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# When Do American Judges Enforce Treaties?

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# When do American Judges Enforce Treaties?

Tim Wu<sup>1</sup>

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When and why do American judges enforce treaties? The question, always important, has become pressing in an age where the United States is party to over 12,000 treaties.<sup>2</sup> Article VI of the United States Constitution declares “all treaties” the “supreme Law of the Land,” and American judges have long had the potential power, under the Constitution, to enforce treaties just like statutes. But judges don’t enforce treaties that way. Instead, judicial treaty enforcement is widely seen as unpredictable, erratic, and confusing. As a result, the question of treaty enforcement has become a leading question in both American jurisprudence and the study of international law. In recent years, given difficult questions surrounding the enforcement of the Vienna and Geneva Conventions, treaty enforcement has also become a regular part of the Supreme Court’s docket.

Today’s dominant theory of treaty enforcement is the doctrine of “self-execution,” which suggests that judicial enforcement of treaties is deduced from the nature of the treaties signed.<sup>3</sup> Thought to have originated in the early 19th century, the theory holds that some treaties are written so as to be directly enforceable, just like a statute, with full domestic effects, while other treaties are written so as to create duties only under international law. Understandably, the distinction has provoked confusion for more than a century.<sup>4</sup> While academics have criticized the doctrine as perplexing and of little predictive value, they have so far failed to come up with an alternative description of judicial behavior.

This Article, based on the study of the history and record of treaty enforcement, advances a new understanding of when treaties are actually

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<sup>2</sup> Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, S. Prt.106-71, 10th Cong. 2d Sess., 39 (2001).

<sup>3</sup> See Restatement (Third) of Foreign Relations §111.

<sup>4</sup> See, e.g., Curtis A. Bradley, *International Delegations, The Structural Constitution, and Non-Self-Execution*, 55 *Stan. L. Rev.* 1557 (2003); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 *Colum. L. Rev.* 1955, 1955 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 *Colum. L. Rev.* 2154 (1999); David Sloss, *Non-Self-Executing Treaties: Exposing A Constitutional Fallacy*, 36 *U.C. Davis L. Rev.* 1, 4 (2002); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 *Am. J. Int’l L.* 695 (1995); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 *A.J.I.L.* 341 (1995); Jordan Paust, *Self-Executing Treaties*, 82 *Am. J. Int’l L.* 760, 760 (1988).

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enforced in American courts. It finds that the main inquiries in treaty enforcement are questions of *deference*. Stated otherwise, judicial treaty enforcement turns mainly on who is accused of being the party in breach, and the perceived competence of the judiciary to offer a remedy. A good guide to treaty enforcement across the history of the United States is a question of identity: whether the judiciary will defer to a breach of a treaty by Congress, the Executive, or a State.

There is, perhaps unsurprisingly, a strong historical pattern of enforcement of treaties against the States. Beginning in 1795 with the *Great British Debt Case*, courts have consistently enforced treaties to prevent States from placing the United States in breach.<sup>5</sup> While the fact has not been recognized before, direct treaty enforcement in U.S. courts consists mostly of enforcement as against State breach of U.S. treaty obligations. There is, moreover, an underlying constitutional logic to such enforcement: States are granted no power under the constitutional design to breach treaties on behalf of the United States. Judges have long enforced what can be called the central dogma of judicial treaty enforcement – that “the peace of the whole not be left at the disposal of a part.”<sup>6</sup>

A second clear finding is with respect to alleged Congressional breach (or anticipatory repudiation) of U.S. treaty obligations. While Congress sometimes arguably mis-implements a treaty, or passes inconsistent legislation, courts in practice do not enforce treaties directly in the face of such Congressional action. Instead, courts obey the legislation passed by Congress, limiting themselves to indirect enforcement through interpretative presumptions (most notably, the *Charming Betsy* canon).<sup>7</sup> In other words, in the Congressional domain, questions of treaty enforcement all turn on the usage of rules like *Charming Betsy* to interpret legislation so as not to conflict with treaty obligations.

While this article identifies fairly clear patterns for Congress and the States, it makes somewhat less progress on perhaps the most vexing problem in treaty enforcement: the patterns of enforcement against Executive breach.

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<sup>5</sup> *Ware v. Hylton*, 3 U.S. 199 (1796).

<sup>6</sup> *The Federalist* No. 80 (Alexander Hamilton).

<sup>7</sup> The *Charming Betsy* canon, in its original form, states that “An Act of Congress ought never be construed to violate the law of nations, if any other possible construction remains.” *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804). The rule is also reflected in the Restatement (Third) of Foreign Relations §115.

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In cases of alleged Executive breach, the judiciary faces a difficult question— is an apparent breach an unwarranted violation of the law or the exercise of a legitimate authority? What this Article shows is the rough development of a system with some similarity to the statutory deference system that usually goes by the name of *Chevron* deference.<sup>8</sup> While it operates in a largely unrecognized and not well understood fashion, we can detect a rough equivalent to the statutory system for deciding when more or less deference is due the Executive.<sup>9</sup>

The descriptive findings in this paper suggest rethinking the law of treaty enforcement in the American legal system. To the extent that a legal theory serves as a prediction of what judges will do, today's doctrine of self-execution is not successful. As scholars have pointed out,<sup>10</sup> the rule of self-execution has been stretched beyond recognition in the 20th century, into a loose doctrine that blocks judicial enforcement of treaties on an *ad hoc* basis. As this Article shows, the doctrine is widely used as a judicial device to enforce political and structural policies related to the identity of the breaching party.

The question of when a treaty is self-executing would be better understood as a ruling that the Court considers itself competent to enforce the treaty in question. That's a question that may sometimes turn on the text of the treaty— the original and narrowest meaning of the phrase “non-self-executing.” But that's relatively uncommon. In the history of treaty enforcement, judicial enforcement has more often depended on different matters: what branch of government is accused of breach, and what deference to that entity's acts the judiciary owes. As in statutory cases, that question of deference often depends on what other branches of government have done – whether it is passing implementing legislation, implementing detailed regulations, or otherwise. These kinds of signals from other branches may make it clear to the judiciary that the treaty will be enforced by other branches, and that the judiciary owes deference to that decision.

Understanding treaty enforcement this way uproots “self-execution” as the central tool for understanding treaty enforcement. It confines it to the narrower textual question above, and asks judges to explicitly consider

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<sup>8</sup> 533 U.S. 218 (2001).

<sup>9</sup> See *infra* Part II.B.

<sup>10</sup> See *infra* n. 14.

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whether they are deferring to other branches of government, and if so, why. That one change can do much to bring treaty enforcement in line with the kind of questions judges routinely face in statutory interpretation and administrative law.

Finally, this Article adds to the discussion of the development of treaty enforcement in the 20th century.<sup>11</sup> Scholars almost uniformly agree that judges have enforced treaties less vigorously in the 20th century, particularly since World War II.<sup>12</sup> The usual theory is either that the rise of multilateral treaties is the cause, or abuse of the doctrine of non-self-execution. As David Sloss writes, “the modern doctrine of non-self-executing treaties, created by courts and commentators in the latter half of the twentieth century, distorts [proper treaty enforcement].”<sup>13</sup>

While this Article agrees that the patterns of judicial enforcement in the 20th century may have changed, it suggests a different explanation. The change in treaty enforcement patterns may come in large part from a change in the treaty-making process-- the emerging prevalence of congressional-executive agreements that have all but replaced Article II treaty-making. Stated otherwise, the practice of making international agreements coupled with simultaneous authorizing and implementing legislation has changed treaty enforcement practice. By creating statutes that surround the treaties signed by the United States, the practice of congressional-executive agreements may have done much to displace direct judicial enforcement of treaties.

To restate, this paper suggests that courts should understand the problem of self-execution as a question of institutional deference. The basic question is whether the alleged act of government breach justifies a judicial remedy. For the judiciary, that’s a familiar question with familiar types of answers. Judicial deference to Congressional action with respect to a treaty is to be expected,<sup>14</sup> while conversely, the judiciary will with confidence

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<sup>11</sup> On the changes in international law over the 20th century, see Paul B. Stephan, *The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 *U. Colo. L. Rev.* 1555, 1557 (1999).

<sup>12</sup> See., e.g., G. John Ikenberry, *America, World Order, and the Rule of Law* (2003).

<sup>13</sup> David Sloss, *Non-Self-Executing Treaties: Exposing A Constitutional Fallacy*, 36 *U.C. Davis L. Rev.* 1, 4 (2002).

<sup>14</sup> See *infra* text accompanying notes \_\_ to \_\_ for a description of this tendency.

continue to use treaty-law to prevent States from putting the United States in violation of its international obligations. Finally, when it comes to the Executive, the judiciary can begin to explain why, in terms of deference, it is or is not choosing to enforce a treaty as against Executive breach.<sup>15</sup>

This paper takes no particular position on whether more or less judicial enforcement of treaties might be desirable. The main point is descriptive – to understand what judges have been doing in the first place. Unfortunately, the relevant considerations are hidden behind the unnecessary and counterproductive complexities of the doctrine of self-execution. Making the real questions central to the discussion of treaty enforcement would represent a major step forward in the development of treaty law in United States courts.

Part I introduces the deference theory of treaty enforcement. Part II outlines the origins of the model in the 18th and 19th centuries, while Part III discusses its application to the problems of the 20th century.

## **Part I: The Self-Execution Problem and the Deference Model**

### ***A. The Trouble with Treaties & Non-Self-Execution***

A first-time reader of the United States Constitution might consider the intended role of treaties in the American system fairly straightforward. Article VI of the Constitution declares in one breath that valid treaties and statutes are the “supreme Law of the Land.” The text suggests a rough equivalence in the legal status of the two, and the simple equivalence view is supported by much, particularly early, Supreme Court writing. According to Chief Justice John Marshall, when a treaty “affects the rights of parties litigating in court ... [it is] as much to be regarded by the court as an Act of Congress.”<sup>16</sup> The equivalence view leads also to the “last-in-time rule,” that treaties trump prior statutes and vice versa. As the Supreme Court has said, “A treaty may supersede a prior act of Congress, and an Act of Congress may supersede a prior treaty.”<sup>17</sup>

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<sup>15</sup> *Medellin v. Dretke*, Oral argument March 28, 2005.

<sup>16</sup> *United States v. The Schooner Peggy*, 1 Cranch 103, 110. See also, Restatement (Third) of Foreign Relations §115 comment a (1987) (“An act of Congress and a self-executing treaty are of equal status in United States law.”).

<sup>17</sup> *The Schooner Peggy*, 1 Cranch at 110.

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This equivalence theory suggests that treaty language, when raised in court, ought usually have effects no different from the exact same language found in the United States Code. Yet it isn't so. The full legal effects that equivalence promises are blocked by a different doctrine: the doctrine known as non-self-execution.

Self-execution is the primary tool used by judges and academics when assessing judicial enforcement of treaties.<sup>18</sup> The theory, usually but wrongly said to have originated in the 1829 case *Foster v. Neilson*,<sup>19</sup> divides all treaties into two categories. "Self-executing treaties" become a domestic law of the United States immediately upon ratification. "Non-self-executing treaties," in contrast, create no domestic law rules, and cannot be directly enforced in American courts. American compliance with a non-self-executing treaty, the theory goes, is a problem for entities other than the judiciary.<sup>20</sup>

How can a court tell the difference between the two categories? Self-execution theory suggests that the *intent* of the treaty-drafters provides the key. As the Third Restatement of Foreign Relations puts it, "An international agreement of the United States is 'non-self-executing' ... if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation."<sup>21</sup> Yet discerning what a treaty intended with respect to its domestic enforcement is often quixotic. Treaties are an exchange of promises as between nations, and almost never speak directly to their enforceability in U.S. courts. To exaggerate slightly, looking for a treaty's intent regarding judicial enforcement can be like asking whether a sales contract takes a side on the merits of affirmative action. The relevant intent usually just isn't in the treaty.

As a consequence, courts have created multiple-part tests designed to tell the difference between a treaty intended to be self-executing from its non-self-executing brethren. An example from the Seventh Circuit reads as follows:

[C]ourts consider several factors in discerning the intent of the parties to the agreement: (1) the language and purposes of the agreement as a

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<sup>18</sup> See supra n. \_\_ (papers discussing self-execution theory).

<sup>19</sup> *Foster & Elam v. Neilson*, 27 U.S. 253 (1829). The theory was recognized by a state court as early as *Camp v. Lockwood*, 1 U.S. 393 (1788), 40 years before *Neilson*.

<sup>20</sup> See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir.1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir.1984)

<sup>21</sup> Restatement (Third) of Foreign Relations §111.



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whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.<sup>22</sup>

As one might expect, using a multiple part test to interpret the “intent” of a document that never addressed the question is a recipe for judicial anarchy. Patterns of treaty enforcement, as scholars have noted, seem impossible to square with the “intent” analysis.<sup>23</sup> Consequently, self-execution problems are universally regarded as confusing, confused, and chaotic.

The goal of the theory of enforcement advanced here is to provide a new and better explanation for what drives judicial treaty enforcement. It is worth noting that the deference model is certainly not the only theory that might conceivably fit the evidence and provide a better explanation than the “intent” theory. During the research of this paper, it became evident that one could argue that judges enforce treaties differently according to subject-matter, yielding a theory that there lies an evolving domain of areas where treaties will be enforced. One might also argue that the Court is motivated by the likelihood of its orders actually being obeyed. However, I advance the deference model as the best descriptive fit to the history and record of treaty enforcement decisions. Its basic premise is that concern for domestic government structure is the primary driver of treaty enforcement patterns. Indeed we might go further and say that many of the familiar forces that drive judicial enforcement of statutes are to be found in treaty enforcement cases, albeit in distinctive (some might say mutated) forms that are driven by the contractual nature of treaties and their connection to foreign affairs.

### ***B. The Deference Model of Treaty Enforcement***

How do American judges enforce treaties? To answer this question, we must first make clear what we mean by the enforcement of a treaty, and what it means for a party to be in breach. Subsequently we may summarize the main findings of Part II, the study of treaty enforcement in U.S. courts.

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<sup>22</sup> Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir.1985).

<sup>23</sup> See, e.g., Valasquez, *supra* n. \_\_, Sloss, *supra* n. \_\_.

### **A Contract Model**

The deference model of treaty enforcement is centered on a familiar yet crucial proposition: treaties are legal agreements as between nations. They are, in other words, analogous to international contracts, containing an exchange of promises between the United States and another country. Like a contract, the promises can be vague, clear, conditional, and so on. The point is that the creation of a treaty can be generally described as a bargained-for exchange of promises as between nations that creates an obligation under international law.

Where does a domestic judiciary enter the picture? In this model, just as in a contract case, the judiciary's role in a treaty case begins when some party complains of breach. To make a claim under a treaty in court, a litigant alleges that some government actor has or will put the United States in violation of a promise made. In effect, a treaty litigant asks the court to take the promise made as a matter of international law and translate it into a domestic rule, providing a domestic remedy as against the international treaty breach. If the United States promised X to Canada, a treaty plaintiff is asking the court to order the United States to honor its promise.

This leads us to the first question: how, exactly, might government actors put the United States in breach of a treaty? Basic contract theory can help us understand what this means. As in contract law, there are two general ways in which government actors can put the entire country in breach. First, a state official or the Executive might act in a manner inconsistent with what it promised to do in the treaty – creating the contract-law equivalent of a breach through nonperformance.<sup>24</sup>

For example, say that the United States and Britain agree by treaty to eliminate visa requirements for citizens who want to enter either country. If federal customs officials continue to demand a visa, a British tourist might argue that the Executive branch has failed to live up to its promise.<sup>25</sup> Conversely, lawmaking entities like a state legislature or Congress may pass a law inconsistent with a promise made in a treaty. In so doing they announce that the United States, or part of it, will henceforth act in a manner inconsistent with a promise made in a treaty – the treaty-law equivalent of

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<sup>24</sup> Cf. Allen Farnsworth, *Contract* §8.8 (2d ed. 1999) (on nonperformance as breach).

<sup>25</sup> Cf. *Taylor v. Morton*, 23 F.Cas. 784 (Cir. C. Mass. 1855) affirmed 67 U.S. 481 (1862), discussed *infra* Part II.

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anticipatory repudiation.<sup>26</sup> If, for example, Congress or a state legislature writes a law that places an explicit quota on the import of German automobiles, we can say that the law announces an anticipatory breach of the U.S. obligations under the General Agreement on Tariffs and Trade (GATT).<sup>27</sup>

Given an allegation of breach, a judge is left with two necessary questions. One is a question of interpretation: does the alleged behavior actually constitute a breach of the treaty? The second and often more difficult question is one of deference to institutional competence. Can the court comfortably translate the international law rule into a domestic remedy? Even if we assume breach of the treaty as an international law matter, is it always appropriate for the judiciary to order a remedy?

There are two principal reasons a court might defer. First, the defendant, as a government actor, may have some privilege to breach the treaty in question, stemming from its power to terminate, for example. Or, the government actor may claim an independent authority to translate the treaty into domestic law rules, and create an implementation of the treaty to which the court owes deference. For any combination of these reasons the court may or may not enforce a treaty in a given case.

Unfortunately, these questions are rarely asked this way in judicial opinions. Asking the questions this way helps us understand how, in fact, courts have acted to remedy treaty breach over the last 200 years. Thanks, perhaps, to the persistence of the self-execution doctrine, the topic is surprisingly under-researched. Yet it is crucial to informing what we might think about the underlying normative questions.

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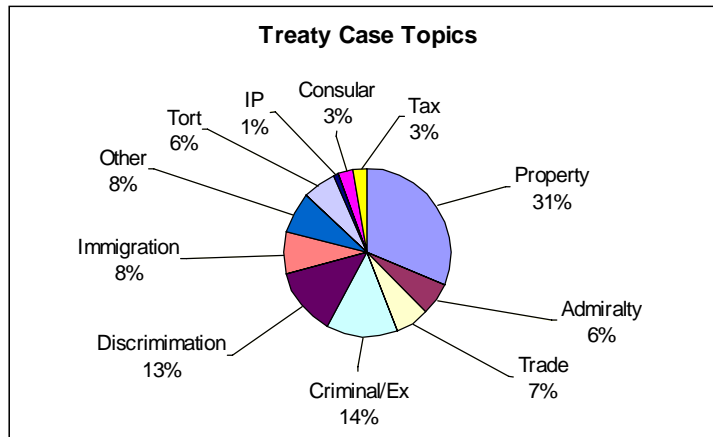
<sup>26</sup> Cf. Allen Farnsworth, *Contracts* §8.20-8.22 (“a repudiation is a manifestation by one party to the other that the first cannot or will not perform at least some of its obligations under the contract.”).

<sup>27</sup> It might strike some readers as strange to speak of Congress breaching a treaty through anticipatory repudiation. But notice that as a positive matter Congress’ passage of the law will not usually nullify the international law duty of the United States to follow the treaty – the GATT in our example. For unless by its nature the treaty allows unilateral amendment, the international law duty survives the passage of an inconsistent law, though as we will see, a domestic court is unlikely to enforce that duty directly.

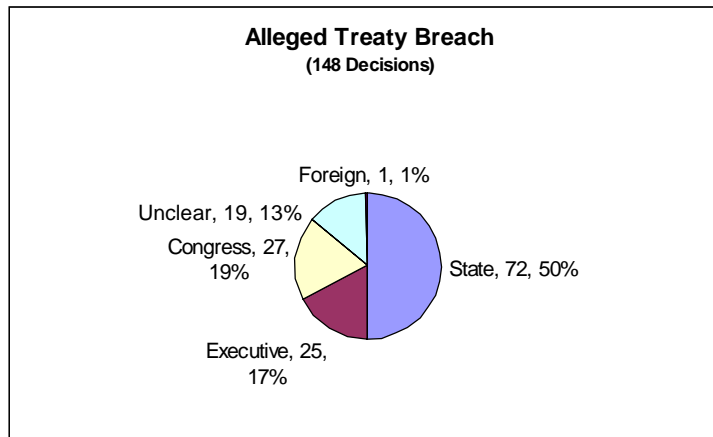
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### Summary of Findings

For purposes of this study this Article identified 148 Supreme Court cases that address the enforcement of treaties (when important, well-known lower court decisions are also discussed).<sup>28</sup> While a full statistical study of the cases is beyond the scope of this paper, and no statistically causal claims are presented, a simple survey of these 148 cases reveals interesting patterns. First of all, by subject matter, the treaty cases break down as follows:



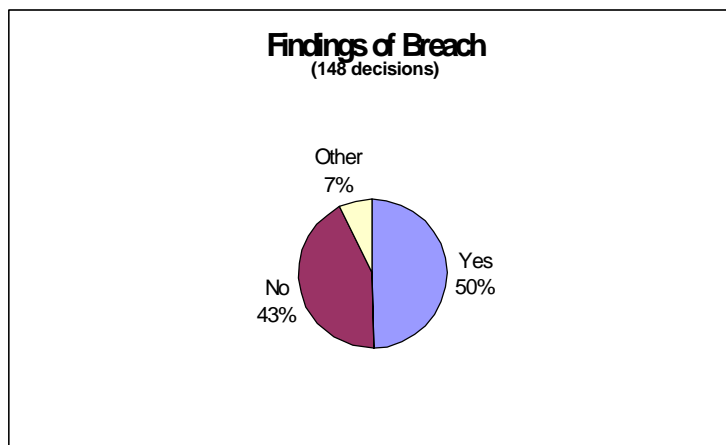
Second, the cases were examined to determine, as best as possible, which government entity was accused of breach. That yields the following:



Finally, the study has made an effort to determine, as best as possible, how many of the cases led to direct judicial enforcement of the treaty. That yielded:

<sup>28</sup> The database is available upon request.

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At this broad a level, few conclusions can be offered. Since the theory suggests different patterns of treaty enforcement for different actors, we now look at each major actor in turn.

**State Breach.** Courts vigorously enforce treaties to remedy state breach—enforcement against states is the primary and historically most significant type of treaty enforcement in the United States, with more than 50 examples in the Supreme Court alone.<sup>29</sup>

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<sup>29</sup> Some examples include: *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) (finding that even if an act of the State of Georgia could be construed to confiscate a debt, it would be invalid if in opposition to the Treaty of Peace); *Hopkirk v. Bell*, 7 U.S. 454 (1806) (interpreting Treaty of Peace to override conflicting state statute); *Hannay v. Eve*, 7 U.S. 242 (1806) (finding that state contract law yields to treaty law); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1807) (finding that treaty is relevant source of law for property dispute); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (finding that State inheritance law was displaced by treaty with France); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453 (1819) (finding that Treaty with Britain protects inheritance as against Virginia law); *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828) (on treaty that ceded Florida from Spain, the “treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States”); *United States v. Percheman*, 7 Pet. 51 (1833) (Spanish-American treaty trumps state property law); *Pollard's Heirs v. Kibbe*, 39 U.S. 353 (1840) (same); *Haver v. Yanker*, 76 U.S. 32, 34-35 (1869) (displacing Kentucky inheritance law); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *In re Ah Chong*, 6 Sawyer 451 (1880) (State law prohibiting aliens from fishing in public waters void due to contravention with Burlingame treaty); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (state ban on immigration of lewd women violates Burlingame treaty); *De Geofroy v. Riggs*, 133 U.S. 258 (1890) (French commerce treaty supercedes inconsistent D.C. law); *Maiorano v. Baltimore & O. R. Co.*, 213 U.S. 268 (1909) (Treaty with Italy not inconsistent with Pennsylvania law); *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (Treaty with Japan trumps inconsistent Washington State law);

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The foundational case of state enforcement is the 1796 *Great British Debt Case* (also known as *Ware v. Hylton*), discussed in detail in Part II.<sup>30</sup> In *Ware* the Supreme Court enforced the 1783 Treaty of Peace to nullify inconsistent State laws that released debtors from their pre-War British creditors.<sup>31</sup> The case created a model of treaty enforcement that has been broadly followed across subject areas ranging from state inheritance law and immigration law to anti-discrimination, trademark, and airline liability.<sup>32</sup> In the famous 1924 case of *Asakura v. City of Seattle*,<sup>33</sup> the Supreme Court enforced a Japanese-U.S. treaty to nullify a Seattle ordinance that discriminated against aliens by allowing pawnbroker licenses to be issued only to U.S. citizens. *Asakura* is a casebook favorite because of oddly vigorous enforcement of the treaty and the total absence of any discussion of the doctrine of non-self-execution. History and the deference model show that *Asakura* is in fact no mystery at all, but rather a typical and even routine case of treaty enforcement as against state breach.

In State cases the Court uses a rule of no deference: it makes no effort to reconcile inconsistent state law, and pays no special attention to state interpretation of a treaty. While always the practice, the court put the rule clearly in *Nielsen v. Johnson*: “as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding

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Jordan v. Tashiro 278 U. S. 123 (1928); Nielsen v. Johnson, 279 U.S. 47 (1929) (“Treaty provisions prevail over inconsistent state enactments”); United States v. Belmont, 301 U.S. 324 (1937) (New York State policy no bar to operation of treaty law); Clark v. Allen, 331 U.S. 503 (1947) (Treaty with Germany trumps inconsistent California law); Trans World Airlines, Inc. v. Franklin Mint Corp, 466 U.S. 243 (1984) (Warsaw Convention limiting liability of airlines displaces inconsistent state law); Delchi Carrier v. Rotorex Corp., 71 F.3d 1024, 1027-28 (2d Cir. 1995) (United Nations sales Convention preempts state law causes of action); Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d, 1142, 1147-52 (2d Cir. 2001) (same); Zicherman v. Korean Airlines Co., 516 U.S. 217 (1996) (interpreting Warsaw Convention in state law personal injury suit); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) (same); Olympic Airways v. Husain, 124 S.Ct. 1221, 1224 (2004) (limiting liability of Olympic Airways).

<sup>30</sup> Ware v. Hylton, 3 U.S. 199 (1796).

<sup>31</sup> Id.

<sup>32</sup> See Part II & III for a history of the *Ware* rule in U.S. Courts.

<sup>33</sup> 265 U.S. 332 (1924).

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possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments.”<sup>34</sup>

It is also worth mentioning that since 1908 courts have sometimes used a different mechanism for enforcing certain kinds of international agreements against states. In these cases, Executive Agreements (not Treaties in the Article II sense, but international agreements made by the President) are at issue. The court is asked, under the authority of *Ex Parte Young*,<sup>35</sup> to issue an injunction that stops a state official from violating the agreement in question or from violating the Supremacy Clause of the Constitution.<sup>36</sup> Most academics put these cases in a different category from treaties altogether, but they may provide additional examples of enforcement as against state breach of an international agreement. There are far fewer examples of this type of treaty enforcement;<sup>37</sup> the most dramatic was 2003’s *America Insurance Association v. Garamendi*,<sup>38</sup> where the Supreme Court found that a series of executive agreements preempted State law in the form of a California insurance statute, preventing even potential inconsistency with an international treaty regime.<sup>39</sup> At a minimum, cases enforcing executive agreements may reflect the broader patterns of enforcement of international agreements against the States.<sup>40</sup>

That the primary domain of treaty enforcement lies against States should be no surprise. By enforcing treaties as against states, courts give effect to the single clearest principle in treaty enforcement, in Madison’s phrase, that “no part of a nation shall have it in its power to bring

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<sup>34</sup> 279 U.S. 47, 52 (1929).

<sup>35</sup> 209 U.S. 123 (1908).

<sup>36</sup> Some might argue that it is confusing to say preemption of state law by treaty is the same thing as enforcing a treaty over inconsistent state action but I think it simpler to see them as the same thing. Accord Curtis Bradley & Jack Goldsmith, *Foreign Relations* (2003) (chapter on treaty preemption of state law).

<sup>37</sup> Examples include *America Insurance Association v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U. S. 654 (1981); *United States v. Pink*, 315 U. S. 203 (1942); *United States v. Belmont*, 301 U. S. 324 (1937); and for examples of lower court usage see David Sloss, *Ex Parte Young and Federal Remedies For Human Rights Treaty Violations*, 75 *Wash. L. Rev.* 1103 (2000).

<sup>38</sup> 539 U.S. 396.

<sup>39</sup> *Id.* at 400-403.

<sup>40</sup> It is also certainly worth asking whether courts should be more deferential to state breach of Executive Agreements as opposed to Senate or Congressionally approved treaties.

[international complaints] on the whole.”<sup>41</sup> The Supremacy Clause is an obvious affirmation of that principle, arguably giving courts both the power and the duty to prevent states from violating the treaty obligations of the United States.

Over the course of American history and in recent years, various writers have suggested that States should be granted more leeway to express their own foreign policies.<sup>42</sup> Whatever the future may hold, the history of treaty enforcement against States has not given much support for such arguments. Instead, courts show far more concern that allowing state breach might create concerns of reciprocity that no actor other than the courts are in a good position to remedy. As Justice Miller memorably wrote of a California statute banning the immigration of foreign, or “lewd” women, “If (the United States) should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?”<sup>43</sup>

**Congressional Breach.** Congressional breach poses more complicated problems for the judiciary. Unlike with respect to the States, the courts do not have a clear command from the Supremacy Clause to prevent Congressional breach of treaties. Instead, the judiciary *shares* the job of treaty enforcement with Congress (and also the President, as discussed in a moment). In addition, Congress has the power, accepted since at least 1798, to terminate, or repudiate, treaty obligations altogether.

When Congress acts inconsistently with a U.S. treaty obligation, the rule of deference has been clear: the judiciary refuses to enforce the treaty independently.<sup>44</sup> Arguably, in the realm of treaty enforcement, Congress is

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<sup>41</sup> 1 The Records of the Federal Convention of 1787, at 316 (Max Farrand ed., rev. ed. 1937).

<sup>42</sup> See, e.g., Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 *Texas L. Rev.* 1 (2004) (arguing for greater deference to states in matters of foreign relations).

<sup>43</sup> *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875). See also *Federalist No. 80* (Alexander Hamilton) (“The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.”).

<sup>44</sup> *Foster & Elam v. Neilson*, 27 U.S. 253 (1829). These cases are less common, because Congress usually implements treaties or passes later-in-time statutes that abrogate them. The first reported case to find the obligation of a treaty an obligation of Congress is *Camp v. Lockwood*, 1 US 393 (1788); others include *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (tariff statute); *Kelly v. Hedden*, 124 U.S. 196 (1888); *Rousseau v. Brown*, 21 App. D.C. 73



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an alternative and perhaps predominant enforcement agency for American treaties. That is not to say that Congress enforces treaties in the usual legal sense of the term, but rather, Congress enforces through implementation. By passing implementing legislation, Congress can decide how it wants a particular treaty to be enforced in the United States. The judiciary, in turn, looks for signs that Congress has taken charge of treaty-enforcement in a given area. That can be evidenced most clearly by the passage of implementing legislation, but sometimes the passage of *prior* legislation in a field can demonstrate that Congress has exerted its control over an area of treaty enforcement (similar patterns are observed in the tariff cases, Chinese exclusion, intellectual property, and human rights treaties).<sup>45</sup> In either case (more obviously the former), potential inconsistency with the treaty represents a Congressional choice.

When Congress implements a treaty through a statute, the statutory regime completely replaces the treaty as a basis for direct enforcement. That is to say, judges do not return to the original text of the treaty as a law they can enforce directly. The Supreme Court has said, “a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute.”<sup>46</sup> It would be a mistake, however, to assume that the judiciary does nothing when Congress’s implementation of a treaty or later-time-legislation is at odds with the treaty. Courts instead may turn to the *Charming Betsy* canon or other presumptions by which Congressional ambiguity may be converted into treaty compliance.<sup>47</sup> Nonetheless, where Congress is absolutely clear in its intent to violate the treaty (through, most obviously, passage of directly inconsistent legislation), the judiciary abandons any effort to enforce the treaty in its original form.<sup>48</sup>

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(1903) (Failure to obey patent treaty fault of Congress); *United Shoe Co. v. Duplessis Shoe Co.*, 155 Fed. 842, 84 C.C.A. 76 (1st Cir. 1907).

<sup>45</sup> See Parts II.B, II.C, III.B. and III.C

<sup>46</sup> *Baker v. Carr*, 369 U.S. 186, 212 (1962).

<sup>47</sup> See, e.g., *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925) (interpreting 1880 Treaty with China as containing rights that survive passage of new immigration act: the “act must be construed with the view to preserve treaty rights unless clearly annulled”). Examples of the use of the *Charming Betsy* canon to inform statutory interpretation based on treaties can be found in Ralph G. Steinhardt, *The Role Of International Law As a Canon Of Domestic Statutory Construction*, 43 *Vand. L. Rev.* 1103 (1990). See also Restatement (Third) of Foreign Relations § 114.

<sup>48</sup> See, e.g., Part II.C (The Chinese Exclusion cases).

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Several illustrative examples from the history of treaty enforcement may help clarify these points. In the 19th century, Congress sometimes arguably mis-implemented U.S. trade treaties with other nations.<sup>49</sup> For example, in 1832 the United States promised Russia Most Favored Nation status – the right to the best tariff rate given any other country. In its 1842 Tariff Act, however, Congress created special tariffs for British and Spanish-grown hemp, in arguable breach of its treaty with Russia. Even if the courts might have agreed with Russia that Congress owed it the best rate, the Supreme Court was unwilling to set Congress straight. It deferred, instead, to Congress’s implementation, relying on the judiciary’s relative lack of information as to why Congress might have implemented the tariffs the way it did.<sup>50</sup>

Similarly, the United States in 1988 joined the Berne Convention of 1886, which sets international, minimal standards of copyright protection,<sup>51</sup> and Congress passed implementing legislation.<sup>52</sup> Despite amendments to the copyright code, the United States arguably still does not comply with the some of the requirements of Berne,<sup>53</sup> particularly the provisions demanding protection of “moral rights.”<sup>54</sup> Yet nonetheless courts have ignored that fact in their decisions, and in fact have failed even to try to construe federal law to be consistent with U.S. treaty obligations.<sup>55</sup> These two examples reflect broader patterns identified more clearly in Part II.

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<sup>49</sup> See Part II.B (discussing 19th century treaty practice).

<sup>50</sup> *Taylor v. Morton*, 23 F.Cas. 784 (Cir. C. Mass. 1855) affirmed 67 U.S. 481 (1862).

<sup>51</sup> See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971 (amended 1979), S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986), 828 U.N.T.S. 221.

<sup>52</sup> See The Berne Convention Implementation Act of 1989, Pub. L. 100-568, 102 Stat. 2853 (1988).

<sup>53</sup> See Ralph S. Brown, *Adherence to the Berne Copyright Convention: The Moral Right Issue*, 35 J. Copyright Soc’y 196, 205 (1987-88); see also Jane Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, University of Houston Law Review, 2004 (discussing right of attribution).

<sup>54</sup> See Berne Convention, supra n. \_\_, Art. 6bis (moral rights protections).

<sup>55</sup> In fact Courts have not even used the Charming Betsy canon to avoid arguable breach of Berne. For example, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 537 US 1099 (2003), the Supreme Court effectively eliminated a category of moral rights protection without questioning whether this would put the United States in violation of its treaty obligations.

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**Executive Breach.** The President, like Congress, has independent powers that make review of his compliance with treaties challenging. The Executive has the power to create executive agreements or treaties in collaboration with Congress, and it assumes the authority to terminate treaties unilaterally.<sup>56</sup> The Executive also engages in independent interpretation of treaties, sometimes writing implementing regulations and ordering its employees to obey the treaty as interpreted. As an example, U.S. soldiers (with well-known exceptions) are regularly ordered to obey various laws of war, including the Geneva Conventions, as the Executive has interpreted them in its regulations.<sup>57</sup>

What then do courts do when facing a lawsuit alleging Executive breach of a treaty? This turns out to be perhaps the hardest problem in the study of treaty enforcement. The *de facto* rule of deference in Executive breach cases is confusing. Courts will, on the one hand, enforce treaties directly against the Executive (unless, to avoid enforcement, they ascribe breach to Congress – more on that in a moment). But courts tend to do so while also granting considerable deference to the Executive’s interpretation of the treaty, and such deference, when strong, can sometimes look like not independently enforcing the treaty.

We need to understand the problem of Executive breach as a cousin to the similarly difficult problem of statutory deference to administrative agencies’ interpretations of the statutes they administer which judges call *Chevron* problems.<sup>58</sup> Logic suggests that there must be a treaty-law system of deference to the Executive in cases of alleged executive breach, but if so, it is only vaguely referred to in the cases and certainly not well understood by anyone. The comparison to statutory deference may therefore serve as useful way to understand the problem of executive treaty deference, though there are enough differences to make treaty deference its own creature.

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<sup>56</sup> The exact amount of authority the President has to terminate treaties is debated. See Louis Henkin, *Foreign Affairs and the United States Constitution* 211 (2d ed. 1996) (“[T]he Constitution tells us only who can make treaties for the United States; it does not say who can unmake them.”); see also *Goldwater v. Carter*, 444 U.S. 996 (1979) (finding validity of Presidential termination of treaty a political or unripe question).

<sup>57</sup> See U.S. Army Field Manual 27-10, *The Law of Land Warfare* (international law rules for soldiers).

<sup>58</sup> See Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L. Rev. 649 (2000) (recommending *Chevron* model for deference in foreign affairs cases).

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The similarity between statutory and treaty deference analysis comes from the fact that in both kinds of cases, courts encounter facts that justify what the Court calls *Skidmore* deference – recognition of, but not necessarily absolute deference to the Executive’s “specialized experience and broader investigations and information.”<sup>59</sup> Beyond expertise, to the degree that statutory deference is premised on the greater political accountability of the Executive as compared with the courts, accountability may similarly drive deference to the Executive in treaty interpretation cases.<sup>60</sup> If the Executive has implemented a treaty and people don’t like the President’s approach, courts may reason that voters can seek a democratic remedy. These common factors – experience, information, and accountability – suggest a baseline level of deference, and in some treaty cases courts grant something like *Skidmore* deference. For example, in taxation treaty cases, while the courts say they will give “great weight” to the Executive’s interpretation, they nonetheless do not hesitate to find the Executive in breach in clear case.<sup>61</sup>

But beyond this *Skidmore* point the comparison with statutory deference becomes complex. For readers unfamiliar with administrative law, in the case *Mead v. United States*,<sup>62</sup> the Supreme Court suggested that the appropriate level of deference to the executive can vary. It depends, said the Court, on evidence of Congressional delegation of legislative authority to the Executive, most obviously textual delegation in the statute itself.<sup>63</sup>

That rule has proven complex for statutes,<sup>64</sup> and what it might mean in the treaty context is oblique. For one thing, explicit delegations or other

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<sup>59</sup> *Mead*, 533 U.S. at \_\_.

<sup>60</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1983).

<sup>61</sup> In tax cases, treaties are usually enforced directly by courts without even discussion of whether they are “self-executing.” See, e.g., *Maximov v. United States*, 373 U.S. 49 (1963); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982); *United States v. Stuart*, 489 U.S. 353 (1989); *Kimball v. Commissioner*, 1946 WL 269 (Tax Ct. 1946). An international tax issue was also raised in *Pelham G. Wodehouse*, 1950 WL 8022, T.C.M. (P-H) P 50,161, 1950 PH TC Memo 50,161, Tax Ct., Jun 30, 1950.

<sup>62</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>63</sup> Thomas Merrill and Kristin Hickman originally suggested that *Chevron* deference should attach only in clear cases of delegation and actual agency rule-making. See Thomas Merrill & Kristin Hickman, *Chevron's Domain*, 89 *Georgetown L. J.* 833 (2001). However, in practice courts have relied on all sorts of evidence. See Adrian Vermeule, *Mead in the Trenches*, Chicago Public Law Working Paper No. 37 (2003).

<sup>64</sup> See Adrian Vermeule, *Mead in the Trenches*, Chicago Public Law Working Paper No. 37 (2003).

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evidence only rarely appear in treaties. Treaties, after all, are written to bind two or more governments and therefore do not usually give precise instructions to domestic actors.<sup>65</sup> For another, the relevant intent of a treaty often reflects a joint intent as between many treaty partners. Asking whether Russia intended to delegate to the U.S. Secretary of Commerce power to implement a given treaty is a strange question for an American judge to answer. In the absence of implementing legislation, the search for a treaty's intent to delegate legislative power to the Executive often makes no sense.

Instead, in treaty cases a common different basis for deference cannot be ignored: the President's independent power not only to enforce treaties, but also to set the foreign policy of the United States. This is the matter of foreign affairs deference (itself sometimes called an offshoot of political question deference) and scholars may have overlooked its effects in cases of treaty enforcement.<sup>66</sup>

How can we explain how exactly foreign affairs deference affects treaty cases in cases of alleged executive breach? One answer comes from Louis Henkin, who in a famous article explained this foreign affairs deference in a manner useful for our analysis here.<sup>67</sup> He suggested that foreign affairs deference is simply the consequence of the constitutional delegation of a legislative power to the executive. When a court defers on foreign affairs grounds, says Henkin, that may mean "that the President's decision was within his authority and therefore law for the courts."<sup>68</sup> Henkin's approach suggests that perhaps the most relevant issue in treaty deference cases is a search for a constitutional as opposed to statutory delegation of legislative power to the Executive.

Based on Henkin's work and the analogy to statutory deference we might outline a rough framework for how courts think about the problem of

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<sup>65</sup> The closest approximation is a promise to give the treaty domestic effect, as in this language for the International Covenant on Civil and Political Rights (ICCPR): "Every State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes ... to give effect to the rights recognized in the present Covenant."

<sup>66</sup> Curtis Bradley describes foreign affairs deference as, in fact, comprising four distinct types of deference, "Political Question," "Executive Branch Lawmaking," "International Facts," "Persuasiveness" and "Chevron." See Bradley, *Chevron Deference*, supra n. \_\_ at 61-77.

<sup>67</sup> See Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *Yale L.J.* 597, 610-614 (1976).

<sup>68</sup> *Id.* at 612.

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Executive breach. When the Executive is accused of breaching a U.S. treaty, the question for the Court, as in a statutory case, is what deference to accord the Executive's interpretation of the treaty in question. First, based on subject matter expertise, courts in treaty cases will accord the Executive something like *Skidmore* deference as a matter of course. That's what we see, for example, in tax treaty cases. Yet in some cases, courts grant even greater or total deference. Unlike in statutory cases, such deference rarely results from the fact that a treaty explicitly delegates legislative authority to the Executive (the path to deference that *Mead* and Thomas Merrill suggest).<sup>69</sup> Instead, courts do so when the Constitution has delegated the relevant power to the Executive branch, such as the power to announce a treaty has been terminated.<sup>70</sup> The result is a rough two-level system of deference to the Executive in treaty cases that might explain why the judiciary defers when it does.

It should be admitted, in closing, that this suggested model for thinking about Executive breach is more aspirational than the rest of the paper. Perhaps the most extreme model of judicial deference to the Executive is the case *United States v. Alvarez-Machain*, yet as discussed in Part III, there seems little special about that case that might particularly have justified strong deference – unless the point was to suggest that the Executive should *always* get complete deference in treaty cases.<sup>71</sup> But that legal conclusion seems implausible in light of the Court's relative lack of deference in other treaty cases. In short, the Court is already offering different levels of deference to the Executive in different types of cases. What is suggested here is simply a more principled way to do so.

**Types of Breach – A Signaling Model.** If we accept that the identity of the breacher is crucial in cases of treaty enforcement, how can a court distinguish instances of Executive, Congressional, and State Breach? The answer to this question can make all the difference in an individual case. As we've seen, characterizing a matter as Executive or State breach opens the door to judicial enforcement, as compared with deciding that the fault lies with Congress for failing to implement the treaty in the first place. The

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<sup>69</sup> See See Thomas Merrill & Kristin Hickman, *Chevron's Domain*, 89 *Georgetown L. J.* 833 (2001).

<sup>70</sup> Of course, looking to the constitution for powers reserved to the Executive might also happen in a statutory case; it is just probably less likely.

<sup>71</sup> 504 U.S. 655 (1992).

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question is important, for it provides courts with a means of avoiding the enforcement of a treaty against the Executive or a State. Faced with what looks like the breach of a treaty, the court can, instead, attribute the problem to Congress by calling the treaty non-self-executing and awaiting Congressional action.

The question is hard, and the contribution of Chief Justice Marshall's opinion in *Foster v. Neilson* was to suggest that this question might sometimes be answerable by the text of the treaty. As he said, "when the terms of the [treaty] stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the Judicial, Department."<sup>72</sup> But despite Marshall's intentions, the text of the treaty is at best rarely used by courts to decide to whom the treaty is "addressed." It is true that in some cases, as *Neilson* suggested, the text may be determinative, but such cases are rare.<sup>73</sup> Instead, in most notable treaty cases the language is indeterminative or just ignored. The history of treaty enforcement shows that there is often little relationship between the particular phrasing of a treaty's language and the enforcement of a treaty. It is littered with treaties bearing direct language that were nonetheless left unenforced by the judiciary for want of Congressional action.<sup>74</sup>

Instead of focusing on text, courts search for other evidence. They want to know whether the Court is meant to be the primary enforcer of the treaty in question, and look for signals from Congress or the Executive that might show who is meant to be in charge of enforcing a given treaty. One of the clearest examples, for instance, is where Congress passes implementing legislation. But sometimes even *previous* Congressional activity has convinced courts that judicial enforcement of an inconsistent treaty would be unwelcome. Rightly or wrongly that's the behavior of the courts hearing the commercial and MFN treaties in the 19th Century,<sup>75</sup> and the multinational

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<sup>72</sup> 27 U.S. at 314.

<sup>73</sup> One example is one of the first reported treaty interpretation cases, *Camp v. Lockwood*, 1 U.S. 393 (1788). The language in question said "Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution." The Definitive Treaty of Peace Article V. The Court had little difficulty finding this created an obligation for Congress as opposed to the States.

<sup>74</sup> Some examples include the 1958 Convention on the High Seas, the International Convention on Civil and Political Rights, and the 19th century Commerce and Most Favored Nation treaties.

<sup>75</sup> See Part II.C.

intellectual property treaties in the early 20th century,<sup>76</sup> and the Human Rights conventions of the late 20th century.<sup>77</sup> In other words, courts have taken the fact that Congress has passed prior legislation in the area as evidence that the failure to implement a treaty is the fault of Congress.

A careful observer will notice that this latter practice contradicts the last-in-time rule (the rule that statutes and treaties are of equal legal power, and the latter law will prevail in cases of conflict.)<sup>78</sup> That is correct. Since non-self-execution or other doctrines of deference can be and are used to prevent a later-in-time treaty from abrogating an earlier statute, the last-in-time rule is not a full or accurate portrayal of judicial practice.<sup>79</sup>

While this may seem a novel point, Professor Westel Woodbury Willoughby made it in 1910. He wrote, "There have been few (the writer has is not sure there has been any) instances in which a treaty inconsistent with a prior Act of Congress has been given full force and effect as law in this country. . . . Furthermore . . . Congress has specifically denied that a treaty can operate to modify the arrangements which it, by statute, has provided, and in actual practice, has in every instance succeeded in maintaining this point."<sup>80</sup> In 1953, Edward Corwin pointed out that the case *Cook v. United States* is the only important appellate case to have enforced a later treaty in abrogation of an earlier statute.<sup>81</sup>

The reciprocal version of last-in-time as U.S. law, in other words, stands on the authority of a single Supreme Court case, and *Cook* requires further examination, for it is not entirely what it seems.<sup>82</sup> During prohibition, the Coast Guard used to raid British ships and seize intoxicating liquors. The United States, after much diplomatic friction, had agreed via a 1924 Treaty to restrain the Coast Guard somewhat—it agreed not to board ships outside of one hour's steaming from the coast.<sup>83</sup> In 1932, in breach of

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<sup>76</sup> See Part III.B.

<sup>77</sup> See Part III.C.

<sup>78</sup> For classic statements of the last-in-time rule, see, e.g., *Reid v. Covert*, 354 U.S. 1, 18 (1957); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

<sup>79</sup> But cf. Julian Ku, *Treaties As Laws: A Defense of the Last in Time Rule*, 80 Ind. L. J. (forthcoming Spring 2005).

<sup>80</sup> 1 Westel Willoughby, *On the Constitution of the United States* §306 at 555 (1910).

<sup>81</sup> *The Constitution of the United States, Analysis and Interpretation* 422 (Corwin, ed. 1953).

<sup>82</sup> 288 U.S. 102 (1933).

<sup>83</sup> See 288 U.S. at 118.



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that treaty (but in compliance with a federal statute), the Federal Coast Guard seized Captain Cook's ship and the Collector of Customs charged him with various violations.<sup>84</sup> The Supreme Court rejected the view that the statute was controlling and enforced the treaty, dismissing the violations.<sup>85</sup>

*Cook* is the only Supreme Court case to explicitly enforce a treaty in face of an inconsistent federal statute.<sup>86</sup> But a little noticed fact about *Cook* is that the Supreme Court did not disregard the Executive Branch's interpretation of the treaty, but rather adopted it. The case was decided against the United States at the request of the United States. In his brief to the Court, Solicitor General Thomas D. Thacher asked for reversal, noting that the Coast Guard had disobeyed Justice Department's commands. "The Commandant of the Coast Guard was advised in 1927 that all seizures of British vessels ... should be within the terms of the treaty."<sup>87</sup> In short, the importance of *Cook's* enforcement of a subsequent treaty must be tempered by the fact that the Court may have enforced the treaty in deference to the Executive's interpretation of the treaty.<sup>88</sup> Overall, as Professor Willoughby suggested, it might clearer and truer to treaty practice to say that a later-in-time treaty will override an earlier-in-time statute only when it explicitly does so. This is not meant to diminish the role of treaties in the U.S. system, but rather to reconcile judicial doctrine with long-standing judicial behavior.

**Foreign Breach.** The final and least well-documented cases are those where a plaintiff asks the federal judiciary to remedy a foreign nation's breach of a United States treaty. There is a limited quantity of cases of this

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<sup>84</sup> See 288 U.S. at 108. Frank Cook was fined \$14,268.18 for failing to include liquor in the manifest. See *id.*

<sup>85</sup> See 288 U.S. at 120 ("As the *Mazel Tov* was seized without warrant of law, the libels were properly dismissed.").

<sup>86</sup> The court in *United States v. Schooner Peggy*, 1 Cr. 103 (1801) also enforced a treaty in face of a contradictory statute, but the conflict was not discussed. See, e.g., Edwin Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 *Am. J. Int'l L.* 231, 234-237 (1934); see also Louis Henkin, *Foreign Affairs and the Constitution* 164 (1972).

<sup>87</sup> *Id.* at 105.

<sup>88</sup> Edward Corwin also contemplated that the decision and the Executive's position were "devised to avoid a diplomatic controversy that the low estate of Prohibition at that date would not have been worthwhile." *The Constitution of the United States* 422 (Corwin, ed., 1953).

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type, most concerning suits for torture or other mistreatment.<sup>89</sup> Of the 148 Supreme Court cases addressing the enforcement of treaties surveyed, only one addressed foreign breach.<sup>90</sup> For that reason, this article does not dwell on foreign breach, but offers a brief analysis of how foreign breach fits into the deference model and serves to elucidate and strengthen the model.

When is it appropriate to order a foreign sovereign to live up to its obligations? The judiciary has usually, using the self-execution doctrine, declined to directly enforce treaties against a foreign nation.<sup>91</sup> For example, in *Tel-Oren v. Libyan Arab Republic*,<sup>92</sup> survivors of a terrorist attack in Israel sued Libya, the PLO and various other defendants. In a concurring opinion on whether the 1907 Hague Conventions created a private cause of action, Judge Robert Bork argued that they must be interpreted not to, because:

... the code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals, including prisoners of war, who might think their rights under the Hague Conventions violated in the course of any large-scale war. ... [T]he prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations.<sup>93</sup>

This is a rule of strong deference to the foreign sovereign. As Judge Bork suggested, there are obvious reasons for reluctance to enforce a treaty against another country, as doing so may too closely resemble the judicial exercise of foreign policy. But should deference to foreign nations really be achieved through the use of the non-self-execution doctrine? Deference theory suggests that the U.S. judiciary may be overusing non-self-execution as a rule of deference, and wrongly replacing Congressional or common-law regimes of foreign sovereign immunity. The Foreign Sovereign Immunities Act and the common-law immunities for foreign officials should arguably be

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<sup>89</sup> See, e.g. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir.1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir.1984).

<sup>90</sup> See Appendix, Chart A, Alleged Treaty Breach.

<sup>91</sup> See, e.g., cases described *supra* n. \_\_\_\_.

<sup>92</sup> 726 F.2d 774.

<sup>93</sup> *Id.* at 808.

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the rules for U.S. law and courts as against foreign nations, not non-self-execution.<sup>94</sup>

An example may make the point clear. Say that Britain, in violation of treaties with the United States, refuses to grant one American citizen a visa and refuses another navigation rights in the English Channel. Both American citizens sue Britain under the treaty. To decline to enforce the treaty through the doctrine of non-self-execution is to announce an empty conclusion. Instead, the question should be whether the foreign sovereign enjoys immunity under U.S. law, which it generally does for sovereign but not commercial acts under the Foreign Sovereign Immunities Act.<sup>95</sup> There is little question that granting a visa is a sovereign act, but it might at least be argued that breaking the treaty granting navigation rights, perhaps to protect a British competitor, represents commercial behavior. As it allows such questions to be asked, the Foreign Sovereign Immunities Act is both the better calibrated and also the Congressionally designed instrument for these problems. It is designed to allow some enforcement of U.S. law against foreign powers, while providing immunity for sovereign acts. As regards foreign nations, meanwhile, non-self-execution is simply a rule of over-deference.

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The goal of this paper is to uproot the theory of self-execution as the dominant mode for understanding treaty enforcement in the United States. The deference theory of treaty enforcement teaches that cases of treaty enforcement often have little to do with the nature of the treaty, as self-execution theory suggests. They are, instead, problems of deference. Courts need to decide whether it would be appropriate or not to correct an alleged breach by the Executive, State, Congress, or a foreign government.

The deference theory, while a departure from present theory, is not a deviation from present practice, but rather a better articulation of it. Yet its goal should be clear: deference theory frames questions of treaty enforcement instead of answering them. It is primarily a positive theory. In

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<sup>94</sup> See the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-11. On official immunities, see generally Curtis & Goldsmith, *Foreign Relations Law*, supra n. \_\_ at 635-55.

<sup>95</sup> See 28 U.S.C. §1605(a)(2) (specifying the commercial exception to sovereign immunity).

this article I have not therefore attempted to address the much broader normative question, namely, when exactly should the court owe more or less deference to the State, Executive, or Congress, and for what reasons? Those are questions that cannot be fully answered in a single paper. There are any number of arguments, for example, that enforcement of treaties against states should be more or less aggressive, or that the courts should defer more or less to the Executive's breach of treaties.<sup>96</sup> For too long the dominance of self-execution theory has made it hard to even appreciate how treaty enforcement decisions are made. In other words, the case for the deference model does not depend on any normative view of when treaties should be enforced. Rather, it depends on making clearer the institutional concerns that drive treaty enforcement, helping us understand why and when judges decline to enforce "the supreme Law of the Land."

## **Part II: Early Treaty Enforcement in the United States**

We have portrayed a judiciary in a partnership with Executive and Congress in its enforcement of the treaties of the United States. In specific cases, whether courts enforce treaties depends heavily on the party in breach: whether it is a State, the Executive or Congress whom the court is asked to discipline.

The paper now turns to a survey of the record of treaty enforcement in the United States. The reason for the turning to history is that the patterns discussed here are the best evidence of what the law of treaty enforcement actually is. The method certainly carries certain risks, for taking on such a lengthy period means oversimplification and inevitably overlooking potentially important details. It should be stressed that what follows is not meant as a contribution to the historical literature, but as a means of understanding treaty enforcement better. And what the approach does reveal is the larger and longer trends of treaty enforcement from over the last 200 years, in which the structural considerations affecting treaty enforcement cannot be missed. It is from this standing record of how treaties are actually enforced which the model in Part I is derived.

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<sup>96</sup> See, e.g., Bradley, *supra* n. \_\_ (appropriate deference to Executive); Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 *Texas L. Rev.* 1 (2004) (arguing for greater deference to states in matters of foreign relations).

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The study begin with treaty enforcement in the early Republic. Here, the patterns of strong enforcement as against State breach, described in Part I, were first established.

### ***A. Establishing the Basic Principle of No Deference to States Who Breach, 1780-1865***

“I have no notion of cheating any Body,”<sup>97</sup> said John Adams in 1772, to British negotiators. This single, “impulsive” remark might be said to have laid the foundations of federal judicial treaty enforcement in the United States, and in particular, the idea, discussed in Part I, that a primary duty of the federal judiciary is remedying state breach. Adams’ comment must be understood in context: it was made right after he joined Benjamin Franklin and John Jay in Paris to negotiate the preliminary treaty of Peace with Great Britain. At the time among the most important points in dispute were the debts owed British creditors – debts in excess of £5 million at the beginning of the revolution.<sup>98</sup> Adams’ comment was a concession: it was a promise that would bind the United States, a country, to guarantee the payment of debts, whatever the individual states might think.

Implicit in Adams’ statement was an expansive view of national power that would ultimately lead to expansive judicial enforcement of treaties as against the States. As John Bassett Moore wrote in 1906, Adams’ concession was “remarkable not only as the embodiment of an enlightened policy, but also as the strongest assertion in the acts of that time of the power and authority of the national government.”<sup>99</sup>

This becomes clear when we see that the legal expression of Adams’ promise was Article 4 of the 1783 Treaty, which reads, “Creditors on either side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted.”<sup>100</sup> Notice something about the treaty provision just quoted. To a lawyer it is obvious that enforcing such language will require some authority (a court or agency) with the power to give effect to such language. The language creates an individual right. It protects the “Creditor” who is granted the right to

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<sup>97</sup> Richard Morris, *The Peacemakers* 361 (1965).

<sup>98</sup> Richard Morris, *The Durable Significance of the Treaty of 1783*, in *Peace and the Peacemakers*, 230, 239 (Ronald Hoffman and Peter Albert, eds. 1986).

<sup>99</sup> John Bassett Moore, *Principles of American Diplomacy* (1906).

<sup>100</sup> *The Definitive Treaty of Peace, Signed at Paris, September 3, 1783 Art. IV.*

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recover debts notwithstanding “lawful Impediment.” And would eventually become clear that it was the job of the new federal courts to give legal life to Adam’s promise.

Few courts existed in the 1780s to bring the Creditors’ rights in Article 4 to life. Instead, contradictory state law put the United States in substantial violation of its stated obligation. Historians of the period may disagree over much, but not over the record of State compliance with the Fourth Article of the 1783 Treaty.<sup>101</sup> Typical was the case of Virginia, the state holding the largest share of debt (over £2.3 million, or about half the national debt). In 1777, Virginia passed a law allowing citizens to pay off their British debt by making an equivalent payment in Virginia’s paper currency. As the Virginia pound depreciated, the law became an easy way to discharge British debt, and many did – even Thomas Jefferson and George Washington.<sup>102</sup> A second Virginia Act in 1782 simply declared that “no debt or demand whatsoever, originally due a subject to Great Britain, shall be recoverable in any court in this commonwealth.”<sup>103</sup> No Virginia court would hear an action to recover British debt, nullifying Adams’ promise to the British.

As historian Brinton Coxe wrote in 1893, “when the Framers met in convention the violation of the treaty of the peace by certain of the states was one of the most pressing anxieties of the political situation of the Union.”<sup>104</sup> The history of the framing of the Supremacy Clause is complex and contested, and this Article does not represent original research into its meaning. Rather it highlights a fact over which there is little disagreement: that the evidence shows a *minimum* view of when the framers believed treaties were enforceable. It shows an intent to create a solution to the problem of state violations of the 1783 Treaty of Peace, an intent to create some mechanism for enforcing Adams’ promise to the British, and

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<sup>101</sup> See, e.g., Butler, Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 52-95 (1973) (highlighting Congress’s difficulty in eliminating foreign trade barriers due to state sovereignty and its effect on the ability to enter into commercial treaties).

<sup>102</sup> See Jean Edward Smith, John Marshall, *Definer of a Nation* 153-154 (1996).

<sup>103</sup> 9 Hening’s *Statutes at Large of Virginia* 75-76.

<sup>104</sup> Brinton Coxe, *An Essay on Judicial Power and Unconstitutional Legislation* (1893).

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preventing the States from inadvertently plunging the United States into an unwanted war.<sup>105</sup>

This view of the role of treaty enforcement was quickly confirmed by the judiciary in the *Great British Debt Case*,<sup>106</sup> now usually called *Ware v. Hylton*.<sup>107</sup> The adoption of the Constitution and the opening of the federal courts in 1790 brought a flurry of a particular type of lawsuits: British creditors seeking their debts. In Virginia alone, more than 200 cases were brought in the first year, comprising the vast majority of the federal docket.<sup>108</sup> *Ware v. Hylton* emerged as a test case. It was brought to present exactly the facts that had created trouble during the 1780s: state refusal to enforce the Treaty of Peace.

The facts were typical. Daniel L. Hylton was a well-off James River merchant, who in 1774 borrowed £1500 from Jones & Farell, a leading British creditor. During the war, Hylton discharged his debts using the Virginia statute described above: he paid the Virginia treasury £953 in Virginia pounds, worth £15 specie.<sup>109</sup> In 1790, when the federal courts opened, Ware on behalf of Jones sued under the Article IV of the Treaty of Peace to get the money back. Despite a vigorous defense of Hylton by his lawyer John Marshall, the Supreme Court upheld the rights of creditor Jones, and along the way established the paradigmatic model of judicial treaty enforcement.

Justice Chase, writing the main and longest opinion, held treaties enforceable by the judiciary, and supreme to state law. First, “The people of America have been pleased to declare, that all treaties made before the

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<sup>105</sup> Some of the strongest evidence include the comments of James Madison at the convention, 1 *The Records of the Federal Convention of 1787*, at 316 (Max Farrand ed., rev. ed. 1937), and his writings in the *Federalist* No. 42, which stressed that the new treaty power was “disembarrassed, by the plan of the convention, of an exception, under which treaties might be substantially frustrated by regulations of the States.” Alexander Hamilton in *Federalist* No. 22, moreover, wrote “The treaties of the United States, under the present Constitution [the Articles of Confederation], are liable to the infractions of thirteen different legislatures and as many courts of final disposition... the faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and interests of every member of which it is composed. ... [Treaties must be] submitted to one SUPREME TRIBUNAL.”

<sup>106</sup> See Leonard Baker, *John Marshall, A Life in the Law* 158 (1974).

<sup>107</sup> *Ware v. Hylton*, 3 U.S. 199 (1796).

<sup>108</sup> See Charles Hobson, “The Recovery of British Debts in the Federal Circuit Courts of Virginia, 1790 to 1793,” 92 *Virginia Magazine of History and Biography* 189 (1984).

<sup>109</sup> See Edwards, 576 n. 69 (detailing facts of *Ware v. Hylton*).

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establishment of the National Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded.”<sup>110</sup> Federal judges, he said, have a “duty” to “determine any Constitution, or laws of any State, contrary to that treaty (or any other) made under the authority of the United States, null and void.”<sup>111</sup>

Justice Irdell, in a separate opinion, wrote an emotional elegy to treaties and the need for their enforcement by the judiciary:

None can reverence the obligation of treaties more than I do. The peace of mankind, the honour of the human race, the welfare, perhaps the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions.

The Definitive Treaty of Peace presented boundless views of future happiness and greatness, which almost overpower the imagination ...Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the supreme law in the new sense provided for.<sup>112</sup>

*Ware* was therefore a bold statement of the role of the judiciary in preventing state violations, and was celebrated by many as such.<sup>113</sup> According to 19th century historian Hampton Carson, the Court found:

the Treaty of 1783 was the supreme law, equal to the Constitution itself, in overruling all State laws upon the subject ....

Happy conclusion! A contrary result would have blackened our character at the very outset of our career as a nation ... and prostrated the national sovereignty at the feet of Virginia.<sup>114</sup>

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<sup>110</sup> 3 U.S. 199, 237.

<sup>111</sup> Id. Other Justices used similar language. Justice Paterson (“The act itself is a lawful impediment, and therefore is repealed; the payment under the act is also a lawful impediment, and therefore is made void.”);

<sup>112</sup> 3 U.S. 199, 271-272.

<sup>113</sup> Importantly, *Ware* did not make it clear what role the House of Representatives needed to play in the formation of a valid treaty, a question that emerged in the midst of a ferocious debate over the necessity of full Congressional enactment of the Jay Treaty. See 1 Butler, *The Treaty Making Power of the United States* §§279-293 (1902) (discussing the Jay Treaty debate). While an inconclusive battle, it showed the extent of disagreement over the mechanics of the Treaty Power.



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Unsurprisingly, those more sympathetic to stronger states' rights have often suggested that *Ware's* significance is limited. Congressman and later law professor Henry St. George Tucker took the counterintuitive position that *Ware*, despite its text, "did not decide that the definitive treaty of peace annulled the Law of Virginia."<sup>115</sup> The law, in his view, was already invalid and could therefore not be nullified by the Supreme Court. Modern day scholars, like John Yoo, have also downplayed *Ware's* holding.<sup>116</sup>

From the vantage point of the 21st century, *Ware* can be seen as the founding moment for judicial treaty enforcement against the states. The Court would perhaps never feel on firmer ground enforcing treaties than when enforcing the very treaty whose violation had led to the Constitutional Convention. The Supreme Court proceeded to decide more than 100 cases in the image of *Ware*, and continues to do so today: its significance cannot be overstated.<sup>117</sup> But in no sense did *Ware* answer all of many treaty questions that were to follow. *Ware* was like a "fat pitch." Its facts were an easy target for the Court to bring to life the core purpose of the federal treaty power, negating violative State laws. But a fat pitch only tells you so much about a batter's potential, and similarly *Ware* left much undecided.

### **The Flip Side**

There is an evident flip-side to *Ware*. John Adams' comment – "I have no notion of cheating anybody" – would lead to judicially enforceable rights for British creditors, affirmed finally by the Supreme Court. But the same cannot be said for the British and Loyalist property-owners who were, if anything, greater victims of the Revolutionary War. The final language of the definitive Treaty of Peace stated that, "Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution of all estates, rights, and properties, which have been confiscated

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<sup>114</sup> History of the celebration of the one hundredth anniversary of the promulgation of the Constitution of the United States 170 (Hampton L. Carson, ed.).

<sup>115</sup> See Henry St. George Tucker, *Limitations on the Treaty-Making Power* §154-183 (1915).

<sup>116</sup> Compare Manuel Vasquez, *Treaty-based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, at 1113 (as a general rule, "individuals may enforce the [treaty] obligation in court even though the treaty does not, as an international instrument, confer rights directly on individuals of its own force."); with John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, supra n. \_\_ at 2080 ("At best, then, *Ware* can stand for only a very limited form of self-execution.").

<sup>117</sup> See supra n. \_\_ (collecting cases in the model of *Ware*).

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belonging to real British subjects.”<sup>118</sup> State legislatures, meanwhile, did roughly the opposite: rather than restoring estates and rights, they passed punitive statutes that prevented loyalists from holding office, and denied various rights of citizenship.<sup>119</sup>

The creditor story leads to the first establishment of another fundamental matter in treaty enforcement: that sometimes the text of the treaty will make it clear that the judiciary is not meant to enforce it. That is made clear by *Camp v. Lockwood*,<sup>120</sup> one of the first cases in the first volume of the U.S. Reports. *Lockwood* featured a loyalist named Abiathar Camp, whose estate was seized during the war. The Pennsylvania court of common pleas said, “It is agreed, indeed, by the 5th article, that Congress shall recommend it to the several Legislatures to provide for such a restitution;” however, “no acts for those purposes have been passed by the Legislatures.”<sup>121</sup> Absent an act of the state legislature as recommended, no relief would be forthcoming; the treaty on its own could not compel relief. The case is, in a sense, of limited legal significance, as it was decided by a state court before the adoption of the Constitution. But it already captures a crucial idea: that some treaties will be implemented by Congress, and others enforced by the Judiciary. In this sense, *Camp v. Lockwood*, while almost completely ignored today, is the first coherent articulation of the idea that treaties sometimes should not be enforced by the judiciary.

*Lockwood* relied on the clear text of the treaty to reach this conclusion, and in is that sense the easy case for non-enforcement. In fact, in *Camp v. Lockwood* we find the first – predating the more famous 1829 case *Foster & Elam v. Neilson*<sup>122</sup> text-based finding that a treaty is not written to be enforced by the judiciary. The very same idea was also expressed in *Ware*. According to Justice Chase: “No one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature.”<sup>123</sup> Justice Chase disagreed that Article

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<sup>118</sup> The Definitive Treaty of Peace Article V.

<sup>119</sup> For example, in 1779 New York passed “An Act for the Forfeiture and Sale of Estates of Persons who have adhered to the Enemies of this State, and for declaring the Sovereignty of the People of this State, in respect to all Property within the Same.” And in 1783 it passed “An Act to preserve the freedom and independence of this state” which prevented Tories from holding office. *Id.*

<sup>120</sup> 1 US 393 (1788).

<sup>121</sup> 1 U.S. 393 (1788).

<sup>122</sup> 27 U.S. 253 (1829).

<sup>123</sup> 3 U.S. 199, at 244.

IV of the Treaty of Peace was such a stipulation; he instead saw it as a contract binding on the judiciary: "I consider the fourth article in this light, that it is not a stipulation that certain acts shall be done, and that it was necessary for the legislatures of individual states, to do those acts; but that it is an express agreement, that certain things shall not be permitted the American courts of justice; and that it is a contract, on behalf of those courts, that they will not allow such acts to be pleaded in bar, to prevent a recovery of certain British debts."<sup>124</sup> In other words, the doctrine of textual non-self-execution, often said to have been enunciated 40 years later in *Foster v. Neilson*,<sup>125</sup> added only a little to what was already obvious in 1788 and 1795.

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The next Part, covering the period 1800-1860, demonstrates two points. First, it chronicles a "golden age" of judicial treaty enforcement, where the model of treaty-enforcement born in *Ware* for creditor interests was extended to a range of new commercial treaties. The judiciary in this period very actively and aggressively enforced treaties as against State laws that discriminated against foreigners.

Second, in this period the judiciary began to face a different problem: Congressional failure to implement a treaty as written, or Congressional breach. While the Court might in this period have chosen to offer remedies for broken promises to other nations, it instead began to defer to even what seemed like Congressional mistakes that put the United States in breach. Born here is the policy of strong deference to Congressional implementation of a treaty discussed in Part I.

***B. Expanding the Basic Principle and Introducing Deference to Congress as Breacher: Commercial Treaties, 1800-1860***

According to John Quincy Adams, "As the Declaration of Independence was the foundation of all our municipal institutions, the preamble to the treaty with France [America's first commercial treaty] laid the corner-stone for all our subsequent transactions of intercourse with foreign nations."<sup>126</sup> He said that "[t]he two instruments were parts of one

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<sup>124</sup> Id.

<sup>125</sup> *Foster & Elam v. Neilson*, 27 U.S. 253 (1829).

<sup>126</sup> John Quincy Adams, quoted in John Bassett Moore, *Principles of American Diplomacy* (1906).

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and the same system matured by long and anxious deliberation of the founders of this Union in the ever memorable Congress of 1776.”<sup>127</sup>

The significance of the treaties modeled on the 1778 Treaty with France did grow to great prominence. In this, the golden age of judicially-enforced treaty law, the federal judiciary did a brisk business using treaties to protect the economic rights of aliens from state incursion. It had a ready partner in the United States Department of State. After a slow start, American diplomats went on something of a world-wide sales blitz, signing dozens of commercial treaties with nearly every country of significance in a determined effort to break a colonial trading system that excluded American products. From this era date numerous treaties of “Amity and Commerce,” or “Peace, Friendship and Navigation,” most of similar content.<sup>128</sup>

The original model for all of these 19th century commercial treaties, as John Quincy Adams suggested, was the 1778 Treaty of Commerce with “His Most Christian King” (the French Sovereign).<sup>129</sup> The 1778 Treaty in fact embodies a principle of equality and legal reciprocity innovative not only as a principle of trade, but also for the judicial role contemplated. The preamble reads:

His most Christian Majesty and the said United States ... tak[e] for the Basis of their Agreement the most perfect Equality and Reciprocity, and by carefully avoiding all those burthensome Preferences, which are usually Sources of Debate, Embarrassment and Discontent; by leaving also each Party at Liberty to make, respecting Commerce and Navigation, those interior Regulations which it shall find most convenient to itself; and by founding the Advantage of Commerce solely upon reciprocal Utility, and the just Rules of free Intercourse; reserving withal to each Party the Liberty of admitting at its pleasure other Nations to a Participation of the same Advantages.<sup>130</sup>

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<sup>127</sup> Id.

<sup>128</sup> See, United States, *Treaties and conventions concluded between the United States of America and other powers, since July 4, 1776 (1873)* (collection of all treaties signed by the United States, most commercial).

<sup>129</sup> In fact, much was taken from an early model commercial treaty that France would not accept. See John Bassett Moore, *Principles of American Democracy* (1906).

<sup>130</sup> Treaty of Amity and Commerce Between the United States and France, February 6, 1778, Preamble.

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An important part of such “perfect Equality and Reciprocity” was a provision guaranteeing the economic rights of French and U.S. citizens in each others’ territories. Article XI declared that Americans in France were to be accorded the economic rights of French citizens.<sup>131</sup> In exchange, French citizens were to enjoy reciprocal economic rights on American territory.<sup>132</sup>

Similar provisions can be found in the many commercial treaties that American diplomats managed to negotiate in the first half of the 19th century. The United States promised the Austrian King in 1829 that Austrian citizens “shall enjoy ... the same security, protection and privileges as natives of the country wherein they reside.”<sup>133</sup> Using almost identical language, the United States and King of Belgium agreed that, “the same security and protection which is enjoyed by the citizens or subjects of each country shall be guaranteed on both sides” in 1845.<sup>134</sup>

As the State Department signed commercial treaties with much of the Europe, the federal judiciary enforced these treaty-based rights aggressively, particularly as against discriminatory State legislation. Consider, for example, the fairly startling case of *Chirac v. Chirac*.<sup>135</sup> A Maryland land statute, passed in 1780, created special inheritance rules for Frenchmen. It gave them the right to own land and devise it to heirs, but also provided if a Frenchman died without a will, all land would revert to the State unless his legitimate relations were American residents.<sup>136</sup> This affected Jean Baptiste Chirac, a naturalized Frenchman. When he died, Monsieur Chirac left behind heirs in France, a bastard son in Maryland, and no will to be found. Maryland seized Chirac’s land and gave it to the American, and the French heirs sued in U.S. court.

The Supreme Court enforced the treaty directly in an opinion that is remarkable in many ways. First, despite the urgings of counsel, the Court

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<sup>131</sup> 1778 Treaty, Art. XI. (“The Subjects and Inhabitants of the said United States, or any one of them shall not be reputed Aubains [aliens] in France.”).

<sup>132</sup> Id. (“The Subjects of the most Christian king [the French] shall enjoy on their Part, in all the Dominions of the sd. States, an entire and perfect Reciprocity relative to the Stipulations contained in the present Article.”).

<sup>133</sup> Treaty of Commerce and Navigation between the United States of America and His Majesty the Emperor of Austria, signed August 27, 1829, ratified February 10, 1831; Article I.

<sup>134</sup> Belgian-American Treaty of Commerce and Navigation, November 10, 1845; Article I.

<sup>135</sup> 15 U.S. (2 Wheat.) 259 (1817).

<sup>136</sup> 15 U.S. 259.

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made no effort whatsoever to reconcile treaty and state statute, but instead simply interpreted the treaty as the source of Chirac's rights. This is an early establishment of the rule of no deference to State law discussed in Part I. Second, Chief Justice Marshall paid no attention to the fact that the treaty may have intruded into an area of traditional State prerogative (land ownership and escheat). The opinion gives an impression of a treaty power not only preemptive of state law, and also insensitive to federalism limits. It foreshadows the broad scope of the treaty power vis-à-vis states announced in *Missouri v. Holland*.<sup>137</sup> And finally, the Court enforced the treaty even though it was abrogated before Chirac had died! Chief Justice Marshall reasoned that since Chirac acquired the property when the treaty was in force, he obtained it with all rights immediately vested, including rights of assignment equivalent to a U.S. citizen. There were numerous ways in which the Court could have favored the domestic defendant or softened the effects of the treaty in deference to the State, but the court declined to do so. Instead it treated the 1778 Treaty as a broad charter of protection for aliens against discriminatory State law. Dozens of other inheritance cases including the famous *Fairfax's Devisee v. Hunter's Lease*, were in the same vein.<sup>138</sup>

### **The Flip Side: Tariffs – When Congress Breaches**

These same treaties of Friendship & Commerce, while enforced vigorously against the states, would also be used to first define how the judiciary ought handle Congressional acts inconsistent with American treaty obligations. The treaties of Friendship were trade treaties, and while they commonly included provisions protecting aliens in the United States, stipulations as to tariffs were (as with modern trade agreements) the *sine qua non*. Some of the friendship and commerce treaties concluded in the first half of the 19th century include an appendix listing the tariffs to be paid on various articles.<sup>139</sup> More common, however, are “most favored nation”

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<sup>137</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>138</sup> See, e.g., *Hauenstein v. Lynham*, 100 U.S. 483 (1879); see also, supra n. \_\_, (list of cases enforcing treaties against the states).

<sup>139</sup> See, e.g., Treaty with China, concluded July 3, 1844, ratified December 31, 1845, appendix.

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provisions, obligating the contracting parties to give each other the lowest tariffs charged.<sup>140</sup>

But what legal status did such stipulations have in the United States? Its important to notice some of the similarities between the tariff bindings and the privilege and immunity (P&I) provisions seen in *Chirac v. Chirac*. Unlike a clear case like *Lockwood*, the language of both was no more or less obviously meant for judicial enforcement. Overcharging on imports could surely create the same kind of international tension that the mistreatment of aliens might. And so importers argued in court, many times and in many different ways, that stipulated tariffs should be directly enforceable as the “supreme Law of the Land.”

But they lost. Despite similar language and circumstances courts nonetheless treated tariff stipulations differently from privilege and immunity stipulations, or aliens differently from importers. The only clear difference is who was alleged to have breached the stipulations. The tariffs cases alleged, in essence, wrongful implementation by Congress, while the P&I provisions were violated by the states.

The leading 19th century tariff case, *Taylor v. Morton* (1855), illustrates this difference.<sup>141</sup> In 1832, Russia and the United States signed one of the many Friendship and Commerce treaties characteristic of the era. The U.S. promised Russia Most Favored Nation (MFN) status – that it would charge Russian goods the lowest tariff granted any other nations. Later, in the 1842 Tariff Act, Congress set a tariff of \$40 per ton for all hemp, with an advantageous tariff for Manilla and Bombay hemp, at \$25 per ton. Since Russian hemp, according to the plaintiffs, was the same, or “like” product as Bombay hemp, the treaty suggested that importers of Russian hemp should also be charged \$25 per ton. They sued for the return of their money.

The *Taylor* case raises interesting questions. First, the treaty language in question gives no clues as to whether it should be enforced by the judiciary. It reads: “No higher or other duties shall be imposed on the importation into the United States of any [Russian] article ... than are or shall

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<sup>140</sup> Many of the most favored nation provisions during this era, however, were understood as “qualified” MFN provisions, meaning that countries did not automatically get the benefits of negotiated deals without making some concession themselves. See Jackson, Trade, qualified MFN explanation.

<sup>141</sup> *Taylor v. Morton*, 23 F.Cas. 784 (Cir. C. Mass. 1855) affirmed 67 U.S. 481 (1862).

be payable on the like article, being the produce or manufacture of any other foreign country.”<sup>142</sup> This is not language, like in *Lockwood*, that says ‘Congress shall pass,’ or even, as in *Foster v. Neilson*, uses the future tense. It stipulates that no tariffs “shall be imposed,” which sounds like a direct command.

Second, the Tariff Act and the Russian treaty are not clearly in conflict, nor is it obvious that the 1842 Act was intended to abrogate the treaty stipulation. The plaintiffs argued, for example, that the meaning of Congress’ distinction between Bombay and other forms of hemp should have been read to give Russian hemp the benefit of the lowest tariff rate. This seems to be a plausible position, particularly given the injunction of *Charming Betsy* to choose the interpretation of a statute that, if at all possible, does not conflict with a treaty. The Court, in other words, might have easily sought to repair or remedy what looked like thoughtless Congressional breach of an American promise, and declare the appropriate tariff \$25.

Nonetheless, Justice Curtis, riding Circuit, found the treaty to have no effect cognizable by a court – it was not “a rule of action” for “the courts of justice.” He justified his decision using a matter crucial for informing the model in Part I, for Justice Curtis relied not on treaty text or interpretation, but institutional deference to Congress. Justice Curtis does not even quote the language of the treaty in the opinion. Instead, he wrote “it is quite plain, it cannot be competent for the court to go any further than a determination that the case is within the treaty. If congress legislates in subordination to the treaty, viewed as municipal law, it is not material what its reasons were...”<sup>143</sup> Given Congress’s power to terminate treaties, and its ongoing role in setting tariffs, he said, there might have been many reasons that Congress wanted to violate the treaty with Russia. How can a judge ask, for example: “whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party ... [or] whether the views and acts of a foreign sovereign ... have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise?”<sup>144</sup>

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<sup>142</sup> Treaty of December 18, 1832 with Russia, Art. [x].

<sup>143</sup> 23 F. Cas. 784, at 786.

<sup>144</sup> 23 F. Cas. 784, at 787.



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Even if Congress had made a mistake (which may have been the case), the judiciary was unwelcome in the interpretation of the Tariff laws' standing vis-à-vis the treaty: "It is wholly immaterial to inquire whether they [Congress] have, by the act in question, departed from the treaty or not ...." For "[i]f by the act in question they have not departed from the treaty, the plaintiff has no case." On the other hand, "If they [Congress] have [breached the treaty], their act is the municipal law of the country, and any complaint, either by the citizen, or the foreigner, must be made to those, who alone are empowered by the constitution, to judge of its grounds, and act as may be suitable and just."<sup>145</sup>

However, *Morton* did not give any sense of what should happen to a tariff treaty adopted later than a tariff statute, a question first addressed in the 1888 case *Whitney v. Robertson*.<sup>146</sup> *Whitney* featured another MFN treaty clause, in a treaty with the Dominican Republic, ratified in 1867. The tariff statute was amended in 1870 to reflect the treaty. Then, in 1876, the United States signed a treaty with Hawaii entitling Hawaii to export sugar to the U.S. duty-free, but the tariff laws were not amended by Congress. This led importers of Dominican sugar to argue that they too were entitled to duty-free imports because the Hawaiian treaty was the last-in-time law of the United States. Read together with the 1867 treaty, it entitled the Dominican Republic the same duty-free imports given Hawaii.

The Court rejected the argument. Again, there is no language in the treaty suggesting that it ought not be enforced by the judiciary, or that there is an obligation due solely to Congress. Furthermore, the Hawaiian treaty was in fact the last "expressed will of the sovereign." But the Court simply decided that Dominican sugar was still governed by the 1870 statute. Potential beneficiaries of the 1876 Hawaiian treaty, such as the Dominican Republic, needed to await Congressional action. The court could have held the later-in-time treaty supreme to the 1870 statute, and of immediate effect. But it didn't.

By this point some central principles of treaty enforcement had been stated for the States and Congress. These principles were tested and reaffirmed in the last major episode of comparative state and Congressional

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<sup>145</sup> Id.

<sup>146</sup> 124 U.S. 190 (1888). See also *Bartram v. Robertson* 15 Rep. 212 (1888) (presenting same facts but Danish treaty).

breach of U.S. treaty obligations – the history of the Burlingame treaty and Chinese immigration.

***C. The Difference Between State and Congressional Breach: Immigration & Chinese Exclusion, 1860-1945***

In April 1867, the Chinese Empire's first overseas diplomatic mission arrived on the shores of San Francisco, marking China's first effort to join the modern diplomatic system.<sup>147</sup> The Chinese, unusually, had appointed an American to head the mission: Anson Burlingame, Envoy Extraordinary and Minister Plenipotentiary. The trade treaty Burlingame would negotiate on behalf of China would become central to more than two decades of judicial treaty-enforcement controversy.

The story of the Burlingame Treaty and its fate in U.S. courts has enormous relevance for the role of the federal judiciary in the enforcement of treaties. It reestablished and solidified a basic dynamic described in Part I – vigorous enforcement as against state breach, and a judicial recognition of Congress' power to breach and subvert a Treaty signed by the United States. Yet it did so under difficult conditions – striking down highly popular, yet discriminatory, State laws.

Anson Burlingame negotiated one of the most liberal of commerce treaties the United States has ever signed. Among its provisions, the United States agreed to a rule of unlimited and unrestricted immigration between China and the United States.<sup>148</sup> The treaty recognized a natural right to immigrate<sup>149</sup> and “the mutual advantage of the free migration and

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<sup>147</sup> The story is recounted fully in Fredrick Wells Williams, *Anson Burlingame and the First Chinese Mission to Foreign Powers* (1912); see also Jonathan Spence, *The Making of Modern China* Ch. 9, 194-215 (1990)(detailing efforts to reform and modernize the Chinese empire in the late 19th century).

<sup>148</sup> As Secretary of State William Seward said at the time, “The essential element of ... commerce and trade” with China, is “the free emigration of the Chinese to the American [continent].” Quoted in Henry Tsai, *China and the Overseas Chinese* 25 (1983).

<sup>149</sup> Additional Articles to the Treaty Between the United States and Tsa Tsing Empire of the 18th of June, 1858, Signed July 28, 1868, ratified November 23, 1869, Art. V [hereinafter, *Burlingame Treaty*] (“The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance.”).

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emigration” of citizens “for purposes of curiosity, of trade, or as permanent residents.”<sup>150</sup>

For Chinese residing in the United States, the Treaty guaranteed rights similar to those placed in European commerce treaties. Chinese citizens, the treaty proclaimed, “shall enjoy the same privileges, immunities or exemptions in respect to travel or resident as may there be enjoyed by citizens of the most favored nation,” and also “entire liberty of conscience,”<sup>151</sup> and exemption “from all disability or persecution on account of their religious faith.”<sup>152</sup> But unlike in the case of the European commerce treaties, there was immense popular support for blocking Chinese immigration and restricting Chinese economic rights.

The Western states largely ignored the Burlingame Treaties’ promises, and by the 1870s had enacted multiple measures to block the immigration of new Chinese workers and restrict the rights of those already in the United States. The Chinese, as Burlingame’s comments show, were at first a curiosity and source of labor. But by the 1870s the Chinese became a scapegoat for the West Coast’s economic woes, seen as unwilling to assimilate, and despised for their willingness to work harder for less money. Examples of anti-Chinese signs of the era read “THE COOLIE LABOR SYSTEM LEAVES US NO ALTERNATIVE” and “MARK THE MAN WHO WOULD CRUSH US TO THE LEVEL OF THE MONGOLIAN SLAVE.”<sup>153</sup>

In 1879 the Californian Constitution was amended to deny Chinese the right to vote in State elections, to permit placing Chinese in ghettos, and most radically, to ban all employment of Chinese workers.<sup>154</sup> It reflected the influence of the California’s Workingman Party, whose slogan was “The Chinese Must Go!”<sup>155</sup> The new California Constitution now read: “No corporation shall ... employ, directly or indirectly, in any capacity, any Chinese or Mongolians.”<sup>156</sup>

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<sup>150</sup> Id.

<sup>151</sup> Burlingame Treaty Art. VI.

<sup>152</sup> Burlingame Treaty Art. IV.

<sup>153</sup> Roger Daniels, *Asian America* 38 (1988).

<sup>154</sup> *In re Tirburcio Parrott* 6 Sawyer 349.

<sup>155</sup> Saylor, *Laws Harsh as Tigers* (1995).

<sup>156</sup> California Constitution of 1879, Article 19, §2.

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But the Chinese immigrants were organized and regarded the federal judiciary and the Burlingame Treaty as their protectors.<sup>157</sup> They “turned to the federal courts at San Francisco ... and enjoyed remarkable success.”<sup>158</sup> Following the model of *Ware v. Hylton*, the federal judiciary repeatedly struck the discriminatory state provisions under the Burlingame Treaty. It was a successful test of the founding principle of treaty supremacy as against even highly popular state constitutional provisions.

In 1880, federal judges first struck down the California Constitution. In *In re Tiburcio Parrott*,<sup>159</sup> Judge Sawyer, relying on *Ware* and subsequent law, struck down the California constitutional ban on the employment of Chinese workers as a violation of the Burlingame Treaty.<sup>160</sup> He asserted that Burlingame had recognized a “natural right” to immigrate:

This absolute, fundamental and natural right [to immigrate] was guaranteed by the national government to all Chinese.... It is one of the 'privileges and immunities' which it was stipulated that they should enjoy.... And any legislation or constitutional provision of the state of California which limits or restricts that right to labor to any extent, or in any manner, not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty.<sup>161</sup>

In dozens of subsequent cases the federal judiciary struck numerous other anti-Chinese statutes, including restrictions on fishing in public waters,<sup>162</sup> immigration of “lewd” women,<sup>163</sup> operating businesses in San Francisco,<sup>164</sup>

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<sup>157</sup> See generally, Lucy E. Saylor, *Laws Harsh as Tigers* xv (1995) (“leaders in the Chinese community spoke with ease and familiarity about the rights owed them under treaties and the Constitution”); Charles McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 *California L. Rev.* 529 (1984) (describing the organization of the Chinese community).

<sup>158</sup> Saylor, *Laws Harsh as Tigers* xv.

<sup>159</sup> 1 F. 481 (1880).

<sup>160</sup> *In re Tiburcio Parrott*, C.C., 1 F. 481 (1880).

<sup>161</sup> *Id.*

<sup>162</sup> *In re Ah Chong*, 6 Sawyer 451 (1880) (State law prohibiting aliens from fishing in public waters void due to contravention with Burlingame treaty).

<sup>163</sup> *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

<sup>164</sup> *In re Lee Sing*, 43 Fed. 359 (1890).

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anti-Chinese covenants in deeds,<sup>165</sup> and zoning rules for Chinese laundries.<sup>166</sup> The rhetoric of *Baker v. Portland*,<sup>167</sup> which invalidated Portland's anti-Chinese employment laws, was typical. Oregon District Judge Deady agreed with the plaintiffs that the Burlingame Treaty was a promise to Chinese immigrants to full privileges and immunities, preemptive of inconsistent municipal regulations.<sup>168</sup> "An honorable man," he wrote, "keeps his word under all circumstances, and an honorable nation abides by its treaty obligations, even to its own disadvantage."<sup>169</sup> Upholding Deady's opinion, Justice Field, though known for his personal contempt for the Chinese race, nonetheless wrote that "the anti-Chinese legislation of the Pacific coast is but a poorly disguised attempt on the part of the state to evade and set aside the treaty with China, and thereby nullify an act of the national government. . . . Between this and 'the firing on Fort Sumter,' by South Carolina, there is the difference of the direct and indirect – and nothing more."<sup>170</sup>

A particularly bizarre case was that of an anti-Chinese ordinance in San Francisco that mandated immediate haircuts for all jailed persons. At the time, apparently, Chinese were filling the jail cells as a result of civil disobedience.<sup>171</sup> Since Chinese law and custom required that Chinese men to keep their hair in a long queue, the law selectively punished the Chinese. Justice Field struck the law, calling it "legislation unworthy of a brave and manly people."<sup>172</sup>

But even as the federal judiciary struck state anti-Chinese laws, the national mood and the federal government inclined toward a change in federal policy. As Justice Field (who had personally struck many of the state laws) wrote: "The people of the coast saw great danger that at no distant day

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<sup>165</sup> *Gandolfo v. Hartman*, 49 Fed. 181 (1892) (striking down covenant not to convey or lease to a Chinaman).

<sup>166</sup> *In re Quong Woo*, 49 Fed. 181 (1892). On the other hand, Justice Field upheld a law restricting the operating hours of laundries (requiring them to be closed between 10pm and 6am) as non-discriminatory. See *Barbier v. Conolly*, 113 U.S. 27 (1885).

<sup>167</sup> 2 F.Cas. 472, 475 (D. Oregon 1879)

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Baker v. Portland*, 2 F.Cas. 472, 475 (D. Oregon 1879).

<sup>171</sup> See Charles McLain & Laurene Wu McClain, *The Chinese Contribution to American Law*, in *Entry Denied: Exclusion and the Chinese Community in America 1882-1943*, 3, 9 (Sucheng Chan, ed.).

<sup>172</sup> *Ho Ah Kow v. Nunan*, 5 Sawyer 552, 564 (1879).

that portion of our country would be overrun by [the Chinese], unless prompt action was taken to restrict their immigration.”<sup>173</sup> In his words, “So urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific coast and from private individuals, that congress was impelled to act on the subject.”<sup>174</sup>

After much agitation and petition, Congress in 1879 wrote its first Chinese immigration restrictions, H.R. 2423, known as the “Fifteen Passenger Bill.” The law would have restricted steamships to fifteen Chinese passengers per voyage to the United States. But President Rutherford Hayes, citing the Burlingame Treaty, vetoed the bill (“saving the nation’s honor”), arguing that it was his legal obligation.<sup>175</sup> Hayes was of the old school: he believed in diplomatic treaty amendment, not Congressional abrogation, and he promptly sent a commission to China to negotiate changes to the Burlingame Treaty. The result was the 1880 Immigration Treaty, which achieved some of what the exclusionists wanted. It stated that the United States could “regulate, limit or suspend [immigration] ... but not absolutely prohibit it.”<sup>176</sup> But it also provided rights for Chinese already in the United States, mandating that Chinese residents “be allowed to go and come of their own free will and accord, and ... be accorded all the rights privileges and immunities ... of the most favored nation.”<sup>177</sup>

Despite the efforts of Presidents Hayes and later President Arthur to veto direct Congressional abrogation, the United States would soon breach even the renegotiated treaty. In 1882 the first Chinese Exclusion Act passed Congress with the preamble “the coming of Chinese laborers to this country endangers the good order of certain localities.”<sup>178</sup> It was styled an enactment of the 1880 treaty and suspended Chinese labor immigration for ten years (a suspension later made permanent). In 1888 Congress enacted a clear breach of its treaties with China with the Second Chinese Exclusion Act.<sup>179</sup> The Act made it illegal for Chinese residents who had left the United States to ever

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<sup>173</sup> The First Chinese Exclusion Case, 130 U.S. 581, 596 (1889).

<sup>174</sup> Id.

<sup>175</sup> Shirley Hune, *Politics of Chinese Exclusion: Legislative-Executive Conflict 1876-1882*, 9 *Amerasia* 5, 15 (1982) (“As I see it, our treaty with China forbids me to give it my approval.”).

<sup>176</sup> Immigration Treaty of 1880, signed November 17, 1880, ratified July 19, 1881, Art. I.

<sup>177</sup> Id. at Art. II.

<sup>178</sup> Act of May 6, 1882, 47th Cong. 1st Sess.

<sup>179</sup> Act of May 6, 1888, 25 U.S. Stat p. 504.

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return.<sup>180</sup> This time, no Presidential veto came. Instead, President Grover Cleveland justified the exclusion, pronouncing the Chinese “ignorant of our constitution and laws, impossible of assimilation with our people, and dangerous to our peace and welfare.”<sup>181</sup>

Faced with conflict between the treaty and statute, the federal courts in California and the Supreme Court decisively held that a later-in-time, inconsistent statute abrogates an inconsistent treaty. Justice Stephan Field was again the central player, writing both the important District Court and Supreme Court decisions.

The first of the *Chinese Exclusion Cases* featured Chae Chan Ping, who had lived in the United States since 1875. He had made a trip to China to see his family after obtaining a prescribed certificate of reentry, but was stopped at the border pursuant to the new treaty. He sued. Justice Field denied that any right to return had vested, and upheld the statute in its entirety. He conceded that “the act of 1888 is in contravention of express stipulations of the treaty of 1868, and of the supplemental treaty of 1880,” but held that “it is not on that account invalid, or to be restricted in its enforcement.”<sup>182</sup> Other cases were similar; including *United States v. Lee Yen Tai*, which refused to find that a new, 1894 treaty had abrogated Congress’ 1882 exclusion statute, and reinforced the suspicion that later-in-time treaties will only rarely be enforced as against inconsistent prior statutes.<sup>183</sup>

The Burlingame era – an era that only really ended in the 1960s, with normalization of Chinese immigration – teaches much about what the American judiciary will and will not do with its power to enforce treaties. It feels comfortable defending the rights of aliens against State encroachment. The two San Francisco district court judges, Ogden Hoffman and Lorenzo Steward, and Justice Field, in his appearances as Circuit Justice, were all predisposed to enforce U.S. treaties on behalf of the alien to preempt

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<sup>180</sup> Act of May 6, 1888, 25 U.S. Stat p. 504 (“[It is] unlawful for any Chinese [resident] laborer ... who shall of departed ... and not returned before the passage of this act, to return to, or remain in, the United States.”).

<sup>181</sup> Quoted in Michael Hunt, *The Making of a Special Relationship: The United States and China to 1914*, 92 (1983).

<sup>182</sup> *The First Chinese Exclusion Case*, 130 U.S. 583, 628 (1889).

<sup>183</sup> See *United States v. Lee Yen Tai*, 185 U.S. 213, 220-223 (1902); See also 2 Butler, *The Treaty Making Power of the United States* §§279-293 (1902) (describing the remainder of the Chinese exclusion cases).

contrary state law, even in face of virulent popular opinion and their own apparently low regard for the Chinese as a people.<sup>184</sup> On the other hand, the exact same judges deferred completely to Congress' expressed desire to break the Chinese treaties. While perhaps the distinction was predictable, the difference made by the institution could not be clearer. The only remaining question was this: what would happen if the Executive were sued for failing to obey a treaty?

***D. Enforcement Against the Executive: Extradition from the Founding to the Present***

By the late 19th Century, several of the principles of treaty enforcement had been stated. Courts, on the model of *Ware, Chirac*, and the State Chinese exclusion cases, would enforce treaties to prevent States from putting the Union in breach of its obligations. Meanwhile, through the tariff cases and federal Chinese exclusion cases, the Courts had begun to respect a separate domain of Congressional treaty implementation. Presented with cases where Congress failed to implement a treaty, or passed statutes inconsistent with treaty obligations, courts declined to offer a remedy. Chief Justice Marshall's rationale in *Foster v. Neilson* was often cited — that certain treaties by their terms create duties for the legislature, not the courts. Yet the actual cases rarely depended on the text of the treaties. They seem instead to depend on the analysis of *Taylor v. Moore*: that Congress has the power to terminate treaty obligations, and to such decisions, courts must defer, on the notion that Congressional decisions might depend on information inaccessible to the judiciary.

All of this left open the question of Executive breach. What would courts do when faced with cases where the Executive branch had failed to live up to its treaty obligations?

The small size of the Executive branch in the 18th and 19th centuries meant few opportunities for the Executive to violate international treaties in a judicially cognizable way. But while small, the Executive branch did employ prosecutors. It was their alleged breaches of international law in matters of extradition that first raised the question of whether the judiciary would order the executive to obey treaties. While quite involved and

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<sup>184</sup> See Christian Fritz, *A Nineteenth Century Habeas Corpus Mill: The Chinese Before the Federal Courts in California*, 32 *American Journal of Legal History* 347, 350-351 (1988) (describing Field's opinion of the Chinese people).



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confusing, the history of the enforcement of extradition treaties gives the first insights into the hardest question posed in Part I – when does the judiciary enforce treaties against the Executive?

As Ruth Wedgwood writes, the history of extradition begins with a “revolutionary martyrdom.”<sup>185</sup> The first American extradition agreement was in the controversial Jay Treaty of 1794, where in Article 27 the United States promised to “deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other....”<sup>186</sup> In 1798, the British demanded the handover of a mutineer and murder suspect named Jonathan Robbins. As Congress had passed no implementing legislation, the question was whether the treaty alone gave courts enough power to extradite Robbins. Robbins said “no,” claiming to be a loyal U.S. citizen, pressed into British navy service, whose mutiny was patriotic. But Judge Thomas Bee, with President Adams’ consent, handed over the suspect based solely on the power of the treaty. Robbins was promptly tried and hanged.<sup>187</sup>

The Robbins affair ignited a political firestorm. Judge Bee, said the *Aurora* newspaper, had held that “A TREATY made by an AGENT of the PEOPLE was PARAMOUNT to the CONSTITUTION under which the agent was chosen.” Members of Congress quickly proposed the censure or impeachment of Adams for his perceived treachery.<sup>188</sup> Adams managed to survive censure (though not the election) thanks in part to an impassioned defense by Congressman John Marshall.<sup>189</sup> But so severe was the political fallout that the United States refused to extradite anyone for any reason for more than forty years.

It was not until 1842 that a new extradition treaty with Britain was signed, and not until the late 1870s that the question of executive breach arose. When it did, the question was linked closely to a familiar problem:

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<sup>185</sup> Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *Yale L.J.* 229 (1990).

<sup>186</sup> *Treaty of Amity, Commerce and Navigation Between His Britannic Majesty and the United States of America*, art. 27, Nov. 19, 1794, 8 Stat. 116, 129, T.S. 105.

<sup>187</sup> *United States v. Robbins*, 27 F. Cas. 825, 827-33 (D.S.C. 1799) (No. 16,175). Two detailed histories of the Robbins case are Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *Yale L.J.* 229 (1990), and John T. Parry, *The Lost History Of International Extradition Litigation*, 43 *Va. J. Int'l L.* 93 (2002).

<sup>188</sup> See Wedgwood, *supra* n. \_\_, at 323, 334.

<sup>189</sup> See Wedgwood, *supra* n. \_\_ at 325.

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state misbehavior placing the Union in breach of its treaties. The issue was “specialty.” That is the principle that it is unlawful to charge an extradited subject with offenses other than the specific crime for which extradition is requested and granted.

Anglo-American diplomatic tension brought specialty to the forefront. In a manner that might be considered unusual today, the 1842 treaty’s extradition language was drafted by Justice Story as a favor to Secretary of State Daniel Webster. It enumerated seven specific offenses as grounds for extradition: “murder, or assault ... or piracy, or arson, or robbery, or forgery, or the utterance of forged paper...”<sup>190</sup> Story purposely excluded any political offenses, as to not “hazard the ratification by our Senate from popular clamour.”<sup>191</sup> The treaty also contained no explicit specialty requirement, and for several decades, extradition proceeded without regard to whether the crime charged was the crime of extradition.

That changed as, in the late 1860s, specialty began to gain intellectual favor in Britain. Following several studies in 1870 the British Parliament passed a new Extradition Act.<sup>192</sup> It required the British government to respect the principle of only charging a suspect with the crime of extradition, and to refuse extradition to nations that did not. That law would soon create yet another Anglo-American showdown.

In 1876, the United States requested the extradition of Erza Winslow for the offense of forgery, for which he was wanted in Massachusetts. Britain captured and imprisoned Winslow, but following its new law, it refused to surrender him unless the United States promised to try him for forgery alone, and not to indict him for other offenses. On the advice of Secretary of State Hamilton Fish, President Ulysses Grant refused. Winslow was let free and never heard from again.

After Winslow’s release, an angry President Grant accused Britain of breaching the 1842 treaty. “Her Majesty’s Government, instead of

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<sup>190</sup> Treaty of Aug. 9, 1842, to settle and define the boundaries between the territories of the United States and the possessions of her Britannic Majesty in North America; for the final suppression of the slave trade; and for the giving up of criminals, fugitive from justice, in certain cases, 8 Stat. 572 art. 10.

<sup>191</sup> Letter from Justice Joseph Story to Secretary of State Daniel Webster (Apr. 19, 1842), in 1 *The Papers of Daniel Webster: Diplomatic Papers, 1841-1843*, at 537 (Kenneth E. Shewmaker ed., 1983).

<sup>192</sup> Extradition Act, 1870, 33 & 34 Vict., ch. 52 (Eng.).

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surrendering the fugitive, demanded certain assurances or stipulations not mentioned in the treaty, but foreign to its provisions. . . . The position thus taken by the British Government, if adhered to, cannot but be regarded as the abrogation and annulment of the article of the treaty of extradition.”<sup>193</sup> Grant announced he was suspending U.S. performance of the treaty unless Britain or Congress gave him reason to change his position.<sup>194</sup>

But the tension was short-lived: by the end of 1876 the Executive and Britain had settled their differences. While making no formal legal commitment, the United States dropped charges in a prominent case, *de facto* observing the specialty principle.<sup>195</sup> The Earl of Derby, British Foreign Minister, told the House of Lords that U.S. objections to specialty were now “purely theoretical.”<sup>196</sup> Said Derby “We continued to maintain, and we maintain now, that the construction we placed on the treaty was the correct one.”<sup>197</sup> Meanwhile Britain quietly stopped demanding assurances that specialty would be respected. Extradition under the treaty of 1842 resumed.

Was President Grant correct about the 1842 treaty? To a modern reader, the lack of any explicit specialty clause combined with decades of practice would suggest the answer is “yes.”<sup>198</sup> But the international law publicists of the late 19th Century jumped on the question and unanimously pronounced the American position incorrect. Wrote John Bassett Moore in 1891, “The general opinion has been that [the United States] was wrong ... yet right in refusing to comply with the demand of the British government.”<sup>199</sup> Attacks on the U.S. position came from law professor and Michigan Supreme Court Justice Thomas Cooley, Judge Lowell of the

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<sup>193</sup> Message from President Ulysses Grant to the Congress in Relation to the Extradition Treaty with Great Britain (June 20, 1876), in 2 Francis Wharton, *Digest of the International of the United States* 786, 787-88 (1886).

<sup>194</sup> *Id.* at 789 (“Should the attitude of the British Government remain unchanged, I shall not, without an expression of the wish of Congress that I do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the Treaty of 1842.”).

<sup>195</sup> See John Bassett Moore, 1 *Treatise on Extradition and Interstate Rendition*, §151 (1891).

<sup>196</sup> See Lord Derby, British Foreign Secretary, Speech to the House of Lords (Feb. 13, 1877), reprinted in part in Moore, *supra* n. \_\_ §151 (1891).

<sup>197</sup> *Id.*

<sup>198</sup> See Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher*, 34 *Va. L. Rev.* 71 (1993).

<sup>199</sup> John Bassett Moore, 1 *Treatise on Extradition and Interstate Rendition*, §152 (1891).

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District of Massachusetts, and most vigorously by William Beach Lawrence, editor of *Wheaton's Elements of International Law*.<sup>200</sup> As Lawrence wrote, Grant's position "proposes to take away all safeguards, which we would protect our own citizens, when extradited perhaps for the most trifling offenses from being exposed in a foreign country, without friends, and without counsel, to a trail for the most heinous crimes..."<sup>201</sup>

The settlement of the Winslow affairs did not, as Lord Derby had promised, end the matter. For while the federal government had its *de facto* policy, state prosecutors and rogue federal prosecutors continued to charge beyond the indictment. A well known example was the Kentucky case of *Commonwealth v. Hawes*, where, despite the complaints of the British ambassador, an extradition for forgery was used to charge a suspect for embezzlement.<sup>202</sup> William Beach Lawrence returned to the Albany Law Journal to warn that State extradition practice threatened "dangers in our international relations," and even "menaced hostilities."<sup>203</sup>

It was with this background that the Supreme Court considered the famous case of *United States v. Rauscher* in 1886. William Rauscher, second mate of the U.S.S. J.F. Chapman, was extradited from Britain on charges of murder. However, the federal prosecutor in the Southern District of New York (apparently without permission from the Attorney General) charged him with cruel and unusual punishment, a crime not enumerated in the 1842 extradition treaty. Justice Miller, joined by six Justices, brushed aside the Government's construction of the 1842 Treaty, and enforced the treaty directly against the federal government. Quoting from *Foster v. Neilson* he found the 1842 Treaty "the Supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding."<sup>204</sup>

The 1842 Treaty contained no explicit specialty requirement. Nonetheless Justice Miller relied on Story's enumeration of seven offenses in the treaty to support an argument that the indictment was illegitimate. "The

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<sup>200</sup> Judge Thomas Cooley, *Extradition*, 3 Int. Review 438 (1876); *Extradition*, 10 Amer. Law Rev. 617 (1875-76) (anonymous, attributed to Judge Lowell), William Beach Lawrence, *The Extradition Treaty*, 14 Alb. L. J. 85 (1876);

<sup>201</sup> Lawrence, *The Extradition Treaty*, supra n. \_\_ at \_\_.

<sup>202</sup> 76 Ky. 697 (1878).

<sup>203</sup> William B. Lawrence, *Extradition*, 16 Alb. L. J. 361, 364 (1877).

<sup>204</sup> 119 U.S. at 419.

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enumeration of offenses ... is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others."<sup>205</sup>

What about President Grant's message and the United States' construction of the treaty? Did not the Supreme Court have some duty to defer to the considered views of the Executive as to the treaty it had negotiated? To a modern reader, the failure of the Solicitor General's brief to press this issue is quite surprising. Indeed there is a languid and concessionary nature to the brief that may suggest the United States was not particularly concerned about losing. In any case Justice Miller did note the dispute over the meaning of the treaty, saying "the correspondence is an able one on both sides," yet instead of deferring, he said it "presents the question we are now required to decide."<sup>206</sup>

Justice Miller made far more of the views of the publicists who had suggested that specialty was an established part of customary international law. William Beach Lawrence was called "a very learned authority on international law living in this country"; Justice Miller also favored the "learned and careful work" of David Dudley Spears. In Miller's view, their examination of the matter was "so full and careful, that it leaves nothing to be desired in the way of presentation of authorities."<sup>207</sup>

In short, in *Rauscher*, the Court ignored the President's interpretation of a treaty, and arguably went beyond the text of the treaty to find the executive branch in violation, and order the breach remedied. Hamilton Fish called the decision "all wrong."<sup>208</sup> In a sense, *Rauscher* treated the Executive branch rather like a state, entitled to no particular deference as to the meanings of the treaties it had signed. What might explain this result?

One answer is simply that the Court believed that the Supremacy clause means that the judiciary should interpret treaties *de novo*, without particular regard to the views of the Executive. Another explanation comes from Jacques Semmelman, an extradition expert who has studied the history

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<sup>205</sup> 119 U.S. at 420.

<sup>206</sup> 119 U.S. at 416.

<sup>207</sup> *Id.* at 417.

<sup>208</sup> Letter from Hamilton Fish to J.C. Bancroft Davis (Dec. 7, 1887), reprinted in part in Charles Fairman, *Mr. Justice Miller and the Supreme Court* 326 (1939).

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of *Rauscher* extensively. Semmelman believes that the Court was motivated primarily by concerns about state misbehavior and problems with Britain.<sup>209</sup> As he writes:

A conclusion either that specialty was not implicit within the Treaty, or that it was not enforceable by the courts, would have conferred unfettered discretion upon the states to decide whether to prosecute for crimes not included in the warrant of surrender. ... [and] serious international difficulties for the United States. .... Justice Miller believed very firmly that the states should be insulated from any role in international relations.<sup>210</sup>

One idea then, is even though the Court was facing a federal defendant, it may have been motivated by the central dogma of treaty enforcement, the prevention of state actions that create Union breach.

A third explanation builds on the analogy to statutory deference discussed in Part I. *Rauscher* was a criminal case, with a treaty raised as a defense. While the judiciary usually defers to Executive constructions in treaty cases, judges have never granted great deference to the Executive in the construction of criminal laws.<sup>211</sup> As Justice Scalia put it in 1990, "The Justice Department, of course, has a very specific responsibility to determine for itself what [a criminal] statute means ... but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."<sup>212</sup> Just as judicial deference to the executive is at a minimum in statutory criminal cases, so it is for criminal cases that touch on treaties. *Rauscher* might on this reasoning stand for a different idea: unless Congress signals otherwise, treaties establishing criminal defenses should be enforced against *any* government, state, Executive, or even foreign.

In any case, with *Rauscher* the Supreme Court created the first domain of treaty-law enforceable against the executive. While there is some disagreement over whether foreign nations may waive the specialty defense on behalf of their citizens, judges continue to enforce specialty clauses

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<sup>209</sup> See Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher*, 34 Va. L. Rev. 71 (1993).

<sup>210</sup> *Id.* at 132-134.

<sup>211</sup> But see Kahan, *supra* n. \_\_\_\_ (arguing that the Federal Government should get Chevron deference in its interpretation of criminal laws).

<sup>212</sup> *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment).

against State and Federal governments.<sup>213</sup> Justice Miller's opinion, moreover, created a domain that has spread beyond extradition into international criminal procedure generally. Today, in addition to extradition, judges have directly enforced prisoner exchange<sup>214</sup> and mutual legal assistance treaties (MLAT).<sup>215</sup>

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By the turn of the century the Supreme Court had established several important matters in treaty enforcement practice. The central mission, upheld in dozens of cases, was preventing States from putting the Union in breach. But the Court in the tariff and Chinese Exclusion cases had also wrestled with the tricky problem of Congressional inconsistency with treaties, using the last-in-time rule and other means to defer to Congress's mistakes and decisions. And the Court in *Rauscher* established a beachhead of strong treaty enforcement as against the executive.

### **Part III: The Twentieth Century and the Age of Multilateral Treaties**

An important premise of the Part I model is that acts undertaken by other branches can and will affect how the judiciary enforces treaties. If that's correct, then it stands to reason that changes in the treaty-relevant practices of other branches may affect how the judiciary enforces treaties. As this section argues, that's exactly what has happened in the twentieth century.

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<sup>213</sup> See, e.g., *Valentine v. Neidecker*, 299 U.S. 5 (1936); *Alvarez-Machain*, 504 U.S. 655, 667 (1992) (applying an extradition treaty as directly applicable federal law); *Terlinden v. Ames*, 184, U.S. 270, 288 (1902) ("Treaties of extradition are executory in their character..."); *United States v. Thirion*, 813 F.2d 146, 151 & n.5 (8th Cir. 1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), cert. denied, 479 U.S. 1009 (1986); *United States v. Levy*, 905 F.2d 326, 328 n.1 (10th Cir. 1990); *United States v. Riviere*, 924 F.2d 1289, 1300 - 01 (3d Cir. 1991); *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) (holding that the extradition treaty between the United States and Uruguay could be enforced directly by the person extradited); *Cheung v. U.S.* 213 F.3d 82, 95 (2d Cir. 2000) ("the Constitution not only allows, but in fact requires, the courts to treat the Agreement as equal to the federal extradition statute").

<sup>214</sup> See, e.g., *Cannon v. United States Department of Justice*, 973 F.2d 1190, 1192 (5th Cir. 1992)(enforcing treaty on the execution of penal sentences between the United States and Mexico as against United States parole commission).

<sup>215</sup> See *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1291 (11th Cir. 2003) (enforcing MLAT with Canada); *United Kingdom v. United States*, 238 F.3d 1312, 1317 (11th Cir. 2001)(enforcing MLAT with the United Kingdom); *In re Erato*, 2 F.3d 11, 15 (2nd Cir. 1993) (enforcing MLAT with the Netherlands).

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It is commonplace to say that in the 20th century, judges have changed how they enforce treaties, or more precisely, slowed down.<sup>216</sup> This Article does not dispute that fact exactly, but provides a fundamentally different explanation for it. The typical arguments suggest either that multilateral treaties typical of the Post-World War II era have discouraged judges from treaty enforcement,<sup>217</sup> or that judges have developed a kind of contempt for treaty law, and refuse to enforce it even though the Supremacy Clause suggests they should.<sup>218</sup>

The work in this part of the Article leads to two comments. First, it is not clear that either the multilateral form or changes in non-self-execution doctrine have fundamentally changed judicial treaty enforcement practice. As the sections below demonstrate, the enforcement practices for multilateral treaties are similar to those for bilateral treaties. Multilateral treaties which displace state law have been enforced vigorously: most notably the Warsaw Convention on aircraft liability and the United States Convention on the Sale of Goods. These two conventions affect state tort and contract law respectively. In contrast, where multilateral treaties might create duties for Congress, courts remain, as in the nineteenth century, reluctant to enforce the treaty and more likely to defer to Executive construction or wait for either Congressional implementing legislation. That can be seen, as discussed below, in the case of the multilateral intellectual property regimes and Human Rights treaties.

This section suggests that different phenomena have profoundly altered judicial treaty enforcement. The main is the rise of the congressional-executive agreement.<sup>219</sup> The Article II treaty procedure (treaties approved by two-thirds of the Senate) has been all but replaced by a different procedure, known as the congressional-executive agreement.<sup>220</sup> In the congressional-

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<sup>216</sup> On the changes in international law over the 20th century, see Paul B. Stephan, *The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. Colo. L. Rev. 1555, 1557 (1999).

<sup>217</sup> See., e.g., G. John Ikenberry, *America, World Order, and the Rule of Law* (2003).

<sup>218</sup> David Sloss, *Non-Self-Executing Treaties: Exposing A Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 4 (2002).

<sup>219</sup> Duncan Hollis made this suggestion first. See Duncan Hollis, *Remarks, Foreign Relations Internet Group Conference*, Dec. 13, 2004.

<sup>220</sup> For an overview on the differences between Article II Treaties and congressional-executive agreements, see Curtis Bradley & Jack Goldsmith, *Foreign Relations Law*, 409-421 (2003).



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executive procedure, Congress enacts legislation with every treaty, changing domestic law when it thinks it necessary. The result is a flip in the default rule of treaty enforcement. Where Congress automatically gives its opinion on the appropriate domestic meaning of a treaty, the judiciary's role recedes. The predictable result is a large shift in the respective sizes of the Congressional and judicial domains of treaty enforcement.

The second is the practice, concurrent with statutory trends, of granting more deference to Executive interpretations of treaties. That development mirrors other trends in American law, most importantly the rise of the Administrative state since the 1930s, which has brought greater levels of Executive and Congressional control over the enforcement of statutes and the common law.<sup>221</sup> Scholars have portrayed the creation of Congressional agencies as replacements for judicial enforcement schemes of the 19th century.<sup>222</sup> The rise of the Congressional-executive agreement is the treaty version of the same phenomenon. It is perhaps not surprising that we have seen more Congressional and Executive as opposed to judicial control of treaty enforcement.

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Returning to the history of treaty enforcement, we see how courts dealt with the first two major multinational treaty regimes: the intellectual property unions of the late 19th century,<sup>223</sup> and the aircraft liability regime established in 1929 (the Warsaw Convention). Afterward we consider how courts have handled the challenge of multinational human rights treaties. These regimes show the same tendency to regard the identity of the party in alleged breach and deference to Congress and the Executive as the central influences on treaty enforcement.

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<sup>221</sup> See generally Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1216-1219 (1982) (discussing the evolution of the control of public remedies).

<sup>222</sup> See Jerry Mashaw et al, *Administrative Law 4-6* (3d ed. 1992) (discussing agencies as replacement for failed judicial enforcement systems).

<sup>223</sup> For example, the Paris Union, established in 1893 by the Convention for the Protection of Industrial Property and the Berne Union, established in 1886 under the Convention for the Protection of Literary and Artistic Work.

**A. Enforcement Against States Continuing into the Present: The Warsaw Convention**

The Warsaw Convention<sup>224</sup> is familiar to travelers from the fine print on the back of airline tickets. It is the clearest example of a contemporary, judicially enforced treaty regime in the traditional of *Ware v. Hylton*. It offers important insight into what kind of treaties the judiciary will enforce directly, and why.

The Warsaw Convention was the child of two international conferences held in Paris in 1925 and Warsaw in 1929, and of the work done by the interim Comité International Technique d'Experts Juridique Aériens (CITEJA). The goal was to create a uniform legal framework to govern the fledgling airline industry. As the reporter for the Convention put it, "What the engineers are doing for machines, we must do for the law."<sup>225</sup>

The most important parts of that legal framework were the standardized limits on carrier liability in domestic courts. Article 17 made carriers liable for personal injury damages sustained during the course of a flight, but the treaty limited that liability (in Article 22) to 125,000 "Poincaré francs," or about \$8,300. Other portions limited liability for lost luggage (Article 18), and flight delays (Article 19). The liability limits – particularly for personal damages – were low even by 1929 standards. The point, however, was to attract investment capital that might otherwise be scared off by fears of plane crash liability.<sup>226</sup>

In the United States, the principal effect of the Warsaw convention is to constrain the States. The Convention limits remedies that would otherwise be available through state tort law. It is in this respect legally similar to the 1780 Treaty of Peace and the many commercial treaties that limit the course that State law might otherwise be inclined to take. And, like these earlier treaties, the Warsaw Convention has been consistently enforced directly by the judiciary as a self-executing treaty. The Warsaw Convention is a pure example of a treaty within the judicial domain. There is no implementing legislation or complementary regulation, yet it is the regime

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<sup>224</sup> 137 L.N.T.S. 11 (1929).

<sup>225</sup> Translation quoted in Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498 (1967), original source 2 Conference International De Droit Prive Aerien, 4-12 Octobre 1929, Varsovie 17 (1930).

<sup>226</sup> See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967).

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under which most suits for damages occurring in the course of international aviation must be brought.

The exact extent to which the Warsaw convention limits State causes of action has long been a matter of some dispute. The Supreme Court's most recent pronouncements adopt a broad position of Treaty preemption. The 1999 case *El Al v. Tsui Yang Tseng*<sup>227</sup> presents a particularly strong vision of judicial preemption of State action. After a plane crash, Tsui Yang Tseng and other plaintiffs sought damages for pain and suffering under New York tort law. The question was whether plaintiffs could recover for injuries not explicitly limited by the treaty – namely, emotional, as opposed to physical, suffering. The Supreme Court said “no,” creating a sharp limit on State regulation of international airline carriage.

Noting that the purpose of the Convention is to “achiev[e] uniformity of rules governing claims arising from international air transportation,” the Court agreed with El Al and the United States Government that the Convention must be read as precluding all personal injury remedies (namely, state remedies) other than those authorized through the Convention itself. In the Court's words: “Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations.”<sup>228</sup>

The Court assumed without discussion that the relevant portions of the Warsaw Treaty were enforceable by the judiciary. This is a feature of every Warsaw Convention case. It is not inevitable: the Court could have held the Warsaw Convention of no effect without implementing legislation. But its failure to do so, and indeed the extremely cursory analysis of the self-execution doctrine in *El Al* and other Warsaw Convention cases, suggests a familiar dynamic. The court finds itself once again preventing state law from disturbing an international regime, happily implementing the central dogma of treaty enforcement.

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<sup>227</sup> *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 161 (1999).

<sup>228</sup> 525 U.S. 155, 169 (1999).

***B. The Difference Between State and Congressional Breach Continues in the 20th Century: International Intellectual Regimes***

The first major multilateral treaties signed by the United States were the Intellectual Property (IP) treaties of the late 19th century. Both the Berne Convention on Copyright and the Paris Convention on Industrial Property (trademark and patent) were ambitious efforts to create global protection for the rights of authors and inventors, respectively.<sup>229</sup> But unlike the Warsaw Convention, these conventions created federal duties, and the enforcement results track these differences.

While the United States refused to sign the Berne Convention (it was at the time, one of the world's leading "pirates" of copyrighted works)<sup>230</sup> the ratification of the Paris Union prompted new questions for the judiciary. On the one hand, the treaties did suggest protection for foreign inventors – similar to some of the treaties that had come before. But the Paris Treaty touched on areas where Congress was already active, having enacted and reenacted federal patent laws. Once again, the sense that Congress was "seized" with the problem of patents would lead the judiciary to leave implementation of the Patent treaties to the legislature.

Article II of the Paris Convention guaranteed equal rights for foreigners in the patent system of Union countries (a "national treatment" provision):

The subjects or citizens of each of the contracting States shall enjoy, in all the other States of the Union ... the advantages that the respective laws thereof ... accord, to subjects or citizens.

The language suggests that a Swiss citizen should have the same rights as an American in the U.S. system, trumping whatever pre-existing discrimination existed in favor of the American. That's exactly what Swiss citizen Ferdinand Bourquin claimed in 1889. U.S. law at the time included blatant favoritism in favor of the American filer: it allowed U.S. citizens alone to file a "caveat," or a kind of preliminary patent, prior to filing the full

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<sup>229</sup> The Paris Convention for the Protection of Industrial Property 1883 to 1983. Geneva: WIPO, 1983.

<sup>230</sup> See Gorman & Ginsburg, Copyright 9 (6th ed. 2003) ("During the republic's first 100 years, the U.S. was a 'pirate nation' with respect to foreign works of authorship.").

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patent application.<sup>231</sup> But despite having on his side a clear later-in-time treaty, Bourquin and others like him lost.

Bourquin's first appeal was to the Patent Office and consequently the matter was considered first by the Executive. By request, Attorney General Miller wrote an opinion, and he concluded the Paris Convention gave Bourquin no rights beyond those in the Patent Act.<sup>232</sup> His reasoning is not particularly helpful: he argues that the treaty "is a reciprocal one; each party to it covenants to grant in the future to the subjects and citizens of the other parties certain special rights in consideration of the granting of like special rights to its subjects or citizens."<sup>233</sup> But of course all treaties are reciprocal: what made the Paris Union special? It seems much easier to understand this opinion, and the Court decisions, as adopting the rationale of the Tariff decisions. In later cases Congress was accused of mis-implementing the treaty: but courts held that any "mistakes" in the Patent Act were for Congress to fix.<sup>234</sup> As the First Circuit stated, "the courts would hesitate before giving a treaty an interpretation differing from that solemnly given it by the executive or by Congress, even if they would ever do it."<sup>235</sup>

Are International IP treaties ever enforced directly? The answer is yes, but only as against State breach. The leading case is *Bacardi Corporation of America v. Domenech*,<sup>236</sup> where the Supreme Court struck down discriminatory Puerto Rican trademark laws. Puerto Rico in 1936 passed a set of laws subsidizing local liquor, and one made it illegal to sell spirits in Puerto Rico under trademarks used outside of Puerto Rico.<sup>237</sup> Bacardi Corporation challenged the law as inconsistent with the General Inter-American Convention for Trade Mark and Commercial Protection.<sup>238</sup> The Court struck the Puerto Rico statute with ease. It stated "this treaty on ratification became a part of our law. No special legislation in the United

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<sup>231</sup> Except those in the process of obtaining U.S. citizenship. §4902 Revised Statutes, 1889.

<sup>232</sup> 19 U.S. Op. Atty. Gen. 273.

<sup>233</sup> Id. at 278-279.

<sup>234</sup> E.g., *Rousseau v. Brown*, 21 App.D.C. 73 (1903), *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, 155 F. 842 (1st Cir. 1907).

<sup>235</sup> 155 F. 842, 849.

<sup>236</sup> 311 U.S. 150 (1940).

<sup>237</sup> Spirits and Alcoholic Beverages Act, No. 149 of May 15, 1937 §44(b).

<sup>238</sup> General Inter-American Convention for Trade Mark and Commercial Protection, signed February 20, 1929, ratified February 11, 1931, 46 Stat. 2907.

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States was necessary to make it effective.”<sup>239</sup> The Puerto Rican statute was nullified on grounds “of repugnance to the treaty.”<sup>240</sup>

### **C. *Human Rights Treaties***

The trademark late-20th century treaty is the human rights convention. The United States, after initial reluctance, has ratified several including the International Convention on Civil and Political Rights (ICCPR), the Convention on the Elimination of Discrimination Against Women, and the Convention Against Torture.<sup>241</sup> As we will see, however, direct domestic enforcement of the treaties is scarce. Can deference theory explain that outcome?

The kind of self-execution analysis called for by the Third Restatement, based on the nature or language of treaty, provides little help. Consider the ICCPR, ratified in 1992. The ICCPR looks like the U.S. Bill of Rights: it provides a list of rights to which everyone is entitled. Article 7 states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>242</sup> That’s not language different in kind from the U.S. 8th Amendment, which states “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>243</sup> As for enforcement, the ICCPR says “Where not already provided for ... each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes ... to give effect to the rights recognized in the present Covenant.”<sup>244</sup> There is, in short, little from the agreement that would seem to preclude judicial enforcement. The lack of judicial enforcement of the ICCPR (and of human rights treaties in general) is from textual analysis alone something of a mystery.

While raw political explanations of non-enforcement are common, the results can also be explained using the deference model. The Senate alone, Congress, or the Executive have signaled to the courts that either they already have implemented, or will implement, the human rights treaties that

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<sup>239</sup> 311 U.S. 150, 161.

<sup>240</sup> 311 U.S. 150, 167.

<sup>241</sup> International Covenant on Civil and Political Rights (1961); International Convention on the Elimination of All Forms of Racial Discrimination (1967); Convention on the Elimination of All Forms of Discrimination Against Women (1975).

<sup>242</sup> ICCPR Art. 7.

<sup>243</sup> U.S. Constitution Amend. VIII.

<sup>244</sup> ICCPR Art. 2.

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the United States has signed. In short, Congress or the Senate have instructed the judiciary that enforcement of human rights treaties is not their business, and this instruction they have respected.

Several signals stand out. In some cases, Congress has passed implementing legislation. The implementing legislation for the Genocide and Torture Conventions specify how Congress thinks the treaty should be enforced domestically.<sup>245</sup> Less obvious (and more controversial) are the Senate's declarations and conditions in its consent to the human rights treaties. In the case of the ICCPR, the Senate states "the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered herein."<sup>246</sup> It adds that "the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."<sup>247</sup> The Senate appears to be signaling that, in effect, the rights in the ICCPR are already provided for.

Judges, in other words, treat the ICCPR exactly as they would a treaty ratified with implementing legislation. That is, the courts treat the Bill of Rights, 14th Amendment, and legislation like the Civil Rights Act of 1964<sup>248</sup> as the implementing legislation of the ICCPR. That suggests independent enforcement is inappropriate, even if Congress (or the courts) have deviated from the text of the ICCPR in its "implementation."

Of course, courts do not state these matters explicitly. But when they address the enforcement of the ICCPR or other human rights treaties, courts have justified non-enforcement based on the signals from the Senate and the presence of adequate domestic remedies.<sup>249</sup> For example, Chief Judge Young

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<sup>245</sup> 18 U.S.C. §1091 (genocide); 18 U.S.C. §2340A (torture).

<sup>246</sup> U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

<sup>247</sup> U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

<sup>248</sup> 42 USC §2000e et seq.

<sup>249</sup> See, e.g., *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (right to vote under Article 25 of ICCPR is not a privately enforceable right under U.S. law); *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001); *Domingues v. Nevada*, 961 P.2d 1279 (Nev. 1998) (ICCPR no defense to juvenile execution); *Heinrich v. Sweet*, 49 F. Supp. 2d 27, 43 (D. Mass. 1999) (plaintiffs have adequate domestic remedies for claims of "crimes against humanity"); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (holding that defendant's civil rights claim under the ICCPR invalid); *White v. Paulsen*, 997

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of the Massachusetts District Court explained his refusal to enforce the ICCPR directly as follows: “[t]he United States Senate declined to pass legislation (similar to the Torture Victim Protection Act of 1991) which would have created a new private right of action enforcing the rights recognized in the Covenant because ‘existing United States Law is adequate to enforce those rights.’”<sup>250</sup>

While deference to implementing legislation (as with the Genocide Convention) is standard, deference to such “pre-implementation” is novel, as is deference to the Senate acting alone. Some academics have on these grounds suggested that courts should ignore the signals in the reservations and enforce Human Rights treaties directly. There is something to this, and the deference model can predict conditions under which courts might in fact consider enforcing a human rights agreement like the ICCPR.

The most likely scenario would be a case of egregious state breach. Imagine, for example, that a State passed a series of laws neutral on their face yet discriminatory in practice against the practice of Islam – like a facially neutral ban on all broadcast calls to prayer. Under the federal constitution and *Employment Division v. Smith*, the laws might be Constitutional.<sup>251</sup> Yet in this scenario, where the State threatens to put the Union into significant tension with Islamic countries, a federal court might find it appropriate to strike down the State law using Article 18 of the ICCPR, the guarantee to religious freedom.<sup>252</sup>

We have seen now that the enforcement patterns for multi-lateral treaties have been roughly the same as for bilateral treaties of similar purposes. The paradigm created for bilateral treaties, targeting state breach, has simply been translated, while human rights treaties have raised new questions about how courts know whether to leave treaty implementation to Congress.

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F. Supp. 1380, 1386 (E.D. Wash. 1998) (“the United States Senate expressly declared that the relevant provisions of the [Covenant] were not self-executing when it addressed this issue providing advice and consent to the ratification”); *In re Extradition of Cheung*, 968 F. Supp. 791, 803 n.17 (D. Conn. 1997) (stating that the ICCPR cannot support extradition defense).

<sup>250</sup> See 49 F. Supp. 2d at 43.

<sup>251</sup> 494 US 872 (1990) (holding facially neutral laws no violation of the establishment clause).

<sup>252</sup> Enforcement, moreover, need not be direct, but could come as *Ex Parte Young* suit. See David Sloss, *Ex Parte Young And Federal Remedies For Human Rights Treaty Violations*, 75 Wash. L. Rev. 1103 (2000).



**D. Further Developments in Enforcement Against the Executive**

Late in the 19th Century the Supreme Court showed a willingness to enforce treaties against the Executive, and in the process show little deference the Executive's interpretations of the treaty's language. Since that time, while it will still consider cases against the Executive, the Supreme Court has begun to grant more attention and deference to Executive branch interpretation of treaties. David Bederman, for example, argues that the deference given the executive is "the single best predictor of interpretative outcomes in American treaty cases."<sup>253</sup>

That trend has affected enforcement of treaties as against the executive. That fact can be clearly seen by looking to the two important and recurrent areas where judges are asked to enforce treaties against the Executive branch: taxation and international criminal procedure, including extradition.<sup>254</sup>

Perhaps the leading area of judicial treaty enforcement as against the executive is taxation. The United States ratified its first bilateral double taxation treaty with France in 1936,<sup>255</sup> and what appears to be the first direct enforcement of that treaty came in the 1946 Tax Court case *Kimball v. Commissioner*.<sup>256</sup> In that case, after reviewing the history of bilateral double taxation conventions, the court proceeded to enforce the treaty directly without discussion of whether the treaty was "self-executing" or whether it owed deference to the executive.<sup>257</sup> Later courts have explicitly stated that tax treaties are directly enforceable in suits against the Commissioner of the Internal Revenue Service.<sup>258</sup> In tax cases the Supreme Court says

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<sup>253</sup> David Bederman, *Revivalist Canons and Treaty Interpretation*, 41 *UCLA L. Rev.* 953, 1015-1016 (1994).

<sup>254</sup> See Part II.C.

<sup>255</sup> *Convention on Double Taxation Between the United States and The Republic of France*, signed April 27, 1932, ratified April 16, 1935, 49 Stat. 3145.

<sup>256</sup> 1946 WL 269 (Tax Ct. 1946). An international tax issue was also raised in *Pelham G. Wodehouse*, 1950 WL 8022, T.C.M. (P-H) P 50,161, 1950 PH TC Memo 50,161, Tax Ct., Jun 30, 1950.

<sup>257</sup> See *id.*

<sup>258</sup> See, e.g., *Samann v. C.I.R.*, 313 F.2d 461 (4th Cir. 1963) (exploring consistency between Tax Treaty and IRS regulation); *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080-81 (9th Cir. 2001) (holding information exchange provisions in the U.S.-France Double Taxation Treaty valid basis for the issuance of an IRS summons). The Supreme Court has also decided several tax treaty cases, see, e.g., *Maximov v. U.S.*, 373 U.S. 49 (1963); *O'Connor v. United States*, 479 U.S. 27 (1986); *United States v. Stuart*, 489 U.S. 353 (1989).

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“[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”<sup>259</sup>

Yet in the latter parts of the twentieth century, the Court appears to have increased its deference to the Executive’s interpretation of tax treaties. An illustrative case is *O’Connor v. United States*.<sup>260</sup> The case turned on a treaty granting certain American workers in Panama an exemption from payment of “any taxes.” As the language suggests, and as lower courts concluded, the phrase “any taxes” might be thought to mean both United States and Panamanian taxes. But Justice Scalia, writing for the Supreme Court, went outside of the plain text of the tax treaty and instead deferred to the Executive’s construction of the treaty, which was that “any taxes” does not include U.S. taxes. While the record is not uniform, other tax cases have featured deference.<sup>261</sup>

Second, as discussed above, the 1886 case *United States v. Rauscher* established a tradition of enforcement of treaties against the Executive in extradition and other criminal procedure cases, and there are cases that follow its model.<sup>262</sup> But since 1886, the lack of deference afforded the Executive’s views of the treaty in *Rauscher* have changed.

The high water mark of judicial deference to the Executive’s interpretation of extradition treaties is surely 1992’s *United States v. Alvarez-Machain*.<sup>263</sup> Here United States agents kidnapped a suspect residing in Mexico, who promptly argued that his abduction violated the 1978 extradition treaty with Mexico. Alvarez-Machain made the straightforward argument that the whole point of the extradition treaty was to preclude kidnappings, and the Mexican authorities announced that his understanding of the treaty was also their interpretation.<sup>264</sup> The Executive, however, advanced what seemed the rather extreme view that ignoring the procedures

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<sup>259</sup> *United States v. Stuart*, 489 U.S. 353, 369 (1989).

<sup>260</sup> 479 U.S. 27 (1986).

<sup>261</sup> See, e.g., *United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) (“of weight”).

<sup>262</sup> See, e.g., *Rice v. Ames*, 180 U.S. 371 (1901); *Terlinden v. Ames*, 184 U.S. 270 (1902); *Grin v. Shine*, 187 U.S. 181 (1902).

<sup>263</sup> 504 U.S. 655 (1992).

<sup>264</sup> 504 U.S. 655, 671 n. 1 (Stevens J., dissenting).

specified by the extradition treaty was not a violation of it. The Supreme Court, though it did not claim to be deferring totally to the Executive, nonetheless accepted the Executive's interpretation of the treaty and held Alvarez-Machain's abduction no violation.

The degree of effective deference in *Alvarez-Machain* is high, yielding a result that looks more like strong *Chevron* deference or arguably non-enforcement of the treaty.<sup>265</sup> One possible explanation is that the courts have changed their approach since the *Rauscher* days and today believe that they owe the United States' interpretation of its treaty a far greater deference – perhaps any reasonable interpretation need be deferred to. That may be true – yet it is worth pointing out that, in contrast to *Rauscher*, the Court was announcing a rule for the Executive alone, and therefore had no need to formulate a rule that would prevent state breach. If *Alvarez* was a case where California had seized a Japanese citizen in breach of a U.S.-Japan extradition treaty the results may have been different.

A full study of treaty interpretation is beyond the scope of this paper. However, one thing is for sure: the *Rauscher* Court's indifference toward the Executive's interpretation of the treaty is today a rarity. That has, in turn changed how the Court enforces cases that allege Executive breach. As argued above, that trend, arguably, is part of something much larger – namely, the rise of the administrative state and expert agencies, necessitating a greater system of deference.

#### ***E. The Rise of the Congressional-Executive Agreement: Altering the Balance of Deference***

In the fifty years from 1789 to 1839, the United States entered into 87 international agreements, or less than two each year. Sixty or 69% were enacted as Article II treaties,<sup>266</sup> with the advice and consent of two thirds of the Senate.<sup>267</sup> From 1939 to 1989 the United States entered into 12,400 international agreements, or on average about 250 per year. Of those, 11,698 or 94% were *not* Article II treaties. Instead the great majority were

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<sup>265</sup> See also Bederman, *Revivalist Canons and Treaty Interpretation*, supra n. \_\_ at 1014 (“*Alvarez Machain* represents the ultimate repudiation of the canon of good faith and liberal interpretation.”)

<sup>266</sup> U.S. Const. Art. II §2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”).

<sup>267</sup> Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, S. Prt.106-71, 10th Cong. 2d Sess., 39 (2001).

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“congressional-executive” agreements, or agreements that instead of receiving a vote of two thirds of the Senate, were passed through both houses of the Congress like normal legislation.<sup>268</sup>

The shift to congressional-executive agreements has attracted much scholarly attention. A healthy debate exists over whether the congressional-executive agreement is a constitutional or legitimate means of making an international agreement.<sup>269</sup> Political scientists are also interested in the change of forms, and ask what might motivate the government to choose one form over another.<sup>270</sup> But while most observers have focused on the constitutional significance of the use of congressional executive agreements, few have appreciated the importance of the change for the judiciary’s role in treaty enforcement.

When a treaty is entered into through the congressional-executive process, the simultaneous passage of any necessary implementing legislation is a natural consequence. When a treaty is simply approved, as in the Article II treaty process, the treaty’s text, joined possibly by statements by the Executive or the Senate, are the only relevant expressions of intent. But when a treaty is both approved and implemented by Congress simultaneously, a new document enters the picture: the enacting and implementing legislation. In that legislation the full Congress has the opportunity, if it wants, to specify how much or how little it wants a treaty to be enforced. By making this determination, as the deference model predicts, Congress will usually displace independent and direct judicial enforcement of a treaty.

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<sup>268</sup> A study of the time period 1946 to 1972 found that 88.3% of the U.S. international agreements made during that time were entered into as Congressional-Executive agreements. See *id.* at 41.

<sup>269</sup> See Lawrence Tribe, *Taking Text and Structure Seriously*, 108 *Harv. L. Rev.* 1221 (1995) (arguing that some congressional executive agreements are unconstitutional); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 799 (1995) (arguing that Congressional-Executive agreements can be used to pass laws beyond the reach of the enumerated powers); Peter Spiro, *Constitutional Method and the Great Treaty Debate*, 79 *Tex. L. Rev.* 961 (2001); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 *Cal. L. Rev.* 671 (1998).

<sup>270</sup> See, e.g., Lisa L. Martin, *The United States and International Commitments: Treaties as Signaling Devices*, Harvard University Department of Government Working Paper, Sept. 2003.

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This dynamic can be seen in what are so far the most important Congressional-Executive agreements: the treaties creating the World Trade Organization in 1994. After the President signed the agreement, Congress passed legislation, named the Uruguay Round Amendments Act of 1994, which the President then signed.<sup>271</sup> That bill did two things at once. It approved the Uruguay Round agreement, making it binding on the United States as a matter of international law.<sup>272</sup> But it also enacted changes to U.S. law that were required (or even suggested) by the treaty. Approval and implementation were a single step, leaving the judiciary with a statute containing the domestic substance of the treaty.

So what about judicial enforcement of the WTO agreements? The WTO has its own dispute resolution system, and the implementing legislation declares the WTO agreement itself non-self-executing.<sup>273</sup> In practice, no judge has directly enforced the agreement or decisions made under it.<sup>274</sup> As for areas where the agreements mandate changes in domestic law, the existence of implementing legislation has in practice made that legislation, and not the treaty, the center of judicial attention. For example, The Uruguay round agreement on intellectual property (TRIPS, or Trade Related Intellectual Property) suggested that members of the WTO create a law against bootlegging, or unauthorized recording of music concerts.<sup>275</sup> Congress took that suggestion seriously, and illegalized bootlegging in a new chapter of the Copyright Code.<sup>276</sup> The result are cases enforcing the new law, which focus on the legislation and not the original agreement.<sup>277</sup>

As the studies above show, most treaty regimes are now implemented via congressional-executive agreement. That doesn't mean that there is no room for independent judicial enforcement. It leaves older regimes, like the

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<sup>271</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809

<sup>272</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, §103.

<sup>273</sup> 19 U.S.C.A. §3512(a)(1), (b)(2)(A).

<sup>274</sup> See, e.g., *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1303 (Fed. Cir. 2002) (Newman, J., dissenting) (“no party asserts that WTO decisions have controlling status as United States law”).

<sup>275</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS -- RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994).

<sup>276</sup> See Uruguay Round Agreements Act Title III; see also 17 U.S.C. §1101 et seq.

<sup>277</sup> See, e.g., *United States v. Moghadam*, 175 F.3d 1269, 1276-77 (11th Cir. 1999).

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Warsaw Convention, along with older Article II treaties. But what this does mean is that the relative size of Congressional as opposed to judicial domains of treaty-enforcement has changed, with Congress's domain now much larger. That development, rather than changing standards of the doctrine of non-self-execution, may explain the apparent decrease in the judicial enforcement of treaties. Furthermore, as the ratio of Article II to Congressional-Executive agreements continues to decrease, direct judicial enforcement of treaties, as opposed to implementing legislation, may slowly become a rarity.

### **Conclusion**

A topic like the judicial enforcement of treaties is a difficult topic to cover completely. Yet the prevailing doctrine of non-self-execution is so poorly descriptive of judicial behavior that something must be done. The immodest goal is to uproot or supplement the theory of self-execution as the dominant mode for understanding treaty enforcement in the United States.

What scholars, judges and policy makers need to understand is that questions of government structure have always had and will always have a strong influence on whether judges enforce treaties – far more than even the treaty text. Yet current doctrine continues to pretend that judges are discerning the “intent” of a document when they are doing something else entirely. The result is an unpredictability and incoherency that makes treaty law far more complicated than it need be.

Over coming years, problems of treaty enforcement will continue to be raised, and the judiciary's appropriate role will always be a question. We might hope, at a minimum, that we can begin facing those problems by asking the right questions. All we need to ask is this: In a treaty case, when should a court owe more or less deference to the State, Executive, or Congress, and for what reasons? Such questions are really those created by the American system of divided government, and should play a starring role in future considerations of treaty enforcement.