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The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation

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INTRODUCTION

In April 1990, the United States ignited a "firestorm of diplomatic

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criticism" by orchestrating the abduction of Dr. Humberto Alvarez-Machain, a Mexican citizen, from his office in Guadalajara, Mexico.[1] Upon his arrival in Texas, Drug Enforcement Administration (DEA) officials arrested Alvarez-Machain on charges associated with the 1985 kidnapping and slaying of DEA agent Enrique Camarena-Salazar in Mexico.[2] Counsel for Alvarez-Machain moved to dismiss the indictment, arguing that the United States lacked jurisdiction because his abduction violated the U.S.-Mexico Extradition Treaty.[3] Although the district court[4] and the Ninth Circuit[5] found a clear violation of the treaty, the Supreme Court reversed. Noting that no specific provision in the treaty explicitly prohibited extraterritorial law enforcement operations, Chief Justice Rehnquist, writing for the majority, concluded that the United States necessarily retained this sovereign right. Alvarez-Machain's abduction may have been "shocking and...in violation of general international law principles," but the Court nevertheless downplayed customary international law's relevance to the task of treaty construction.[6] "[T]he practice of nations under customary international law," Justice Rehnquist wrote, is "of little aid in construing the terms of an extradition treaty or the authority of a court to later try an individual who has been so abducted."[7]

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1. David O. Stewart, *The Price of Vengeance: U.S. Feels Heat for Ruling that Permits Government Kidnapping*, 78 A.B.A. J. 50, 50 (Nov. 1992); United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992).

2. *Id.*

3. United States v. Caro-Quintero, 745 F. Supp. 599, 606 (C.D. Cal. 1990) (citing Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter Extradition Treaty]).

4. *Id.*

5. United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991).

6. *Id.* at 669-70 (internal quotation marks omitted).

7. Alvarez-Machain, 504 U.S. at 668 n.15. Upon remand, the district court ultimately dismissed the charges against Alvarez-Machain, finding the government's evidence insufficient. Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20, *cited in* Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 42 (1994).

In 2001, the Ninth Circuit concluded that the kidnapping indeed violated Alvarez-Machain's customary international rights to freedom of movement, to remain in his own country, and to enjoy security in his person, as well as customary prohibitions against arbitrary detention. Alvarez-Machain v. United States, 266 F.3d 1045, 1050-52 (9th Cir. 2001), *reh'g granted,* Alvarez-Machain v. [Order] United States, 284 F.3d 1039 (9th Cir. 2002). The customary prohibition against acts of force by one sovereign State within another's territory finds expression in numerous international agreements and treatises. *See, e.g.*, U.N. CHARTER art. 2, para. 4 (obligating "all members" to "refrain...from the threat or use of force against the territorial integrity or political independence of any State...."); Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, *as amended by* Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324; 1 L. OPPENHEIM, INTERNATIONAL LAW § 128 n.1, at 295 (H. Lauterpacht ed., 8th ed. 1955) ("It is...a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed

Although *Alvarez-Machain* has inspired substantial academic literature,[8] surprisingly little attention has been paid to the decision's broader implications for U.S. courts' interpretation of international agreements. *Alvarez-Machain* is remarkable not only for the Supreme Court's sweeping repudiation of the customary norm against extraterritorial abductions, but more generally for its failure to recognize or employ customary international canons of treaty construction. In construing the U.S.-Mexico Extradition Treaty, neither the majority nor the dissent makes even passing reference to the Vienna Convention on the Law of Treaties (Vienna Convention),[9] a multilateral treaty prepared by the United Nations that codifies the customary international canons governing international agreements.[10] This oversight is particularly striking given that the Convention directly addresses two critical issues that divided the majority and dissent in *Alvarez-Machain*: (1) the relevance of customary international norms in treaty interpretation, and (2) the degree of deference that courts should render to extra-textual materials. Had all nine justices employed the Vienna Convention's directive to interpret the Extradition Treaty in conformity with all "relevant rules of international law applicable in the relations between the parties,"[11] the rationale advanced in Justice Blackmun's dissent likely would have prevailed.[12]

Notwithstanding the Vienna Convention's internationally authoritative status, the Supreme Court has never applied the

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a crime"); RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 (1987) [hereinafter RESTATEMENT] ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state").

8. *See, e.g.*, Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939 (1993); Michael J. Glennon, *State-Sponsored Abduction: A Comment on* United States v. Alvarez-Machain, 86 AM. J. INT'L L. 746 (1992); Jordan J. Paust, *After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 ST. JOHN'S L. REV. 551 (1993); Andrew L. Strauss, *A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court's Abduction Decision in Alvarez-Machain*, 67 TEMP. L. REV. 1209 (1994).

9. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (*entered into force* Jan. 27, 1980) [hereinafter Vienna Convention].

10. A separate convention governs the interpretation of agreements between States and international organizations and agreements between international organizations. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21,1986, U.N. GAOR, U.N. Doc. A/CONF.129/15, *reprinted in* 25 ILM 543 (1986).

11. Vienna Convention, *supra* note 9, art. 31(3)(c).

12. *See* Alvarez- Machain, 504 U.S. at 678-81 (1992) (Stevens, J., Blackmun, J., and O'Connor, J., dissenting) (arguing that treaty partners cannot idly be presumed to abrogate the law of nations).

Convention as U.S. law. In fact, since its entry into force in 1980, only two Supreme Court opinions have cited the Vienna Convention—one a majority opinion authored by the Chief Justice, which distinguishes the Constitution's narrow definition of "treaties" from the Convention's broader definition,[13] and the other a lone dissenting opinion by Justice Blackmun, citing the Vienna Convention as incidental support for principles already firmly entrenched in federal common law.[14] No member of the Court has ever appealed to the Vienna Convention for an independent and controlling rule of decision.

By contrast, many lower federal and state courts apply the Convention's treaty-interpretation provisions routinely as customary international law. "When resolving [treaty-related] questions," the Court of Appeals for the Second Circuit explained recently, "we apply the rules of customary international law enunciated in the Vienna Convention on the Law of Treaties."[15] Although the Senate has yet to ratify the Vienna Convention, these courts rely on the Convention as a "restatement of customary rules" that "binds States regardless of whether they are parties."[16]

Tensions between the Vienna Convention's customary canons and the Supreme Court's nationalist treaty jurisprudence raise challenging questions about the interrelationship between international and domestic treaty law: Is "the practice of nations under customary international law," as expressed in the Vienna Convention, indeed "of little aid" in domestic treaty interpretation? When U.S. courts interpret treaties, should they look to customary international law for guidance?

To date, few have answered Justice Rehnquist's challenge. For example, the American Law Institute's *Restatement (Third) on the Foreign Relations Law of the United States* (Restatement) openly acknowledges the nationalist/internationalist schism in U.S. treaty

13. *See* Weinberger v. Rossi, 456 U.S. 25 (1982) (noting that the Vienna Convention "does not distinguish between agreements designated as 'treaties' and other agreements" between States, while the Constitutional meaning of the word "treaty" is restricted to instruments concluded pursuant to Article II, § 2, cl. 2).

14. *See* Sale v. Haitian Centers Council, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (citing the Convention for the proposition that a treaty "must first be construed according to its 'ordinary meaning'").

15. Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423, 433 (2d Cir. 2001).

16. Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308 (2d Cir. 2000) (quoting Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 286 (1988)) (citing opinions of the International Court of Justice). A Westlaw search finds that Articles 31-33 of the Vienna Convention have been cited only thirteen times by U.S. federal courts and two times by state courts. In comparison, Westlaw indicates that the European Court of Human Rights has cited these provisions twenty-three times.

interpretation,[17] yet vacillates between the two approaches, resisting some customary international canons which conflict with U.S. practice, while accepting others as binding "even if the United States jurisprudence of interpretation might have led to a different result."[18] Other commentators have given the issues similarly short shrift.

This article bridges the gap between the nationalist and internationalist approaches in U.S. treaty interpretation by seeking answers to three interrelated questions: First, how do contemporary common law canons differ from the Vienna Convention's internationalist approach? Second, have U.S. courts historically approached treaty interpretation from a nationalist or internationalist perspective? Third, is the Vienna Convention's interpretive framework compatible with the United States' constitutional commitments and sovereign prerogatives as currently recognized by U.S. courts?

Part I addresses the first of these questions by exploring the Vienna Convention's drafting history and by contrasting its salient provisions with contemporary common law canons. Although the Senate has not ratified the Vienna Convention, the United States is a signatory, and both the executive and legislative branches employ the Convention as an authoritative guide to international treaty law. The Vienna Convention and the nationalist approaches differ in at least three critical respects: First, the Vienna Convention gives courts less freedom to explore extra-textual materials beyond *travaux préparatoires*. Second, although the Vienna Convention discourages courts from deferring to a single state's uncorroborated treaty interpretations, domestic courts regularly give substantial deference to executive branch interpretations—even when treaty partners contest these interpretations. Third, the nationalist approach and the Vienna Convention take radically different approaches to customary international law as an interpretive guide. These methodological distinctions are not merely of academic interest, I argue, because they go to the heart of a much larger debate concerning U.S. courts' proper institutional role in resolving international disputes. Whereas the Vienna Convention envisions municipal courts in treaty cases as quasi-international tribunals committed to traditional rule-of-law values, the nationalist approach views U.S. courts as agents of national sovereignty with an obligation to maximize the United States' immediate strategic interests. Thus, the choice between the Vienna Convention and nationalist treaty canons

17. *See* RESTATEMENT, *supra* note 6, cmt. (d)-(g), at 197-98 (1987) (discussing differences between the Vienna Convention's rules and U.S. practice).

18. *Id.* at 201 n.4.

engages broader debates over American exceptionalism in foreign affairs.

Part II explores international treaty canons' traditional role in U.S. jurisprudence. The Constitution gives the federal judiciary stewardship over domestic treaty law, but it provides little guidance concerning the principles that courts should apply in treaty construction. Since the founding, however, the Supreme Court has recognized that U.S. courts must interpret treaties according to internationally authoritative canons. The current nationalist/internationalist tension in U.S. treaty interpretation owes more to historical accident and common law inertia, I argue, than constitutional principle or original intent.

Part III evaluates contemporary justifications for the United States' nationalist approach. American scholars typically rationalize departures from the Vienna Convention's guidelines by raising constitutional objections and casting doubt on customary international law's nature and function. This discussion demonstrates, however, that relatively few elements of the nationalist approach are strictly required as a matter of U.S. constitutional or international law. Excepting Senate reservations, declarations, and understandings, courts have no legitimate legal justification to disregard international treaty canons.

Looking forward, Part IV argues that U.S. courts may revitalize the internationalist paradigm in U.S. treaty jurisprudence by applying the Vienna Convention's customary canons as U.S. law. The Vienna Convention enhances U.S. treaty law's coherence and provides a potential corrective to the nationalist approach's disregard for non-state actors. The Convention also focuses courts' attention on the international legitimacy and acceptability of domestic treaty-related decisions. Finally, the Convention's customary canons provide a rudimentary legal grammar (i.e., a set of common concepts and principles) that may facilitate more effective dialogue between foreign, international, and domestic courts. Incorporating these customary canons into U.S. jurisprudence represents a critical step toward the development of a coordinated international system for treaty adjudication.

I. U.S. TREATY INTERPRETATION AT A CROSSROADS

Globalization's acceleration has forced nation-states to adopt innovative, collaborative strategies to handle the expanding transnational dimensions of commerce, communications, criminal networks, environmental harms, human migration, and other collective

concerns. International agreements like the U.S.-Mexico Extradition Treaty lend enhanced clarity to public and private legal regimes in the international arena. But the proliferation of international regulatory agreements raises yet another pressing dilemma of transnational proportions: the need to develop internationally acceptable principles for interpreting international agreements.

As this part demonstrates, the Vienna Convention on the Law of Treaties represents the global community's authoritative response to this global problem. The Vienna Convention provides a distinct interpretive framework founded on authoritative principles of customary international law. To the extent that U.S. courts have not fully assimilated the Vienna Convention's customary canons, I argue that this methodological dissonance reflects a basic tension between two competing visions of U.S. courts' appropriate role in treaty litigation: (1) an internationalist approach attuned to international custom and committed to the promotion of an orderly international system, and (2) a nationalist approach that draws interpretive principles analogically from national law and adapts to shifting foreign-policy preferences.

A. The Treaty to Govern All Treaties

The Vienna Convention on the Law of Treaties represents the culminating achievement of a decades-long effort to establish an international grammar for treaty interpretation. Pursuant to Article 13 of the UN Charter,[19] the UN General Assembly delegated this task to the International Law Commission (ILC), a working group of thirty-four leading publicists charged with "making the evidence of customary international law more readily available" through the codification and progressive development of international custom.[20] The ILC labored over its "treaty on treaties"[21] for over two decades, engaging the talents of many of the leading internationalist scholars of the era; ILC rapporteurs during this period included such eminent legal luminaries as

19. U.N. CHARTER art. 13. Article 13 authorizes the General Assembly to "initiate studies and make recommendations" for the following purposes:

> Promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
>
> Promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id. at 12.

20. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 75-76 (1997).

21. Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

James L. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, and Sir Humphrey Waldock.[22] The Commission's 1966 draft convention provided the starting point for the UN Conference on the Law of Treaties, which convened on March 26, 1968.[23]

The Conference's final product—the Vienna Convention on the Law of Treaties—consists of eight parts and a brief annex. Subjects addressed include treaties' conclusion and entry into force (II); observation, application, and interpretation (III); amendment and modification (IV); invalidity, termination, and suspension (V); and depositaries, notification, corrections, and registration (VII). For present purposes, however, the Convention's most important provisions are Articles 31-33, which incorporate customary international treaty canons into a unified interpretive framework.

Article 31 enshrines a robust textualist canon: treaties, are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty."[24] As one ILC member explained during a drafting session, "[t]he starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[25] Where feasible, courts should construe provisions in a manner that honors the agreement's "object and purpose."[26] In addition, a treaty's terms are to be understood "in their context,"[27] which the Convention defines narrowly as including, "in addition to the text [and] the preamble and annexes":

> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

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22. *Id.* at 51.

23. For a comprehensive record of the Conference proceedings, see United Nations Conference on the Law of Treaties, Official Records, 1st Sess., U.N. Doc. A/CONF.39/11 (1969) [hereinafter Vienna Conference 1] and United Nations Conference on the Law of Treaties, Official Records, 2d Sess., U.N. Doc. A/CONF.39/11/Add.1 (1970) [hereinafter Vienna Conference 2]; E.W. Vierdag, *The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention*, 76 AM. J. INT'L L. 779, 779 (1982).

24. Vienna Convention, *supra* note 9, art. 31(1). Interpreters are only to depart from a term's ordinary meaning "if it is established that the parties so intended." *Id.* art. 31(4); *see also* Advisory Opinion, Competence of the General Assembly for Admission of a State to the United Nations, 1950 I.C.J. 4, 8 (Mar. 3) ("The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context of which they occur.").

25. *Reports of the International Law Commission on the Second Part of its 17th Session and on its 18th Session*, [1966] 2 Y.B. Int'l L. Comm'n 220, U.N. Doc. A/6309/Rev.1 [hereinafter *Reports*].

26. Vienna Convention, *supra* note 9, art. 31(1).

27. *Id.* art. 31(1).

> [and]
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[28]

Such ancillary agreements and instruments facilitate successful negotiation by clarifying sensitive diplomatic compromises that find imprecise expression within the original treaty text.

Recognizing that strict adherence to a treaty provision's ordinary meaning will occasionally lead to unreasonable or absurd results, the Convention's drafters softened Article 31's "ordinary meaning" presumption with several important caveats. First, interpreters may attribute a "special meaning" to a particular term if the treaty's text suggests that the parties intended to use treaty terms in an idiosyncratic sense.[29] Second, courts may deviate from "ordinary meaning" when treaty parties conclude a subsequent agreement that otherwise elucidates or reconfigures "the interpretation of the treaty or the application of its provisions."[30] Third, interpreters may consider parties' "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[31] Like subsequent agreements, parties' post-ratification practice may reflect an implicit agreement to revise the original treaty document.

Article 33, which governs the interpretation of treaties authenticated in two or more languages, offers yet another basis for departure from Article 31's "ordinary meaning" canon. Unless otherwise expressed, the Convention declares that a treaty text "is equally authoritative in each [authenticated] language."[32] Where incongruences in translation render a text's "ordinary meaning" ambiguous, Article 33 instructs courts to look for zones of overlapping signification, on the presumption that treaties bear "the same meaning in each authentic text."[33]

Finally, Article 32 rounds out the exceptions to the Vienna Convention's textualist canon by providing for judicial recourse to "supplementary means of interpretation":

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning

28. *Id.* art. 31(2).
29. *Id.* art. 31(4).
30. *Id.* art. 31(3)(a).
31. *Id.* art. 31(3)(a)-(b).
32. *Id.* art. 33(1).
33. *Id.* art. 33(3)-(4).

> resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.[34]

Construed strictly, Article 32 decrees that courts may not consider *travaux préparatoires* except in extraordinary cases where Article 31 would render an ambiguous, obscure, "manifestly" absurd, or otherwise unreasonable result. Article 32 does not specify with great precision, however, how much ambiguity or obscurity must persist after Article 31 analysis in order to trigger Article 32(a). The Convention's assertion that courts may reference preparatory material "in order to confirm the meaning resulting from the application of article 31" suggests that even reasonable doubt may justify Article 32 analysis. This weaker formulation tracks courts' actual practice more closely and reflects a more realistic portrait of the adjudicatory process; as long as litigants bring *travaux* to courts' attention—as they always do—courts cannot prevent Article 31 analysis from becoming prematurely "contaminated" by these supplementary materials.[35] Indeed, the ILC itself recognized that the Vienna Convention's interpretive framework should be understood as "accumulative, not consecutive."[36] Articles 31 and 32 might assign different weight to different sources, but interpreters should not convert these provisions into an overly mechanistic process.

No matter how one spins Article 32, the provision clearly anticipates that courts will privilege a text's "ordinary meaning" over insights

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34. *Id.* art. 32. "Supplementary means of interpretation" may include traditional interpretive canons such as *lex specialis derogat legi generali* (specific rule prevails over general rule) and *lex posterior derogat legi prior* (last in time rule). ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 200-01 (2000). However, the Vienna Convention clearly disfavors domestic ratification materials outside the agreement's official *travaux préparatoire*.

35. *See* Kenneth J. Vandevelde, *Treaty Interpretation from a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281, 296-97 (1988) (expressing skepticism regarding the courts' capacity to consider *travaux* as a second-level consideration without having this analysis color their first-level textualist construction). The ICJ has, in fact, refused to consider preparatory work in at least one case where the text alone was deemed sufficiently clear:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.

Competence of the General Assembly, *supra* note 24, at 8. But it has also appealed to *travaux* in other cases in order to confirm conclusions reached by other means. *E.g.*, Convention of 1919 Concerning the Work of Women at Night, 1932 P.C.I.J. (ser.A/B) No. 50, at 380; *see generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 608-09 (2d ed. 1973) (describing the ICJ's jurisprudence in this area).

36. Reports *supra* note 25, at 204.

culled from supplementary sources. Ironically, to the extent that Articles 31 and 32 admit ambiguity, the Convention's drafting and negotiation records plainly confirm this principle. During the Vienna Conference negotiations, the United States' chief delegate, Yale Law School Professor Myres McDougal, vigorously challenged the hierarchy of sources enshrined in Articles 31 and 32. In McDougal's view, this interpretive two-step processwould unnecessarily place states' actual negotiated agreements at risk:

> The rigid and restrictive system of articles [31] and [32] should not be made international law because it could be employed by interpreters to impose upon the parties to a treaty agreements that they had never made. The parties...could well have a common intent quite different from that expressed by the "ordinary" meaning of the terms used in the text. The imposition upon the parties of certain alleged "ordinary" meanings...could lead to the arbitrary distortion of their real intentions.[37]

In place of the draft convention's "rigid and restrictive" hierarchy of sources, McDougal proposed a more flexible amendment that would give interpreters greater discretion in weighing a treaty's text *vis-à-vis* extrinsic sources. This amendment received scant support, however, from McDougal's peers at the Conference. Delegates from developing countries feared that broad reference to *travaux* would privilege wealthy nations capable of maintaining superior archives.[38] More importantly, delegates feared that this flexible approach would give treaty interpreters carte blanche to disregard clear, textual meanings in favor of spurious unilateralist interpretations. Uruguay's delegate offers a representative critique of McDougal's proposal:

> International law should avoid the idea of a "will of the parties" floating like a cloud over the *terra firma* of a contractual text. If respect for the wording of a treaty that had been signed and ratified was not something sacred, if the parties were to be allowed freely to invoke their supposed real will, an essential advantage of written and conventional law would be lost.[39]

The vast majority of countries represented at the Conference agreed that the original ILC draft should prevail since this predominately textualist approach—rather than the McDougal's more contextual

37. Vienna Conference 1, *supra* note 23, at 167-68; *see also* Official Records, Documents of the Conference, U.N. Doc. A/Conf.39/C.1/L.15 (1969).

38. Kearney & Dalton, *supra* note 21, at 520.

39. Vienna Conference 1, *supra* note 23, at 170.

approach—offered a "neutral and fair formulation of the generally recognized canons of treaty interpretation."[40]

In the end, the Conference decisively rejected McDougal's proposal by a vote of sixty-six nations against to eight nations in favor, with ten abstentions.[41] When the Conference reconvened one year later, the ILC draft passed unanimously.[42]

President Nixon transmitted the completed Convention to the Senate in 1971, stressing treaties' increasingly vital role in international governance and the need to support "well defined and readily ascertainable rules of international law applicable to the subject."[43] The Senate Foreign Relations Committee reported out a resolution of advice and consent to ratification, but conditioned this resolution upon a special understanding and interpretation with respect to Article 46. This article declares that states' failure to observe internal procedural requirements when concluding treaties does not invalidate a treaty for international purposes unless "that violation was manifest and concerned a rule of its internal law of fundamental importance."[44] The Committee's proposed understanding qualified Article 46 to account for treaties' special constitutional status within U.S. law:

> [I]t is a rule of internal law of the United States of fundamental importance that no treaty (as defined by paragraph 1(a) of Article 2 of the Convention) is valid with respect to the United States, and the consent of the United States may not be given regarding any such treaty, unless the Senate of the United States has given its advice and consent to such treaty, or the terms of such treaty have been approved by law, as the case may be.[45]

The State Department objected to the Committee's interpretation, fearing that it would cause other states to believe that the United States would no longer honor its preexisting congressional-executive agreements (agreements passed by a majority of both houses rather than a supermajority of the Senate) and pure executive agreements

40. Kearney & Dalton, *supra* note 21, at 520.

41. Vienna Conference 1, *supra* note 23, at 185.

42. Vienna Conference 2, *supra* note 23, at 57. To date, eighty-three countries have signed the Vienna Convention. Thirty-eight have formally ratified or acceded to the agreement. Vienna Convention, *supra* note 9, at 332.

43. *The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation*, 78 AM. SOC'Y INT'L L. 277, 276 (1984) (remarks by Robert E. Dalton).

44. Vienna Convention, *supra* note 9, art. 46(1). "A violation is manifest if it would be objectively evident to any state conducting itself in accordance with normal practice and in good faith." *Id.* art. 46(2).

45. Dalton, *supra* note 43, at 276.

(agreements concluded by the executive branch alone).[46] The two sides made little progress in resolving this dilemma, and the resolution of advice and consent stalled in committee. On January 27, 1980, the Vienna Convention entered into force without U.S. ratification.[47] To date, the United States remains a signatory to the Vienna Convention, but the Senate has yet to furnish the consent required for ratification under the Constitution.

Although the Vienna Convention does not apply in the United States as a matter of domestic treaty law, many of the principles codified in the Convention have force nonetheless as expressions of customary international law.[48] The Secretary of State's letter submitting the Convention to the Senate for formal ratification observed that although the Vienna Convention was "not yet in force," the document was nevertheless already "generally recognized as the authoritative guide to current treaty law and practice."[49] In subsequent communications, the State Department has explained further that the Vienna Convention represents "a primary source of reference for determining...the customary principles of treaty law,"[50] which the Department consults "in dealing with day-to-day treaty problems."[51]

When executive declarations affirm customary international norms, these norms naturally have claim to greater jurisprudential legitimacy in domestic courts. Indeed, even the most outspoken critics of contemporary customary international law generally accept that courts may apply these norms when they receive "authorization from the political branches."[52] The State Department's representations in treaty transmittal letters, congressional hearings, and the like may not be legally binding to the same extent as formal executive orders

46. *Id.* at 276-77.

47. Vierdag, *supra* note 23, at 779.

48. The Statute of the International Court of Justice defines customary international law as "general practice accepted as law." Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 (1945); *see also* RESTATEMENT, *supra* note 6, § 102 (stating that customary international law "results form general and consistent practice of states followed by them out of a sense of legal obligation").

49. Secretary of State Rogers' Report to the President, Oct. 18, 1971, 65 DEP'T ST. BULL. 684, 685 (1971).

50. Dalton, *supra* note 43, at 278; *see also* S. Exec. Doc. L., 92d Cong., 1st Sess., at 1 (1971).

51. *Contemporary Practice of the United States Relating to International Law*, 65 AM. J. INT'L L. 599, 605 (1971).

52. Curtis A. Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 868, 870 (1997) [hereinafter Bradley & Goldsmith, *Critique*]. Whether Bradley and Goldsmith would recognize the Vienna Convention as customary international law in the absence of an express executive order is not, however, entirely clear.

promulgated by the President. Nevertheless, these declarations merit considerable respect as guides to the United States' general intent in treaty negotiations and as expert opinions regarding customary international treaty law's content.

The State Department's acceptance of the Vienna Convention as an authoritative guide to customary international law also comports with the general principles that govern customary international law. Over the last half-century, quasi-universal conventions such as the Universal Declaration of Human Rights[53] and the United Nations Conventions on the Law of the Sea (UNCLOS)[54] have blurred traditional distinctions between positive and customary international law. According to the International Court of Justice (ICJ), multilateral conventions such as these may reflect customary international law in three cases: First, a treaty provision may be "declaratory of pre-existing custom." Second, a treaty provision may "crystallize customary law in the process of formation." Third, a treaty provision may fall within the ambit of customary international law if it successfully "generates new customary law subsequent to its adoption."[55] The ICJ embraced this last category most explicitly in *The North Sea Cases*:

> [A] norm creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, [becomes] binding even for countries which have never, and do not, become parties to the Convention.[56]

Pursuant to these principles, the ICJ applies some multilateral

53. U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/811 (1948).

54. Geneva Convention on the High Seas, Apr. 29, 1958, U.N. Doc. A/Conf.13/L.52-L.55 [hereinafter UNCLOS]; *see also* President's Statement on United States Oceans Policy, 1983 Pub. Papers 378, 378 (Mar. 10, 1983) (announcing that the United States would honor UNCLOS and stating that the Convention contained "provisions with respect to the traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interest of all states").

55. LOUIS HENKIN ET AL ., INTERNATIONAL LAW: CASES AND MATERIALS 101 (1993). In fact, because international custom exists independent of treaties themselves, the provisions of a treaty that are not yet in force may constitute customary international law binding even on nonsignatories. *See* Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, 29-30 (June 3) (applying provisions of the 1982 Convention on the Law of the Sea as customary international law despite the fact that the Convention had not yet entered force between the parties).

56. North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.), 1969 ICJ 3, 41 ¶ 71 Feb. 20).

conventions to signatories and non-signatories alike.[57] The status of customary international law "is not lightly to be regarded as having been attained," however; the ICJ generally refuses to enforce multilateral conventions against non-parties absent a showing that the relevant provisions satisfy both the generality and *opinio juris* requirements.[58]

U.S. courts also accept the principle that multilateral conventions may restate, crystallize, or progressively generate international custom.[59] The critical question for judicial determination is not whether a particular international agreement reflects preexisting international custom (although equivalence at the time of ratification would establish a strong presumption that the norm remains customary); rather, courts must decide whether, at the time of adjudication, convention provisions and customary practice coincide. As states conform their behavior to a convention's progressive principles, these principles may become binding even on those states that fail to ratify the convention.[60]

The ILC has confirmed that Articles 31-33 codify preexisting customary international law.[61] Ian Brownlie, a member of the ILC for

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57. *E.g.*, Nottebohm (Liech. v. Guat.), 1953 I.C.J. 7 (Mar. 21); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20); Barcelona Traction, Light and Power Co., Ltd. (New Application 1962) (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5); S.S. Wimbledon, (Ger. v. UK, Fr., Italy, Japan), 1923 P.C.I.J. (ser. A) No. 1, at 182 (Aug. 17).

58. See Hiram Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and International Law*, 28 VAND. J. TRANSNAT'L L. 973, 1041-42 (1995) (citing the ICJ's Asylum case (Columbia/Peru) and the North Sea Continental Shelf case (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)).

59. The Supreme Court's oft-cited 1900 decision, The Paquete Habana, 175 U.S. 677, 700 (1900), relied upon several bilateral treaties as evidence of international maritime custom. *Id.* at 687-88, 691. More recently, the Second Circuit's influential *Filártiga* decision suggested that conventions such as the UN Declaration of Human Rights "create[] an expectation of adherence, and 'insofar as the expectation is gradually justified by State practice,...may by custom become recognized as laying down rules binding upon the States.'" Filártiga v. Peña-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (quoting M.G.K. Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813, 816-17 (1978)); Howard S. Schrader, Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751, 762-63 (1982) (demonstrating that U.S. courts deduce customary international law from treaties).

60. The Restatement recognizes this rule: "[C]odification of branches of international law by international bodies...have provided authoritative text as a source for restatement of some topics." In fact, the Restatement specifically cites the Vienna Convention as a prime example of this phenomenon. RESTATEMENT, *supra* note 6.

61. In theory, the ILC is required to employ differentiated procedures for the codification and progressive development of customary international law. While this bright-line procedural distinction does not always obtain in practice, the ILC often sends other signals to communicate whether it approaches its task in a particular instance as primarily to codify existing customary law or to progressively generate new custom. *Id.* at 78-79, 99. In drafting of Articles 31-33, the ILC clearly envisioned its role as codifying preexisting custom.

the drafting of Articles 31-33, explains that the Commission did not seek to develop new canons for treaty construction; instead, it sought only to isolate "the comparatively general principles which appear to constitute general rules for the interpretation of treaties."[62] For example, the Commission's decision to adopt a predominantly textualist approach reflected the customary practice recognized in numerous ICJ decisions.[63] Article 31's "ordinary meaning" canon reflected generally accepted practices identified years earlier by both the Institute of International Law[64] and the Permanent Court of International Justice (PCIJ).[65] In short, rather than pioneer a progressive system for treaty interpretation, as the Restatement suggests, Articles 31-33 actually provided a comparatively skeletal guide to basic principles that were already well entrenched in customary international law.

Numerous domestic, foreign, and international tribunals have recognized that the Vienna Convention codifies customary international treaty law. The ICJ invokes the Vienna Convention routinely,[66] citing even some of its most controversial provisions as customary law and applying these principles to signatories and non-signatories alike.[67] In *Libya v. Chad*,[68] for example, the ICJ specifically emphasized Article 31's customary status:

> The Court would recall that, in accordance with customary international law, reflected in Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object

62. BROWNLIE, *supra* note 35, at 624.

63. *Id.*

64. Vienna Conference 1, *supra* note 23, at 177.

65. BROWNLIE, *supra* note 35, at 626 (citing Advisory Opinion No. 11, Polish Postal Service in Danzig, 1925 P.C.I.J. (ser. B.) No. 11, 37, at 39 (May 16) (finding "a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd")); *Reports supra* note 25, at 172, 185.

66. *See, e.g.*, Fisheries Jurisdiction (U.K. and Ir. v. Ice.), 1974 I.C.J. 3, at 14 (citing Article 52 regarding agreements under threat of force); Advisory Opinion, Presence of South Africa in Namibia, 1971 I.C.J. 16, 47 (June 21) (discussing the Convention's provisions on treaty breach as reflecting customary international law). In fact, the ICJ has never found a provision of the Vienna Convention to be inconsistent with customary international law. AUST, *supra* note 34, at 11.

67. *See* France-United Kingdom: Arbitration on the Delimitation of the Continental Shelf, 54 Int'l L. Rep. 6; 18 I.L.M. 397 (1979). Courts recognize, however, that these canons operate only as residual defaults; treaty parties may freely abrogate the Vienna Convention by express agreement. *The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation*, 78 AM. SOC'Y INT'L L. PROC. 270, 272 (1984) (remarks by Sir. Ian Sinclair).

68. Territorial Dispute (Libya v. Chad), 1994 ICJ 4, 16 (Feb. 3).

> and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.[69]

Most national and regional courts have followed the ICJ's lead, invoking the Convention "as an authoritative source of law, thus gradually transforming its innovative features into customary law through such application."[70] The European Court of Human Rights, for example, chose to apply Articles 31-33 as "generally accepted principles of international law" well before the Vienna Convention even entered force.[71] Similarly, every American court to address the Vienna Convention's legal authority has concluded that its provisions express binding customary norms.[72] Notwithstanding the United States' failure to ratify the Vienna Convention, U.S. courts regularly apply Articles 31-33 as customary law.[73]

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69. *Id.* at 21.

70. LOUIS HENKIN, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 416 (1993).

71. Golder v. United Kingdom, 18 Eur. Ct. Hum. Rts. (ser A) No.18 (1975).

72. *E.g.*, Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423 (2d Cir. 2001) ("[W]e apply the rules of customary international law enunciated in the Vienna Convention on the Law of Treaties"); Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308 n.5 (2d Cir. 2000) ("We...treat the Vienna Convention as an authoritative guide to the customary international law of treaties."); Croll v. Croll, 229 F.3d 133, 145 (2d Cir. 2000) (citing the Vienna Convention's directive that treaty text "must be interpreted 'in accordance with the *ordinary meaning* to be given to the terms....'"); Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1296 n.40 (11th Cir. 1999) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.") (quoting Kreimerman v. Casa Veerkamp S.A. de C.V., 22 F.3d 634, 638 n.9 (5th Cir. 1994)); Kreimerman v. Casa Veerkamp, 22 F.3d 634, 638 (5th Cir. 1994) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties."); Haitian Centers Council v. Sale, 969 F.2d 1350 (2d Cir. 1992) ("[P]rinciples of treaty construction are themselves codified, in Article 31 of the Vienna Convention on the Law of Treaties."); R. Griggs Group Ltd. v. Filanto Spa, 920 F. Supp. 1100 (D.Nev. 1996) ("The United States is not a signatory to the Vienna Convention; however, it has been a policy of the United States that Articles 31 and 32 are declaratory of customary international law, and will be so applied in the United States."); Logan v. Dupuis, 990 F. Supp. 26 (D.D.C. 1997) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention (and specifically, Article 31) as codifying the customary international law of treaties."); Busby v. State, 40 P.3d 807 (Alaska App. 2002) ("[B]oth federal and state courts have acknowledged and employed the principles of interpretation codified in the Vienna Convention. We will too."); State v. Martinez-Rodriguez, 33 P.3d 267, 273 n.3 (N.M. 2001).

73. *E.g.*, Haitian Centers Council v. Sale, 969 F.2d 1350, 1361-62 (2d Cir. 1992) ("Rather than having evolved from a judicial common law,...principles of treaty construction are themselves codified in Article 31 of the Vienna Convention on the Law of Treaties."); Gonzalez v. Guitierrez, 311 F.3d 942, 949 n.15 (9th Cir. 2002) ("While the United States is not a signatory to the Vienna Convention, it is the policy of the United States to apply articles 31 and 32 as customary international law."); Busby v. State, 40 P.3d 807 (Al. App. 2002) (applying Articles 31

In sum, the Vienna Convention's interpretive methodology is distinctive in several respects. First, Article 31 declares that courts must interpret treaty provisions "in good faith" according to their "ordinary meaning" and consistent with the treaty's broader "object and purpose." Unusual, subjective interpretations lack force unless other treaty partners ratify these interpretations by express agreement or consistent post-ratification practice.[74] Second, the Convention enshrines a canon against interpretations in derogation of international law, presuming instead that states negotiate agreements against the backdrop of their preexisting international obligations. Third, when textualist and teleological readings leave a provision's meaning ambiguous, Article 32 allows courts to seek additional illumination from a treaty's formal ratification record. Executive branch practice and general principles of international legal theory confirm the conclusion reached by numerous domestic, foreign, and international tribunals: Articles 31-33 of the

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and 32 as customary international law).

A few commentators have questioned whether Articles 31-33 accurately reflect customary international law. The Restatement provides the preeminent example:

> Customary international law has not developed rules and modes of interpretation having the definiteness and precision to which [the Vienna Convention] aspires. Therefore, unless the Vienna Convention comes into force in the United States, [Articles 31 through 33 do] not govern interpretation by the United States or by courts in the United States. But it represents generally accepted principles and the United States has already appeared willing to accept them despite differences in nuance and emphasis.

RESTATEMENT, *supra* note 6, § 325, cmt. (a). Maria Frankowska similarly asserts that "it is still debatable whether [Articles 31-33] simply codified the then existing customary law or whether they generated such law." Frankowska, *supra* note 16, at 332. These critics offer little support, however, for the proposition that customary international law lacks the Convention's "definiteness and precision" aside from the observation that U.S. courts have not uniformly followed the Vienna Convention's prescribed methodology. As the foregoing analysis demonstrates, there is compelling evidence that Articles 31-33 reflect customary international law.

74. By the terms "subjective interpretation" and "subjective intent," I have in mind McDougal's suggestion that treaty texts and *travaux préparatoires* often inaccurately represent the negotiating parties' actual political bargains. "Subjective interpretations" may arise from allegations that negotiators' actual "meeting of the minds" produced special understandings that would be frustrated by strict enforcement of treaties' textual expression. States may also insist that treaties must be construed according to the unilateralist understanding of domestic political institutions (e.g., the President or Senate). Interpretations in the first category are "subjective" in the sense that they discount treaty text and accord heightened deference to states' unilateral interpretations. Interpretations in the second category share these qualities, but may also be "subjective" in the sense that they would distinguish treaties' domestic legal meaning from their meaning under foreign and international law. For a defense of this dualist approach, see Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1589-90 (2003). "Objective interpretation," on the other hand, aims to establish as accurately as possible states' intent at the time of contracting as expressed in instruments and conduct accessible to all parties.

Vienna Convention represent binding canons of customary international law.

B. The Nationalist and Internationalist Approaches

Notwithstanding the Vienna Convention's customary status, U.S. courts have not consistently followed the Convention's interpretive framework. The Supreme Court has never relied upon the Vienna Convention as an authoritative source of law.[75] A growing number of federal courts and two states recognize the Vienna Convention as an authoritative codification of customary treaty canons,[76] but few recognize the degree to which the Convention's guidelines differ from U.S. practice.

The Vienna Convention's imperfect assimilation into U.S. law reflects an unresolved conflict between two competing visions of domestic courts' institutional role in treaty-related litigation. One vision suggests that domestic courts take part in an international judicial system when they adjudicate treaty cases and bear a duty to interpret treaties according to internationally accepted standards. Another vision posits the judicial branch as a steward of national sovereignty entrusted with the responsibility to safeguard national legal norms and political preferences.[77] Viewed from this latter perspective, treaties have force in domestic law only by virtue of the Constitution, and Article III courts—the oracles of American constitutional law—have inherent authority to develop parochial treaty canons even if these canons depart from customary international law. Whereas internationalist judges apply the Vienna Convention in order to facilitate transnational legal order, nationalist judges give the political branches maximum discretion to interpret and perform the United States' international obligations according to prevailing national political preferences.

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75. *See* discussion *supra* notes 12-15 and accompanying text.

76. See cases cited *supra* note 72.

77. This nationalist/internationalist tension is a natural dynamic of international legal federalism and plays an important role in virtually every aspect of the United States' internalization of international norms. *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 446-47 (1952) (describing the enduring tension between nationalist and internationalist traditions as "guided by ethical or political preferences" rather than "the science of law"); *see, e.g.*, Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999) (advocating a dualist approach to U.S. treaty practice, with special reference to the Vienna Convention on Consular Relations); Harold Hongju Koh, *International Business Transactions in United States Courts*, 261 RECUEIL DES COURS 9 (1996) (discerning this tension in international business transactions).

1. Should Courts Privilege Extrinsic Sources over Texts?

Both the nationalist and internationalist approaches to treaty interpretation consider a court's main objective to be the identification and enforcement of parties' collective intent. These approaches proffer strikingly different methodologies, however, for ascertaining state intent. The nationalist approach—tracking contemporary American contract theory—seeks to identify party intent by drawing indiscriminately upon all available evidence of parties' respective expectations. The international approach, on the other hand, follows the Vienna Convention's injunction to focus on objective indicia of party intent such as treaty text and *travaux préparatoires*.

General principles of contract law play a central role in both the nationalist and internationalist approaches.[78] For centuries, leading publicists such as Hugo Grotius and Emmerich de Vattel characterized treaties as "public compacts" analogous to private contracts.[79] The founding generation of American statesmen—themselves steeped in the great treatises of Grotius and Vattel—also frequently invoked general principles of private contract law to define and delimit the treaty power. Alexander Hamilton's famous explanation in *Federalist No. 7* is representative:

> The power of making treaties...relates neither to the execution of the subsisting laws, nor to the enaction of new ones, and still less to an exertion of the common strength. Its objects are *contracts* with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.[80]

Building upon this contract analogy, the contemporary nationalist approach encourages courts to develop common law treaty canons by incorporating principles from domestic contract law. "In interpreting an

78. Professor David Bederman traces this private contract analogy in treaty interpretation to the earliest compacts among the Ancient Greek city-states. DAVID J. BEDERMAN, CLASSICAL CANONS: RHETORIC, CLASSICISM AND TREATY INTERPRETATION 46-67 (2001).

79. HUGO GROTIUS, THE LAW OF WAR AND PEACE, Ch. XV, § I (Louise R. Loomis trans., Walter J. Black 1949) (1625) (describing treaties as forms of contract); EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, Ch. XVII, § 267-68 (Charles G. Fenwick trans., 1916) (1758) (analogizing treaty interpretation to contract interpretation); *see also* EUGENE RAFTOPOULOS, THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES 84 (1990). Significantly, Grotius still supported the development of objective rules for treaty interpretation. BEDERMAN, supra note 78, at 119.

80. THE FEDERALIST NO. 7 (Alexander Hamilton) (George W. Carey & James McCellan eds., 2001) (emphasis added).

international treaty," the Supreme Court proclaimed in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*,[81] "we are mindful that it is 'in the nature of a contract between nations...to which [g]eneral rules of construction apply.'"[82] Because judges are often unfamiliar with foreign contract law, recourse to "general rules" of contract law inevitably reflects an American-law bias.

Among the more important "general rules" that U.S. courts have drawn from domestic contract law is the modern parol evidence rule. The parol evidence rule conceptualizes contract texts as mere symbolic expressions of parties' actual intent. It recognizes that a treaty's text often provides the best evidence of parties' actual intentions but encourages courts to consult extrinsic sources liberally to pinpoint party intent as accurately as possible. When courts decide that an agreement's textual expression does not accurately reflect the parties' actual, unformalized intentions, courts give parties' subjective intent precedence over their objective representations.[83]

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81. 482 U.S. 522 (1987).

82. *Id.* at 533 (quoting Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253, 262 (1984)); *see also* Trans World Airlines, Inc. v. Franklin Mint Corp., 104 S.Ct. 1776 (1984) (Stevens, J., dissenting) ("A treaty is essentially a contract between or among sovereign nations."); Santovincenzo v. Egan, 284 U.S. 30 (1931) ("[T]reaties are contracts between independent nations...."); Sullivan v. Kidd, 254 U.S. 433, 442 (1921) ("Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals...with a view to making effective the purposes of the high contracting parties...."); Zicherman v. Korean Airlines, Ltd., 516 U.S. 217, 226 (1996) ("[A] treaty ratified by the United States is not only the law of this land...but also an agreement among sovereign powers"); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979); Harris v. US, 768 F.2d 1240, 1242 (11th Cir. 1985) ("International agreements should be construed more like contracts than statutes.").

83. John A. Townsend, *Tax Treaty Interpretation*, 55 TAX LAW 219, 239-40 (2001). Interestingly, the parol evidence rule first entered U.S. treaty jurisprudence through an Indian treaty case—the Supreme Court's 1943 decision, *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943)—rather than a case involving a treaty with a foreign nation. Construing a treaty between the United States and the Chickasaw and Choctaw tribes, the Supreme Court offered the following dictum:

> [T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.

Id. at 431-32. Although courts have read this passage broadly to apply to all U.S. treaties, the Supreme Court originally designed the liberal use of extrinsic sources as a response to Indian treaties' unique deficiencies. By softening its traditional textualist approach in this context, the *Choctaw Nation* Court attempted to compensate for the United States' disproportionate bargaining power in treaty negotiations with Indian tribes, the obvious disparities in negotiating skills and legal expertise, and language barriers that prevented tribes from critically evaluating treaty texts. Anthony A. Lusvardi, Note, Montana v. United States—*Effects on Liberal Treaty Interpretation and Indian Rights to Land Underlying Navigable Waters*, 57 NOTRE DAME LAWYER 689, 690-91 (1982). Recognizing that the United States might easily manipulate treaty

One court describes this rule's operation in treaty construction thus:

> The basic aim of treaty interpretation is to ascertain the intent of the parties who have entered into agreement, in order to construe the document in a manner consistent with that intent.... We must therefore examine *all available evidence* of the shared expectations of the parties to this Convention in order to answer the interrelated questions [raised].[84]

By widening the scope of judicial investigation beyond the four corners of a treaty's text, the parol evidence rule aims to "facilitat[e] the ability of private parties to reach voluntary bargains through manifesting shared understandings, and [to] limit[] judges' ability to frustrate these bargains through 'objective' interpretations.'"[85] An agreement's "ordinary meaning" may serve as the starting point for judicial investigation, but this ceremonial symbol of the parties' agreement represents only one of several factors under judicial consideration.[86]

Numerous cases witness the parol evidence rule's recent entrenchment in U.S. treaty jurisprudence. Consider, for example, the Supreme Court's 1986 decision, *O'Connor v. United States*,[87] which

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provisions to tribes' prejudice, the Supreme Court departed from its previous textualist baseline in order to protect tribes' actual expectations.

The Court's extension of *Choctaw Nation* to the interpretation of treaties with foreign nations represents one of the great ironies in U.S. foreign affairs law. When domestic courts interpret international agreements today, they typically invoke *Choctaw Nation* to rationalize *increasing* the federal government's influence, rather than to correct for the United States' disproportionate bargaining power in negotiations with other nation-states.

84. Maximov v. United States, 299 F.2d 565, 569 (2d Cir. 1962) (emphasis added).

85. Stephen Ross & Daniel Tranen, *The Modern Parol Evidence Rule and its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 207 (1998).

86. RESTATEMENT, *supra* note 6, at 200 n.4. One commentator offers the following observation:

> The courts of most countries interpret international agreements in accordance with the ordinary meaning of the text of the agreement; the object and purpose of the agreement is merely ancillary, casting light on the ordinary meaning. The courts of the United States, however, have a distinctly different approach to interpretation. The ordinary meaning of words is for American courts merely one of the factors to be taken into account in the interpretive process. The prime objective of interpretation by American courts is to ascertain the meaning intended by the parties.

THE EFFECT OF TREATIES IN DOMESTIC LAW (Jacobs and Roberts eds., 1987).

87. 479 U.S. 27 (1986). Other treaty cases, which support liberal use of extrinsic sources, include Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 84 (1993) (Blackmun, J., dissenting); Eastern Airlines Inc. v. Floyd, 499 U.S. 530, 535 (1991); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988); and Air France v. Sacks, 470 U.S. 392, 396 (1985).

examined whether the Panama Canal Treaty[88] immunized American citizens employed in Panama by the Panama Canal Commission from U.S. tax laws. The petitioners in *O'Connor* relied upon the plain meaning of Article XV, Section 2 of the Panama Canal Treaty, which specifically exempted U.S. citizen employees and their dependents "from *any* taxes, fees or other charges on income received as a result of their work for the Commission."[89] Conceding that the Treaty offered textual evidence to support extending U.S. tax law to the petitioners, a unanimous Court—in an opinion authored, ironically, by Justice Scalia—focused on "the contextual case for limiting Article XV to Panamanian taxes."[90] Among the contextual evidence, the Court cited pieces of negotiation history introduced by the government, including the State Department's internal treaty drafts and post-ratification interpretations by the executive branch.[91] These documents were not among the official *travaux* prepared by the parties simultaneously with the drafting of the Treaty itself; on the contrary, the petitioners' brief suggests that this negotiating history was "contrived by the government" some time later "to further its interests in litigation."[92] Although the Vienna Convention discourages reference to internal memoranda and drafts such as these, the Court consulted these sources pursuant to the parole evidence rule.

The parol evidence rule's assimilation into U.S. treaty interpretation has three major consequences: First, the rule significantly erodes the age-old presumption that a treaty's text most accurately reflects treaty parties' intent. "In foreign affairs," notes Professor Louis Henkin, "the Supreme Court has authoritatively declared the text to be incomplete and inadequate."[93] When expectations conflict with the treaty's clear text, courts privilege the agreement's spirit over its textual expression.[94]

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88. Panama Canal Treaty, Sept. 7, 1977, U.S.-Pan., T.I.A.S. No. 10030.

89. *Id.* art. XV, § 2 (emphasis added). The petitioners argued that the court must enforce this provision domestically pursuant to 26 U.S.C. § 894(a), which declares that "[i]ncome of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation...." *O'Connor*, 479 U.S. at 30.

90. O'Connor, 479 U.S. at 31. As Justice Scalia's *O'Connor* opinion demonstrates, nationalism and textualism are often difficult to reconcile in the treaty context.

91. *Id.* at 33 (citing Letter from John L. Haines, Jr., Deputy General Counsel, Panama Canal Commission, to David Slacter, United States Department of Justice, Dec. 20, 1982, pp. 2-3, 1 App. in Nos. 85-504, 85-505, 85-506, and 85- 507 (CA Fed.), at 61-62; United States draft of § 2 of Art. XV, 1 App. in Nos. 85- 504, 85-505, 85-506, and 85-507 (CA Fed.), at 74).

92. BEDERMAN, *supra* note 78, at 271.

93. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 73 (1990).

94. *E.g.*, United States v. Stuart, 489 U.S. 353, 366 (1989) (providing no more than a passing reference to a treaty's text before invoking *Choctaw Nation* as a basis for resting its decision almost exclusively on domestic ratification materials); Sumitomo Shoji Am., Inc. v. Avagliano,

Second, the parol evidence rule institutionalizes a multifactor judicial inquiry, in which no particular interpretive source *a priori* receives greater weight or credibility than any other source. Courts explore the full panoply of sources at their disposal—from internal diplomatic memoranda to unilateral press releases—and accord weight to these sources on an ad hoc basis.[95]

Third, the parol evidence rule substantially enhances the executive branch's influence in judicial treaty interpretation. As an actual treaty signatory with access to the full negotiating record and other documents, executive agencies have an inherent evidentiary advantage in litigation involving private parties. The United States' extensive archival system provides another obvious advantage *vis-à-vis* developing countries—a concern specifically raised by delegates at the Vienna Conference.[96] In addition, the vast array of negotiating materials available for judicial consideration (including purely domestic materials not included in the *travaux préparatoires*) arguably increase courts' freedom to promote domestic interests to the detriment of foreign treaty parties. "The Rehnquist Court cases do not provide any objective means for selecting among [extrinsic] sources," one commentator complains. "Once a court moves from the treaty's text, and its immediate orbit of structural context, it is left in a void in which it is simply free to use the materials which accord with the preferred result sought."[97]

Focusing on parties' subjective intent need not lead inexorably to pro-forum bias; in theory, courts might invoke the parol evidence rule to preserve party autonomy and correct for the United States' disproportionate bargaining power in international treaty negotiation. In practice, however, courts typically employ parol evidence to effectuate executive agencies' subjective interpretations of international agreements—notwithstanding conflicting representations from foreign treaty partners.

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457 U.S. 176, 180 (1982) (holding that although "[t]he clear import of treaty language" presumptively "controls," courts may disregard agreements' textual expression if "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories" (quoting Maximov v. United States, 373 U.S. 49, 54 (1963)); *see also* THE EFFECT OF TREATIES IN DOMESTIC LAW 165 (Francis G. Jacobs & Shelley Richards eds., 1987) (observing that subjective intent often trumps clear text in U.S. treaty interpretation).

95. *See, e.g.*, Denby v. Seaboard World Airlines, 575 F. Supp. 1134, 1139 (2d Cir. 1983) ("The Second Circuit has frequently indicated that language is merely one relevant consideration in interpreting the Warsaw Convention....The fundamental consideration in treaty interpretation is to effectuate the treaty's evident purposes." (internal quotations omitted)).

96. *See supra* notes 38-40 and accompanying text.

97. BEDERMAN, *supra* note 78, at 289.

Although the Supreme Court continues to apply the parol evidence rule, the Vienna Convention's holistic textualist approach has experienced a modest revival in lower federal and state courts. As discussed previously, the Vienna Convention dictates that courts identify parties' *objective* intent as conveyed by a treaty's "ordinary meaning" and its manifest "object and purpose."[98] *Travaux préparatoires* serve as ancillary interpretive guides,[99] but Article 31 cautions adjudicators to avoid imbuing treaty terms with unusual, subjective meanings unless the treaty parties collectively ratify these interpretations.[100] Courts consider negotiating history only as supplementary support for provisions' plain meaning or for assistance in cases where a provision's text, in isolation, yields an "absurd or unreasonable" result,[101] and they avoid reliance on internal ratification materials—including contemporaneous representations from U.S. negotiators.[102] Like the nationalist approach captured in *O'Connor*, the Vienna Convention permits courts to consider a treaty's *travaux préparatoires*; but unlike the nationalist approach, the Convention safeguards treaty texts as the preeminent authority in judicial treaty interpretation.[103]

2. *Should Courts Ignore the United States' Other International Obligations?*

A second critical difference between the Vienna Convention's interpretive guidelines and the nationalist approach is their respective receptivity toward international law as a guide to treaty interpretation. The Vienna Convention requires treaty interpreters to take into account "any relevant rules of international law applicable to relations between

98. Vienna Convention, supra note 9, art. 31(1); *see also* International Law Commission Report on the Law of Treaties, U.N. GAOR, 19th Sess., Supp. No. 9, at 27 U.N. Doc. A/5809 (1964) (affirming that "the text [of a treaty] must be presumed to be the authentic expression of the intention of the parties").

99. *Id.*

100. *Id.* art. 31(3)-(4).

101. *Id.* art. 32. The Restatement suggests that, in practice, international courts have varied in their willingness to look beyond treaty text to *travaux préparatoires*. RESTATEMENT, *supra* note 6, at 199.

102. Vienna Convention, *supra* note 9, art. 31-32.

103. This conflict between the Vienna Convention approach and the traditional U.S. approach closely mirrors traditional debates over courts' resort to parol evidence in contract interpretation generally. *See generally* Ross & Tranen, *supra* note 85 (describing the U.S. evolution from an objective theory of contract interpretation to modern subjectivist approaches); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000) (describing the objectivism/subjectivism dialectic as a recurrent theme in contract jurisprudence).

the parties."[104] Courts that apply the Vienna Convention construe treaties against the broader context of states' obligations under international law. If a treaty provision has two reasonable constructions—one that undermines a party's international obligations and another that is consistent with these obligations—courts presume that treaty partners intend to comply with international law.

This provision essentially extends a common law rule that U.S. courts apply routinely in statutory interpretation.[105] "It has been a maxim of statutory construction since the decision in *Murray v. Schooner Charming Betsy*," the Supreme Court proclaimed in *Weinberger v. Rossi*, "that 'an act of congress ought never to be construed to violate the laws of nations, if any other possible construction remains.'"[106] Just as the *Charming Betsy* canon instructs courts to presume that Congress intends to avoid conflicts with international law, the Vienna Convention encourages courts to read treaties against the backdrop of international law unless parties explicitly signal otherwise.

In the past, U.S. courts have accepted the Vienna Convention's presumption that international agreements should not be construed in derogation of international law.[107] Recent cases such as *United States v. Alvarez-Machain*[108] suggest this internationalist presumption may be losing force, however. In its brief to the Supreme Court, Alvarez-Machain's counsel contended that cross-border abductions were "so

104. Vienna Convention, *supra* note 9, art. 31(3)(c). This provision codifies a principle of customary international law long recognized by courts and scholars alike. *See, e.g.*, Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 182 (Apr. 11); Advisory Opinion No. 15, Jurisdiction of Courts of Danzig 1928 P.C.I.J.(ser. B) No.15 (Mar. 3); Advisory Opinion No. 10, Exchange of Greek and Turkish Populations, 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21); D.P. O'CONNELL, 1 INTERNATIONAL LAW 261 (2d ed. 1970).

105. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

106. Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (internal quotation omitted) (citation omitted). In the second half of the twentieth century, courts retreated from the analogous presumption that courts should interpret legislation narrowly to minimize derogation from common law rules. *See, e.g.*, Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) ("The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." (quoting Jamison v. Encarnacion, 281 U.S. 635, 640 (1930)). However, common law principles still play a significant role in statutory interpretation today. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 34 (using the common law of torts to deduce the types of damages available under 42 U.S.C. § 1983).

107. *See, e.g.*, Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (citing De Geofroy v. Riggs, 133 U.S. 258, 271 (1890), for the proposition that treaties are to be construed in reference to their meaning under the "law of nations"); United States v. Rauscher, 119 U.S. 407, 419-20, 429 (1886) (presuming that treaty parties did not intend for the provisions of an extradition treaty to depart from the parties' preexisting rights under international law).

108. *Alvarez-Machain*, 504 U.S. at 655.

clearly prohibited in international law" that the treaty parties had no reason to draft a clause expressly prohibiting this conduct.[109] Amicus briefs from the Mexican and Canadian foreign ministries and from numerous specialists in international law supported this construction.[110] Nevertheless, six justices flatly rejected this view,[111] concluding that the treaty did not implicitly incorporate customary international norms: "The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation."[112] International law might *supplement* positive law under some circumstances, *Alvarez-Machain* implies, but courts should not read customary norms into international accords.[113]

The First Circuit's 1997 decision, *United States v. Lui Kin-Hong*,[114] also aptly illustrates the nationalist impulse to subordinate the United States' international obligations to transitory foreign-policy interests. In December 1995, the United States apprehended Lui Kin-Hong in Boston's Logan Airport and announced its intention to extradite him to Hong Kong to stand trial on bribery charges.[115] Lui challenged Hong Kong's extradition request on the grounds that Hong Kong would be unable to try his case before its reversion to the People's Republic of China. By extraditing Lui to Hong Kong for prosecution, the defendant argued, the United States would violate Article XII of its extradition treaty with Hong Kong, which provided that "a person extradited shall

109. Brief for Respondent at 11, United States v. Alvarez-Machain.

110. *See, e.g.*, Brief for the United States of Mexico as Amicus Curiae in Support of Affirmance, Brief of the Government of Canada in Support of Respondent, Brief for Amicus Curiae and Real Party in Interest Rene Martin Verdugo-Urquidez, 1991 U.S. Briefs 712 (1992).

111. *See* Alvarez-Machain, 504 U.S. at 666 ("The international censure of international abductions is further evidenced, according to respondent, by the United Nations Charter and the Charter of the Organization of American States.").

112. *Id.* at 667.

113. *Cf.* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2282 (1994) ("[I]nternational law can be used to supplement existing law. Here the use of international law is apparently consistent with the decisions of the executive branches; international law fills an area that domestic law has left blank"). Justice Blackmun later criticized *Alvarez-Machain* for "ignor[ing] its first principles and constru[ing] the challenged treaty directly contrary to the opinions of mankind." Justice Harry Blackmun, *The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind*, 104 YALE L.J. 39, 45 (1994). The Supreme Court's construction of the UN Refugee Convention in the Haitian refugee case, Sale v. Haitian Centers Council, 509 U.S. 155 (1993), showed similar disregard for international law as a substantive guide in treaty interpretation. *See* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2416-19 (1994) (describing the Court's failure to respect international law in *Haitian Centers Council*).

114. 110 F.3d 103 (1st Cir. 1997).

115. *Id.* at 107.

not...be extradited by that Party to a third State."[116] Underpinning the treaty's plain language were customary norms—codified in the Vienna Convention on Succession of States in Respect of Treaties—which require that "a change in sovereignty brought about when one sovereign state is ceded and becomes part of the territory of another preexisting state...generally terminates the effect of treaties of the predecessor state with respect to the territory in question."[117]

The district court accepted this construction of the statute and released Lui on bail, but the First Circuit ordered Lui returned to custody and cleared the way for his extradition to Hong Kong—and, ultimately, to China. According to a majority of the three-judge panel, the treaty should be construed in a manner that "produce[s] reciprocity between, and expanded rights on behalf of, the signatories.... 'For that reason, if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.'"[118] Ignoring customary international law, the court narrowed the Article XII limitation and reversed the district court's grant of habeas corpus.

The Vienna Convention rejects the nationalist presumption that treaty parties draft international agreements on a *tabula rasa*. One country's legal duty to respect another's territorial sovereignty does not evaporate, the Convention suggests, simply because the two sign an extradition agreement. Instead, the Convention presumes that states negotiate and conclude agreements against the backdrop of their preexisting obligations under customary international law just as U.S. courts presume that Congress passes legislation against the backdrop of domestic common law. To the extent that the Convention permits courts to construe states' rights "liberally," Article 31(3)(c) of the Vienna Convention dictates that states' other international obligations mark the

116. *Id.* at 122 (citing Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227, *12, *as amended* June 25, 1985, U.S.-U.K., T.I.A.S. No. 12050, art. XII(1)(a)-(b)).

117. *United States v. Kin-Hong*, No. 97-1084, 1997 U.S. App. LEXIS 7587, *33 (Stahl, J., dissenting) (citing the Vienna Convention on Succession of States in Respect of Treaties, art. 15 U.N. Doc. A/CONF. 80/31 (1978), 72 AM. J. INT'L L. 971 (1978)). The United States is not a signatory to this Convention, it is nevertheless widely recognized to express the customary international law on this subject. *See id. at* *33 n.10 (noting that "the Convention [on Succession] is...viewed as an authoritative statement of the rule governing the succession of states under public international law"); MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 159 (1987) (noting that although the Convention on Succession "is not yet in force...many of its provisions codify the customary international law on the subject").

118. Kin-Hong, 110 F.3d at 110 (quoting Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1993), and United States v. Howard, 996 F.2d 1320, 1330 n.6 (1st Cir. 1993)).

outer limits of this discretionary zone.[119]

3. *Should Courts Always Defer to the Executive Branch?*

A third salient distinction between the nationalist and internationalist approaches is the degree of deference that each accords executive interpretations of ambiguous treaties. In theory, U.S. courts "interpret treaties for themselves."[120] In practice, however, judges rarely adopt interpretations that conflict with the views expressed by the State Department and other executive agencies. While not formally "conclusive," the Supreme Court has held that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and implementation is entitled to great weight."[121]

Over the last two decades, the Court's deference to executive treaty interpretations has come to signify a virtual presumption of accuracy, which opposing litigants may rebut only by furnishing exceptionally strong counterevidence (e.g., proof that a proposed interpretation rests on fundamentally faulty logic).[122] *Alvarez-Machain* demonstrates that the Court will follow these executive interpretations even when treaty partners provide conflicting representations regarding their own specific intent and expectations. As Professor Bederman has observed, "Judicial deference to the Executive's position is the single best predictor of interpretive outcomes in American treaty cases."[123]

The Supreme Court's extraordinary deference to executive agencies in treaty cases represents a nationalist adaptation of a customary principle common to both the nationalist and internationalist approaches: the canon of "liberal interpretation." This general principle

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119. Vienna Convention, *supra* note 9, art. 31(3)(c). An apt analogy is the concept of "margin of appreciation" in European Union law, which allows regional interpreters to interpret EU treaties liberally, provided that these interpretations do not breach other relevant norms. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

120. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); *see also* RESTATEMENT, *supra* note 6, § 326 ("Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States...").

121. Sumitomo Shoji Am., Inc., 457 U.S. at 184-85.

122. *See, e.g.*, Chan v. Korean Airlines, Ltd., 490 U.S. 122 (1986).

123. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1015 (1994); *see also* Bush, *supra* note 8, at 956 (discussing three "choreographed steps" in judicial treaty interpretation: "(1) acknowledging that deference to the political branches is the prevailing rule; (2) refusing to defer in this specific case, noting that the leading statement on deference to the political branches, *Baker v. Carr*, does not require it; and (3) affirming the Executive Branch claims after looking at the case on its merits."). U.S. courts may not be unique in their systematic bias toward national interests. *See* MYRES MCDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 259 (1967) ("[N]ational judges appear to have voted for the position championed by their country about 80 percent of the time.").

(applied expansively in *Kin-Hong*) declares that, in the absence of affirmative treaty obligations, *jus cogens* norms, or customary international law "[r]estrictions upon the independence of States cannot...be presumed."[124] As the Permanent Court of International Justice explained, "If the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum obligations for the Parties should be adopted."[125] Thus, within certain limits, international law allows interpreters to adopt treaty constructions that minimize the parties' contractual obligations.[126]

In several cases, the Supreme Court has characterized this canon of liberal construction as a presumption favoring expansive interpretations of states' rights under treaties and disfavoring interpretations that restrict state sovereignty. "Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable of them, the latter is to be preferred."[127] Viewed through a nationalist lens, the decision to construe treaty provisions in a "broad and liberal spirit" favors deference to executive agencies' reasonable interpretations of ambiguous treaty provisions, since this approach inhibits courts from burdening the United States with gratuitous international obligations.

While this nationalist approach has some intuitive appeal, it suffers from two major flaws. First, construing the United States' rights "liberally" often induces courts to restrict a treaty partner's rights under international law. In *Alvarez-Machain*, for example, the Supreme Court invoked the canon of "liberal construction" as a basis for construing the United States' sovereign rights under the U.S.-Mexico Extradition Treaty liberally (allowing cross-border abductions by U.S. law enforcement). The Court devoted little attention, however, to the fact that this "liberal" construction implied a correspondingly stingy construction of Mexico's territorial rights. By deferring to the State Department's interpretation, the Supreme Court sent a message to other treaty partners that, in U.S. courts, some sovereign interests are more sovereign than others.

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124. S.S. Lotus (Fr. V. Turk), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). *But see* Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U.J. INT'L L. & POL'Y 559 (1996) (arguing that "the time has come to reexamine" this approach).

125. Interpretation of the Treaty of Lausanne, 1925 P.C.I.J. (ser. B) No. 12, at 25 (Nov. 21).

126. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION 85 (4th ed. 1996) (describing the canon of liberal interpretation in teleological terms).

127. Asakura v. Seattle, 265 U.S. 332, 342 (1923).

Second, deference to "liberal" executive treaty interpretations may prejudice private parties and other nation-states, which act in reliance upon a treaty's objective meaning. A paradigmatic example is *Sale v. Haitian Centers Council, Inc.*[128] In *Haitian Centers Council*, the Supreme Court considered whether forced repatriations of Haitian refugees apprehended in international waters by the United States Coast Guard violated the United Nations Convention Relating to the Status of Refugees (Refugee Convention).[129] Article 33(1) of the Refugee Convention contains the following general prohibition:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[130]

Rather than read this provision at face value to proscribe the refugees' "return" to Haiti, the Supreme Court deferred to the United States' interpretation and construed the term "return" ("refouler") narrowly to contain an express geographic limitation. The Court argued that any attempt to apply this prohibition extraterritorially to persons apprehended on the high seas would unjustifiably limit U.S. sovereignty. Ironically, however, the Court's expansive reading of the United States' sovereign rights under the Refugee Convention significantly diminished the rights of the refugees themselves—the very persons that the Convention was designed to protect. As Justice Blackmun argued in a stinging dissent, this so-called "liberal interpretation" undermined the Convention's core purpose by "driving" the refugees "back to detention, abuse, and death."[131] Repatriating the refugees may have served United States' immediate foreign-policy interests, but it required a highly improbable construction of Article 33(1) viewed in light of its "ordinary meaning" and "object and purpose."[132]

The Supreme Court's deference to executive agencies in treaty cases draws most attention in political hot-button cases like *Haitian Centers Council* and *Alvarez-Machain*, but it plays a powerful role in less politically-sensitive cases as well. Most of the Supreme Court's treaty

128. 509 U.S. 155 (1993).

129. Convention Relating to the Status of Refugees, July 28, 1951, art. 33(1), 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176.

130. *Id.*

131. Haitian Centers Council, 509 U.S. at 208.

132. *Id.* at 169, 191.

cases over the last quarter-century have involved civil actions brought under the Warsaw Convention, which governs carrier liability for "bodily injur[ies]" incurred in the course of "international transportation."[133] Unlike *Haitian Centers Council* and *Alvarez-Machain*, these bread-and-butter Warsaw Convention cases are hardly the political powder keg cases that test the judiciary's capacity to deal impartial justice. Nevertheless, of the seven Warsaw Convention cases that reached the Supreme Court over the last twenty years, the Supreme Court accepted the government's position in every case but one.[134]

Not surprisingly, the Vienna Convention rejects the nationalist approach's extraordinarily deferential attitude toward executive treaty interpretations. Although the Convention does not address the issue directly, it prohibits courts from imposing any "special meaning" on treaty terms unless Articles 31-33 "establish[] that the parties so intended."[135] Only those national instruments that are "accepted by the other parties as an instrument related to the treaty" fall within the Vienna Convention framework.[136] "Subsequent agreement[s]" and "subsequent [state] practice [with respect to]...the application of [a] treaty" are admissible only if they clearly establish the parties' *shared* agreement.[137]

Taken as a whole, these provisions suggest that courts should not accord heightened deference to any particular state (including the home forum) in treaty cases. International law might empower courts to construe treaty provisions "liberally" where necessary to avoid unreasonable restrictions on national sovereignty. It might also permit U.S. courts to give executive treaty interpretations limited deference according to agencies' unique expertise and their potential to further transnational uniformity. Nevertheless, the Vienna Convention clearly does not anticipate that courts will exercise this deference as liberally as

133. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 1, 49 Stat. 3000, 3014, T.S. No. 876 (note following 49 U.S.C. § 40105).

134. The only case in which the Rehnquist Court has rejected the United States' interpretation of a treaty is Chan v. Korean Airlines, Ltd., 490 U.S. 122 (1989), where the Court found the government's reasoning to be fundamentally logically defective. In all other cases—including the other six Warsaw Convention cases—the Court adopted the government's position. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999); Dooley v. Korean Airlines Co., Ltd., 524 U.S. 116 (1998); Zicherman v. Korean Airlines Co., Ltd., 516 U.S. 217 (1996); Eastern Airlines, Inc., v. Floyd, 499 U.S. 530 (1991); Air France v. Saks, 470 U.S. 392 (1985); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984).

135. Vienna Convention, *supra* note 9, art. 31(4).

136. *Id.* art. 31(2)(b).

137. *Id.* art. 31(3)(a)-(b).

many U.S. courts have done in the past; in fact, the Convention implicitly cautions courts against exercising this discretion in a manner that contradicts a treaty's purpose or undermines the proper symmetry of rights and obligations between treaty partners.

C. Surveying the Great Divide

As this part has shown, the nationalist and internationalist approaches differ in three fundamental respects: First, although both the approaches seek to effectuate parties' "shared expectations," the nationalist approach places greater emphasis on extrinsic sources as evidence of subjective state intent. Second, the Vienna Convention presumes that international law informs states' expectations regarding their treaty obligations, but the nationalist approach rejects this presumption. Third, the nationalist approach accords "great weight" to the executive agencies' treaty interpretations, while the internationalist approach discourages courts from privileging a single treaty party's uncorroborated ex post representations.

From an internationalist perspective, the nationalist canons applied in cases like *Kin-Hong*, *Alvarez-Machain*, and *Haitian Centers Council* epitomize the United States' dysfunctional internalization of its international commitments. These decisions do not call into question U.S. courts' *competency* to apply international treaty law so much as they cast doubt on courts' *commitment* to international treaty law. While the Rehnquist Court has not gone so far as to declare treaty interpretation a nonjusticiable political question, its nationalist approach effectively immunizes most executive treaty interpretations from legal challenge.[138]

Viewed from a nationalist perspective, however, the Supreme Court's deference to executive agencies and its diminished respect for international customary norms reflect the executive's superior expertise and political accountability in foreign affairs. Minimal judicial interference in domestic treaty compliance safeguards U.S. sovereignty and prevents judges from compromising sensitive or (perhaps) secret diplomatic understandings.

Of course, in the vast majority of cases, courts will likely arrive at comparable outcomes by following either the nationalist approach or the internationalist approach. As legal realists have demonstrated, formal method is an imprecise gauge for predicting the outcome of specific

138. *Cf.* Koh, *supra* note 113, at 2434-35 (describing this tendency in foreign affairs law generally).

cases. Indeed, even the Vienna Convention's drafters recognized that, despite their efforts to standardize treaty interpretation through the Vienna Convention, "[t]he interpretation of documents is to some extent an art, not an exact science."[139]

Nevertheless, while differences between the nationalist approach and the Vienna Convention "should not be exaggerated" (as the Restatement justly cautions),[140] the foregoing case studies suggest that differences may, in fact, generate conflicting results in a significant set of cases.[141] As courts become more familiar with the Vienna Convention's interpretive regime, this conflict is likely to intensify.

II. THE NATIONALIST AND INTERNATIONALIST PARADIGMS IN HISTORICAL PERSPECTIVE

Before turning to the merits of the nationalist and internationalist approaches, it may be useful to retrace the paths by which they diverged. In theory, the principle that U.S. courts should derive treaty canons from customary international law—a principle I will refer to as the "internationalist paradigm"—has long enjoyed a dominant position in U.S. treaty practice. For centuries, U.S. courts have recognized that they must interpret treaties according to internationally authoritative canons rather than fashion their own common law treaty canons—an alternative I will call the "nationalist paradigm." Although contemporary common law treaty canons differ from the Vienna Convention's internationalist canons in certain respects, these differences are not an inevitable outgrowth of U.S. constitutional or statutory law. Instead, this part shows that the contemporary nationalist tradition originally developed as a contingent *internationalist* response to a global jurisprudential crisis.

A. The Internationalist Paradigm: First Principles

Since the United States' inception, U.S. courts repeatedly have rejected the proposition that parochial treaty canons should supplant customary international canons. Instead, when domestic courts

139. *Reports of the International Law Commission on the Second Part of its 17th Session and on its 18th Session*, [1966] 2 Y.B. Int'l L. Comm'n 218, U.N. Doc. A/6309/Rev.1.

140. RESTATEMENT, *supra* note 6, § 325 n.4.

141. *See* BEDERMAN, *supra* note 78, at 240 ("Now, more than ever, there is a conflict between U.S. practice and more 'international' approaches to treaty interpretation.... This schism in method has been well-documented, and judges in the United States are more frequently realizing that the approach taken by the Vienna Convention on the Law of Treaties may lead to interpretive outcomes very different than those suggested by...litigants.").

adjudicate cases with transnational elements, they become "court[s] of all the nations of the world, because all persons, in every part of the world, are concluded by [their] sentences."[142]

The Framers clearly anticipated that the law of nations would play an integral role in domestic law, by providing independent rules of decision and clothing the Constitution's bare bones in flesh. John Jay, the Supreme Court's first Chief Justice, noted that the country "had, by taking a place among the nations of the earth, become amenable to the law of nations."[143] Just as international law illuminates constitutional, statutory, and common law adjudication, U.S. courts anticipated that the law of nations would inform the treaty power's substantive scope and practical operation. "The subject of treaties ... is to be determined by the law of nations," the Supreme Court affirmed in 1796.[144] Decades later, in *Holden v. Joy*,[145] the Court sharpened this point:

> Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur, and inasmuch as the power is given...*it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty*, if not inconsistent with the nature of our government and the relations between States and the United States.[146]

Although the law of nations might not speak directly to all questions regarding the "proper subject of negotiation and treaty," the Court appreciated that it would furnish many rules of decision for judicial application.

More important for present purposes, U.S. courts have long recognized that international law not only circumscribes the treaty power's *scope* but also provides the principles by which courts must *interpret* treaties.[147] As Justice Story emphasized in 1817, "the law of

142. Penhallow v. Doane's Administrators, 3 U.S. 54, 91 (1795); *see also* Rose v. Himely, 8 U.S. 241, 277 (1808) (defending the fundamental "principle" that "the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.").

143. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793).

144. Ware v. Hylton, 3 U.S. (2 Dall.) 199, 261 (1796).

145. 84 U.S. 211 (17 Wall.) (1872).

146. *Id.* at 242-43 (emphasis added); *see also* De Geofroy v. Riggs, 133 U.S. 258, 266 (1890) ("That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear.").

147. The law of treaties traditionally constituted a subdivision of the customary international "law of states." Due to Americans' "disillusioning experience" under the Articles of

nations is always to be consulted in the interpretation of treaties."[148] Chief Justice Jay expressly affirmed this principle at the celebrated 1849 trial of Gideon Henfield:

> Whenever doubts and questions arise relative to the validity, operation, or construction of treaties, or of any articles in them, those doubts and questions must be settled according to the maxims and principles of the law of nations applicable to the case.[149]

Because treaties operate on the international plane, municipal courts must apply international interpretive canons "whenever doubts and questions arise" in domestic treaty construction. Consistent with this principle, U.S. courts traditionally identified and applied international canons in resolving treaty-related disputes. Transcripts of oral argument—themselves crowded with references to international treaty canons—testify eloquently to the vital role that these canons played in domestic courts during the eighteenth and nineteenth centuries. Courts recognized that international treaty canons constituted a field of law distinct from ordinary domestic public and private law that must be ascertained by reference to international consensus.[150]

In theory, courts' responsibility to apply customary international treaty canons remains a cardinal rule in U.S. jurisprudence today. Customary international treaty canons do not merely *displace* domestic common law canons; they *become* authoritative federal rules of which

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Confederation, the treaty power's international valence "was never out of mind in the days of the Constitutional Convention." Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States II*, 101 U. PA. L. REV. 792, 821-22 (1953); *see also* Jay, *supra* note 242, at 827 ("In its broadest usage, the law of nations comprised...the law governing the relations between states.").

148. The Pizarro, 15 U.S. (2 Wheat.) 227, 246 (1817).

149. *See* THOMAS M. F RANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS, AND SIMULATIONS 97 (1987) (quoting Chief Justice Jay's opinion).

150. *See, e.g.,* De Geofroy v. Riggs, 133 U.S. 258, 271 (1890) (arguing that because treaties "are contracts between independent nations, in their construction, the words are to be taken in their ordinary meaning, as understood in the public law of nations...."); United States v. Rauscher, 119 U.S. 407, 419-20 (1886) (interpreting an extradition treaty against the background of international law); The Scotia, 81 U.S. (14 Wall.) 170, 187-88 (1871) ("Like all the laws of nations, [the law of the sea] rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.... Of that fact, we think, we may take judicial notice."); Dred Scott v. Sandford, 60 U.S. 393, 556 (1856) ("International law is founded in the opinions generally received and acted on by civilized nations, and enforced by moral sanctions."); Shanks v. Dupont, 28 U.S. 242, 250 (1830) (distinguishing "rules of interpretation applicable to treaties between independent states" from public-law and common law principles).

courts must take judicial notice.[151] "The frame of reference in interpreting treaties is naturally international and not domestic," Justice Stevens has explained. "Construction of treaties yielding parochial variations in their implementation are anathema to the *raison d'être* of treaties, and hence to the rules of construction applicable to them."[152] When U.S. courts preside over treaty cases, they truly become "courts of all the nations of the world," participants in an ancient, international judicial system.[153]

In sum, U.S. courts have long ascribed to the internationalist paradigm, treating international treaty law as U.S. treaty law. International treaty canons are U.S. treaty canons. And, like other fields of customary international law, "courts must interpret" international treaty law "not as it was in 1789, but as it has evolved and exists among the nations of the world today."[154] Centuries of judicial practice confirm that international treaty canons are "our law, and must be ascertained and administered by the courts of justice."[155]

B. The International Crisis and the United States' Response

Given the internationalist paradigm's firm foundation in judicial rhetoric, how is it that U.S. courts have retreated from the Vienna Convention's internationalist treaty canons? Before the 1920s, the notion that domestic courts should follow a unique nationalist approach rather than apply customary international treaty canons (a proposition

151. *See* Ker v. Illinois, 119 U.S. 436, 444 (1886) (suggesting that courts must take notice of international law).

152. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 262-63 (1984) (Stevens, J., dissenting).

153. *See generally* Jenny S. Martinez, *The International Judicial System*, 56 STAN. L. REV. (forthcoming 2003) (outlining the governing dynamics of an international judicial system composed of national, regional, and international tribunals).

154. Filártiga v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980) [hereinafter *Filártiga*] (citing Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796) (distinguishing the "ancient" law of nations from the "modern" law of nations)). Scholars have developed numerous of theories to explain *how* international law becomes U.S. law. *See, e.g.*, O'CONNELL, *supra* note 110, at 49-51 (describing three conventional explanations—transformation, adoption, and harmonization); Harold H. Sprout, *Theories as to the Applicability of International Law in Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932) (describing five originalist theories); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 10 (1999) ("The founders viewed the law of nations and sovereignty as inextricably bound.... This understanding bound the country to honor and adopt this law as an incident to sovereignty—without requiring any formal theory of incorporation.").

155. The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* Frankowska, *supra* note 16, at 307 ("The law of treaties binding in the United States is today what it has been for two centuries—customary international law, penetrating the domestic legal order in an almost invisible manner.").

that some scholars take for granted today) would have seemed patently absurd.[156] The contemporary nationalist paradigm apparently took root in U.S. treaty law only in the early- to mid-twentieth century, apparently reflecting new movements in political and legal theory. While a thorough examination of the forces giving rise to this shift is beyond this article's scope, it may be helpful to highlight a few general trends.

By the early decades of the twentieth century, even confirmed idealists began to challenge the notion that international treaty law represented a coherent, empirically grounded system of customary norms. "There is, in fact whatever the names used in the books, *no system* of international law—and still less, of course, a code," Sir Alfred Zimmern concluded. "What is to be found in the treatises is simply a collection of rules which, when looked at closely, appear to have been thrown together, or to have been accumulated, almost at haphazard."[157] In an effort to set the liberal ideal in a more solid foundation, leading publicists subjected international treaty law to more rigorous empirical analysis but ultimately conceded that relatively few "customary" principles evinced the requisite generality and determinacy.[158] By the end of the 1920s, this skepticism encountered little resistance; few commentators openly espoused the antiquated theory that customary international law might provide judicially manageable canons for treaty interpretation. J.L. Brierly, for example, argued that there were "no technical rules in international law for the interpretation of treaties; [a court's] objective can only be to give effect to the intention of the parties as fully and fairly as possible."[159] Twenty years later, even the United Nations itself—the preeminent advocate for the codification of international treaty law—openly lamented that few areas of international treaty law were entirely "free from doubt and, in some cases, from confusion."[160]

156. Bederman, *supra* note 123, at 30 n.76, 261 nn.970-71.

157. SIR ALFRED ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW 1918-1935, 98 (1939).

158. *See, e.g.*, J.L. BRIERLY, THE LAW OF NATIONS 168 (1928) (challenging the existence of "technical rules" of treaty interpretation); CHARLES G. FENWICK, INTERNATIONAL LAW 331 (1924) (according international rules of treaty interpretation only "inchoate legal value"); AMOS S. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION 445 (1927) (arguing that "[t]he rules for the interpretation of treaties are derived from general jurisprudence" but "form no part of International Law proper"); Draft Convention on the Law of Treaties, 29 AM. J. INT'L L. 657, 944 (Supp. 1935) [hereinafter Harvard Draft] ("[T]he tendency among modern writers...has been to reduce rather than to extend the number of [customary] rules of interpretation and to deny them the character of international law altogether.").

159. BRIERLY, *supra* note 158, at 168.

160. Survey of International Law in Relation to the Work of Codification of the International Law Commission, U.N. Doc. A/CN.4/I/Rev.1, at 52 (1948), *cited in* Richard D. Kearney and

As international publicists began to challenge international treaty law's generality and determinacy, on the domestic front the burgeoning American legal realist movement provided a second potent challenge to U.S. courts' application of international treaty law. Theorists such as Jerome Frank, Karl Llewellyn, and Roscoe Pound denounced the popular "theory that rules decide cases," arguing that legal thought could not be divorced from moral and political discourse generally and from a judge's idiosyncratic values and biases in particular.[161] New insights into the logical indeterminacy of established rules, the ambiguity of legal language, the problem of social and economic change, the multiplicity and imprecision of precedents, and other analytic difficulties augmented realists' skepticism toward formal canons.[162] In Pound's words, "[T]he certainty attained by mechanical application of fixed rules to human conduct has always been illusory."[163]

Legal realism challenged customary treaty canons' legitimacy not only by undermining their claim to customary status, but also by questioning their ability to provide determinate, objective results. As a substitute for formalistic rules, American scholars developed innovative, process-oriented models for fostering international legal order in a post-utopian world. For example, the New Haven School pioneered by McDougal and Harold Lasswell counseled courts to fashion "a more usable conception of international law" by recognizing and accommodating "authority and control" rather than focusing myopically on "rules and operations."[164] McDougal and Lasswell argued that courts should forsake the quixotic quest for mechanistic treaty

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Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L 495, 496 (1970). Note, however, that even those commentators most skeptical "customary" treaty canons' existence nevertheless implicitly recognized some rules as having universal application. For instance, the 1928 edition of Oppenheim's celebrated treatise on international law argued that neither "customary nor conventional rules of international law exist concerning the interpretation of treaties," but proceeded to recommend a number of "rules of interpretation which recommend themselves, because everybody agrees upon their suitability." L. OPPENHEIM, 1 INTERNATIONAL LAW 759-61 (Arnold D. McNair ed., 4th ed. 1928).

161. Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 7 (1934); *see also* JEROME FRANK, LAW AND THE MODERN MIND (1930); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Roscoe Pound, *The Call for a Realistic Jurisprudence*, 44 HARV. L. REV. 697 (1931); *see generally* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 193 (1992) (describing the Realists' challenge to the "claim that legal thought was separate and autonomous from moral and political discourse" as "the most important legacy of Realism").

162. WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIA PROCESS 55-67 (1968).

163. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 71 (1954).

164. MYRES S. MCDOUGAL, STUDIES IN WORLD PUBLIC ORDER 169 (1960) (reprinting 1959 article).

canons and embrace flexible, process-oriented decision-making strategies that allow judges to grapple with their decisions' broader policy consequences.[165] If courts, not canons, decide particular cases, the legitimacy of judicial decisions naturally turns on the legitimacy of the substantive values and policies that animate a court's decision-making process. Thus, the New Haven School's turn to normative interpretive theories provided a framework for mediating between legal realism's "rule-skepticism" and traditional "rule of law" values.

Like the American legal realists, political realists of the 1930s and 1940s such as E.H. Carr and Hans Morgenthau challenged the notion that abstract rules could constrain judicial decision-making. Unlike the legal realists, however, political realists dismissed the notion that arid legal doctrines or decision-making processes could significantly influence international relations. Rather, political realists argued that international law inevitably served the interests of powerful nation-states by mirroring and sustaining the prevailing equilibrium of power.[166]

Believing that international stability depended upon political calculation rather than legal legitimization, Carr denied that international disputes could be resolved through adjudication rather than diplomacy backed by force.[167] Morgenthau similarly rejected municipal adjudication as a mechanism for resolving treaty disputes:

> In the international field, it is the subjects of the law themselves that not only legislate for themselves but are also the supreme authority for interpreting and giving concrete meaning to their own legislative enactments. They will naturally interpret and apply the provisions of international law in the light of their particular and divergent conceptions of the national interest. They will naturally marshal them to the support of their particular international policies and will thus destroy whatever restraining power, applicable to all, these rules of international law, despite their vagueness and ambiguity, might have

165. *See generally* MYRES S. MCDOUGAL ET AL ., INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967) (outlining a policy-oriented interpretive theory that emphasizes the role of individual decision-makers in the resolution of global problems.).

166. Thus, the "bankruptcy of [international] utopianism resides" not merely in its failure to constrain state actors, Carr argues, but also "in the exposure of its inabilities to provide any absolute and disinterested standard for the conduct of international affairs." EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS, 1919-1939, 111 (1940).

167. *Id.* at 178-80; *see also* MICHAEL JOSEPH SMITH, REALIST THOUGHT FROM WEBER TO KISSINGER 82 (1986) (describing Carr's skepticism toward judicial resolution of treaty-related disputes).

possessed.[168]

By Morgenthau's reasoning, international rules of treaty interpretation—like treaties themselves—are of limited practical utility, because they do not actually constrain powerful states from applying treaties in self-serving ways. Courts might invoke internationalist canons when this approach advances national interests, but not when political expedience directs otherwise.[169]

Thus, the early decades of the twentieth century witnessed a weakening of the United States' internationalist paradigm as new theoretical movements challenged customary international canons' empirical underpinnings, efficacy, and moral and political legitimacy. American jurists responded to this challenge in several ways.

First, legal academics and diplomats participated in a variety of international conferences that endeavored to crystallize and codify customary treaty canons in multilateral conventions. These early codification efforts aimed to reconcile theory and practice by forging a new global consensus around basic customary principles. These conferences produced influential draft treaties such as the 1929 Havana Convention[170] and the 1935 Harvard Draft Convention,[171] but no single draft secured the collective approval of the international community. Over time, however, this codification movement laid the groundwork for the International Law Commission's more successful efforts in the decades following the Second World War.

Second, U.S. courts filled the jurisprudential vacuum in international treaty law with "general principles of law."[172] This approach tracked Hersch Lauterpacht's famous prescription that courts should use general

168. HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 258 (2d ed. 1954). Morgenthau did not dispute the *existence* of an international legal regime, "primitive" though it might be: "[T]o deny that international law exists at all as a system of binding legal rules flies in the face of all the evidence.... To recognize that international law exists is, however, not tantamount to asserting that it is...effective in regulating and restraining the struggle for power on the international scene." *Id.* at 251.

169. Lauterpacht adopts this view in a later article, citing traditional canons "more out of piety than conviction" while resolutely maintaining that international treaty canons are often merely "the form in which the judge cloaks a result arrived at by other means." Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. YB. INT'L L. 48, 49, 53 (1949).

170. Convention on Treaties, adopted by the Sixth International Conference of American States at Havana, February 20, 1928, 29 AM. J. INT'L L. 1205 (Supp. 1935).

171. Harvard Draft, *supra* note 159.

172. *See* Statute of the International Court of Justice, *supra* note 48, art. 38 (recognizing "the general principles of law recognized by civilized nations" as a legitimate source of international law).

principles of law to fill gaps between consensual norms.[173] Asserting that "the legal nature of private law contracts and international law treaties is essentially the same," Lauterpacht urged courts to restore international order in treaty interpretation by rebuilding international law on a foundation of neutral, transnational contract principles.[174]

Courts should not apply this contract analogy indiscriminately, however:

> Nothing is more likely to obscure the identity of contracts and treaties, or to bring into disrepute the recourse to analogy based on recognition of such identity, than the indiscriminate appeal to rules belonging exclusively to one system of private law and owing their origin to special reasons of time and place. It is only general principles of the private law of contracts, following with logical necessity from the very conception of that institute of law, which may, and must, be applied.[175]

Unfortunately, U.S. courts embraced Lauterpacht's private-law analogy during the mid-twentieth century without heeding this cautionary counsel. This approach stabilized U.S. treaty jurisprudence domestically, but it also set U.S. treaty practice adrift from its internationalist moorings.

Third, U.S. courts responded to the global crisis in international treaty law by according heightened deference to the political branches' interests and expertise. Prior to the 1930s, the Supreme Court explicitly deferred to the executive branch only in the limited subset of extradition treaties, and then only in cases involving the Secretary of State's decision whether to extradite a criminal (on the theory that this determination presented a political question).[176] In 1933, however, the Court broadened its theory of deference by proclaiming a general rule that courts should defer to executive treaty interpretations whenever

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173. H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 215-96 (Archon Books 1970) (1927); *see also* MARTI KOSKENIEMI, THE GENTLE CIVILIZER OF NATIONS 364 (2001) (describing Lauterpacht's intellectual leadership in this movement toward general principles of law).

174. LAUTERPACHT, *supra* note 176, at 176; *see also* STEPHEN HALEY ALLEN, INTERNATIONAL RELATIONS 70 ("Generally the meaning of a treaty is to be ascertained by the same rules of construction and course of reasoning as is applied in the interpretation of private contracts.").

175. *Id.* at 176-77.

176. *See, e.g.*, Charlton v. Kelly, 229 U.S. 447, 476 (1913) (deferring to the executive branch's decision to extradite an individual); Terlinden v. Ames, 184 U.S. 270 (1902) (The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision).

questions arise involving treaty interpretation.[177]

C. *Treaty Interpretation after the United States' Response*

The most important conclusion to be drawn from the foregoing discussion is also the most obvious: The contemporary nationalist paradigm in U.S. treaty interpretation is not an *originalist* paradigm, nor is it an inevitable outgrowth of the United States' "dualist" legal system. For nearly a century and a half after the founding, U.S. courts employed a predominately monist treaty jurisprudence in which U.S. courts invoked and applied international treaty canons as U.S. law.

If the Supreme Court's response to the skepticism and uncertainty of the 1920s-1940s in fact represented a genuine "constitutional moment" in U.S. treaty jurisprudence, this "moment" apparently went unnoticed by the courts that masterminded the revolution. There is little evidence that judges of the period intended to abandon the internationalist paradigm for a nationalist paradigm or even recognized the growing dissonance between U.S. common law canons and general international practice. To the maximum extent possible, courts continued to rely upon international consensus as a guide. Indeed, even during the heyday of legal realism and political realism, courts regularly affirmed their duty to decide treaty cases impartially according to internationalist canons.[178] With international treaty law in shambles, American courts simply had no choice but to formulate new common law principles to aid them in disposing of the treaty cases that came within their purview.

III. EVALUATING THE INTERNATIONALIST PARADIGM

At the end of the day, the internationalist paradigm's survival will undoubtedly depend less upon its historical pedigree than upon the

177. Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933). Even in *Factor*, however, the Court maintained that treaties should be construed "so as to effect the apparent intention of the parties to secure equality and reciprocity between" treaty parties. *Id.* at 293.

Deference to executive agencies also defused concerns that judicial treaty interpretation constituted a nonjusticiable political question. *See, e.g.*, TSUNE-CHI YÜ, THE INTERPRETATION OF TREATIES 70-71 (1927) (arguing that if "judges of an arbitral tribunal should be given a right...[to] apply[] rules of construction without sufficient evidence, they...would be free even to distort the issue of the most unnatural shapes, and cripple where they had sought only to adjust its proportions according to their own arbitrary opinions."); *cf.* Baker v. Carr, 369 U.S. 186, 222 (1962) (indicating that the lack of judicially manageable standards renders an issue a nonjusticiable "political question").

178. *See, e.g.*, Allen v. Markham, 156 F.2d 653 (1946); State Tax Commission v. Gas Co., 284 U.S. 30, 40 (1931) ("As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'").

normative question lurking behind the scenes: *Should* U.S. courts continue to conceptualize treaty interpretation through an internationalist lens or should they pursue nationalist, common law canons? While international relations scholars might approach this question from a variety of perspectives, my focus here is somewhat narrower: Is the Vienna Convention's internationalist approach compatible with the United States' legal system? Are there compelling legal justifications for shifting to the nationalist paradigm?

Tensions between the nationalist and internationalist paradigms in U.S. treaty interpretation feed into broader scholarly debates in legal academia over American exceptionalism in foreign affairs. Recently, the nationalist paradigm has gained new adherents as revisionist scholars such as Curtis Bradley, Jack Goldsmith, and John Yoo have re-examined, and have attempted to recast, domestic courts' traditional role in transnational litigation. Flashpoints in the nationalist/ internationalist debate include the scope of the President's foreign affairs powers, federal courts' competency to apply customary international law, and the appropriate relationship between domestic and international tribunals. Revisionists share a common set of assumptions concerning the Constitution's allocation of foreign affairs powers, the definitional attributes of state sovereignty, contemporary international law's alleged "democratic deficit," and the superiority of domestic jurisgenerative institutions *vis-à-vis* international institutions. Thus, the Vienna Convention's contemporary vitality depends in no small part on the force and accuracy of these revisionist critiques.

A. Constitutional Concerns

Whether U.S. courts should follow the Vienna Convention or nationalist common law canons naturally depends upon the approaches' compatibility with domestic constitutional and statutory law. No federal or state legislature has enacted uniform rules for treaty construction;[179] the only domestic text that limits courts' interpretive discretion is the Constitution itself. Four provisions address the treaty power directly. Article I, Section 10 forbids states from engaging in independent treaty making with foreign nations.[180] Article II, Section 2 provides that the President "shall have Power, by and with the Advice and Consent of the

179. Several American states have codified guidelines for judicial interpretation of state legislation. *E.g.*, MINN. STAT. § 645 (2002); Pennsylvania Statutory Construction Act, 1 PA. CONS. STAT. §§ 1921-28 (2003). The U.S. Code also codifies a number of interpretive principles. *See, e.g.*, 1 U.S.C. §§ 1-7 (providing instructions for construing various types of words).

180. U.S. CONST., art. I, § 10 ("No State shall enter into any Treaty....").

Senate to make treaties, provided two thirds of the Senators present concur."[181] Article III, Section 2 extends "the judicial Power to...all Treaties made, or which shall be made" pursuant to the Constitution and laws of the United States.[182] Finally, the Supremacy Clause, Article VI, Clause 2, declares treaties to be the "Supreme law of the land," which binds all states within the union.[183] Most objections to the Vienna Convention turn on these four constitutional provisions. These objections warrant careful scrutiny, since constitutional norms supersede customary international law in the United States' "dualist" system. Should the Vienna Convention's application violate the Constitution, U.S. courts would have no choice but to modify or abandon the Convention's internationalist approach.

1. Advice and Consent

One possible constitutional objection to the Vienna Convention concerns the Senate's authority to render "advice and consent" in the ratification of treaties. Over the past two decades, few issues in U.S. foreign affairs law have generated as much controversy as the Senate's constitutional advice and consent responsibility. President Reagan's 1983 "Star Wars" speech,[184] in which he announced his intent to reinterpret the 1972 Treaty on Anti-Ballistic Missile Systems (ABM Treaty)[185] and the 1987 Treaty on Intermediate-range Nuclear Forces (INF Treaty),[186] provided the initial focal point for this debate. While an exhaustive examination of this issue is beyond this Article's scope, several points deserve consideration.

First, there can be little doubt that, in some circumstances, the Treaty Clause may require domestic courts to construe treaties in a manner inconsistent with the Vienna Convention. Consider, for example, the Senate's ongoing practice of attaching reservations, declarations, and understandings to treaties. Although understandings do not ordinarily alter treaties' substantive content,[187] reservations and declarations often

181. U.S. CONST., art II, § 2, cl. 2.

182. U.S. CONST., art. III, § 2, cl.1.

183. U.S. CONST., art. VI, § 1, cl. 2.

184. National Security: President Reagan's address to the Nation, 19 WEEKLY COMP. PRES. DOC. 442 (Mar. 23, 1983).

185. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503.

186. Treaty on the Elimination of Intermediate-range and Shorter-range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., *reprinted in* 23 WEEKLY COMP. PRES. DOC. 1459 (Dec. 14, 1987).

187. The State Department has defined an "understanding" as "a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is

materially modify a treaty provision's meaning. In most cases, the United States simultaneously concludes "a protocol of exchange" with treaty partners—an auxiliary agreement that spells out the prospective significance of any Senate reservations, declarations, or understandings appended to the first treaty.[188] Occasionally, however, the United States dispenses with additional diplomatic negotiations and simply attaches reservations, declarations, and understandings without obtaining treaty partners' express or implied consent. Under such circumstances, the Vienna Convention's instruction that courts should consider only materials accepted by both treaty partners would preclude judicial consideration of Senate reservations and declarations.[189] Nevertheless, because the Senate conditions its constitutionally required consent upon these reservations and declarations, American courts bear a unique constitutional obligation to honor these unilateral instruments.[190]

Aside from official reservations, declarations, and understandings, however, the Senate's constitutional role in domestic treaty interpretation remains highly controversial. In the context of the ABM/INF controversy, several schools of thought developed to explain the Senate's constitutional role in treaty practice. Some scholars analogized the Senate's authority in treaty ratification to the executive's

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intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than as a substantive reservation." MICHAEL J. GLENNON & THOMAS FRANCK, 2 UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 16 (1980).

188. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 132 (1990).

189. Vienna Convention, *supra* note 9, art. 31-32.

190. *See* Reid v. Covert, 354 U.S. 1, 17 (1957) ("This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty"); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 351 (1945) (giving legal effect to a Senate treaty amendment); Haver v. Yaker, 76 U.S. 32, 35 (1869)

> ("In this country...the Federal Constitution declares [treaties] to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate...may modify or amend it, as was done with the treaty under consideration.").

John Norton Moore has questioned the conventional wisdom that Senate reservations, understandings, and declarations (RUDs) bind domestic courts, on the ground that the Supremacy Clause only makes "[t]reaties made, or which shall be made" the "supreme Law of the land, not domestic conditions attached to treaties or...separate legally binding Senate interpretations apart from the treaty." John Norton Moore, *Treaty Interpretation, the Constitution, and the Rule of Law*, 42 VA. J. INT'L L. 163, 193 (2001). The Restatement provides some support for Moore's view. RESTATEMENT, *supra* note 6, § 303, n.4 ("A condition imposed by the Senate that does not seek to modify the treaty and is solely of domestic import, is not part of the treaty and hence does not partake of its character as 'supreme law of the land.'"). If accepted, Moore's challenge to domestic RUDs would support my thesis that U.S. law does not prevent domestic courts from applying the Vienna Convention. Nevertheless, because a full exploration of this question is beyond this Article's scope, I will simply assume for brevity's sake that RUDs fall within the Supremacy Clause.

veto power in the federal legislative process, arguing that courts should not accord the Senate's subjective understanding of a treaty (as evidenced in the ratification record) any deference.[191] Others reasoned that the Senate cannot effectively "consent" to what it does not understand; any treaty interpretation that conflicts with the Senate's subjective original understanding would therefore lack the "consent" necessary for Article-II legitimacy.[192] A third school contended that courts should presume that the Senate consents to a treaty's *international* meaning as defined by international treaty law.[193]

To date, courts have offered only limited assistance in resolving this debate.[194] No court has declared the Constitution requires courts to consider Senate ratification in all cases. While courts occasionally consult Senate ratification materials in order to clarify the Senate's subjective intent,[195] they typically rationalize this maneuver by stressing that Senate ratification materials are "useful" for clarifying the executive's intent as the United States' representative in treaty negotiations—not that the Constitution itself requires deference to Senate ratification materials.

Strict adherence to the Senate's subjective understanding of treaty provisions makes little sense from a pragmatic perspective. As one commentator has cautioned, "[t]o require that the President meet both the nation's international obligations and the passively-gained understandings of the Senate would sometimes place the Executive in a double bind. Nothing in the Constitution or its interpretive history requires the President to be placed in that position."[196] Even assuming

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191. *E.g.*, John C. Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001).

192. *E.g.*, Harold Hongju Koh, *The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?*, 15 YALE J. INT'L L. 331 (1990).

193. *E.g.*, David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1408-12 (1989).

194. Most of these cases address the President's authority to form international agreements other than Article II treaties. *See, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 30 n.6 (1982) ("[T]he President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause of the Constitution...."); Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942).

195. *See* Detlev F. Vagts, *Senate Materials and Treaty Interpretation*, 83 AM. J. INT'L L. 546 (1989) (identifying seven cases in which the Supreme Court has considered Senate ratification materials).

196. Kenneth S. Gallant, *American Treaties, International Law: Treaty Interpretation after the Biden Condition*, 21 ARIZONA ST. L.J. 1067, 1103 (1989); *see also* Malvina Halberstam, *A Treaty is a Treaty Is a Treaty*, 51 VA. J. INT'L L. 63 (noting that this approach would mean that "the President would have to review the whole pre-ratification record...every time a question of treaty interpretation arose, to see whether he could decipher any Senate understanding—explicit or implicit—that would require him to take a particular position on the question.").

arguendo that the Constitution requires deference to the Senate's express reservations, declarations, and understandings, this constitutional requirement would not excuse courts from following the Vienna Convention when these conflicts are absent. Express Senate reservations, declarations, and understandings would be rendered superfluous if courts could bypass treaties' ordinary meaning by privileging less formal expressions of Senate intent. In short, although express reservations, declarations, and understandings may require judicial deference, the Treaty Clause does not obligate courts to defer to the Senate's informal interpretations of treaties rather than apply the Vienna Convention's customary international canons.

2. *The Judicial Power and Article II*

Several scholars have defended the nationalist paradigm on the ground that the Constitution commits treaty interpretation primarily to the executive branch rather than the judicial branch. Arguments for executive supremacy have considerable intuitive appeal, since the United States could not function effectively on the international plane without executive institutions competent to negotiate and execute international agreements. In theory, maximizing executive discretion over domestic treaty practice augments the executive's capacity to perform the United States' informal and secret international commitments. Nevertheless, these arguments for heightened judicial deference to executive treaty interpretations ultimately remain unpersuasive, because they do not adequately account for the judiciary's nonderogable constitutional role.

Advocates for judicial deference in treaty interpretation typically contend that the Constitution vests foreign affairs power primarily in the executive branch. John Yoo, for example, has argued that the Treaty Clause's location within Article II rather than Article III reflects the Framers' understanding of the treaty power as a fundamentally *executive* power. All matters respecting the functioning of treaties—their formation, execution, enforcement, and interpretation—fall within Article II's general endowment of authority to the executive branch. This constitutional allocation of interpretive power also finds expression in the Vesting Clause, which declares that all unenumerated executive powers—including, Yoo suggests, the treaty power—reside within the executive branch.[197]

197. John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1309 (2002) (citing U.S. CONST., art. II, § 1, cl. 1).

Yoo argues further that "treaty interpretation has to rest with the President due to his management of foreign policy and his constitutional control over the interpretation of international law on behalf of the United States.... The President must constantly interpret international law in the course of conducting our day-to-day foreign affairs."[198] In Yoo's opinion, the President's constitutional competency to execute treaties entails the corresponding competency to interpret treaties on the United States' behalf. Given the elusive ontology of party intent, the power to bind the United States to particular treaty interpretations must rest with the branch that has the greatest political accountability and the most intimate acquaintance with treatymakers' original agreement.[199]

Although executive branch's constitutional authority to "take Care that the Laws are faithfully executed"[200] undoubtedly extends to treaties with foreign nations, as Yoo suggests, this authority to interpret treaties for *execution* purposes does not justify executive *supremacy* in treaty interpretation. Federal legislation provides the obvious analogue in U.S. law: No one seriously challenges the executive's competence to interpret federal statutes since this interpretive authority falls within the President's authority to administer the public implementation of federal law. Yet this executive competence does not utterly preempt the judiciary's final authority "to say what the law is."[201] On the contrary, courts consistently have defended the constitutional *grundnorm* that Article-III judges, rather than elected officers or appointed bureaucrats, have the final say when questions arise involving the interpretation of self-executing treaties.[202]

As with federal legislation, all three branches of government play important constitutional roles in treaty formation and internalization. Two-thirds of the Senate must "concur" before treaties negotiated by the executive become U.S. law.[203] Once the Senate tenders its consent, a

198. *Id.* at 1310. In this respect, Yoo's thesis echoes Professor W. Michael Reisman's earlier observation in the context of the ABM/IMF debate: "The issue is simply the competence to perform treaties internationally. If you cannot interpret, you cannot perform." W. Michael Reisman, *Necessary and Proper: Executive Competence To Interpret Treaties*, 15 YALE J. INT'L L. 316, 326 (1990).

199. Yoo, *supra* note 196, at 881. Yoo does not explain, however, why party intent should be considered more elusive in the treaty context than in the context of private contracts.

200. U.S. CONST, art. II, § 3.

201. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

202. *E.g.*, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("[T]he courts have the authority to construe treaties and executive agreements...and we cannot shirk this responsibility merely because our decision may have significant political overtones.").

203. U.S. CONST. art. II, § 2, cl. 2.

treaty becomes the "supreme Law of the Land."[204] The executive's constitutional duty to see that treaties are "faithfully executed" does not give executive agencies unbounded interpretive discretion over treaties; on the contrary, it obligates agencies to conform their actions to judicial decisions.[205] "[T]he judicial power extends "to all Cases, in Law and Equity, arising under [self-executing] Treaties," just as it extends to cases arising under the Constitution and "the Laws of the United States,"[206] and courts possess the same supreme interpretive authority with respect to U.S. treaties that they possess in cases involving federal constitutional and statutory law. Treaties "partake of the nature of municipal law," as the Supreme Court stressed in *The Head Money Cases*,[207] meaning that, for interpretation purposes, "[t]he Constitution of the United States places such provisions as these in the same category as other laws of Congress."[208]

Acknowledging courts' constitutional role in U.S. treaty interpretation, Professor Curtis Bradley offers a somewhat more nuanced defense of the nationalist paradigm.[209] According to Bradley, the Supreme Court's deference to executive treaty interpretations closely parallels the *Chevron* doctrine in administrative law:[210] courts actually defer to executive agencies' interpretations of ambiguous treaties based upon an implicit presumption that "United States treatymakers [i.e., the President and Senate]...delegate[] interpretive power to the executive branch because of its special expertise in foreign affairs."[211] Tracking *Chevron*, courts do not defer to an executive agency's treaty interpretation if the treaty's plain language resolves the issue, if the interpretation is patently unreasonable, or if the interpreting agency is not itself responsible for administering the treaty.[212]

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204. U.S. CONST. art. VI, § 1, cl. 2.

205. *See* Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1271 (2002) ("As part of the law of the land, [self-executing treaties] must also fall within the executive's obligation in Article II, Section 3 to 'take care' that the 'Laws' are faithfully executed."); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 655 (2000) (arguing that self-executing treaties are "part of the 'Laws' referred to in Article II's Take Care Clause").

206. U.S. CONST. art. III, § 2, cl. 1.

207. 112 U.S. 580, 598 (1884).

208. *Id.*

209. Bradley, *supra* note 213.

210. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (suggesting that courts should ordinarily defer to agencies' reasonable interpretations of ambiguous statutes).

211. Bradley, *supra* note 209, at 702; *see also* BEDERMAN, *supra* note 78, at 169 n.577, 303 n.1178 (2001) (analogizing judicial deference to executive agencies in treaty cases to *Chevron*).

212. Bradley, *supra* note 213, at 703.

Viewed from a nationalist perspective, Bradley's *Chevron* paradigm effectively safeguards the Constitution's checks and balances. To the extent that treaties are ambiguous, the *Chevron* paradigm presumes that the Senate delegates interpretive discretion to executive agencies (unless such delegation seems unreasonable under the circumstances),[213] maximizing national sovereignty to the extent reasonable under the relevant treaty. If the executive branch's interpretation exceeds the Senate's intended delegation of authority or violates the Senate's actual expectations, Congress may effectively overrule the President's treaty interpretation by enacting superceding legislation.

Bradley's *Chevron* paradigm is far less compelling, however, when viewed from an internationalist perspective. Granting policymaking discretion to executive agencies may cause a single, self-executing treaty to have fundamentally different meanings under international and domestic law. *Chevron* deference thus draws U.S. treaty jurisprudence into conflict with international treaty law's foundational principle, *pacta sunt servanda*.[214]

Bradley's *Chevron* analogy also glosses over the basic principle that U.S. treatymakers cannot unilaterally delegate interpretive authority to executive agencies, because these institutions lack treaty-making authority without the express consent of an Indian tribe, foreign sovereign, or other international entity. Far from compelling courts to defer to executive treaty interpretations, the Constitution arguably *restricts* U.S. treatymakers' authority to render binding treaty interpretations by making judicial interpretation the rule and congressional override of judicial interpretations the exception. Unless treaty parties clearly communicate their intent to delegate interpretive power to municipal authorities, U.S. courts should not impede international uniformity by according the executive's subjective treaty interpretations *Chevron* deference.

Of course, courts need not (and should not) disregard executive treaty interpretations entirely. Executive treaty interpretations may merit great weight based upon a variety of factors, including the cogency of the

213. *Id.* at 703-04 ("Issues such as the effect and validity of a Senate reservation and whether a treaty overrides earlier federal legislation are issues not likely to be delegated by the Senate to the executive branch.... [C]ourts have not tended to give *Chevron*-like deference to the executive branch on those issues.").

214. As discussed previously, U.S. courts have overwhelmingly defended the internationalist paradigm, affirming that courts' primary duty in treaty cases is to honor States' *collective* intent rather than the United States' unilateral interests. *See, e.g.*, Air France v. Saks, 470 U.S. 392, 399 (1985) ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.").

agency's reasoning, the agency's relevant expertise, and evidence that the United States' treaty partners have ratified the agency's interpretation. A particularly important factor in a court's deference assessment is the extent to which the agency's proposed interpretation will further international legal order by safeguarding public and private reliance and by enhancing the law's coherence, predictability, and uniformity.[215] Applying persuasiveness deference, rather than *Chevron* deference, decreases the likelihood that domestic courts will adopt self-serving treaty interpretations that violate treaty partners' reasonable expectations and the United States' own international obligations.[216]

3. *Customary International Law and the Separation of Powers*

A third potential objection to the Vienna Convention's interpretive regime might be formulated thus: If U.S. courts may apply the Vienna Convention's treaty-interpretation principles as customary international law, doesn't this undermine the Treaty Clause by licensing courts to internalize treaties that the political branches have rejected?

Viewed from a nationalist perspective, courts that apply unratified multilateral conventions violate the Constitution's delicate separation of powers. Since "the nature of the treaty/customary law distinction may determine who makes the law, who applies the law, and who is subject to it," courts' discretion to identify and apply customary international law arguably effects a judicial *coup d'état*.[217] To escape potential separation-of-powers conflicts, nationalists argue that courts should not allow unratified treaties to slip in the back door through customary international law. Senator Jesse Helms, for example, has analogized the Vienna Convention's domestic effect to that of "a dead cat lying on somebody's doorstep....[U]ntil the proposed convention is brought before the Senate for consideration in executive session...its provisions have no relevance whatsoever...and ought to be ignored."[218]

Although the distinction may be somewhat slippery in practice, the power to identify customary international law should not be mistaken for an arbitrary power to override the political branches' foreign-policy

215. In determining whether to defer to executive treaty interpretations, courts regularly consult the positions adopted by the United States' treaty partners. *See, e.g.*, El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 175-76 n.16 (1999) (considering decisions of New Zealand, Singapore, and the United Kingdom).

216. For more detailed critiques of Bradley's thesis, see Evan Criddle, Comment, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927 (2003), and Van Alstine, *supra* note 205, at 1298-1302.

217. Chodosh, *supra* note 58, at 990-91.

218. 134 CONG.REC. L11460 (1988).

determinations. As Professor Henkin has observed, "courts do not create but rather find international law, generally by examining the practices and attitudes of foreign states. Even the practices and attitudes of the United States that contribute to international law do not emanate from and respond to life in this society, as does the common law."[219] Because courts identify customary international law by reference to *opinio juris* and state practice, their discretion to internalize provisions from multilateral treaties is relatively slight.[220] More importantly, separation-of-powers concerns are particularly weak in the treaty-interpretation context, because the Constitution grants federal courts authority to develop common law canons even in the absence of authoritative international canons. Rather than expand their own power to the political branches' prejudice, federal courts arguably cabin their own discretion by applying the Vienna Convention's interpretive framework.

The Supreme Court outlined the principles that govern U.S. courts' incorporation of customary international law in *Banco Nacional de Cuba v. Sabbatino*, a case involving the Cuban government's expropriation of property owned by a U.S. corporation.[221] According to *Sabbatino*, domestic judicial relief is restricted by the common law "act of state" doctrine, which declares that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[222] Although "the Constitution does not require the act of state doctrine," the Court explained, the principle that courts should ordinarily honor the actions of other nation-states nevertheless has important "'constitutional' underpinnings"[223]:

> It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international

219. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 876 (1987).

220. *See* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1853 (1998) ("When construing customary international law, federal courts arguably exercise *less* judicial discretion than when making other kinds of federal common law, as their task is not to create rules willy-nilly, but rather to discern rules of decision from an existing corpus of customary international law rules."). *But see* Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 396 (2002) (challenging the proposition that customary international law is highly determinate).

221. 376 U.S. 398 (1964).

222. *Id.* at 416 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

223. *Id.* at 423.

> relations.... If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.[224]

Significantly, Justice Harlan's majority opinion does not portray the act of state doctrine as a constitutional requirement that trumps customary international norms in all cases; instead, the doctrine's "vitality" turns upon its capacity to safeguard the proper distribution of powers between the judiciary and the political branches. This constitutional allocation of authority depends, in turn, upon the clarity and universality of the customary norm under scrutiny:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[225]

As Ryan Goodman and Derek Jinks have observed, Justice Harlan's opinion establishes a "sliding scale" for determining the justiciability of customary international norms.[226] Where international law is clear and international consensus (i.e., state practice and *opinio juris*) sufficiently strong, courts must apply international law rather than develop independent principles themselves. On the other hand, where an

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224. *Id.* at 427-28.

225. *Id.* at 428. In addition to *Sabbatino*'s generality and determinacy prongs, the Court also suggests a third consideration: "It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." *Id.* As I have argued, international consensus regarding the Vienna Convention's customary status, combined with the political branches' acceptance of the Vienna Convention as an authoritative guide to customary international law, render such concerns relatively unproblematic. Assertions that the Vienna Convention's interpretive regime might "touch...sharply on national nerves" in some individual cases are not really arguments against the Vienna Convention itself but rather against judicial treaty interpretation as a whole (i.e., that courts should defer to the executive in politically sensitive cases). *Id.*

226. Ryan Goodman & Derek P. Jinks, Filártiga*'s Firm Footing*, 66 FORDHAM L. REV. 463, 482 (1997); *see also* W.S. Kirkpatrick & Co. v. Environmental Techtonics Corp., 493 U.S. 400, 409 (1990) (commenting that "in *Sabbatino*" the Court "suggested that a sort of balancing approach could be applied" to "the validity of the act of a foreign sovereign within its own territory").

international norm remains inchoate or international consensus uncertain, courts must leave the norm's refinement and enforcement to the political branches. Thus, *Sabbatino*'s sliding scale prevents courts from unreasonably restricting the political branches' foreign policy discretion, but also respects the fundamental principle that states' responsibility to comply with customary international law increases as international consensus develops as to the law's content.[227]

In *Sabbatino*, the Supreme Court argued that the norm against expropriation of foreign property had not achieved sufficient international consensus to overcome separation-of-powers concerns. Nevertheless, the Court clearly anticipated that future courts would apply customary international law in other settings where the law's clarity and consensus were sufficiently great. Since *Sabbatino*, federal courts have employed *Sabbatino*'s sliding scale in a variety of settings as the authoritative metric for determining customary international law's justiciability. The leading precedent in this area is the Second Circuit's groundbreaking 1980 decision, *Filártiga v. Peña-Irala*,[228] which established that noncitizens may bring civil actions in U.S. courts under the United States' Alien Tort Claims Act (ATCA) to punish international human-rights violations.[229]

In *Filártiga*, a Paraguayan national sued a Paraguayan official for committing acts of torture and wrongful death in violation of

227. *See* James Anaya, *Customary International Law*, 92 AM. SOC'Y INT'L L. PROC. 41, 43 (1998) (describing this principle in the context of international human rights norms). In *Sabbatino* itself, the Supreme Court found a lack of international consensus with respect to the alleged norm against expropriations of foreign property. *Sabbatino*, 376 U.S. at 428 ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."). Given this alleged absence of international consensus, judicial application of an inchoate norm against expropriations of foreign property would constitute an impermissible encroachment on the executive's foreign-affairs power:

> When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.

Id. at 432-33. Should courts expand or contract customary norms notwithstanding conflicting State practice and *opinio juris*, this would significantly impede the Executive's ability to advocate understandings of emerging customary norms that promote U.S. interests. As the *Sabbatino* Court justly cautioned, "the possibility of conflict between the Judicial and Executive Branches [in such cases] could hardly be avoided." *Id.* at 433. Naturally, the distinction between activist "progressive development" and conservative "application" of preexisting standards is ambiguous at best. *Sabbatino*'s sliding scale reflects the variegated spectrum between these ideals.

228. *Filártiga*, 630 F.2d at 876.

229. 28 U.S.C. § 1350 (2003) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.")

international covenants, declarations, and practices, which he alleged constituted "the customary international law of human rights and the law of nations."[230] Finding the plaintiff to have a colorable claim under the ATCA, the Second Circuit agreed that the international norm prohibiting torture was of sufficient generality to warrant judicial application. "[T]here are few, if any, issues in international law today," the court concluded, "on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."[231] As evidence of this global consensus, the court noted that the prohibition against official torture had "become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights."[232] Other international accords such as the UN Charter[233] and the UN Declaration on the Protection of All Persons from Being Subjected to Torture[234] also witnessed the norm's customary status. In light of these findings, the Second Circuit concluded that the international norm prohibiting official torture had attained sufficient international acceptance to merit judicial application.

Less heralded than the Second Circuit's generality finding, but equally important to the court's ultimate decision, was the second prong of *Sabbatino*'s balancing test—the determinacy requirement. Considered in the abstract, the international norm against torture might seem to be riddled with practical uncertainties. Indeed, the D.C. Circuit reached precisely this conclusion in *Tel-Oren v. Libyan Arab Republic*, when it determined that the torture prohibition's applicability to *non-state* actors had yet to achieve the broad international consensus necessary for domestic judicial enforcement.[235] The determinacy prong proved far less problematic in *Filártiga*, however, for two reasons: First, the complaint involved allegations of *official* torture—an offense falling squarely within the customary norm's core traditional meaning. Second,

230. 630 F.2d at 879.

231. *Id.* at 881.

232. G.A.R. 217 (III)(A), U.N. GAOR, 3d Sess., pt. 1, at 71 (1948) (stating that "no one shall be subjected to torture").

233. U.N. CHARTER art. 55 ("With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations...the United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all...."), art. 56 ("All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.").

234. G.A. Res. 3452, 30 U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N.Doc. A/10034 (1975).

235. 726 F.2d 774, 792 (1984) (Edwards, J., concurring) (citing the *Sabbatino* test but finding the "degree of 'codification or consensus'...too slight"); *id.* at 805 (Bork, J., concurring) ("Adjudication...would require the analysis of international legal principles that are anything but clearly defined....").

binding international declarations provided clear support for the torture prohibition's applicability to the acts considered in *Filártiga*. As the court's opinion observed, "[t]hese U.N. declarations [prohibiting official torture] are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, '[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote.'"[236] Because the Universal Declaration on Human Rights specifically enumerated official torture as a human-rights violation, the Second Circuit concluded that the norm had attained sufficient determinacy to merit domestic judicial application. Indeed, confronted with the norm's codification in these and other "international conventions and declarations," even Judge Robert H. Bork conceded in *Tel-Oren* that "the proscription of official torture" is "'clear and unambiguous.'"[237]

Both *Filártiga* and *Tel-Oren* demonstrate that multilateral treaties with quasi-universal membership not only provide evidence that state practice and *opinio juris* have attained sufficient generality for judicial application, but also clarify customary norms' content "with great[er] precision." Thus, after norms have been codified and affirmed by international consensus, individual nation-states ordinarily can no longer contend that the codified customary norms lack sufficient *determinacy* for principled judicial application.[238] By promoting the clarity of customary international law, multilateral conventions like the Vienna Convention defuse separation-of-powers concerns and thereby increase courts' constitutional responsibility to apply customary international law.

Under *Sabbatino*'s sliding scale, the Vienna Convention's customary international canons would seem ideally suited for application in U.S. courts. Just as the Universal Declaration of Human Rights provided the clarity and specificity necessary for the Second Circuit's *Filártiga* decision, numerous state and federal courts have recognized that Articles 31-33 of the Vienna Convention possess the normative clarity and specificity necessary for application as customary international law.[239] Admittedly, the Convention's flexible interpretive guidelines

236. *Filártiga*, 630 F.2d at 883 (quoting Sohn, *A Short History of United Nations Documents on Human Rights*, *in* The United Nations and Human Rights, 18th Report of the Commission (Commission to Study the Organization of Peace ed. 1968)).

237. *Tel-Oren*, 726 F.2d at 819-20 (Bork, J., concurring).

238. *See, e.g.*, R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 965 n.3 (4th Cir. 1999) (accepting the 200-mile exclusive economic zone established by the United Nations Convention on the Law of the Sea—an instrument the United States has yet to ratify).

239. *See* notes and text accompanying *supra* note 87.

permit municipal judges to exercise considerable discretion (as would any reasonably effective system). But it would be difficult to argue that these guidelines do not lend themselves to principled judicial application. On the contrary, the Vienna Convention's detractors typically criticize Articles 31-33 for being rather too *rigid* and *specific*. By any reasonable standard, the Vienna Convention's international canons clearly satisfy *Sabbatino*'s generality and determinacy requirements for application in U.S. courts.[240]

Of course, separation-of-powers objections such as these often veil deeper concerns about the so-called "democratic deficit" in customary international law generally. From a nationalist perspective, judicial incorporation of unratified multilateral conventions privileges international consensus over domestic, democratic processes. Yet concerns about the democratic legitimacy of customary international law have little traction in the treaty-interpretation context. All available evidence indicates that Congress and the executive branch fully accept the Vienna Convention's interpretive framework as customary international law. The State Department has consistently recognized that Articles 31-33 represent an authoritative guide to customary international canons of treaty interpretation, and the Foreign Relations Committee's ratification record contains no significant challenge to this determination. Applying the Vienna Convention's customary international canons does not weaken the political branches' control over the United States' treaty obligations; it simply allows judges to apply a body of law that the political branches already accept. Thus, even assuming that customary international law's domestic legitimacy turns upon the consent of U.S. foreign policymakers, the Vienna Convention's applicability remains unimpeached.[241]

240. In addition to the *Sabbatino* analysis, Congress's capacity to override judicial internalization of customary international law also cuts against nationalist concerns regarding judicial incorporation of the Vienna Convention. As Justice Bradley explained in *The Lottawanna*, customary international law has force in domestic courts only insofar as Congress permits. 88 U.S. (21 Wall) 558, 577 (1874). With the exception of nonderogable *jus cogens* norms, Congress may override customary international law—including Articles 31-33 of the Vienna Convention—if it chooses to exercise this power. *See* Crowell v. Benson, 285 U.S. 22, 39 (1932) (describing the Congress's power to preempt international maritime law as being "beyond dispute"); Dickinson, *supra* note 147, at 810-11.

241. My own view is that the very nature of customary international law precludes disproportionate deference to the executive and legislative branches. As the Supreme Court explained in *Rose v. Himely*, "the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all." 8 U.S. (4 Cranch) 241, 277 (1808).

B. Customary Treaty Canons as Common Law

Aside from the foregoing constitutional concerns, the Vienna Convention's incomplete internalization into U.S. law might reflect popular uncertainty regarding the international treaty canons' jurisprudential status. The principle that "international law is part of our law, and must be ascertained and administered by the courts of justice" has formed a cornerstone of U.S. jurisprudence since the earliest days of the American republic.[242] But courts have yet to define precisely *why* international law is part of our law and *how* they should ascertain and administer its commands. "Treaties and the laws of the United States are proclaimed by the Constitution to be the supreme law of the land," observes Maria Frankowska. "The Constitution is silent, however, on the status of customary international law within the U.S. legal system."[243] As principles of international custom, the legitimacy of the Vienna Convention's interpretive canons depends, in large part, upon customary international law's general legitimacy.

Over the last several years, customary international law's status within U.S. law has become a veritable battleground for competing visions of the United States' interrelationship with the international community. On one side of the battle line, internationalist scholars have defended the orthodox view that customary international law enters domestic law as a strain of federal common law.[244] Marshaled against this mainstream position is an emerging vanguard of revisionist scholars who contend that the Supreme Court's landmark decision, *Erie Railroad v. Tompkins*,[245] utterly abolishes federal courts' law-generative authority—including the competence to identify applicable rules of customary international law.[246] According to revisionists, the authority

242. The Paquete Habana, 175 U.S. 677, 700 (1900). For excellent discussions of the law of nations' role in early American life, see JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 6-7 (1996), and Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989).

243. Frankowska, *supra* note 16, at 388.

244. *E.g., id.* at 388 & n.524; Goodman & Jinks, *supra* note 231, at 468-69; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law After* Erie, 66 FORDHAM L. REV. 393 (1997).

245. 304 U.S. 64 (1938).

246. *E.g.*, Bradley & Goldsmith, *Critique*, *supra* note 52; Curtis Bradley & Jack Goldsmith, *The Current Illegitimacy of Customary International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith, *Human Rights Litigation*]; Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 396 (2002)

to articulate norms of customary international law passed to state courts after *Erie*. The stakes in this skirmish are high, since state primacy over customary international law would jeopardize federal human rights litigation under the ATCA.[247]

Whatever may be the merits or demerits of the revisionists' challenge to traditional customary international law, this critique clearly has no bearing upon customary international treaty canons' legitimacy. The Constitution itself commits stewardship over federal treaty canons to the federal judiciary. Two elementary principles of federal jurisdiction support this understanding. First, even after *Erie*, federal courts retain the authority to develop common law rules where "necessary to protect uniquely federal interests."[248] The obvious need for national uniformity in foreign relations dictates that the authority to prescribe binding principles of treaty construction should vest, for domestic supremacy purposes, in federal courts alone. "[U]nder the national government, treaties and articles of treaties, as well as the laws of nations, will always be...executed in the same manner," John Jay explained in *Federalist No. 3*, "whereas, adjudications on the same points and questions in thirteen States...will not always accord or be consistent."[249] Second and more important, federal courts retain supreme authority over domestic treaty canons by virtue of the Supremacy Clause, which proclaims that all "Treaties"—like all federal statutes—are "supreme Law of the Land."[250] Pursuant to this provision, federal courts wield the same supreme authority over treaty interpretation that they wield with respect to the interpretation of the federal constitution and federal statutes. This principle finds support in Section 25 of the Judiciary Act of 1789, which authorized the Supreme Court to review decisions of state courts where the exercise was "repugnant to the Constitution, treaties, or laws of the United States"[251] In the United States, treaty interpretation is a question of federal law over which federal courts, rather than state courts, are the final custodians.[252]

(challenging the proposition that customary international law is highly determinate).

247. Bradley & Goldsmith, *Human Rights Litigation*, *supra* note 253.

248. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.1 at 336 (2d ed. 1994) (quoting Texas Indus. Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)); Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

249. THE FEDERALIST NO. 3, at 22 (John Jay) (1 Bourne ed. 1901).

250. U.S. CONST. art. VI, cl. 2. Federal district courts have jurisdiction over "all civil actions arising under the...treaties of the United States." 28 U.S.C. § 1331.

251. 28 U.S.C. § 1257.

252. One important implication arising from this analysis is the principle that states lack authority to develop canons of treaty interpretation inconsistent with those adopted by federal courts.

C. *Customary Treaty Canons and U.S. Foreign Policy*

Lastly, conventional wisdom suggests that many international norms address themselves exclusively to the political branches without creating judicially enforceable rights. Some of these norms are thought to operate on the "horizontal" level between nation-states, but are not considered to have legal force in municipal courts. Drawing upon this classical "horizontal" paradigm of international law, some commentators suggest that the Vienna Convention's interpretive canons address themselves exclusively to the political branches, leaving municipal courts free to develop alternative regimes.

Even if many customary international norms create affirmative duties only for the political branches, this restriction clearly does not extend to international treaty canons. The Constitution vests supreme authority over treaty interpretation in the federal judiciary, and the judiciary—not the President or Congress—bears the final responsibility for ensuring that the United States interprets self-executing treaties in good faith. Admittedly, some treaties that do not give rise to causes of action in U.S. courts (i.e., non-self-executing treaties) may address themselves exclusively to the political branches, leaving the executive and legislative branches to monitor the United States' performance without judicial interference. However, the determination whether a treaty is self-executing or non-self-executing is itself a question for judiciary resolution to which international treaty canons naturally apply.[253] Courts may respect the political branches' interpretive decisions when treaty parties commit agreements exclusively to the political branches' discretion, but courts cannot disregard customary treaty canons in deciding cases properly before them without undermining their own legitimacy.

A related justification for judicial deference to executive and legislative treaty interpretations focuses upon the political branches' "sovereign" power to denounce or breach treaty obligations on the United States' behalf. Professor Henkin describes this sovereign power thus:

> [P]resumably the President can exercise [the sovereign] power for the United States, acting under one of his explicit powers or under authority he derives from the powers of the United States inherent in its sovereignty. If so, the fact that an action of the

253. In practice, courts apply a variety of tests—both objective and subjective—to determine whether treaties are self-executing or non-self-executing. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697 (1995).

> President puts the United States in violation of international law, however deplorable that be, does not, *ipso facto*, render that action a violation of the Constitution.[254]

In the United States' dualist system, courts cannot *compel* the political branches to perform the nation's treaty obligations. Although the United States may suffer political or economic reprisals for violating its international agreements, such violations do not constitute infringement of the Constitution or laws of the United States. On the other hand, the executive branch's "sovereign" authority to breach or terminate treaties does not give executive agencies a legal *right* to interpret self-executing treaties contrary to the Vienna Convention's customary canons. The United States may denounce or terminate its treaty obligations, but the customary international principles that govern treaty interpretation cannot be denounced or abrogated unilaterally.[255] In short, treaty interpretation is not a "political question" necessitating judicial abstention.

IV. REVITALIZING THE INTERNATIONALIST PARADIGM

The nationalist concerns I have described in the preceding discussion continue to impede the Vienna Convention's internalization into U.S. law. Although international relations theorists might challenge the internationalist paradigm on policy grounds, the preceding discussion suggests that the paradigm's *doctrinal* underpinnings remain sound. The Vienna Convention key interpretive guidelines are not, in fact, inconsistent with U.S. constitutional or customary international law. The Constitution imposes few categorical restraints on courts' methodology for interpreting international agreements;[256] aside from the

254. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 236 (1996) (citation omitted).

255. As Justice Iredell declared in 1792, "The law of nations...is...enforced...by the *municipal law*; which...may...facilitate or improve the execution of its decisions... *provided the great universal law remains unaltered.*" Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160, 162 (1792) (second emphasis added). For contemporary commentary discussing this principle, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, intro n.2 (Tentative Draft No. 6, 1985) (acknowledging that the international law of treaties is a part of foreign relations law of the United States); O'CONNELL, *supra* note 105 at 264-65; Frankowska, *supra* note 16, at 306 (footnote omitted) ("There is ample evidence that U.S. courts apply rules of international law when interpreting treaties."); *id.* at 307 (footnote omitted) ("The law of treaties binding in the United States is today what it has been for two centuries—customary international law.... Since its rules are applied only in conjunction with a treaty, actual reliance on the law of treaties by the courts is not always properly acknowledged.").

256. *See* Gallant, *supra* note 196, at 1094 (footnote omitted) ("The [Supreme] Court has not treated the rules of substantive interpretation of treaties, as opposed to their validity and effect on

duty to honor the Senate's express reservations, declarations, and understandings. In the final analysis, the emerging nationalist paradigm in U.S. treaty interpretation does not rest on constitutional principle, but rather on a naked policy preference favoring American exceptionalism in foreign affairs.[257]

Nationalist concerns about the Vienna Convention's determinacy and democratic legitimacy remain unpersuasive because they ignore the principles that govern courts' assimilation and application of international norms. As discussed previously, *Sabbatino* suggests that the Vienna Convention's domestic applicability depends upon three factors: (1) whether a preponderance of states observe the relevant norm out of a sense of legal obligation, (2) whether the norm has achieved sufficient determinacy for principled application in domestic courts, and (3) whether judicial internalization of the relevant norm will "touch...sharply on national nerves."[258] This multi-factor balancing test effectively screens out emerging norms that are not yet ripe for domestic internalization. Yet this screening function is only half the story: When emerging international norms satisfy the three prongs of *Sabbatino*'s sliding scale, they become binding principles of domestic law, which U.S. courts must enforce.

By all accounts, the Vienna Convention's treaty interpretation provisions easily satisfy *Sabbatino*'s three-part test. First, as demonstrated in Part I, the Convention's authoritative status has gone virtually unchallenged over the last quarter century. International, foreign, and domestic courts routinely apply Articles 31-33 as customary law when they interpret international agreements. Second, the Vienna Convention's textual codification gives its interpretive guidelines a sufficiently high degree of determinacy for principled application by domestic courts. Third, the Convention's framework for

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federal and state law, as a constitutional matter.").

257. In reality, courts' failure to internalize the Vienna Convention's interpretive framework may reflect ignorance of the Convention's requirements. "For United States jurists," Bederman has argued, "rules of treaty construction are truly judge-made law, and they remain largely ignorant of international glosses on the subject...There appears to have been little appreciation of substantive canons of treaty interpretation—default rules which favor particular interpretive results or policy outcomes." BEDERMAN, *supra* note 78, at 244. *See also* Blackmun, *supra* note 113, at 8 ("Modern jurists...are notably lacking in the diplomatic experience of early Justices such as John Jay and John Marshall, who were familiar with the law of nations and felt comfortable navigating by it. Today's jurists...are relatively unfamiliar with interpreting instruments of international law."). Even jurisdictions that claim to apply the Vienna Convention's interpretive provisions frequently overlook or ignore the distinctions between the Convention and the nationalist approach.

258. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

treaty interpretation not only does not "touch...sharply on national nerves" but actually furthers American values and interests. The Vienna Convention does not present a scenario in which courts seek to internalize customary norms in defiance of the executive branch's express or tacit disapproval, or even in the proverbial "twilight zone" of executive silence.[259] Hence even when viewed from a nationalist perspective, the judiciary's authority and responsibility to apply the Vienna Convention would seem to be "at its maximum."[260] The Convention clearly has become "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[261]

How should the Vienna Convention's interpretive framework inform judicial practice in the United States today? The answer is simple enough: U.S. courts should explicitly invoke the Vienna Convention and construe individual treaty provisions according to the Convention's interpretive framework. For purposes of illustration, let us return to the point at which we began—the United States' controversial kidnapping of Humberto Alvarez-Machain.

In *Alvarez-Machain*, the Supreme Court's dispute over the U.S.-Mexico Extradition Treaty's proper interpretation was largely a product of the justices' inability to agree upon the relevant interpretive principles.[262] Although both the majority and dissent apparently

259. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (describing the executive's authority to act in foreign affairs in the face of congressional silence).

260. *Id.* at 635 (describing the executive's authority to act in foreign affairs "pursuant to an express or implied authorization of Congress"). *See also* Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 267 (Dec. 20) ("It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."); Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L. J. 87, 122-24 (1991) (explaining that such unilateral declarations may aid in crystallizing substantive international law and in clarifying states' international obligations). Even judges who advocate a nationalist approach to treaty interpretation that focuses solely on the United States' unilateral intent should nevertheless apply the Vienna Convention, since the executive branch claims these interpretive principles as its own.

261. The Paquete Habana, 175 U.S. 677, 700 (1900).

262. Given the Court's failure to reach a strong consensus regarding the interpretive principles applicable to the U.S.-Mexico Extradition Treaty, it is not surprising that six justices were hesitant to condemn the executive branch's actions:

> That the Executive may wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes should not influence this Court's interpretation.... [B]ut it is precisely at such moments that we should remember and be guided by our duty 'to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it.'

accepted that the Extradition Treaty should be interpreted "in accordance with the ordinary meaning to be given the terms" and consistent with the treaty's overarching "object and purpose," neither seriously considered the Convention's instruction to construe treaties "in good faith."[263] Informing this assessment of "good faith" is Article 31(3)(c)'s additional instruction, which enjoins courts to "take into account...[a]ny relevant rules of international law applicable to the relations between the parties."[264] Thus, a "good faith" treaty interpretation would account for "the general principle of international law," discussed in Justice Rehnquist's majority opinion, i.e., "that one government may not 'exercise its police power in the territory of another state.'"[265] The Vienna Convention incorporates this "general principle" into the Extradition Treaty by implication.[266]

Of course, the Vienna Convention's interpretive framework does not operate mechanically, eliminating the need for courts to exercise "good faith" and sound judgment. Instead, the Vienna Convention's function is primarily *heuristic*, channeling courts' reasoning toward a circumscribed range of internationally acceptable treaty constructions.

This observation suggests two obvious limitations to the Convention as an interpretive framework: First, as applied to many treaty provisions, the Vienna Convention's internationalist canons may not provide definitive criteria for selecting between competing constructions of a treaty provision. Second, the Vienna Convention's interpretive framework may not prevent courts from adopting specious, self-serving interpretations in politically sensitive cases. These limitations are not unique to the Vienna Convention; they are, as legal realists have shown, endemic to the adjudicatory process generally.

Given these inherent limitations, what contribution can the Vienna Convention make to U.S. treaty interpretation? In my view, the Vienna Convention's superiority over nationalist common law canons does not lie in its (in)ability to transcend the limits of legal reasoning; rather, the Convention's value is four-fold: First, the Convention lends greater *coherence* to U.S. treaty jurisprudence by narrowing the gap between

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United States v. Alvarez-Machain, 504 U.S. 655, 686-87 (1992) (footnotes omitted).

263. Vienna Convention, *supra* note 9, art. 31(1).

264. *Id.* art. 31(3)(c).

265. Alvarez-Machain, 504 U.S. at 668 (quoting Brief for Respondent 16).

266. Even without the Vienna Convention, Justice Rehnquist's majority opinion admits the possibility that an international norm applicable to treaty interpretation such as the doctrine of specialty might deserve judicial deference. *Id.* at 659-60, 668-69. The Vienna Convention merely expands the incorporation of implied terms to embrace relevant norms of customary international law applicable between the treaty parties.

courts' aspirational internationalist rhetoric and its de facto nationalist methodology. Second, the Convention's canons *mitigate states' disproportionate influence* in domestic treaty adjudication. Third, the Convention's application enhances U.S. courts' international *legitimacy*. Fourth, the Convention offers a framework for *more effective dialogue* between domestic, foreign, and international tribunals in developing transnational treaty regimes.

Coherence. As this article has demonstrated, tensions between the United States' nationalist and internationalist approaches have prevented courts from developing a coherent, consistent treaty jurisprudence. On a doctrinal level, the Vienna Convention's uneasy coexistence with nationalist common law canons sows confusion for courts and litigants alike. By adopting the Vienna Convention as a foundational text, courts may reverse this trend and bring their actual methodology in closer alignment with their internationalist rhetoric. If the United States' internationalist paradigm for treaty interpretation is to be taken seriously, Articles 31-33 of the Vienna Convention cannot be lightly dismissed.

Mitigating Statism. It is certainly no secret that international law has shifted away from a state-centric paradigm to a more eclectic and inclusive paradigm in which "persons," "peoples," and other nongovernmental entities have become legitimate subjects of international rights and duties.[267] NGOs, for example, play an increasingly influential role in the drafting and negotiation of international agreements. More important for present purposes, numerous international agreements such as the Refugee Convention have as their primary purpose the advancement of individual rights rather than the promotion of strategic state interests.

The nationalist approach does not adequately reflect this paradigm shift. As *Haitian Centers Council* demonstrates, the nationalist approach's categorical deference to the executive branch and liberal construction favoring state sovereignty may prejudice the interests of a treaty's intended beneficiaries. Nationalist interpretations may also work to the detriment of nongovernmental entities (e.g., corporations, charitable organizations) that structure their relationships in reliance on a treaty's international meaning. While the Vienna Convention may not solve this problem entirely, its focus on objective indicia of party intent and a treaty's "object and purpose" are clearly steps in the right direction.

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267. Ruth G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 362-63 (2002).

Legitimation. The Vienna Convention reminds courts that some interpretive strategies, which may find wide acceptance in domestic constitutional, statutory, or contract interpretation, are simply inapplicable and unacceptable in the treaty context. The Convention directs courts toward internationally accepted interpretive principles and also away from nationalist strategies that would undermine their decisions' legitimacy in the eyes of foreign treaty partners. This approach reduces interstate frictions, increases public confidence in the judiciary, and encourages prospective litigants to select U.S. courts as a forum for resolving their treaty-related disputes.

The United States may be able to weather the political repercussions that flow from nationalist interpretations of bilateral treaties. Aside from high-profile cases such as *Alvarez-Machain*, municipal courts usually may adopt nationalist interpretations of bilateral treaties without significantly undercutting the United States' diplomatic influence or disturbing international regulatory networks. However, when courts apply nationalist treaty canons to *multilateral* treaties, the stakes are far higher, since the United States must then take on the whole international community. Nationalist treaty interpretations are particularly indefensible in this context, because they contravene multilateral treaties' core purpose—the promotion of transnational legal uniformity.[268]

The United States has a compelling interest in cultivating a reputation for honoring treaty partners' reasonable interests and expectations. When courts interpret treaties according to internationally accepted criteria, they manifest their respect for foreign treaty partners' legitimate expectations and interests. The internationalist approach naturally increases the United States' soft power in international treaty negotiations and enhances U.S. courts' credibility and influence with foreign and international courts in the development of multilateral treaty regimes. These potential benefits are imperiled when courts ignore international treaty canons and interpret treaties according to nationalist canons that enhance executive discretion at the expense of traditional rule-of-law values.

Interjudicial Dialogue. The Convention's principles and structure provide a universal legal grammar that may facilitate more effective communication, cooperation, and decisional uniformity among domestic courts and foreign and international tribunals.[269] Just as federal courts

268. *See El Al Israel Airlines*, 525 U.S. at 169 (describing "uniformity of rules" as the "cardinal purpose" of multilateral conventions such as the Warsaw Convention).

269. Although "the opinions of [the United States'] sister signatories" are not formally

enter the domain of "state law" when they apply state constitutional provisions, U.S. courts enter international jurisprudential space when they apply treaties. The Vienna Convention situates U.S. courts within a global interpretive community, providing a gateway to this community's expectations, values, and interests. Rather than excluding cultural assumptions from the interpretive process, the Convention draws upon and informs the global "cultural assumptions within which both texts and contexts take shape for [municipal courts] situated" within an international context and thereby mediates between treaty parties' often radically dissimilar cultural assumptions.[270]

As globalization increases the frequency and intensity of international judicial exchange, the global "community of courts" has emerged as a vibrant epistemic community capable of unprecedented cooperation in international treaty law's progressive development.[271] Articles 31-33 of the Vienna Convention help to bridge the "gulfs in language, culture, and values that separate nations"[272] by providing a set of definitive "conventions of description, argument, judgment, and persuasion" to facilitate interjudicial dialogue.[273] Naturally, these rudimentary interpretive guidelines cannot ensure perfect transnational coordination in judicial treaty interpretation, but at very least they provide a starting point for a more sophisticated, transnational treaty jurisprudence. Whether the Vienna Convention achieves its full potential will depend, in large measure, upon U.S. courts' active cooperation.

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binding upon U.S. courts, these decisions—like executive treaty interpretations—are "entitled to considerable weight." Air France v. Saks, 470 U.S. 392, 404 (1985) (citation omitted); *see also* El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) (considering interpretations of the Warsaw Convention by the British House of Lords, the Supreme Court of British Columbia, the General Division of the Ontario Court, the New Zealand Court of Appeal, and the Singapore Court of Appeal).

270. STANLEY FISH, DOING WHAT COMES NATURALLY 300 (1989). For a study of interpretive communities' function in municipal treaty interpretation, see Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371 (1991). Curiously, Johnstone does not consider the Vienna Convention's role in expressing and constituting interpretive communities.

271. For scholarly commentary on the global "community of courts," see William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002) (describing the potential and limitations of this international community of courts in the context of international criminal law), and Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003) (exploring the dynamics of this international judicial dialogue).

272. Trans World Airlines, Inc. v. Franklin Mint Corp., 66 U.S. 243, 262 (1984) (Stevens, J., dissenting).

273. FISH, *supra* note 275, at 116.

CONCLUSION

As the United States enters the twenty-first century, many of the most hotly debated questions in domestic law involve the interpretation of international agreements. Recent examples include the definition of "unlawful combatants" under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War[274] and the scope of foreign nationals' right to consular assistance under the Vienna Convention on the Law of Consular Relations.[275] International agreements impact innumerable other fields of domestic law as well, as the United States cooperates with foreign nations to promote transnational legal order. To an unprecedented degree, these bilateral and multilateral treaty regimes have effected a profound *internationalization* in the source and content of U.S. law.

Given treaties' increasing importance as sources of domestic rights and obligations, the United States' sovereign interests, and the interests of individual U.S. citizens governed by these agreements, are ill-served by a schizophrenic treaty jurisprudence that vacillates capriciously between conflicting nationalist and internationalist paradigms. Internationalist treaty canons are needed more desperately today than at any other moment in American history to promote transparency, stability, and predictability—in short, the "rule of law"—in transnational treaty litigation. The Vienna Convention moves U.S. treaty jurisprudence in this direction by providing courts with authoritative internationalist canons for treaty construction. These canons are fully compatible with the United States' constitutional commitments (subject, arguably, to Senate reservations, declarations, and understandings) and clearly satisfy the Supreme Court's "sliding scale" test for the judicial internalization of customary international law. As a guide to international custom, the Vienna Convention's treaty

274. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. *See, e.g.*, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (holding that a detainee at the U.S. Naval Base at Guantanamo had no right to habeas corpus in U.S. courts); Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (holding that a U.S. citizen's apprehension in a combat zone in Afghanistan sufficed to justify his detainment as an "enemy combatant"); United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (finding that an American citizen who fought alongside Taliban soldiers in Afghanistan did not qualify for lawful-combatant immunity). *See generally* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002).

275. *See, e.g.*, Federal Republic of Germany v. United States, 526 U.S. 111 (1999) (refusing to grant a preliminary injunction to stay the execution of a German citizen who claimed a violation of his rights under the Vienna Convention); Breard v. Greene, 523 U.S. 371, 375-76 (1998) (asserting that the Vienna Convention on Consular Relations allowed state law to prescribe when a noncitizen's rights to consular access expire).

canons furnish an invaluable framework for harmonizing U.S. treaty jurisprudence with international law.

For over two centuries, U.S. courts have applied customary international treaty canons in domestic treaty cases with the aspiration to promote world public order. It would be an incalculable mistake to abandon this internationalist paradigm now, just when internationalist treaty canons are needed most.