes been referred to as the ‘law habit.’”); see also *supra* note 56 and accompanying text.

142. Raustiala, *supra* note 18, at 600 (noting the dearth of empirical evidence on political commitments).

143. Compare 42 U.S.C. § 7671 (2008) (implementing the Montreal Protocol), with *Clean Diamond Trade Act*, 19 U.S.C. §§ 3901–3913 (2003) (implementing the Kimberley Process).

when a state breaches a treaty, international law may allow the United States to claim a legal violation, but not do much else. If the United States wants to respond to such a breach, it employs the same tools available in the case of noncompliance with political commitments, namely *political* responses.<sup>144</sup>

In such situations, “political or economic arguments can bring about a reversal of the [other] State’s position” (e.g., suspension of assistance or cooperation, refusals to agree on other matters).<sup>145</sup> For example, when North Korea reneged on its political commitment to suspend uranium enrichment, the United States suspended aid it had promised to provide under the commitment and encouraged international sanctions.<sup>146</sup> Similarly, if the United States breaches a political commitment, it may trigger the same sort of *political* responses from other states that would arise for a treaty breach. Indeed, the possibility that estoppel may constrain departures from U.S. political commitments suggests that political commitments might in some sense even generate legal consequences.<sup>147</sup>

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144. Treaty breach may entitle injured states to take measures of reprisal in addition to retorsion, but those countermeasures are frequently constrained. See *Draft Articles on Responsibility of States for Internationally Wrongful Acts* art. 49, reprinted in [2001] 2 Y.B. Int’l L. Comm’n 129, U.N. Doc. A/55/10.

145. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 7, at 58 (discussing political consequences for violation of political commitments); Baxter, *supra* note 48, at 550. When Russia breached a political commitment not to sell arms to Iran, the United States threatened to enforce sanctions it had agreed to suspend under the political commitment. See Letter from Madeleine Albright, U.S. Sec’y of State, to Igor Ivanov, Russ. Foreign Minister (Jan. 13, 2000), cited in Bill Gertz, *Senate to Probe Gore’s Pact with Russian Leader: Angered by Lack of Cooperation*, WASH. TIMES, Oct. 20, 2000, at A1.

146. Selig S. Harrison, *Time to Leave Korea?*, 80 FOREIGN AFF., Mar./Apr. 2001, at 62, 62–67 (offering a history of the political commitments between the United States and North Korea); *North Korea’s Nuclear Programs Move Forward, Not Back, in 2006*, VOICE OF AMERICA NEWS, available at <http://www.voanews.com/english/archive/2006-12/2006-12-23-voa15.cfm> (reporting the international sanctions imposed on the year of North Korea’s nuclear test and the U.S. urging of more vigorous economic measures to be taken); EMMA CHANLETT-AVERY & SHARON SQUASSONI, NORTH KOREA’S NUCLEAR TEST: MOTIVATIONS, IMPLICATIONS, AND U.S. OPTIONS (Cong. Research Serv., CRS Report for Congress Order Code RL33709, Oct. 24, 2006), available at <http://fas.org/sgp/crs/nuke/RL33709.pdf> (offering an in-depth look at North Korea’s actions, their possible motivations, and the United States’ options either to continue the current regime of political commitments or to seek more binding measures). In another example, NATO states refused to ratify the Adaptation Agreement to the CFE Treaty until Russia complied with its political commitment to withdraw its military from Georgia and Moldova. See OSCE, *Istanbul Document 1999*, at 49–50, available at [http://www.osce.org/documents/mcs/1999/11/4050\\_en.pdf](http://www.osce.org/documents/mcs/1999/11/4050_en.pdf); Duncan B. Hollis, *Russia Suspends CFE Treaty Participation*, 11 ASIL INSIGHT, July 2007, at <http://www.asil.org/insights070723.cfm>.

147. See *supra* notes 67–68 and accompanying text.

Thus, in terms of international functions, treaties and political commitments overlap in many ways. It is not surprising, therefore, that the executive now regards the political commitment as an essential mechanism for advancing foreign policy interests. At the same time, such similarities suggest that the formation and exercise of both instruments require constitutional control.

The Constitution authorizes—and regulates—U.S. treaty formation, application, and exit precisely because of the international function these instruments serve.<sup>148</sup> They are indispensable tools for all sovereign states.<sup>149</sup> At the same time, compliance (or breach) of treaties can generate significant consequences for the United States and its nationals, whether specifically in the form of countermeasures or more generally in terms of reputation.<sup>150</sup> Executive concerns with U.S. reputation, in particular, have frequently served to explain treaty compliance.<sup>151</sup> The extent to which political commitments have become an equally indispensable tool of sovereign states—one that also can generate powerful consequences via countermeasures or reputational effects—suggests that we should regard political commitments, like treaties, as a product of federal power.<sup>152</sup> As such, political commitments must garner their authority from, and remain subject to, the instrument conveying such power: the Constitution.

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148. See, e.g., HENKIN, *supra* note 7, at 25–30, 175–84; Hathaway, *supra* note 8, at 1316–23, 1349–52; Vázquez, *supra* note 127.

149. See, e.g., Hathaway, *supra* note 8, at 1349–51.

150. See *supra* note 145 and accompanying text (discussing countermeasures). Just as we have documented variations in form, substance, organization, and autonomy for political commitments, a similar variety exists among treaties. As a result, not all treaties generate the same consequences from compliance (or breach); we expect a similar diversity of consequences for U.S. political commitments.

151. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979); see also Abram Chayes & Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 *NEGOTIATIONS J.* 311, 323 (1991); George Downs & Michael Jones, *Reputation, Compliance, and International Law*, 31 *J. LEGAL STUD.* 95, 97 (2002); Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT'L L.* 705 (1988); Andrew Guzman, *A Compliance Based Theory of International Law*, 90 *CAL. L. REV.* 1823, 1861–65 (2002); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 1950–52 (2002); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 *AM. J. INT'L L.* 541 (2005).

152. Scholars have assumed that breaching a political commitment has fewer reputational costs than breaching a treaty commitment. See, e.g., Lipson, *supra* note 20, at 508–09. But that may not always be true. For example, the reputational costs for breaching the Helsinki Accords' human rights provisions might mirror those for violations of human rights treaty commitments. Further empirical study is clearly warranted on this topic.

## 2. *Domestic Functions of Political Commitments*

Even if treaties and political commitments share similar international functions, they differ domestically. The Constitution affords treaties made pursuant to Article II domestic legal status as part of the “supreme Law of the Land”—a status political commitments lack.<sup>153</sup> The judiciary has explicit jurisdiction over cases involving treaties but not political commitments.<sup>154</sup> While it is possible that these domestic differences could justify denying constitutional status to political commitments, three considerations counsel against such a conclusion: (a) the questionable domestic legal status of many treaties; (b) democratic accountability principles; and (c) political commitments’ impact on domestic law.

First, as in the international context, the domestic functional differences between treaties and political commitments may not be as great as they first appear. Through the doctrine of non-self-executing treaties, reiterated most recently in *Medellín v. Texas*, the Supreme Court has limited the domestic judicial enforceability—if not the domestic law status—of many Article II treaties.<sup>155</sup> As a result, when non-self-executing treaties require implementing legislation, it is an open question whether Congress must treat them any differently than political commitments needing implementing legislation. Similar questions surround the domestic legal force of congressional-executive agreements—as distinct from *their* implementing legislation—not to mention sole executive agreements.<sup>156</sup> Meanwhile, courts appear increasingly reluctant to employ treaties in the exercise of the judicial function to the same extent as statutes or the Constitution.<sup>157</sup> As a result, a treaty’s domestic legal status may have significantly less value in distinguishing it from a political commitment than Articles III and VI of the Constitution might otherwise suggest.

Second, political commitments function domestically in ways that trigger the same concerns about democratic accountability that justify

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153. U.S. CONST. art. VI, § 2.

154. *Id.* art. III, § 2.

155. See *Medellín v. Texas*, 128 S. Ct. 1346, 1366 (2008). See generally Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 547–50 (2008); Vázquez, *supra* note 127, at 601–03, 646–47 (discussing the holding of *Medellín*); Yoo, *supra* note 127 (defending the doctrine of non-self-execution).

156. See, e.g., HENKIN, *supra* note 7, at 198–204, 225–30; Hathaway, *supra* note 8, at 1307–37.

157. See Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 PROC. AM. SOC’Y INT’L L. (forthcoming 2009).

constitutional control over treaty making.<sup>158</sup> Even without direct legal effect, political commitments still “shift power toward the executive and away from the legislature.”<sup>159</sup> Executive requests for congressional action on topics from climate change to Iraq have a different hue when the executive invokes authorization from, or the requirements of, a political commitment than when the president requests congressional action based solely on presidential policy.<sup>160</sup> As a result, the executive has an interest in preserving the ability to make political commitments in part because of how that ability enhances domestic executive power.

This power shift operates in tension with the foundational principle of democratic accountability that undergirds our constitutional system. The Constitution commits public policy decisions to the legislative branch as the body most in touch with the sovereign—the people.<sup>161</sup> But the executive branch has used political commitments as a way to escape exactly this sort of review.<sup>162</sup> For President Franklin D. Roosevelt, the Atlantic Charter achieved executive preferences without the burden of having to deal with the advice and consent of the Senate, or Congress more generally.<sup>163</sup> Similar motivations likely lay behind the Bush administration’s original formulation of an SFA with Iraq.<sup>164</sup> Thus, even as the executive should have an interest in using the Constitution to le-

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158. See, e.g., Bothe, *supra* note 20, at 92 (“[O]ne of the most important (and problematic) reasons for the non-legal approach [is] avoidance of problems in the sphere of national procedures, especially from the legislative branch.”); see also THE FEDERALIST NO. 64, bk. 2, at 10, 10 (John Jay) (Tudor Publishing 1937) (defending the allocation of treaty power to those selected by democratic processes as being “in the manner most conducive to the public good”); Hathaway, *supra* note 8, at 1308–11 (arguing that ex post congressional-executive agreements have greater democratic legitimacy than do Article II treaties).

159. Lipson, *supra* note 20, at 517. Our discussion of domestic consequences may appear at odds with our later conclusion that political commitments do not raise traditional federalism concerns. This inconsistency is only superficial. As discussed in this Section, the consequences are real, but they are not legal in a way that would allow or require them to trump contrary state law (or federal legislation).

160. GLENNON, *supra* note 8, at 123 (“The domestic value of pluralistic governmental decision making competes with the international value of reciprocal expectations.”).

161. EDWARD S. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 122 (1976) (“The chief constitutional value which overextension of presidential power threatens is, of course, the concept of ‘government of laws and not of men’—the ‘rule of law’ principle.”); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 216 (1999); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 679 (1998).

162. GLENNON, *supra* note 8, at 167 (“[T]here is a danger that nonbinding agreements . . . will be used to circumvent constitutionally required procedures for making agreements.”); see also Lipson, *supra* note 20, at 516; Ramsey, *supra* note 21, at 185.

163. Theodore A. Wilson, *The First Summit: FDR and the Riddle of Personal Diplomacy*, in THE ATLANTIC CHARTER 1, 6–7 (Douglas Brinkley & David R. Facey-Crowther eds., 1994).

164. See DeYoung, *supra* note 9, at A10.

gitimize its political commitments, Congress may also desire constitutionalization, not to enable such executive power but to constrain it.

Third, even if political commitments are not U.S. law, they function in ways that significantly impact such law. Fulfilling political commitments may require continuing action by the executive branch or Congress, whether in terms of funding or the devotion of personnel or other resources. Since political commitments are not law, Congress theoretically can ignore executive entreaties to take action called for by a political commitment. In reality, however, Congress may feel compelled to take action precisely because a political commitment already exists. Even if Congress was not compelled to implement the Kimberley Process, it chose to change U.S. law to comply with the commitment.<sup>165</sup> Thus, political commitments raise issues similar to unfunded mandates in federal government contracting (which Congress may feel obligated to fund even when it did not authorize the mandate). Of course, Congress criminalized unfunded mandates to forestall their creation; in a similar vein, political commitments could be conditioned on the availability of appropriated funds or other constitutional constraints.<sup>166</sup>

U.S. political commitments can also soften domestic resistance to, or even build support for, the creation of future treaty commitments.<sup>167</sup> Because these treaties may qualify as domestic law, both Congress and future administrations may be affected by the political commitments the current executive makes. Congress and the president thus have interests in monitoring political commitments that may presage future legal commitments. Similar, if not greater, interests apply when a political commitment actually supplements, or even modifies, existing treaty commitments; where they do so, political commitments can interfere with the exercise of constitutional control over treaties.

Why should we constitutionalize political commitments? Even as differences remain, political commitments and treaties have come to overlap significantly in terms of the international functions they perform. In doing so, political commitments give rise to many of the same concerns with credibility, countermeasures, and reputation that underlie the Constitution's regulation of treaty making. Although political commitments do function differently from treaties domestically, those differences should not be overstated, particularly because political commitments

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165. See Clean Diamond Trade Act, 19 U.S.C. §§ 3901–3913 (2003).

166. See Israel-United States Memorandum of Understanding, *supra* note 81, at 288 (subjecting U.S. commitments to congressional appropriations and constitutional constraints).

167. See *supra* note 109 and accompanying text.

shift power within the federal government, diminish democratic accountability, and impact (if only indirectly) future legislative and executive behavior.

*B. Distinguishing Political Commitments from Treaties and Foreign Affairs*

No one questions the Constitution's allocation of the treaty-making power to the federal government. Article II grants the president a treaty power, subject to the Senate's advice and consent, while Article I denies that power to the states.<sup>168</sup> Since 1792, when Congress authorized foreign postal agreements, Congress has used its own enumerated powers to authorize the president to conclude "congressional-executive" agreements with other nations.<sup>169</sup> And President Franklin D. Roosevelt's insistence on transferring certain Russian assets under an agreement with the Soviet Union—the Litvinov Assignment—led the Supreme Court to recognize executive power to make sole executive agreements.<sup>170</sup>

Thus, no less than three different constitutional processes exist for the president to produce "treaties" in the international law sense of the term.<sup>171</sup> Selecting among these methods has generated some friction between the president and Congress.<sup>172</sup> The Supreme Court has generally declined to intervene, leaving the two political branches to devise their own *modus vivendi*.<sup>173</sup> In 1972, Congress passed a statute, the Case-

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168. See U.S. CONST. art. I, § 10, cl. 1; *id.* art. II, § 2, cl. 2.

169. See, e.g., Act of Feb. 20, 1792, § 26, 1 Stat. 236 (1792) (authorizing the U.S. Postmaster General to enter into agreements for foreign mail delivery); Dalton, *supra* note 7, at 770–74. The executive would later explicitly endorse the nonexclusivity of Article II. See 19 Op. Att'y Gen. 513, 519–20 (1890).

170. See *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–29 (1936). *But see* *Medellin v. Texas*, 128 S. Ct. 1346, 1371–72 (2008) (distinguishing *Pink* and *Belmont*).

171. A fourth method—agreements made pursuant to the authority of an Article II treaty—has also been employed occasionally. See, e.g., Panama Canal Treaty, U.S.-Pan., art. IX, ¶¶ 7, 11, Sept. 7, 1977, 33 U.S.T. 1 (authorizing other treaties).

172. See, e.g., CRANDALL, *supra* note 140, at 24–25, 102–33; Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); Tribe, *supra* note 8, at 1265; Ingrid B. Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 12 (2003).

173. See *Goldwater v. Carter*, 444 U.S. 996 (1979); *Baker v. Carr*, 369 U.S. 186 (1962); *Made in the USA Found. v. United States*, 242 F.3d 1300 (11th Cir. 2001); *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978); *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977); see also Dalton, *supra* note 7, at 781 ("United States courts are generally reluctant to decide disputes between

Zablocki Act, requiring the executive branch to report all treaties that it concludes without Senate advice and consent.<sup>174</sup> The executive, in turn, issued regulations detailing criteria for the creation of U.S. treaty commitments that it will report to Congress.<sup>175</sup> Together, the political branches’ practice has produced a deep and broad, though not always coherent, framework governing treaty making.<sup>176</sup>

So, why not use this treaty power as the basis for making U.S. political commitments? We could characterize the authority to create political commitments as a lesser power that falls under the greater power of making U.S. treaties. Questions about the process for making political commitments would replicate existing, recognized mechanisms where the president can act alone, with Congress, or with only the Senate. In this vision, the creation of political commitments would just be a version of treaty making by another name.

On closer examination, however, we cannot condone extending treaty-making powers to political commitments. First, as our definition of political commitments makes clear, political commitments are *not* treaties—they lack mutual intent to form legal obligations. Treaties and political commitments share no common sphere divisible into greater and lesser powers; the two are mutually exclusive. Indeed, to the extent that the executive branch relies on domestic treaty-making processes, it forestalls its ability to create *any* political commitments. Participating states must have a manifest intent to create political commitments; the use of treaty-making authority signals a contrary intent, namely making a treaty.<sup>177</sup>

As a descriptive matter, moreover, neither Congress nor the executive has regarded the treaty-making power as covering political commitments. On the contrary, both define U.S. treaty making to exclude political commitments.<sup>178</sup> The executive’s implementing regulations for the Case-Zablocki Act make this point expressly; to qualify as a treaty,

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members of Congress and the President concerning the treaty-making power.”) *But see Medellín*, 128 S. Ct. at 1371 (suggesting that the scope of sole executive agreement power for “[t]he claims-settlement cases involve a narrow set of circumstances”).

174. 1 U.S.C. § 112b (2000); *see also* H.R. REP. NO. 92-1301 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3067, 3068 (“Congress has not always been kept adequately informed about the international executive agreements entered into by the President . . .”).

175. 22 C.F.R. § 181.1–9 (1996).

176. *See* Hathaway, *supra* note 8, at 1252–70.

177. *See supra* note 56 and accompanying text. From a domestic perspective, additional questions would arise if political commitments were done per treaty-making powers that normally give all three forms of U.S. treaty making legal effect. *See supra* note 7.

178. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 7, at 58–59.

the “parties must intend their undertaking to be legally binding, and not merely of political or personal effect.”<sup>179</sup> That approach effectively precludes using treaty-making powers to authorize making political commitments.

At first glance, the foreign affairs powers offer a more promising source of authority for making political commitments. In their loosest sense, they collect under a single umbrella an array of enumerated and unenumerated federal powers implicating U.S. international relations. Article I grants Congress the power to regulate foreign commerce and currency, to define and punish offences against the law of nations, and to declare war.<sup>180</sup> Congress also has more general powers, under the Necessary and Proper and Tax and Spend Clauses, which enable it to legislate and pay for all foreign affairs authorities of the federal government.<sup>181</sup> As for executive power, it is “vested in a President of the United States of America,” who, apart from the treaty power, has substantial authority to conduct foreign relations via the “Commander in Chief” role, the power to nominate, appoint (subject to Senate advice and consent), and receive foreign ambassadors, as well as to execute federal law.<sup>182</sup>

These enumerated powers, however, do not capture the full breadth of U.S. foreign affairs powers. The Constitution is widely recognized to afford the federal government the remaining (or “residual”) foreign affairs powers. At the same time, it denies those powers to the states through a dormant foreign affairs power.<sup>183</sup> As in the treaty power context, acknowledging the existence of residual and dormant foreign affairs powers has not allayed controversy over their scope or allocation *within* the federal government. Some have tried to find a textual basis for these powers, reading the Vesting and Take Care Clauses of Article II as giving the president all aspects of executive power (including foreign relations) not otherwise transferred to Congress by Article I of the

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179. 22 C.F.R. § 181.2 (1996).

180. U.S. CONST. art. I, § 8, cls. 3, 10, 11 (providing for congressional powers to define and punish piracies and felonies on the high seas; to grant letters of marque and reprisal; and to make rules concerning captures). Congress’s power over the military may also implicate foreign affairs. *See id.* cls. 12–16.

181. *See, e.g., id.* cls. 1, 18.

182. *Id.* art. II, § 1, cl. 1; *id.* § 2, cls. 2–3; *id.* § 3 (enumerating powers to nominate, appoint (with Senate advice and consent), and receive ministers, and consuls; and to take care that the laws be faithfully executed).

183. *See HENKIN, supra* note 7, at 151–64.

Constitution.<sup>184</sup> But that effort has met with considerable controversy and lengthy rebuttal on historical terms.<sup>185</sup>

Looking to the enumerated foreign affairs powers, we do not contest that many of them can bolster, or even authorize, certain U.S. political commitments that fall within their subject matter. For example, if Congress has power to regulate foreign commerce, it can authorize the executive to make political commitments in that area just as it has authorized the executive to make relevant legal commitments.<sup>186</sup> Similarly, the president’s power as Commander-in-Chief encompasses making both legal and nonlegal commitments regarding the conduct and operation of U.S. armed forces abroad.<sup>187</sup>

Our problem with such a power-by-power approach lies in its inability to demonstrate the existence of a *general* political commitment power for the federal government. It suggests instead that the executive would only have authority to make political commitments on topics subject to executive power; the president would need additional congressional authority when a political commitment implicated a topic subject to legislative power; and the executive branch would be denied that power entirely for subjects not specifically enumerated.

Although that approach *could* define the scope of the political commitment power, we do not think the approach is adequate either descriptively or normatively.<sup>188</sup> For example, President George W. Bush committed the United States to pursuing massive reductions in carbon emissions via the G8 Climate Change Declaration without any consultation (let alone authority) from Congress, despite the legislature’s regulatory power over foreign and interstate commerce.<sup>189</sup> Moreover, empha-

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184. U.S. CONST. art. II, § 1, cl. 1; *id.* § 3, cl. 1; *see also* Prakash & Ramsey, *Executive Power*, *supra* note 25, at 234–35 (relying on Vesting Clause to allocate residual powers); Ramsey, *supra* note 21, at 212 (“Textually, the most satisfactory solution to the dilemma of the ‘unallocated’ foreign policy power is the Executive Vesting Clause.”); Tribe, *supra* note 8, at 1265 (“Whereas the authority of the legislative branch is limited to enumerated powers, full executive power is vested in the President, who is thus recognized to have executive authority to enter non-treaty agreements on behalf of the nation.”).

185. *See generally* Bradley & Flaherty, *supra* note 25.

186. *See* Dalton, *supra* note 7, at 773–74 (discussing “fast track” authorization in the trade context).

187. *See* Ingrid B. Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 79–82 (2007).

188. For our arguments favoring a discrete political commitment power not defined by subject matter, *see infra* Part II.C.

189. *See supra* note 16 and accompanying text; *see also* Massachusetts v. EPA, 549 U.S. 497, 531–34 (2007) (suggesting the executive has authority to negotiate with “key developing nations” to reduce emissions despite Congress’s authority under the Clean Air Act to regulate emissions domestically).

sizing the subject matter of a political commitment risks clouding more important variables in terms of its form, substance, organization, and autonomy as outlined above. We doubt, for example, the utility of lumping together a political commitment to seek new legislation on international trade with one that actually commits the United States to follow new international trade rules simply because they share the same subject matter. An enumerated powers approach to political commitments thus has little explanatory value and appears normatively undesirable. Broader conceptions of foreign affairs powers encounter similar problems.

We readily concede that any U.S. power to make political commitments falls within the umbrella of a foreign affairs power broadly conceived. But, as with the enumerated powers, current constructions of the residual foreign affairs power do little work for our theory of political commitments. Residual foreign affairs powers essentially involve questions of federal authority to take *unilateral* action, ranging from the Monroe Doctrine to proclamations of neutrality; from recognizing new states and governments to breaking off diplomatic relations.<sup>190</sup> Political commitments, in contrast, exist as a function of *mutuality*; they are creatures of, and are subject to, a commitment forged between two or more states. Although unilateral actions by the United States can create expectations of future behavior, a very different set of expectations exists when the United States makes promises to foreign nations.<sup>191</sup> It does not follow that the allocation of authority for making mutual commitments to foreign nations should mirror that for taking unilateral actions with foreign effects.

In any event, equating political commitments with unilateral acts would do little to illuminate the scope or allocation of a political commitment power. It would merely replicate existing confusion over the default placement of foreign affairs powers as between the president and Congress.<sup>192</sup> In addition, a foreign affairs power framework carries with it a heavy mantle of federalism. Whether as a matter of dormant or residual foreign affairs, constitutional attention has focused predominantly on what requirements the federal government can legally impose on the states or what freedom of action the states retain to make their own legal

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190. Compare, e.g., HENKIN, *supra* note 7, at 36–45, 88–89, with *id.* at 176–80.

191. See *supra* notes 52, 140–147 and accompanying text.

192. Although the executive has long held the dominant position, the Supreme Court and Congress have recently begun to reassess this position. See, e.g., *Medellin v. Texas*, 128 S. Ct. 1346, 1369–71 (2008); Bradley & Flaherty, *supra* note 25.

rules.<sup>193</sup> But political commitments generally do not implicate either position. They do not, by themselves, create legal obligations, so they do not bind the states without further federal action.<sup>194</sup> Nor do they constitute a dormant power that preempts state action simply because they touch on foreign affairs. Indeed, the states have their own robust political commitment practice, involving hundreds of such arrangements with foreign governments in recent years.<sup>195</sup>

What about the judiciary's most famous articulation of the foreign affairs power, *Youngstown Sheet & Tube Co. v. Sawyer*? Justice Robert Jackson's tripartite concurrence in that case could provide a framework for delineating the scope of executive power to make political commitments based on whether Congress authorized the political commitment (maximizing executive power), objected to it (minimizing executive power), or stayed silent (a zone of twilight).<sup>196</sup> Although paradigmatic for many exercises of presidential authority, we find Justice Jackson's scheme ill suited to the political commitment context. First, it is a test

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193. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 397–98 (2003) (finding a California statute requiring disclosure of information regarding Holocaust-era insurance policies was preempted by presidential authority in foreign affairs and specifically by executive agreements for claim settlement with the insurance companies of former belligerent states); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (finding a Massachusetts statute imposing barriers to trade with companies doing business with Burma violated the Supremacy Clause, because Congress occupies the field and, demonstrative of congressional powers, a federal act was passed imposing sanctions on Burma shortly after Massachusetts's act took effect); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (holding that an Oregon statute limiting the ability of a nonresident alien to inherit property in that state was an invasion of the foreign affairs powers constitutionally entrusted to the executive and legislative branches). *But see* *Barclays Bank v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (finding a California statute implementing reporting requirements for calculating corporate franchise taxes for multinational corporations were not in violation of the Commerce Clause and thereby not preempted by congressional power); see also Sarah H. Cleveland, *Crosby and the 'One-Voice' Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 1010 (2001) (finding flaw in the presumption of preemption held in *Crosby* and instead noting executive and congressional tolerance, and even encouragement, of state and local measures that impact on foreign affairs); Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259 (2001) (pointing to the similarities between the *Crosby* court's preemption analysis and the dormant foreign affairs doctrine set forth in *Zschernig*).

194. See *supra* notes 153–54 and accompanying text. Indeed, much of the foreign affairs focus has turned on sorting out a role for the Court in enforcing federal authority over U.S. states in foreign affairs or enforcing a dormant foreign affairs power against the states. See generally Edward T. Swaine, *Crosby as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001). Political commitments, by contrast, have much less salience to the judicial role, and the allocation of such authority lies essentially between the political branches. See *infra* notes 202–04 and accompanying text.

195. See *Hollis*, *supra* note 51. The Constitution may, however, separately control the states' ability to conclude "any agreement or compact" with foreign governments. U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

196. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

designed for the Supreme Court; a body unlikely to grapple with *political* commitments at all.<sup>197</sup> Second, Justice Jackson's test uses the exercise of congressional power to dictate the scope of presidential power. In doing so, he skips over the very question political commitments pose: whether and how *Congress* has power over the executive's authority to make political commitments. Third, notwithstanding its rhetorical appeal, Justice Jackson's test has proved notoriously difficult to apply in practice, casting serious doubt on its ability to actually clarify or govern the executive's exercise of a political commitment power outside of the courts.<sup>198</sup>

In sum, although the authority of the United States to conclude political commitments has strong analogues to the federal government's treaty making and foreign affairs powers, we do not find these powers to encapsulate adequately the power at stake. Political commitments cannot function as treaties, and, even if they fall under the federal government's enumerated or unenumerated foreign affairs powers, both the conception and operation of these powers appears ill suited at present to act as an authority for making political commitments. That does not mean, however, that the federal government lacks authority to conclude these instruments. On the contrary, the Constitution, when viewed through standard interpretative modalities, allows for an independent executive power to make political commitments.

### C. *Locating a Discrete Political Commitment Power*

How does the Constitution regulate the process by which the United States enters into its political commitments? The answer to that question may turn on *who* decides what the Constitution regulates. Since *Marbury v. Madison*, the judiciary has claimed the final word on constitutional interpretation.<sup>199</sup> But, the Supreme Court has defined such judi-

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197. See *infra* notes 199–203 and accompanying text.

198. See, for example, Joshua J. Newcomer, Comment, *Messing with Texas? Why President Bush's Memorandum Order Trumps State Criminal Procedure*, 79 TEMP. L. REV. 1029, 1039–40 (2006), for an example of plausible applications of *Youngstown* to both sides of a legal dispute. For example, the president might naturally fall back on the executive's residual foreign affairs authority to defend such actions, regardless of congressional action; however, that would likely reproduce the same problem of mixing authorities for unilateral and mutual commitments mentioned above. See *supra* notes 190–91 and accompanying text.

199. 5 U.S. (1 Cranch) 137 (1803). Chief Justice John Marshall's *Marbury* opinion could be read more narrowly as only insisting on judicial supremacy with respect to statutes assigning cases to the judiciary. The Court, however, has since adopted a more expanded view of *Marbury*'s import. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (asserting that *Marbury* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitu-

cial supremacy in *legal* terms, in saying "what the law is."<sup>200</sup> From the Court's perspective, the idea of constitutional control over political commitments might appear to be an anathema. How can the Constitution regulate what are—by definition—nonlegal, political acts? Political commitments do not qualify as laws or treaties, which are subject to the jurisdiction of the Court under Article III.<sup>201</sup> Thus, we might expect the Court to find that the Constitution does not regulate political commitments at all or to treat the issue as a nonjusticiable political question.<sup>202</sup> To date, that is exactly what the lower courts have done.<sup>203</sup>

The Supreme Court, however, is not the only actor that can interpret the Constitution. The political branches also have a large say in its meaning, particularly if the judiciary is absent.<sup>204</sup> Keith Whittington developed the concept of "constitutional construction" to define a paradigm for "the elaboration of constitutional meaning outside the courts."<sup>205</sup> Whittington recognizes that institutional actors employ general interpretative frameworks faithful to the constitutional text to define their respective roles, "even as some indeterminacies remain."<sup>206</sup> Indeed, he argues that constitutional construction remains possible even where the constitutional text lacks "discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules."<sup>207</sup> Whittington's theory of constitutional construction thus provides a theoretical alternative to

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tion"); see also TUSHNET, *supra* note 24, at 6–8.

200. *Marbury*, 5 U.S. (1 Cranch) at 177.

201. See U.S. CONST. art. III, § 2. Article III, however, does create judicial power over cases arising under the Constitution which, if we are correct about the Constitution's inclusion of political commitments, might provide a basis for some judicial review. *Id.*; see also *Holmes v. Jennison*, 39 U.S. 540, 560 (1840); *infra* notes 215–17 and accompanying text.

202. See, e.g., *Baker v. Carr*, 369 U.S. 186, 210–12. The political question doctrine actually has its origins alongside the power of judicial review. See *Marbury*, 5 U.S. (1 Cranch) at 170.

203. See, e.g., *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 8–9 (D.C. Cir. 2006) (holding political commitments not cognizable by U.S. courts); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 263 (2d Cir. 2003) (finding the Rio Declaration was created without intent that it be legally binding); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 376 (7th Cir. 1985) (concluding violations of Helsinki Accords ought "normally to be redressed outside the courtroom").

204. In focusing on the president's and Congress's interpretative roles, we do not mean to suggest that they are the only substitutes for the Court in questions of constitutional interpretation. The states do have a role, embedded in the Supremacy Clause, in articulating their own understanding of their rights and duties under the Constitution. Scholars such as Mark Tushnet have argued that we extend the same line of thinking to afford individuals and groups a similar interpretive role. TUSHNET, *supra* note 24, at 30–31.

205. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 207 (1999).

206. *Id.* at 5.

207. *Id.* at 5–6.

judicial supremacy that we employ as the basis of our inquiry into constitutional controls over political commitments.

In terms of the inquiry itself, we do not advocate for a particular “method” or “hierarchy” of constitutional analysis. Instead, we review standard methods of constitutional interpretation—text, original meaning, custom, structure, and prudence—to divine their respective contributions to the question of a political commitment power.<sup>208</sup> Employing textualism and originalism, we find some relevant material that leaves space for a political commitment power while emphasizing the constancy of a legislative role in the formation of international agreements. Customary practice affords much more concrete evidence of an executive power to form political commitments with occasional congressional participation or approval. And, structurally, the utility of the political commitment favors its construction as an executive power, although separation of powers counsels against finding the power to be plenary. The evidence, on balance, thus suggests a discrete presidential power to make political commitments that is neither unlimited nor plenary.

### 1. *Political Commitments and Constitutional Text*

The text of the Constitution appears to do little work for our construction of a political commitment power. It is silent on the subject. Such silence, of course, does not preclude the existence of constitutional power; otherwise, it would cast doubt on residual and dormant foreign affairs powers, not to mention the existence of unenumerated powers more generally.<sup>209</sup>

Thin as it is, the text does suggest three principles that support our vision of a nonplenary executive political commitment power.<sup>210</sup> First, the text explicitly contemplates multiple forms of international agreement making. The Compact Clause of Section 10 of Article I bifurcates the power between (a) agreements that the states can make with foreign powers *if* Congress consents—compacts and agreements—and (b)

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208. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991); GLENNON, *supra* note 8, at 69–70; Richard J. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

209. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1152–54 (3d ed. 2000).

210. We do not use the term “thin” here in the same sense as does Tushnet; rather, we use it to emphasize the lack of textual attention to political commitments. Cf. TUSHNET, *supra* note 24, at 9–14 (referring to the “thin” Constitution as the document’s “fundamental guarantees of equality, freedom of expression, and liberty,” not its literal text including the overlaid meaning given by its historical underpinnings, their particular justifications, the Framers’ intent, and judicial decisions referred to as the “thick” Constitution).

agreements that the states cannot make at all—treaties, alliances and confederations.<sup>211</sup> The text thus implies that treaties operate either as a category separate from—or a subclass of—other international agreements.<sup>212</sup> Moreover, most commentators infer from the text or structure of the Constitution that if the states can make compacts or agreements (as distinct from treaties) the federal government can do so as well.<sup>213</sup>

Second, where the text addresses formation of international agreements, whether as treaties or compacts, it always provides for a legislative role. The president has power to conclude Article II treaties, *provided* the Senate gives advice and consent. U.S. states can make “any Agreement or Compact . . . with a foreign power” *so long as* Congress consents.<sup>214</sup> The text thus suggests a legislative role in concluding international commitments.

Third, the text does not limit the multiple methods of agreement making to *legal* agreements. Nothing precludes interpreting “any agreement or compact” to include political commitments, whether made by states or the federal government. Indeed, in *Holmes v. Jennison*, the only Supreme Court case to consider the meaning of this phrase with respect to foreign powers, a plurality read the language to encompass *all* forms of commitment.<sup>215</sup> Chief Justice Roger Taney’s opinion found that the phrase included “every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.”<sup>216</sup> One dissenting justice questioned if the text could be read so broadly.<sup>217</sup> That difference of opinion, however, reinforces the possibility that the text

211. See U.S. CONST. art. I, § 10, cls. 1, 3.

212. See Ramsey, *supra* note 21, at 163 (“[T]his language suggests an understanding of ‘treaty’ as a subclass of all possible international agreements.”); see also GLENNON, *supra* note 8, at 178; Paul, *supra* note 161, at 735; Tribe, *supra* note 8, at 1265–66.

213. See, e.g., Ramsey, *supra* note 21, at 207 n.293; Spiro, *supra* note 172, at 977; Tribe, *supra* note 8, at 1268. *But see* Berger, *supra* note 172, at 28–30 (denying the federal government power, where text reserves practice to states subject to congressional approval). The fact that the United States concluded some nontreaty international agreements under the Articles of Confederation bolsters the predominate view, given the assumption that the Constitution intended to give the federal government *more* power in foreign affairs. See, e.g., McDougal & Lans, *supra* note 172, at 228.

214. U.S. CONST. art. I, § 10, cl. 3.

215. 39 U.S. 540, 560 (1840). *Holmes* involved a challenge to Vermont’s power to extradite a fugitive back to Canada. In what is now regarded as an authoritative opinion, Chief Justice Taney, writing for the plurality, concluded that even absent a written agreement with Canada, the governor’s arrest warrant implied a prohibited compact with Canada absent congressional consent. *Id.* at 573; see also *United States v. Rauscher*, 119 U.S. 407, 414 (1886).

216. *Holmes*, 39 U.S. at 572.

217. *Id.* at 594–98 (Carton, J., dissenting) (suggesting that if an agreement existed, it “would have been prohibited by the Constitution”).

can encompass an executive political commitment power and perhaps subject it to a legislative role.

## 2. *The Political Commitment and Original Meaning*

Moving from the text to the historical context in which the Constitution was drafted, we find little appreciation of a political commitment power per se.<sup>218</sup> This finding holds regardless of the version of originalism employed.<sup>219</sup> In drafting the Articles of Confederation, a “Council of State” was proposed whose power to conduct “[d]iplomatic correspondence with foreign powers was not to go so far as to commit the United States to ‘any Engagements that shall be binding.’”<sup>220</sup> That body, however, never came into existence, and the Framers themselves did not discuss political or nonbinding commitments. In fact, they did not even anticipate much need for diplomacy or treaties, other than in a commercial context.<sup>221</sup> Nor did the subject of political commitments arise in the state ratification debates. Eighteenth-century dictionaries make no relevant distinction between treaties and other international agreements, let alone between those governed by law versus those enforced by politics or morals.<sup>222</sup> The “father of international law,” Hugo Grotius, did refer-

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218. We are sensitive to charges of law-office history or history “lite” in the short historical survey provided herein and have endeavored to reflect larger themes and concepts implicating the political commitment power. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 23, 25 (Jack N. Rakove ed., 1990); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995).

219. The Supreme Court appears to have endorsed the original public meaning approach to originalism in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008). For a discussion of originalism as a method of constitutional interpretation, see, for example, RANDY BARNETT, RESTORING THE LOST CONSTITUTION 89–117 (2004) (arguing for a version of originalism based on original meaning rather than original intent); WHITTINGTON, *supra* note 161 (explaining why originalism best serves the purposes of constitutional interpretation); Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Framers would disapprove of the use of the Framers’ intent); Lawrence Solum, *Semantic Originalism* 124 (University of Illinois College of Law, Research Paper No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) (follow “Download” hyperlink) (providing a theoretical foundation for “original public meaning originalism”).

220. Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 51 (1979).

221. F. MARKS, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 155 (1973); Stewart Jay, *The Status of the Law of Nations in Early American Life*, 42 VAND. L. REV. 819, 839 (1989).

222. See, e.g., 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 451 (2d ed. 1756). See generally Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453 (1935) (discussing a lack of distinc-

ence nonlegal obligations, but only to the extent they arose *within* treaties.<sup>223</sup>

Such sparse treatment is unsurprising. The political commitment concept did not gain traction in international practice until the 1860s, and another century passed before scholars devised theories to explain the concept.<sup>224</sup> Thus, the fact that political commitments went mostly unrecognized at the Framing does not preclude the subsequent incorporation of such promises into the constitutional framework once they became a standard diplomatic tool.<sup>225</sup>

The historical context does, however, offer an explanation for the textual distinction between treaties and other forms of international agreement. In his influential *Law of Nations*, Emerich de Vattel presented one of the few contemporaneous typologies of international commitments.<sup>226</sup> Vattel distinguished the "treaty" as an instrument made "for perpetuity, or for a considerable time" from "agreements" that "have temporary matters for their object" and "are accomplished by one single act, and not by repeated acts."<sup>227</sup> Vattel viewed both concepts, however, as obligations arising under public law.<sup>228</sup> Thus, to the

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tion between treaties and agreements).

223. GROTIUS, *supra* note 26, at 167. Grotius distinguished *foedus* ("treaty") from *sponsions* (unauthorized agreements requiring state approval) from *pactiones aliae* ("other agreements"). *Id.*; see also Ramsey, *supra* note 21, at 167; Weinfeld, *supra* note 222, at 457–58.

224. See *supra* notes 26–28 and accompanying text.

225. In his Farewell Address, George Washington indicated distaste for "permanent alliances." George Washington, Farewell Address, Sept. 17, 1796, ¶ 38, available at [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp). He recognized a need for "conventional rules of intercourse," but favored "temporary alliances" and the ability to abandon or vary U.S. commitments "as experience and circumstances shall dictate." *Id.* ¶ 40. The character of Washington's "temporary" commitments might accord with modern concepts of political commitments, but his wording could alternatively reference variations in legal agreements.

226. VATTEL, *supra* note 26, § 152, at 192. Emerich Vattel's work was well known at the Framing. On the eve of the Revolution, Benjamin Franklin told Vattel's publisher that a copy of the book "has been continually in the hands of the members of our Congress now sitting." Letter from Benjamin Franklin to Charles F. W. Dumas (Dec. 19, 1775), reprinted in 2 FRANCIS WHARTON, UNITED STATES REVOLUTIONARY DIPLOMATIC CORRESPONDENCE 64 (1889). St. George Tucker's early treatise also relies on Vattel. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES app. at 310 (1803).

227. VATTEL, *supra* note 26, §§ 152–53, at 192 ("A treaty, in Latin *foedus*, is a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time."); *id.* § 153, at 192 ("The compacts which have temporary matters for their object are called agreements, conventions, and pactions. They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution once for all: treaties receive a successive execution whose duration equals that of the treaty.").

228. See *id.* § 206, at 217; see also McDougal & Lans, *supra* note 172, at 189; Ramsey, *supra* note 21, at 184. Vattel's distinction follows earlier work by Christian von Wolff, an author who

extent that Vattel's typology grafts onto the constitutional text, it suggests—contrary to the view of Chief Justice Taney—that the compact or agreement category originally included only international *legal* agreements.<sup>229</sup>

The likelihood that originalism does not endorse a political commitment power does not mean that originalism has no relevance to our construction of the power. Although we have declined to subsume political commitments under either the treaty or foreign affairs powers, the original understanding of both powers informs our effort to define the power to create political commitments. In general, the early history supports Whittington's theory of constitutional construction; then Representative John Marshall's speech regarding the Case of Jonathan Robbins illuminated the principle that “[q]uestions of ‘political law’ are necessarily decided by the political branches.”<sup>230</sup> More specifically, in the context of the treaty power, extensive evidence confirms that the authority was a “cooperative venture” between the president and the Senate—a way of preventing each branch from acting independently of the other.<sup>231</sup>

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had little exposure in the nascent American Republic. Christian von Wolff, *Jus Gentium Method Scientifica Pertractum* (Joseph H. Drake trans.), in 2 CLASSICS OF INTERNATIONAL LAW bk. 1, § 369, at 191 (James Brown Scott ed., 1934) (1764) (“A treaty is defined as a stipulation entered into reciprocally by supreme powers for the public good, to last forever or at least for a considerable time. But stipulations, which contain temporary promises, or those not to be repeated, retain the name of compacts.”); see also Weinfeld, *supra* note 222, at 454–58.

229. See Ramsey, *supra* note 21, at 190; *supra* notes 216–17 and accompanying text.

230. H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1521 (1999); see also 10 ANNALS OF CONG. 596, 607 (1800) (statements of John Marshall) (“[T]he Judicial power cannot extend to political compacts.”); *id.* at 613 (describing U.S. compliance with its French alliance as “a question of law but no man could have hazarded the opinion that such a question must be carried into court, and can only be there decided,” and characterizing a provision in the Jay Treaty with Great Britain as “a question of law, but of political law. The question to be decided is, whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts”); *id.* at 614 (conceding that with respect to execution of the political provisions of the Jay Treaty “Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract: but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses”). Jonathan Robbins was the alias for Thomas Nash, whose extradition to Great Britain on murder charges instigated a political debate over the scope of executive power; Marshall's speech defended the executive's extradition where nothing in the Constitution had prohibited it.

231. Bestor, *supra* note 220, at 135; see also 1 ANNALS OF CONG. 1085 (quoting Roger Sherman stating similar views); Convention of Pennsylvania (1787), in 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 507 (Jonathan Elliot ed., 2d ed. 1891) (quoting James Wilson at the Pennsylvania ratifying convention that “[n]either the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people”); THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 158, bk. 2, at 80, 81 (stating that the power to make treaties is “found

Whether a similar sharing of power extends to foreign affairs more generally depends on the original meaning of the Vesting Clause.<sup>232</sup> Did it grant the executive the foreign affairs powers broadly recognized to constitute executive functions, as defined by reference to such legal theorists as William Blackstone, John Locke, and Baron de Montesquieu, less only those powers enumerated to Congress’s domain?<sup>233</sup> Or, did the detailed allocation of certain foreign affairs powers to Congress imply a more complete separation of powers along functional lines that extended beyond the specifically enumerated powers (i.e., where the legislature would develop foreign policy that the president would merely execute and the judiciary adjudicate)?<sup>234</sup> The drafting and ratifying debates have been well-documented elsewhere and provide no clear answer to this issue.<sup>235</sup> Alexander Hamilton was a leading proponent of executive authority under the Constitution and favored the former view of a broad executive power—suggesting that in the absence of an allocated political commitment power, the power lies entirely with the president.<sup>236</sup> Other Founders, however, did not favor so broad an executive authority—thus suggesting the opposite result.<sup>237</sup> The majority (in-

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to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them”); GLENNON, *supra* note 8, at 181.

232. U.S. CONST. art. II, § 1, cl. 1 (“The executive power shall be vested in a President of the United States of America.”).

233. Prakash & Ramsey, *Foreign Affairs*, *supra* note 25, at 265–72. Locke, Montesquieu, and Blackstone theorized a foreign affairs power more thoroughly concentrated in the executive branch than emerged in the Constitution. *See, e.g.*, TUCKER, *supra* note 226, at 81 (allocating certain foreign affairs powers to the executive prerogative); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 409–12 (P. Laslett ed., rev. 1960) (1690) (dividing governmental authority by legislative, executive (including judicial), and federative powers (including much foreign affairs content), and allocating both executive and federative powers to the executive, including authority to control relations with other nations); 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 151 (T. Nugent trans., 1949) (1751) (building on Locke’s insights by identifying legislative, executive, and judicial roles and concentrating foreign affairs authority in the executive).

234. *See* Bestor, *supra* note 220, at 36–38 (advocating for separation of functional powers); Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 537–38 (1974) (quoting Madison for the proposition that the “accumulation” of legislative, executive, or judicial functions was the “very definition of tyranny”); Bradley & Flaherty, *supra* note 25, at 566 (citing 2 THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 57 (1756)).

235. *Compare* Prakash & Ramsey, *Executive Power*, *supra* note 25, with Bradley & Flaherty, *supra* note 25.

236. *See* THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 158, bk. 2, at 40, 44; *see also* Ramsey, *supra* note 21, at 208–09, 212–13, 217. Hamilton, however, also acknowledged the Senate’s role in managing foreign relations and denied the president has such powers as went to the British sovereign. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 158, bk. 2, at 40, 45; Berger, *supra* note 172, at 11.

237. *See* Bestor, *supra* note 234, at 536–37 (concluding that the Framers believed “separation

cluding Hamilton), in any case, recognized foreign affairs responsibilities in all three branches of government.<sup>238</sup>

Overall, although a pro-executive view of the Vesting Clause “helps reconcile the spare list of powers in Article II with the reality of vast presidential authority in foreign relations,” it is by no means the settled understanding of the Vesting Clause.<sup>239</sup> That clause is simply not determinative in this case. Instead, political commitments are a feature of modern foreign relations law that more likely finds justification in the longstanding interactions of the political branches than in any set understanding at the Founding.<sup>240</sup>

### 3. *Political Commitments Emerge from Custom*

Ever since President George Washington walked out on his first and only attempt to garner Senate advice on treaty negotiations, the political branches have demonstrated the ability to derive constitutional meaning through custom.<sup>241</sup> And it is through custom that the political commitment power finds the most support.

As characterized by Michael Glennon, a constitutional custom is a definitive statement of constitutional meaning established by the political branches.<sup>242</sup> A constitutional custom has two components. First, a

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of powers *required* each branch to maintain a vigilant check upon the doings of the others and to act when necessary to halt encroachments and usurpations”); Bradley & Flaherty, *supra* note 25, at 626, 688.

238. By default, the early history may favor a larger legislative role in foreign affairs than the dominant role of the executive today would otherwise suggest.

239. See Bradley & Flaherty, *supra* note 25, at 688 (concluding that the Vesting Clause “encompassed simply a power to execute the laws”). As Curtis Bradley and Martin Flaherty note, the meaning of the Vesting Clause is at best indeterminate, and they do a thorough job of contesting the textual and historical bases of Saikrishna Prakash and Michael Ramsey’s theory. *Id.*

240. See *id.*

241. See CORWIN, *supra* note 138, at 239–43 (1941) (noting that the first and only presidential visit to the Senate for treaty negotiation advice marked the commencement of the current practice of post hoc consent); *The Diary of William Maclay and Other Notes on Senate Debates*, in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 128–30 (Kenneth R. Bowling & Helen E. Veit eds., 1988) (Aug. 22, 1789, diary entry) (recounting Washington’s meeting with the Senate). Similarly, through political branch interaction, custom supports the current paradigm that accepts multiple procedural paths for treaty making. See, e.g., Letter from James Monroe, U.S. Sec’y of State, to the U.S. Senate (Apr. 6, 1818), reprinted in 3 S. EXEC. J. 132, 134 (20th Cong., 1828) (sending the 1817 Rush-Bagot Agreement, originally concluded under executive authority, to the Senate for its view on whether it required advice and consent). On custom, see generally GLENNON, *supra* note 8, at 56; WHITTINGTON, *supra* note 205, at 6; and Spiro, *supra* note 172, at 981.

242. GLENNON, *supra* note 8, at 55–56. Michael Glennon visualizes custom as aiding judicial interpretation of political branch practices, but the factors he articulates appear equally useful to political actors themselves. He is not the only scholar to theorize constitutional construction in

custom requires a *consistent practice* by the political branches. Although multiple factors have been proposed to evidence a practice’s pedigree, they distill into two considerations that are relevant here—*duration* and *frequency*.<sup>243</sup> Higher frequency evidences custom through an act’s repetition. Longer duration supports a practice based on the length of usage, absence of gaps in usage, and use across administrations.<sup>244</sup> Second, even where a consistent practice exists, to become a constitutional custom both political branches must also intend it to represent a constitutional norm.<sup>245</sup> This requires, at minimum, one branch to act and the other branch to have actual notice of the act to which it then acquiesces.<sup>246</sup> Where the other branch objects, formally or informally, it can defeat a custom’s creation.<sup>247</sup>

With respect to a constitutional custom’s first component, the executive branch has demonstrated a consistent practice of concluding political commitments. For well over a century, presidents across administrations have used political commitments in innumerable circumstances as part of routine diplomatic practice. Although this practice is longstanding, its exact duration is difficult to discern. The practice did not emerge in the decades immediately following the framing of the Constitution. The Supreme Court has suggested this fact counsels against viewing the authority to conclude political commitments as a plenary power.<sup>248</sup> In

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foreign relations using custom. *See also, e.g.*, Ackerman & Golove, *supra* note 8, at 804 (describing the gradual acceptance of congressional-executive agreements); Ramsey, *supra* note 21, at 138; Spiro, *supra* note 172, at 1012 (devising a theory of constitutional “episodes”).

243. GLENNON, *supra* note 8, at 57–58. Glennon actually adopts six factors to establish consistent practice. He uses two—numerosity and density—to encompass what we reference as *frequency*, and another three—duration, regularity, and normalcy—to reflect our concept of *duration*. According to Glennon, a practice must be consistent—where “distinct and often unrelated historical events are sufficiently similar”—to be custom, but other factors may vary, with strengths in one overcoming weaknesses in another. *Id.* at 56–59.

244. *See id.* at 57.

245. *Id.* at 59 (requiring *opinio juris*).

246. *Id.* Glennon believes an act is required; assertions of authority are insufficient. *Id.* at 59–64.

247. For example, Congress could pass legislation prohibiting the executive’s act or sense of the House or Senate resolutions on the act’s validity. If only part of Congress objects—for example, if a congressional committee reports on the practice—the president’s act may still be entitled to some weight, particularly if other evidence suggests the whole Congress does not share the views of its objecting part. *Id.* at 64. The opposite result may occur where only part of Congress acquiesces.

248. *Id.* at 66; *see also* *Mistretta v. United States*, 488 U.S. 361, 399 (1989); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Schick v. Reed*, 419 U.S. 256 (1974); *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (“[T]he precedential value of [custom] tends to increase in proportion to their proximity to the Convention in 1787.”); *Myers v. United States*, 272 U.S. 52, 109–14 (1925); *The Laura*, 114 U.S. 411, 414 (1885).

those early years, the political branches debated which instruments had to be formed through the Article II treaty process. Other texts—whether executive agreements (legal) or political commitments (nonlegal)—were treated as a single category. This practice has made identifying the first U.S. political commitment difficult, although an 1850 promise to build a lighthouse on Horseshoe Reef may occupy the inaugural slot.<sup>249</sup> Once the United States began making gentlemen's agreements in the late 1800s, however, the political commitment practice had commenced.<sup>250</sup>

Since President Grover Cleveland's administration entered into an informal agreement on Newfoundland fisheries with the United Kingdom, virtually every president has concluded political commitments to advance U.S. interests.<sup>251</sup> For example, President Theodore Roosevelt committed the United States to administer Santo Domingo's customs house and financial affairs before the Senate authorized a treaty on the subject.<sup>252</sup> Under his watch, the United States also concluded the Root-Takahira Agreement with Japan.<sup>253</sup> In 1911, the administration of Presi-

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249. Protocol of a Conference Held at the Foreign Office, Ceding Horse-Shoe Reef to the United States, U.S.-Gr. Brit, Dec. 9, 1850, 18(2) Stat. 325, *reprinted in* TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, 1776-1909, at 663-64 (William M. Malloy ed., 1910) [hereinafter Horse-Shoe Reef Agreement] (describing Great Britain's cession of a Niagara River islet to the United States, provided that it "engage to erect" a lighthouse); *see also* Ackerman & Golove, *supra* note 8, at 820 (stating that the protocol imposed no actual obligations); Ramsey, *supra* note 21, at 200 n.274 (citing the protocol as an agreement that "is properly classified as imposing no material obligations upon the United States"). *But see* Forsyth-la Branche Letter, *supra* note 26 (acknowledging U.S. informal agreements as early as 1838).

250. *See, e.g.*, 1 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 213-14 n.2 (1902) (documenting the informal protocol establishing the 1898 Anglo-American Joint High Commission).

251. *See* George G. Wilson, *Newfoundland Fisheries Dispute*, in 2 CYCLOPEDIA OF AMERICAN GOVERNMENT 545 (Andrew C. McLaughlin & Albert Hart eds., 1914) (describing the 1885 U.S.-UK diplomatic agreement established after treaty expiration and lasting until 1908).

252. Correspondence Relating to the Protocol of Agreement Between the United States and the Dominican Republic Providing for the Collection and Disbursement of Customs Revenue in that Republic (1905), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 298, 306 (1906). President Theodore Roosevelt's characterization of the Protocol as a personal commitment suggests a gentlemen's agreement. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 551 (1913) ("The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo. But the Constitution did not forbid my doing what I did. I put the agreement into effect, and I continued its execution for two years before the Senate acted . . . [I]t was far preferable that there should be action by Congress, so that we might be proceeding under a treaty which was the law of the land and not merely by a direction of the Chief Executive which would lapse when that particular Executive left office.").

253. Notes Exchanged Between the United States and Japan Declaring their Policy in the Far East (Nov. 30, 1908), *reprinted in* TREATIES, CONVENTIONS, INTERNATIONAL ACTS,

dent William Howard Taft made tariff promises to Canada, but recognized that they could not bind Congress.<sup>254</sup> Under President Woodrow Wilson, the United States concluded the Lansing-Ishii Agreement, recognizing Japan's special interest in China and secretly promising not to take advantage of World War I to gain new footholds there.<sup>255</sup> President Franklin D. Roosevelt concluded the Atlantic Charter, while President John F. Kennedy used the political commitment concept to settle the Cuban Missile Crisis.<sup>256</sup> In addition to the Shanghai Communiqué, President Richard Nixon made political commitments to North and South Vietnam in negotiating an end to the Vietnam War.<sup>257</sup>

These commitments have, moreover, occurred frequently. We have already listed an array of them, including the 1907 Gentlemen's Agreement, the Atlantic Charter, the Shanghai Communiqué, the Helsinki Accords, the London Guidelines, the Bonn Declaration, the Sinai Peace Accords, the Stockholm Disarmament Declaration, the Rio Declaration, the FATF, the Global Aids Fund, and the G8 Declaration on Climate Change.<sup>258</sup> But such high profile commitments comprise only a small part of a much larger practice; political commitments are a routine tool in the day-to-day diplomatic intercourse of the United States.<sup>259</sup>

The political commitment practice has become particularly dense since the Ford administration completed the Helsinki and Sinai Accords.<sup>260</sup> The administration of President Jimmy Carter followed suit with the Bonn Declaration and the London Guidelines on Nuclear Ex-

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PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, 1776–1909, *supra* note 249, at 1045–46 (explaining that the Root-Takahira agreement reflected the two sides' "wish" and "policy" to achieve their interests, and their intention "firmly resolved reciprocally" to respect each other's territorial possessions).

254. Letter from W.S. Fielding & William Paterson, Canadian Ministers, to P.C. Knox, U.S. Sec'y of State (Jan. 21, 1911), *reprinted in* S. EXEC. DOC. NO. 62-80, pt. 3C, at 4679–87; *see also* Ackerman & Golove, *supra* note 8, at 827–28.

255. HACKWORTH, *supra* note 138, § 517, at 430–31 (documenting a nonpublic protocol accompanying the Lansing-Ishii exchange of notes that was "in perfect accord with the declared policy of the two Governments"); *see also* CORWIN, *supra* note 161, at 43.

256. *See supra* note 80.

257. *See* LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS 70–71 (1984). The Nixon administration also joined the 1972 Stockholm Declaration. *See supra* note 86.

258. For citations to these and other similar agreements, *see supra* notes 13–16, 29, 59, 81–83, 90, 105, 110, 117; *see also* notes 60–61, 87, 93, 109, 115 (citing additional political commitments).

259. *See, e.g.*, U.S.-Uzbek Plan of Cooperation, *supra* note 93; *see also* SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 7, at 23–24 ("Presidents have often made mutual declarations and agreed on final acts and communiqués after international meetings."); Spiro, *supra* note 172, at 984.

260. *See supra* notes 15, 79, 81 and accompanying text.

ports and Chemical Trade, not to mention political commitments associated with the Strategic Arms Limitation Treaty (SALT I) and the Algiers Accords.<sup>261</sup> President Ronald Reagan used political commitments to reflag Kuwaiti oil tankers and preserve observance of SALT II.<sup>262</sup> President George H.W. Bush concluded the 1992 Charter for Partnership and Friendship with the new Russian Federation.<sup>263</sup> President Bill Clinton authorized Vice President Al Gore to sign off on the Rio Declaration.<sup>264</sup> Most recently, President George W. Bush participated in the G8 Climate Change Declaration, not to mention the creation of the U.S.-Iraqi Declaration of Principles that caused so much controversy.<sup>265</sup> Taken together, this evidence reveals the executive branch's consistent practice of making and employing political commitments.

As for a custom's second component—notice to Congress of the president's acts and acquiescence by Congress to those acts—the legislature has clearly acquiesced to the president's conclusion of *some* political commitments. In his former capacity as Senate Foreign Relations Committee Chairman, then Senator and current Vice President Joe Biden acknowledged this practice in commenting on NATO's "Strategic Concept":

[O]ne of the things that we sometimes confuse here—I know I do—is what is a political obligation and what is a constitutional obligation. I respectfully suggest that there is no constitutional requirement for the President of the United States—this President or any future President—to submit to the Senate for ratification, as if it were an amendment to a treaty, a Strategic Concept that is a political document.<sup>266</sup>

This view corresponds to earlier instances of congressional acceptance of the executive's conclusion of political commitments, such as the Horseshoe Reef Protocol, the Lansing-Ishii Agreement, the Root-Takahira Exchange, the Atlantic Charter, and the Rio Declaration.<sup>267</sup>

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261. See President Jimmy Carter, The President's News Conference of March 14, 1980, reprinted in 16 WEEKLY COMP. PRES. DOC. 484, 488 (1980); Cyrus Vance, U.S. Sec'y of State, Statement of Intent Regarding SALT I Interim Agreement (Sept. 23, 1977), reprinted in 77 DEP'T ST. BULL. 642 (1977); *supra* notes 83, 90, 98, 117.

262. See Michael H. Armacost, *U.S. Policy in the Persian Gulf and Kuwaiti Reflagging*, 87 DEP'T ST. BULL. 78 (1987); *supra* note 52.

263. See Charter for Partnership and Friendship, U.S.-Russ., June 17, 1992, 31 I.L.M. 782, 785.

264. See *supra* note 82.

265. See *supra* notes 1, 16.

266. 145 CONG. REC. S5901 (daily ed. May 25, 1999) (statement of Sen. Biden).

267. See, e.g., HACKWORTH, *supra* note 138, at 430–31 (quoting congressional discussion of

Just because Congress has acquiesced to the president's exercise of *some* power over political commitments does not mean it has acquiesced in giving the president *plenary* power over such instruments. Both houses of Congress have shown interest in actively opposing (or supporting) certain political commitments, particularly more formal instruments with higher substantive and organizational content.<sup>268</sup> For example, in 1995, the House of Representatives passed a joint resolution that, if approved by the Senate, would have significantly curtailed the president's authority to comply with a U.S.-North Korea political commitment on denuclearization.<sup>269</sup> The Senate undertook a similar effort with respect to U.S. participation in the NATO-Russia Founding Act.<sup>270</sup> Congress has also occasionally passed legislation superseding political commitments.<sup>271</sup>

Alternatively, Congress may facilitate the president's implementation of political commitments. It may fund or otherwise enact legislation to ensure U.S. performance. For example, Congress provided the statutory authority necessary for U.S. participation in the Kimberley Process.<sup>272</sup> Congress may also devise mechanisms to monitor ongoing U.S. efforts pursuant to its political commitments. It established a commission to oversee U.S. participation in the OSCE.<sup>273</sup> Congress's insistence that its commission representatives participate in the U.S. OSCE delegation under a threat to cut off OSCE funding led to a showdown with the ad-

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Lansing-Ishii Agreement); Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 675 (1944) (discussing Senate acquiescence in the Horseshoe Reef and Root-Takahira agreements); Press Release, White House, President Roosevelt's Message to Congress on the Atlantic Charter (Aug. 21, 1941), *available at* <http://avalon.law.yale.edu/wwii/atmess.asp>; *see also* BAILEY, *supra* note 80, at 574.

268. As we discuss below, the lines of demarcation remain clouded given Congress's various approaches to the political commitment practice, which is due, in part, to the lack of formalized mechanisms to keep Congress apprised of political commitments made by the president.

269. *See* Joint Resolution Relating to the United States-North Korea Agreed Framework and the Obligations of North Korea under That and Previous Agreements with Respect to the Denuclearization of the Korean Peninsula and Dialogue with the Republic of Korea, H.R.J. Res. 83, 104th Cong. (1st Sess. 1995). The joint resolution was referred to the Senate Committee on Foreign Relations, where it languished.

270. Protocols to the North Atlantic Treaty of 1949 on Accession of Poland, Hungary, and the Czech Republic, S. Res. 480, 105th Cong. (1998).

271. *See, e.g.*, Immigration Act of 1924, 68th Cong., 43 Stat. 153 (overriding the Lansing-Ishii Agreement).

272. *See* Clean Diamond Trade Act, 19 U.S.C. §§ 3901-3913 (2003).

273. In 1976, Congress established the Commission on Security and Cooperation in Europe, an independent agency monitoring compliance with the Helsinki Accords. *See* Act of June 3, 1976, Pub. L. No. 94-304, 90 Stat. 661 (current version at 22 U.S.C. §§ 3001-3009 (2000)). Members include representatives from the House of Representatives and Senate as well as the State, Defense, and Commerce Departments. *Id.*

ministration of George H.W. Bush, which refused to comply with the legislature's demand.<sup>274</sup>

More often, however, Congress has simply sought executive consultation on political commitments. It held hearings on many of the high-visibility political commitments, including the Lansing-Ishii Agreement, the Sinai Peace Accords, political commitments relating to SALT I and II, the reflagging of oil tankers in the Persian Gulf, and the recent Declaration of Principles with Iraq.<sup>275</sup> During those hearings, Congress sought executive views on the nature and scope of the commitments under review. In the Lansing-Ishii Agreement hearings, for example, Senator Frank Brandegee asked if the Agreement had binding force or if it "[was] simply a declaration of your policy, or the policy of this Government," to which Lansing replied that it was a nonbinding promise.<sup>276</sup>

Thus, custom provides a firm foundation for the basic existence of a presidential power to conclude political commitments. With at least partial consent of Congress, past presidents have devised a consistent practice of making political commitments with foreign governments. Custom, however, has less to say about the extent (or limits) on the president's power. Congress has shown that it *can* facilitate, condone, resist, or supersede political commitments made by the executive branch. The evidence of it doing so, however, is much less regular and less frequent than the actual political commitment practice.

Constitutional custom requires that Congress must acquiesce to the president's acts of which it has actual knowledge.<sup>277</sup> But the executive branch frequently makes political commitments without any congressional consultation, oversight, or objection. Indeed, it is unclear in how many cases Congress lacked knowledge of a political commitment, whether by executive design or inadvertence. That information gap undermines the weight assigned to cases where Congress did affirmatively acquiesce to the president's promise. In any case, Congress clearly has an interest in being better informed. For example, a rancorous debate accompanied public disclosure of a secret 1995 aide mémoire between Vice President Gore and Russia's Prime Minister Viktor Chernomyrdin, which effectively exempted Russia from U.S. sanctions in return for a

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274. See McGinnis, *supra* note 23, at 309–11.

275. See *Lansing-Ishii Hearings*, *supra* note 138; *Sinai Hearings*, *supra* note 38; S. REP. NO. 95-499, at 13–14 (1977) (recording that Senators Dick Clark and George McGovern concluded that commitments relating to SALT I and II were not governed by international law); Armacost, *supra* note 262.

276. *Lansing-Ishii Hearings*, *supra* note 138, at 219.

277. See GLENNON, *supra* note 8, at 59–63.

phase out of Russian arms sales to Iran.<sup>278</sup> Congress’s hearings on the topic featured executive insistence that the aide mémoire had no legal effect, with skeptical senators disputing how much the nonlegal nature of the agreement mattered given the substance of the instrument itself.<sup>279</sup>

#### 4. *Political Commitments within the Constitutional Structure*

Edward Corwin, the venerable editor of *The Constitution of the United States: Analysis and Interpretation*, famously noted that when it comes to foreign affairs, the Constitution “is an invitation to struggle for the privilege of directing American foreign policy.”<sup>280</sup> That struggle turns on the constitutional structure, its underlying architecture, and its animating purposes.<sup>281</sup> Such structure adds support for the existence of a nonplenary political commitment power for the president.

Constitutional structure may support the existence of a *federal* political commitment power, depending on which structural vision of the Constitution is adopted. If, for example, one envisions the Constitution as an instrument of narrowly defined, limited, and enumerated powers, federal authority over political commitments, which are not enumerated, seems less justified.<sup>282</sup> Despite this structural vision’s deep historical

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278. See John M. Broder, *Despite a Secret Pact by Gore in '95, Russian Arms Sales to Iran Go on*, N.Y. TIMES, Oct. 13, 2000, at A1. Ironically, Russia never fully complied with the deal, stating it was not a legal commitment under international law. *Id.*

279. *A Review of Gore-Chernomyrdin Diplomacy: Hearing Before the Subcomm. of European Affairs the Subcomm. of Near Eastern and South Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 19 (2000) (statement of John P. Barker, Deputy Assistant Secretary of State for Nonproliferation Controls); John M. Broder, *Arms Deal Tied to Gore Is Called Within Law*, N.Y. TIMES, Oct. 26, 2000, at A7 (citing Senator Sam Brownback’s complaint that “that the administration’s explanation—that the agreement was not a binding international agreement . . . [was] “‘hairsplitting’ that undermine[d] public confidence in elected officials”). The hearings also debated the extent to which certain congressional committees had been notified of the conclusion of the agreement in 1995.

280. CORWIN, *supra* note 138, at 200; see also EDWARD S. CORWIN, *THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION* (E. Corwin ed., 1952).

281. Tribe, *supra* note 8, at 1235–39 (describing the importance of attending to the “topology” of the Constitution to interpret the text); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999) (concluding that “constitutional provisions create arrangements that serve particular functions in a system of governance”). See generally CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) (advocating constitutional interpretation based on inferences from constitutional ordering).

282. See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1900 (1833); *Ex parte Merryman*, 17 F. Cas. 144, 149–50 (C.C.D. Md. 1861) (No. 9487) (“The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted . . .”).

roots, however, it does not match modern foreign relations practice. Indeed, if all federal power must depend on explicit enumeration, other federal powers (e.g., making congressional and sole executive agreements, presidential use of force) would appear equally problematic.<sup>283</sup> As a result, this is not the structural vision we employ here.

At the other extreme, a federal political commitment power finds strong support if we employ an extraconstitutional vision of foreign relations authority, coming not from the Constitution, but by virtue of U.S. sovereignty. Justice George Sutherland championed this view in *United States v. Curtiss-Wright Export Corporation*, arguing that “the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.”<sup>284</sup> Because sovereign states have popularized and utilized political commitments as one of their core international functions, *Curtiss-Wright* supports giving the president power over such commitments as well.<sup>285</sup>

But just as the strict enumerated power structural vision is too narrow regarding the sources of federal foreign affairs powers, Sutherland’s thesis is too broad.<sup>286</sup> We join other critics in declining to accept the idea that one must (or should) go outside the Constitution to find justification for federal power over foreign affairs.<sup>287</sup> Doing so implies that the Constitution itself does not authorize, constrain, or otherwise control political commitments.

We believe instead that support for a federal political commitment power can be found in the structure of the Constitution, constructed as a delegated, if unenumerated, sovereign power of the federal government. The political commitment power can be explained as part of the states’ (and the people’s) delegation to the national government of authority on all matters implicating foreign relations. It is a delegation involving all the powers that sovereign states possess.<sup>288</sup> Thus, even though political

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283. See Bradley & Flaherty, *supra* note 25, at 687–88.

284. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

285. See *id.* at 319–21.

286. Nevertheless, the Court continues to look favorably on the case as precedent. See, e.g., *United States v. Lara*, 541 U.S. 193, 201 (2004) (citing *Curtiss-Wright*, 299 U.S. at 315–22).

287. See, e.g., HENKIN, *supra* note 7, at 19–21; HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION* 94 (1990). But see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1296–97 (1996).

288. See 8 Op. Att’y. Gen. 411, 414–18 (1857); THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 158, bk. 1, at 152, 154–56; CORWIN, *supra* note 138, at 202; see also *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States as a part of those sover-

commitments post-date the original delegation of the foreign affairs power to the federal government, to the extent that the authority attributable to all nation-states is deemed to reside in the federal government, federal powers include the authority to create political commitments.

The states’ ability to conclude their own agreements with foreign powers reinforces this view. If the Compact Clause grants the states’ conditional authority to conclude political commitments—and the text suggests it might—the federal government should have at least the same amount of power as the states.<sup>289</sup> Otherwise, states would have greater power over this aspect of foreign relations than the federal government, a condition that is inconsistent with the basic delegation of foreign powers to the federal government.<sup>290</sup> In any case, leaving decisions regarding the formation of *national* political commitments in the hands of fifty states would likely prove prohibitive in terms of transaction costs.<sup>291</sup> We do not presume the Constitution imposes such a burden.

If the federal government has political commitment authority, which branch should exercise it? The president’s role as the dominant interlocutor with foreign states naturally favors the executive branch’s assumption of this power.<sup>292</sup> Indeed, many of the same executive abilities that give the president advantages in making treaty commitments have clear analogues to the formation of political commitments. As John Jay noted in *The Federalist No. 64*, the president enjoys a unity of office, capacity for secrecy and dispatch, as well as superior sources of information over Congress.<sup>293</sup> These abilities make the president better suited to control “delicate matters of international diplomacy.”<sup>294</sup> Add to this

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eign powers delegated by the constitution . . .”).

289. U.S. CONST. art. I, § 10, cl. 3; see *supra* note 215 and accompanying text

290. See Tribe, *supra* note 8, at 1268 (suggesting that the omission of an express federal power to conclude agreements or compacts analogous to those that states can make under the Compact Clause “could in theory imply a genuine ‘hole’ in constitutional ‘space,’ whereby no branch of the federal government is empowered to enter the United States into binding nontreaty agreements with foreign nations, [which] would radically limit the power of the federal government over foreign affairs”).

291. See, e.g., Ramsey, *supra* note 21, at 207 n.293; cf. Swaine, *supra* note 126, at 1162 (reaching the same conclusion for the dormant treaty power). *But see* Berger, *supra* note 172, at 40.

292. See, e.g., Letter from Thomas Jefferson, U.S. Sec’y of State, to Edmond Genet, French Ambassador to the U.S. (Oct. 2, 1793), reprinted in 27 THE PAPERS OF THOMAS JEFFERSON 175, 176 (John P. Catanzariti ed., 1997) (“[B]y our constitution all foreign agents are to be addressed to the President of the US. No other branch of the government being charged with foreign communications.”).

293. THE FEDERALIST NO. 64 (John Jay), *supra* note 158, bk. 1, at 10, 12–13.

294. Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1301 (2002); see also Swaine, *supra* note 126, at 1165–66 (“The design of the two

the vast organizational resources of the State Department in Washington, D.C. and abroad that have developed over the last two centuries, and the executive possesses substantive expertise beyond that available even to today's Congress, which has many more informational resources than were available at the founding of the nation.<sup>295</sup> Not only is the executive branch well-suited to make political commitments, the president also has an interest in doing so.<sup>296</sup> Allocating the power over political commitments to the president thus has "structural appeal."

On the other hand, Congress does not seem well situated to participate actively in the formation of political commitments. Legislative debate and approval are often prolonged processes. In many cases, members of Congress fail to coordinate sufficiently to take action, which explains why congressional hostility to a political commitment has so often failed to mature into a concrete response.<sup>297</sup>

We do not mean to imply, however, that the constitutional structure disfavors any congressional role (or that it favors a plenary executive one). Congress is at its best in debating and legislating on broad policy matters that do not require immediate action or secrecy.<sup>298</sup> Congress, after all, exists in part to preserve democratic accountability within the federal government.<sup>299</sup> And, as our variables for political commitments—form, substance, organization, and autonomy—show, at least some current political commitments may warrant such scrutiny. Where Congress "has time to act, and where the agreement is one of unusual importance, arguments for an exclusive presidential prerogative are less persuasive."<sup>300</sup> In those situations, the "institutional attributes of the Senate or Congress as a whole, suggest that the decision-making process will benefit from its inclusion."<sup>301</sup> Thus, the overall constitutional structure—and the relative abilities of the political branches—supports the president's power to enter into political commitments, subject to some congressional checks.

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branches seems to give the President decided advantages in initiating negotiations.").

295. Myriad other executive agencies also coordinate policies and commitments with other nations and international organizations, often on informal bases.

296. See *supra* note 159 and accompanying text.

297. See *supra* notes 268–74 and accompanying text.

298. Berger, *supra* note 172, at 55–58.

299. See *supra* notes 161–64 and accompanying text.

300. GLENNON, *supra* note 8, at 183.

301. *Id.*

### 5. *A Political Commitment Power as a Matter of Prudence*

Beyond text, original meaning, custom, and structure, we also need to ask the prudential question: what would happen if constitutional actors overtly recognized the executive's power to make political commitments subject to some legislative check?<sup>302</sup> We have no doubt that such recognition would impose new costs on current executive practice. To date, the executive has formed, monitored, complied with, and even breached political commitments largely free from any supervision, let alone regulation, by Congress. Congress has only occasionally inserted itself into questions about political commitments.<sup>303</sup> Constitutionalizing this mechanism would change that status quo by giving Congress a recognized foundation for questioning executive practice.<sup>304</sup> An increased congressional role might, in turn, chill executive use of political commitments. And for those political commitments that the president would still pursue, congressional involvement would raise transaction costs; or, in the vernacular of international relations, decrease the very flexibility for which these instruments are known.<sup>305</sup>

Should we worry about such "costs"? At least in some cases, imposing costs on the president might actually benefit the nation as a whole, such as where a commitment's high form, substance, and organization warrant democratic accountability, or where its lack of autonomy intrudes on other exercises of constitutional power. But many, if not most, political commitments will not implicate such concerns. At the same time, they will serve an indispensable international function in achieving or maintaining U.S. interests that should not be unnecessarily hindered.<sup>306</sup>

It is a mistake, however, to view all constitutional scrutiny of political commitments as inherently hostile to this mechanism's utility. Simply put, treating political commitments as the product of executive power will not end their use but simply rest it on firmer foundations. Constitutionalizing political commitments will benefit the president's use of the mechanism by giving the executive a constitutional basis on which to explain (and justify) so much of its existing practice. The executive will be able to invoke the Constitution to respond to challengers

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302. See BOBBITT, *supra* note 208, at 16 (explaining the prudential modality).

303. See *supra* notes 269–74 and accompanying text.

304. Congress might do so to delineate boundaries for the executive's power or to protect its own autonomy over significant policy issues or those warranting democratic accountability.

305. See *supra* note 73 and accompanying text.

306. See *supra* Part II.A.1.

who question the president's ability to make political commitments or who insist that particular agreements require a legal form. Moreover, any congressional involvement may just as often produce a cooperative venture among the political branches as it would engender legislative resistance to executive overreaching.

Legitimizing congressional participation in the political commitment process would have positive internal and external effects for the United States as well. Internally, it offers a path around informational deficits that currently plague U.S. practice. At present, no reporting or monitoring mechanisms exist to track U.S. political commitments like those that apply to both public and secret treaties.<sup>307</sup> Congress thus lacks information on what political commitments the president makes, not to mention their form, substance, organization, or autonomy. As a result, congressional responses to political commitments, both favorable and unfavorable, are largely ad hoc. Congressional hostility to the Gore-Chernomyrdin aide mémoire only arose because someone leaked the text; had that not happened, presumably, Congress would have remained silent. Treating the president's power to make political commitments as subject to some legislative check would give Congress a constitutional foundation to remedy such information gaps by requiring more regular information and consultation from the executive branch.

Externally, recognizing a constitutional political commitment power would help manifest the requisite U.S. intent to make political commitments, and, in doing so, perhaps amplify the credibility of the commitments made. Such recognition could also mitigate problems of conflicting intent. Israel, for example, viewed U.S. security commitments under the Sinai Peace Accords as treaty obligations, while the United States intended them to function as political commitments.<sup>308</sup> Such confusion can have significant consequences. In the 1990s, the United States was surprised to discover that the British (and many other commonwealth countries) considered numerous MOUs on defense and military matters with the United States to be political commitments, while the United States intended (and needed) them to be treaty commitments. The subsequent U.S. suspension of cooperation under these commitments pending their renegotiation ended up costing hundreds of millions of dollars and introduced substantial friction in U.S. relationships with otherwise close allies.<sup>309</sup> Greater domestic clarity via recognized constitutional

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307. See, e.g., 1 U.S.C. §112a-b (2008).

308. See *supra* note 81.

309. See, e.g., John H. McNeill, *International Agreements: Recent U.S.-U.K. Practice Con-*

processes for making *both* treaties and political commitments could avoid such scenarios in the future.<sup>310</sup> Moreover, recognition of political commitments in constitutional terms could push the executive branch toward greater self-awareness of the relative advantages and disadvantages of treaties and political commitments, providing a basis for realigning what sort of promises the United States makes through one vehicle or the other.

Taken together, the text, history, custom, and structure of the Constitution all point toward (or allow for) an executive political commitment power, subject to limited legislative oversight. As a prudential matter, moreover, although recognizing political commitments as subject to the Constitution will impose new costs, the attendant benefits should outweigh them. Having made the case for a nonplenary presidential political commitment power, we now turn to an explanation of how this power would actually operate.

### III. THE SCOPE AND LIMITS OF THE POLITICAL COMMITMENT POWER

So far, we have shown why constitutional actors should care about political commitments, why existing constitutional theories do not adequately encompass them, and what constitutional support exists for conceiving of the political commitment as an executive power subject to legislative checks. Simply denying the executive plenary authority, however, does not tell us what role Congress should play. Two possibilities exist. The first is informational. Absent adequate information, Congress cannot fully participate in the constitutional construction of a political commitment power. Thus, Congress may facilitate (or demand) the disclosure of political commitments, and the president would have a corresponding obligation to provide Congress with such data.<sup>311</sup>

Congress could occasionally exert a second, more substantive role. Although rare, there are certain political commitments where the presi-

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*cerning the Memorandum of Understanding*, 88 AM. J. INT'L L. 821 (1994).

310. Indeed, the United States' steps to recognize a political commitment power could set a precedent for other states to do the same, which might change when and how states choose between making treaties or political commitments. *See supra* notes 68–73 and accompanying text.

311. Further political branch interaction should determine how much data Congress requires. The executive is likely to resist the costs of providing complete information to Congress, while Congress itself may decide it does not need information on certain types of political commitments, such as those with insignificant topical content. Indeed, in their application of the reporting requirements of the Case-Zablocki Act, 1 U.S.C. § 112b (2008), the executive branch and Congress have agreed on certain types of treaties that do not require reporting. *See* 22 C.F.R. § 181.8 (1996).

dent cannot simply inform Congress about the instrument post hoc. In such circumstances, the president must afford Congress more affirmative opportunities for involvement in the process, whether in terms of approval or implementation. The precise circumstances in which Congress has a constitutional basis for demanding this greater role is likely imprecise and depends on interactions between the political branches.

We believe, however, that the four variables for differentiating political commitments identified in Part I—form, substance, organization, and autonomy—give constitutional actors a framework for evaluating which political commitments Congress *must* address in this second, substantive role.<sup>312</sup> These variables bridge the gap between the international and domestic functions of political commitments. Like other states, the United States can make international agreements, whether treaties or political commitments, which vary in terms of flexibility, credibility, confidentiality, and domestic legal control.<sup>313</sup> These variables, however, do not necessarily have relevant meaning within our constitutional system. Certain confidential political commitments may warrant congressional scrutiny (e.g., the Gore-Chernomyrdin aide mémoire) as much as do highly public instruments (e.g., the Helsinki Accords). Likewise, domestic legal approval presupposes the existence or nonexistence of congressional notification and activity that our analysis attempts to rationalize.

In contrast, ramping up form, substance, and organization, or decreasing autonomy can indicate conditions of flexibility and credibility that *do* warrant constitutional control, whether because of concerns with process (e.g., democratic accountability) or product (e.g., commitments that are significant for future conduct, consequences, or reputational effects).<sup>314</sup> These variables provide a basis for congressional scrutiny that does not involve forcing political commitments into domestic treaty-making procedures for which they are ill suited.<sup>315</sup> At the same time, our variables legitimate executive practice. They support the president's

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312. See *supra* Part I.B. As the prior history of congressional involvement in political commitments reveals, Congress can theoretically insert itself into questions over *any* U.S. political commitment; what our theory seeks to identify are those situations where Congress has a duty to involve itself as opposed to those where the executive can rely on the president's power to make political commitments and resist overreaching by Congress.

313. See *supra* note 73 and accompanying text.

314. See *supra* Part II.A.

315. See *supra* notes 177–79 and accompanying text. Thus, we accept the ability of the executive (and other states) to avoid making treaties and the domestic controls that apply to them by using political commitments. But, in doing so, the executive does not escape all domestic controls; the president will still be subject to those applicable to political commitments.

power to enter into most political commitments without mandating congressional scrutiny, even as they indicate certain, limited cases where such scrutiny should occur.<sup>316</sup>

In Part I, we identified form, substance, organization, and autonomy as independent variables for differentiating the international functions of political commitments. These variables are equally suitable for a constitutional analysis. From oral deals to elaborate, written agreements, the first factor, form, reflects the process employed to create a political commitment. It also signals the credibility (and reputational risks) at stake. More formal national commitments have greater credibility than those done at lower levels of government or via more informal vehicles; thus, the more formal the commitment, the greater the basis for congressional scrutiny. The second variable, substance, differentiates commitment content as a function of normativity and precision, with detailed promises of result having more substance than generalized statements of intention. Political commitments regarding general intentions are less likely to raise constitutional concerns than are instruments involving U.S. adherence to elaborate rules given how differently they (a) limit U.S. flexibility going forward and (b) involve discernible reputational risks.<sup>317</sup> The third factor, organization, refers to the level of agreed processes for future interaction that can affect both U.S. credibility and reputation. Highly organized political commitments suggest a particular type of credibility—decision making by nonpolitical actors—that can raise constitutional stakes.<sup>318</sup> Democratic accountability also becomes more of a factor where commitments involve processes or regimes with extended future timelines. The final variable, autonomy, examines how political commitments relate to future or contemporaneous legal commitments. The less autonomy a political commitment has, the more it implicates the operation and effect of international and domestic law. Unlike the other variables, therefore, *less* autonomous political com-

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316. See *supra* notes 280–81 and accompanying text.

317. Unlike other frameworks that might apply to political commitments (e.g., treaty making), our model’s substance variable does not emphasize subject matter per se. We do not believe subject matter operates as a sufficiently independent variable when it comes to political commitments (i.e., even for those political commitments addressing subjects otherwise within congressional power, such instruments may not warrant scrutiny if they have low normativity and precision, but they would require oversight if normativity and precision were high). See *supra* notes 180–89 and accompanying text.

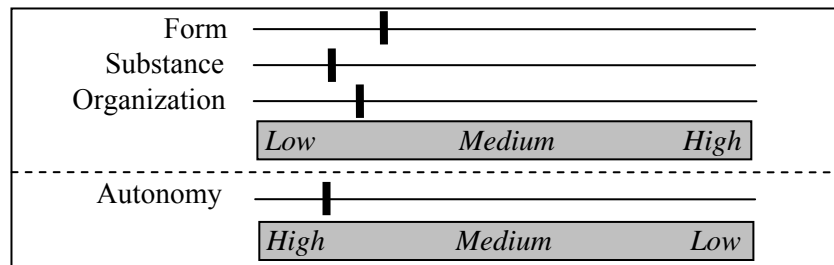
318. See Organization for Security and Co-operation in Europe, *supra* note 106 (discussing Helsinki’s evolution in the Office of the High Commissioner).

mitments may warrant *more* congressional scrutiny to protect constitutional processes relating to both domestic and international law.<sup>319</sup>

Because any political commitment power will operate via political branch interaction, these variables have the added benefit of objectivity.<sup>320</sup> They are readily identifiable and stable. Executive officials can employ them in deciding what types of commitments to conclude; legislators can rely on them in deciding when to intervene; and both institutions can use them to analogize past practice to present circumstances.

So, what do these variables tell us about political commitments? To start, they justify executive conclusion of most of these promises without congressional notification, let alone approval. Where an autonomous political commitment is characterized by low to medium form, low to medium substance, and low to medium organization, congressional scrutiny appears unwarranted. Such political commitments neither involve an extensive commitment of U.S. credibility nor reduce the flexibility of the United States going forward. These conditions characterize (and thus cover) the vast majority of myriad, small-scale political commitments that arise in everyday, low level diplomatic intercourse.

CHART 1: EXECUTIVE-ONLY POLITICAL COMMITMENTS



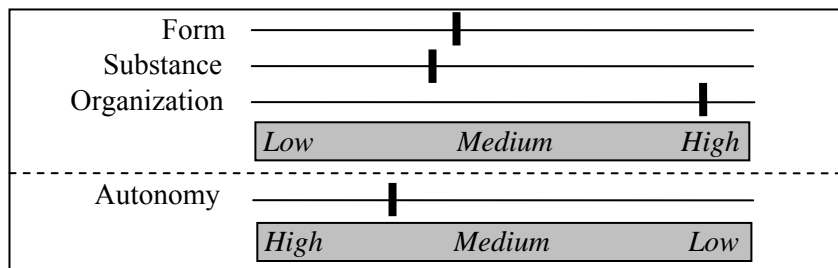
Congress must, however, take on *some* role if any one of these first three variables shifts to the high position. High form, substance, or organization warrants congressional requests for information from the executive. Indeed, in these situations, we contend that Congress does not merely have an option to obtain information on a commitment; rather, it has a duty to do so. High form, substance, or organization signal a situa-

319. See *supra* notes 107–21 and accompanying text.

320. A similar approach already exists for evaluating which treaties the executive must report to Congress. See 22 C.F.R. § 181.4 (2006) (basing reporting requirement on the parties, their intent, and the text's specificity, significance, and form).

tion where domestic accountability or significant or extended consequences from a national commitment are at stake. For example, Congress should have demanded an informational role for the London Guidelines on Nuclear Exports, on the basis of either the commitment’s high substance or its high organization. By obtaining information about the commitment, Congress has the necessary notice to make a decision on whether to check or acquiesce to the president’s exercise of power.<sup>321</sup> And once Congress checks, facilitates, or chooses not to respond to the commitment, the two branches further the constitutional construction of the political commitment power itself.

CHART 2: POLITICAL COMMITMENTS GIVING RISE TO AN INFORMATIONAL CONGRESSIONAL ROLE



Similarly, as political commitments move from autonomous to nonautonomous agreements, informational demands should arise. By definition, nonautonomous political commitments alter the legal landscape, raising constitutional concerns about fidelity to the processes and procedures relating to law, whether international or domestic. Although formally distinct, such impacts may apply equally to a political commitment’s effects on preexisting legal norms and future legislative activity.<sup>322</sup> In contrast, when an agreement has high autonomy, the relevance of this variable recedes, and the other variables control the question of Congress’s role in the process.<sup>323</sup>

321. See *supra* notes 266–79 and accompanying text.

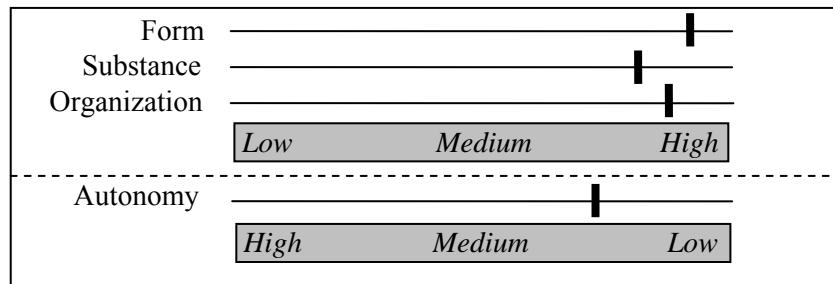
322. Thus, Congress had every right to demand information on President Ronald Reagan’s commitments regarding continuing abidance under the unratified SALT II regime, which, despite its low form, moderate substance, and low organization, also had low autonomy. See President’s Report to Congress on U.S. Compliance with Arms Control Agreements (Feb. 17, 1987), reprinted in 87 DEP’T ST. BULL. 42 (1987).

323. See *London Guidelines*, *supra* note 83.

What about Congress's second, substantive role? We do not believe it arises if one or more of the first three variables occupy low or medium positions. Those commitments should not trigger constitutional considerations that mandate more direct congressional involvement because they do not pose accountability concerns or present high reputational risks.

If, however, form, substance, and organization all simultaneously occupy a high position, Congress must do more than simply request information. In these admittedly rare situations, Congress should approve the commitment, particularly if its functions are analogous to those that would require approval if they were created in treaty form. Congress did just that with the Sinai Peace Accords, approving them subject to legislative conditions.<sup>324</sup> Equally rarely, Congress should also adopt political commitment norms as domestic law, as it did with the Kimberley Process.<sup>325</sup>

CHART 3: POLITICAL COMMITMENTS GIVING RISE TO HEIGHTENED CONGRESSIONAL POWER



More frequently, Congress should employ alternative approval mechanisms to check against the risk of abuse by the executive in exercising its political commitment power. Congress has various tools to do this. For example, it can create agencies to monitor political commitments; Congress dealt with the extraordinarily high form, substance, and organization of the Helsinki Accords by creating the Helsinki Commission.<sup>326</sup> It can decide to fund political commitments that require

324. See Sinai Peace Accords, Pub. L. No. 94-110, 89 Stat. 572 (1975).

325. See Clean Diamond Trade Act, 19 U.S.C. §§ 3901–3913 (2003).

326. Such agencies have a dual purpose—signaling the United States' commitment to the political commitment, while removing some of the executive's control over the commitment by demanding progress reports or directly monitoring acts of other participants. See *supra* notes 273–74.

such resources if it agrees with the president on the need to do so.<sup>327</sup> Of course, Congress can also deny, or threaten to deny, funding for programs that implement political commitments it considers problematic.<sup>328</sup>

Our contextual model thus helps to define when and how Congress should intervene with respect to the president’s political commitment practice. This framework also may aid Congress in identifying the most appropriate response to the executive’s conduct once it has decided to intervene. For example, if a commitment’s high organization causes concern (as it did with the NATO-Russia Founding Act), funding constraints may best check problems of durability. Alternatively, if adherence to the promise’s substance is a more pressing concern (as was true with the Helsinki Accords), monitoring mechanisms or legislative conditions may be more effective. Overall, recognizing the constitutional import of political commitments should, by reference to the variables we identify, generate frequent legislative demands for information and, more rarely, a requirement of approval.

#### CONCLUSION

Political commitments matter. Like the treaties they now so often rival, political commitments allow nation-states to reach agreement. They do so outside the international legal framework, relying on politics, rather than international law, as the exclusive basis for obligation and sanction. Even as treaty making proliferates, political commitments have demonstrated their own capacity to regulate significantly how nations behave. They do so in divergent ways, depending on the political commitment’s form, substance, organization, and autonomy.

For more than a century, presidents have actively employed political commitments to advance U.S. interests. As the SFA political commitment proposal suggested, these instruments arise frequently and often address the most important questions of U.S. foreign relations, including the 1907 Gentlemen’s Agreement, the Helsinki Accords, and the FATF. The political commitment is now an indispensable tool of the United States’—and most all nation’s—foreign relations.

A much murkier vision of political commitments exists, however, if we switch from an international lens to a constitutional one. The executive branch has never explained its constitutional authority to negotiate and conclude these instruments. Nor have the political branches recog-

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327. See Horse-Shoe Reef Agreement, *supra* note 249.

328. Congress may also condition its appropriations in some way.

nized the constitutional issues at stake in the formation and operation of such promises. But they clearly need to do so. As political commitments serve a wider array of international functions, the differences between those instruments and treaties have narrowed. As a result, the same constitutional considerations that justify treating the formation of treaties as a federal power favor similar treatment of political commitments. And the fact that political commitments are not U.S. law overlooks the important domestic impact of these instruments: shifting power to the executive, implicating principles of domestic accountability, and presaging or supplementing domestic law itself. Simply put, the time has come to recognize that political commitments exist as a function of constitutional power.

Existing conceptions of federal powers that might explain the political commitment phenomenon are not well suited to that task. Even though they overlap functionally, treaties and political commitments differ by definition. Thus, federal treaty-making powers cannot authorize or constrain the president's creation of political commitments. Although the political commitment power falls within the general rubric of foreign affairs power, political commitments do not mesh with this power's presently constructed focus on unilateral federal acts, which lack the mutuality of political commitments. Similarly, neither federalism nor the *Youngstown* vision of separation of powers has much purchase in the political commitment context. As a result, assuming that the Constitution should control the exercise of this power, no theory presently exists to explain how it would do so.

This Article proposes a way of constructing a constitutional political commitment power that is independent of judicial doctrine and free from reliance on (unlikely) judicial enforcement. We find that the Constitution already favors the existence of a discrete executive power to make political commitments that is subject to a legislative check when the political commitment has particular significance or triggers domestic accountability concerns. The Constitution's text, original meaning, custom, and structure all allow for, or overtly favor, this position.

Instead of drawing boundary lines for this power that the president or Congress cannot cross, we favor a contextual approach to the process. Using the variables of form, substance, organization, and autonomy, we differentiate between those political commitments that the executive can conclude on its own authority, those requiring congressional consultation, and those requiring congressional approval. As each variable is engaged, the constitutional mandate for congressional scrutiny increases,

whether because the commitment's lack of autonomy interferes with the exercise of other constitutional powers, such as the power to make treaties, or because its substance or organization reflects a commitment of such magnitude to warrant more democratic accountability. In the rare situation where all of the variables are engaged, both the reputational stakes and the risks of a democratic deficit require that Congress undertake a more formal approval role for itself.

Our framework thus confirms the significant constitutional concerns that were at stake in the proposal to conclude the U.S.-Iraqi SFA as a political commitment. Assertions that the SFA would be nonbinding did not preclude congressional demands for information about, and involvement in, the agreement making process.<sup>329</sup> Along with the SOFA, the SFA generated no less than seven pieces of draft legislation, requiring consultation or approval of these instruments or conditioning their funding.<sup>330</sup> Throughout this process, no one assessed the political commitment posture adopted by the executive in constitutional terms. Had they done so, our contextual approach would have provided constitutional support for the president to conclude the SFA as a political commitment. At the same time, it would have endorsed Congress's informational requests (given the relatively high levels of formality and organization projected in early SFA discussions), but not its demand for legislative approval (given the SFA's autonomy and low substance in terms of both normativity and precision).<sup>331</sup>

The final text of the SFA, of course, reflects an international legal agreement that the executive branch concluded under its own powers,

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329. House and Senate committees held multiple hearings on both the SOFA and the SFA, focusing on whether any security commitment or assurances to Iraq required legislative approval. *See, e.g.*, Satterfield, *supra* note 3; *see also* WEED, *supra* note 4, at 10–18 (documenting Senate or House of Representatives hearings that addressed the SFA on January 23; February 6, 8, 13, and 28; March 12, April 8 and 10; and June 4, 2008). Of course, the Declaration of Principles was itself a political commitment to settle norms at a future point. *See* Declaration of Principles, *supra* note 1.

330. *See, e.g.*, Congressional Oversight of Iraq Agreements Act of 2007, S. 2426, 110th Cong. (2007); Iraq Strategic Agreement Review Act of 2008, H.R. 4959, 110th Cong. (2008); H.R. 5128, 110th Cong. (2008); H.R. 5626, 110th Cong. (2008); Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, H.R. 5658, 110th Cong. §§ 1212, 1220 (2008); Resolution Reasserting Congressional Prerogatives in Foreign Policy, H.R. 1028, 110th Cong. (2008); Resolution Calling for Iraq to Agree to Pay Costs of Continued U.S. Presence in Provisions of Any Bilateral Agreement with Iraq, H.R. 1123, 110th Cong. (2008). One proposal became law, preventing funding for any program implementing an agreement that subjects U.S. forces to Iraqi courts or law. *See* Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 612, 121 Stat. 1844 (2008); WEED, *supra* note 4, at 3–4.

331. *See, e.g.*, Declaration of Principles, *supra* note 1; Bruno, *supra* note 10.

subject to the reporting requirements of the Case-Zablocki Act.<sup>332</sup> As with the SOFA, further constitutional discussion of the SFA will thus most likely arise in the context of debates over the scope of executive authority to conclude treaties.<sup>333</sup> But this would be a mistake. It is equally important to understand *why* the United States and Iraq concluded the SFA as a treaty rather than a political commitment. Did the treaty conversion occur at Iraq's request, or did it come from the U.S. side? How, if at all, did U.S. officials weigh the relative advantages and disadvantages of these two different mechanisms for reaching agreement? And did the executive (or Congress) appreciate the possibility for a legislative role independent of those devised for treaty making? These questions bear close analysis, if not for the SFA itself, then for the host of future agreements where questions will undoubtedly arise on the appropriate use of political commitments and their implications for Congress.

The SFA experience thus illustrates both the problem and potential of a political commitment power. The problem lies in existing domestic inattention to political commitments and the misunderstandings and missed opportunities that it can produce. The potential of the political commitment power lies in constitutional actors recognizing its significant implications for executive practice and foreign relations more generally. With recognition comes regulation; a recognized political commitment power will raise the cost of making political commitments for the president, reducing the flexibility and, potentially, the usage of such instruments. But, recognition will also generate considerable benefits. It will provide the executive branch with a constitutional basis for the political commitments that it chooses to make. It will force future presidents to think more consciously about choices between treaties, political commitments, and unilateral action, which may produce more coherent executive practice. Recognition of a political commitment power will correct the current information deficit where the executive so often operates without congressional (or public) notice. Formalizing a path for the president's creation of political commitments could also improve the instrument's signaling function internationally. Most broadly, a political commitment power would affirm the Constitution's founding principle—establishing a system based on the rule of law—and its application to all U.S. international agreements, not just some of them.

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332. See *supra* notes 174–75 and accompanying text.

333. See *supra* note 8.